1

The Right to Reparation for Victims of Armed Conflict

The Intertwined Development of Substantive and Procedural Aspects

Shuichi Furuya

I. INTRODUCTION

Every social system is a product of social consciousness. Thus, as that consciousness fluctuates among the people involved, each system is subject to change. The shifting mindsets of politicians, government officials, policymakers, scholars, and even ordinary people generate a social spirit to replace the old system with a new one, even if their outward appearance remains unchanged. To this extent, every social system, including systems of international law, should be understood dynamically as a 'process' in which dialectical exchanges are ceaselessly reiterated between claim and counterclaim, assertion and reaction.[1] The right to reparation for victims of armed conflict is no exception: as will be discussed in detail, this right is typical of those whose *raison d'être* has shifted in recent years and continues to shift. In this regard, it is inappropriate to examine the right to reparation under international law at a series of fixed points in time; rather, one should consider the continuum of past and potential future evolution of this right, and the drivers thereof. Put differently, what is to be analysed here is the 'course' followed to date by the right to reparation as a social system and its potential future direction.

The right to reparation has two dynamic aspects: one is its expansion from, traditionally, a right of the State to become an individual right; the other is the shift from inter-State resolution of reparation claims, such as the conclusion of lump-sum agreements, towards victim-oriented mechanisms entitling individuals to claim reparation for harms they have suffered. The former is a matter of substantive right to reparation, while the latter relates to its procedural aspect.

[1] See James Crawford, *Chance, Order, Change: The Course of International Law* (The Hague: Hague Academy of International Law, 2014), 20.

https://doi.org/10.1017/9781108628877.002 Published online by Cambridge University Press

In discussing these independently, it has sometimes been stressed that the existence of a substantive individual right is not dependent on any international procedural capacity to assert it and hence that the two should be dealt with separately.[2] This separation is both theoretically correct[3] and practically meaningful, given the past inclination to deny an emerging substantive individual right based on the limited number of international mechanisms for individual claims. In my view, however, excessive emphasis on the separation of substantive and procedural rights may cloud our understanding of how the right to reparation has been shifting from State-centred to victim-oriented.

There has been and still is no ready-made procedure for victims according to which they might make claims regarding harms they have suffered as a consequence of violations of international rules applicable in armed conflict. The only possible avenue for victims of armed conflict were historically the domestic courts of the States involved. However, victims have often faced serious legal hurdles before those domestic courts, including jurisdictional immunities, statutes of limitations, and high thresholds for evidence, and, as will be examined later, the legal actions brought by victims of World War II before the domestic courts of Germany, Japan, and the United States yielded unsatisfactory results. Thus we might conclude that little advancement of the right to reparation is to be found in domestic jurisprudence.

It is to be noted, however, that the victim-oriented right to reparation has been developing over the last thirty years in tandem with the establishment of *ad hoc* reparation mechanisms, including the United Nations Compensation Commission (UNCC) and the Eritrea–Ethiopia Claims Commission (EECC), among others. These bodies manifest the intentions of policy-makers involved in the creation of reparation mechanisms and in the drafting of the respective constituent instruments. Those intentions were various: in some cases, policy-makers were the intermediaries whose

[2] Rainer Hofmann, 'Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)', Commentary to Article 6, in International Law Association, *Report of the Seventy-Fourth Conference Held in The Hague 15–19 August 2010* (London: International Law Association, 2010), 295–334 (310).

[3] See Hans van Houtte, Bart Delmartino, and Iasson Yi, *Post-War Restoration of Property Rights under International Law, vol. I: Institutional Features and Substantive Law* (Cambridge: Cambridge University Press, 2008), 241; Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', *International Review of the Red Cross* 85 (2003), 497–526 (507); Albrecht Randelzhofer, 'The Legal Position of the Individual under Present International Law', in Albrecht Randelzhofer and Christian Tomuschat (eds), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague/London/Boston: Kluwer Law International, 1999), 231–41 (233–4); Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: Cambridge University Press, 2016), 44–50.

task was to advance peace negotiations and end an armed conflict; in other cases, policy-makers were the legal experts in the UN Secretariat charged with comprehensively planning the post-conflict reconstruction of a State that the UN provisionally administered. Nevertheless, it is a very important fact that, from a certain point on, policy-makers started to establish reparation mechanisms that aimed at resolving the claims of individual victims rather than to disregard these claims entirely or to resolve them only through a lump-sum settlement – practices familiar until the 1980s. Conceivably, it was a growing awareness of the individual right to reparation and/or the perceived necessity of such a right in the international community that led policy-makers to establish such reparation mechanisms.

This suggests some important points that should be taken into account in any examination of the right to reparation. First, the individual substantive right and procedural right are closely intertwined, and the cross-fertilisation between the two has promoted their recognition in practice. In other words, an abstract discussion of the substantive right to reparation has little significance; the concrete substance of that right can and must be identified in the respective historical circumstances in which policy-makers found it necessary to set out a procedure. In this respect, we can identify the substance of the right only once we have a procedure establishing it. Most of the research so far into the right to reparation has attempted to demonstrate the existence or non-existence of a substantive right to reparation as a customary rule. In my view, however, the discussion of whether the right to reparation has or has not been crystallised into a customary norm makes little sense, because actual exercise of that right depends largely on the reparation procedure, which would have to be established as a consequence of the *ad hoc* decisions of policy-makers. However, this is not to say that the right to reparation is merely a product of policy-makers' whim: as will be demonstrated later, there is a persistent trend among policy-makers to establish a procedure for realising reparation for individual victims.

Through the practices of establishing *ad hoc* reparation mechanisms, the necessity of victim-oriented reparation has been gradually acknowledged among policy-makers, and a set of minimum common principles of the substantive and procedural rights to reparation has emerged, because policy-makers are inclined to refer to and follow past mechanisms in establishing new, similar ones. At the same time, these practices have informed the social consciousness more broadly, including within civil society, which started to campaign for the establishment of effective reparation mechanisms for victims of armed conflict. This increasing social consciousness in turn has pressed

policy-makers to take a more victim-oriented perspective when deciding on the concrete designs of reparation mechanisms.

What is to be examined here is therefore to what extent policy-makers have come to acknowledge the necessity of an individual right to reparation – or at least have given in to social pressure to realise such a right. What are the minimum core principles that have repeatedly been adopted in the reparation mechanisms established so far, and in which direction is the social consciousness headed in regard to that right?

For this analysis, a strict distinction between the *lex lata* and the *lex ferenda* does not seem productive. Even if one accepts the substantive right to reparation as *lex lata*, it requires policy-makers to decide upon procedure while taking into account the particular political and social circumstances of the conflict, as well as the needs of victims. Absent that decision and the substantive right to reparation is almost 'pie in the sky'; the invocation of such a right is virtually tantamount to a *lex ferenda* claim. However, even if one denies the existence of the right to reparation, once policy-makers establish a reparation mechanism for the victims of a certain armed conflict by means of a treaty or an international organisation's resolution, that right definitely exists for those victims and is no longer a matter of *lex ferenda*. It is therefore important to examine how reparation mechanisms come to be established – that is, how what was initially a *lex ferenda* claim regarding a victim's right to reparation becomes the *lex lata* of respective historical circumstances.

The present chapter therefore aims to comprehensively analyse the closely related development of both substantive and procedural aspects of the right to reparation. For this purpose, sections II and III first trace the historical development of war reparations, and then elucidate the emerging individual rights through the practices of international criminal judiciaries and *ad hoc* reparation mechanisms. In addition, they examine the ideological background of the activities and opinions of the United Nations and its organs, and they demonstrate the expanding purpose of reparation not only to redress victims, but also to promote social reconstruction and reconciliation in war-torn States. Section IV explores the concept and substance of the right to reparation currently granted to victims of armed conflict. Section V addresses reparation obligations corresponding to the right of individual victims by focusing on several crucial issues, particularly the questions of who are the duty-bearers and what forms reparation should take. Furthermore, it discusses whether and to what extent States can restrict their obligation by concluding a treaty, such as a lump-sum agreement. Section VI considers the procedural aspect of the right to reparation, focusing particularly on the victim's right to access an effective mechanism, whether national or international, and

demonstrating the victim-oriented nature of the *ad hoc* reparation mechanisms established in the last thirty years. Finally, section VII compares the *ad hoc* reparation mechanisms, aiming to distil the basic shared principles and methods through which they have efficiently and effectively processed many claims. In this, I aim to clarify the shifting purpose of reparation as not only to deliver remedial justice to victims, but also to realise restorative justice that emphasises reconciliation in States and local communities at the post-conflict stage, at the same time as it recognises the support and assistance of the international community.

II. A STATE-CENTRED RIGHT TO REPARATION: HISTORICAL DEVELOPMENTS UNTIL THE 1990S

A. *The Situation before World War II*

Until World War I, postwar reparation was, essentially, a victor's right to plunder the resources of the vanquished as the 'spoils of war'.[4] At that time, reparation was not considered a remedy for victim States harmed by violations of international law. However, World War I differed from previous wars in Europe, in both its scale and the total involvement of civilian populations. Even the fact that it caused more casualties of soldiers than any war before it cast a cloud of sorrow over a broad range of people on the home front and had an economic impact on their lives. These differences raised the stakes of reparation for the victors, inviting the possibility that those higher stakes could be justified by Germany's responsibility.[5] This changed, at least in part, the nature of war reparations from mere victors' spoils to remedies for violations of international law or moral duties. Article 231 of the Treaty of Versailles plainly indicates this shift: 'The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.' Based on the responsibility affirmed in this provision, Article 232 then obliged Germany to 'make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property ... by such

[4] Pietro Sullo and Julian Wyatt, 'War Reparations', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edn, 2015), para. 36.

[5] Richard M. Buxbaum, 'A Legal History of International Reparations', *Berkeley Journal of International Law* 23 (2005), 314–46 (319).

https://doi.org/10.1017/9781108628877.002 Published online by Cambridge University Press

aggression by land, by sea and from the air, and in general all damage as defined in Annex l hereto'. Because Annex 1 included the damage brought by acts of cruelty, violence, or maltreatment caused to civilian victims and prisoners of war (POWs), the reparations demanded of Germany were related not only to acts of aggression against the Allies, but also violations of the laws and customs of war.

However, under traditional international law, a violation of rules applicable in a situation of armed conflict was considered to be the conduct of a State. Even though it is individuals who physically commit law-violating acts, such as the wilful killing and injuring of civilians, it was the State that bore sole responsibility for the violations perpetrated by its nationals. This State-centred perspective was also traditionally applied to determining the victim harmed by the violation. Even where violations directly harmed individual civilians, it was their State of nationality that was considered the 'victim'. Consequently, only that State was entitled to seek reparation from the State held responsible.[6] Writing during World War I itself, Borchard explained this situation precisely thus:

> A long course of practice and the Hague Regulations have given some authority to certain rules for the treatment of alien enemies in the country of the territorial sovereign. But even a departure from these rules, which has occurred in several instances during the present European War, can hardly give rise to individual pecuniary claims in law. The alien enemy's individual grievances are settled by the treaty of peace, and if his country should happen to lose in the war, he is without redress. If his country should be the conqueror, indemnities may be demanded from the defeated nation, but his pecuniary remedy then depends on the bounty of his own state.[7]

Agreed in 1907, Article 3 of the Hague Convention respecting the Laws and Customs of War on Land provided that '[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons

[6] The Treaty of Versailles established a series of mixed arbitral tribunals between each Allied Power and Germany to which private claimants could present their claims directly. However, they had the jurisdiction over, e.g., claims dealing with debts payable before the war and debts that became payable during the war and of which execution was suspended on account of the war (Art. 296), and properties, rights, and interests of nationals of Allied Powers affected by the exceptional war measures and measures of transfer taken by Germany (Art. 297), but not over the claims for the harms caused by the violations of international law. See Elyse J. Garmise, 'The Iraqi Claims Process and the Ghost of Versailles', *New York University Law Review* 67 (1992), 840–78 (846–9).

[7] Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad, or, the Law of International Claims* (New York: Banks Law, 1915), 251.

https://doi.org/10.1017/9781108628877.002 Published online by Cambridge University Press

forming part of its armed forces.'[8] On the one hand, this provision clearly indicates that it is not the individuals who actually commit acts violating the annexed Regulations but the State to which they belong that is responsible for those violations and which is therefore obliged to pay compensation. On the other hand, the provision does not specify who can claim such compensation – whether individual victims or the State to which they belong. As Borchard pointed out, however, given the prevalent State-centred view of international claims at the time it was adopted, it was natural to conclude that the 1907 Convention did not intend to grant a right to reparation to individuals who had suffered harm as a consequence of an enemy State's violation of international law.[9]

B. A *Framework for Settling the Consequences of World War II*

The State-centred perspective of international law was not fundamentally altered by the framework established to settle the disastrous consequences of World War II. Both the International Military Tribunal at Nuremberg (the Nuremberg Tribunal) and the International Military Tribunal for the Far East in Tokyo (the Tokyo Tribunal) were based on the principle of individual responsibility, whereby accountability for international law violations shifted from the State to individuals, undoubtedly providing the foundations for the current development of international criminal justice. Nevertheless, the policy that evolved in these Tribunals completely disregarded the other individuals involved: those who were injured or otherwise harmed by the actions of the accused. Individual victims had no positive position before the Nuremberg and Tokyo Tribunals as they would later have before the International Criminal Court (ICC) in The Hague. The Statute of the Nuremberg Tribunal made no provision for victim participation other than as witnesses and no record indicates that including victims as *partie civile* was even mentioned by those States with a tradition of civil party participation in

[8] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, 18 October 1907.

[9] See Rainer Hofmann, 'Compensation for Personal Damages Suffered during World War II', in Wolfrum (ed.) *Max Planck Encyclopedia* (n. 4), para. 5; Rudolf Dolzer, 'The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945', *Berkeley Journal of International Law* 20 (2002), 296–341 (308). However, some scholars assert that Art. 3 was drafted to enable victims to present their claims directly to a responsible State. See Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and beyond', *International and Comparative Law Quarterly* 40 (1991), 827–58 (830–7).

their own domestic systems.[10] This was also true of the Tokyo Tribunal. On reparation to victims, the Nuremberg Tribunal had competence to deprive convicted persons of any stolen property and to order its delivery to the Control Council for Germany.[11] However, no such order was actually made. The Tokyo Tribunal had no similar competence. Moreover, neither Tribunal had any competence or procedure to receive reparation claims from victims.[12]

The State-centred perspective was also applied to the general framework of reparation from Germany and Japan in the aftermath of World War II. According to Hofmann, approximately 95 per cent of all claims for reparation were regulated by lump-sum agreements, whereby the responsible State paid a fixed amount of money or provided reparations in kind to the home State of individual victims.[13] The distribution of assets received under a lump-sum agreement was, however, within the discretion of the home State.

Regarding Germany, the agreed Protocol of the Berlin (Potsdam) Conference in 1945 provided, on the one hand, that the reparation claims of the Soviet Union and Poland were to be met by resources removed from the Soviet-occupied zone, in addition to German external assets in Bulgaria, Finland, Hungary, Romania, and eastern Austria. On the other hand, the reparation claims of the United States, the United Kingdom, and other States were to be met by resources removed from the Western zones and from all the other German external assets. The Soviet Union was also entitled to receive 25 per cent of industrial capital equipment from the Western zones, because this was deemed unnecessary for the German peace economy.[14] Subsequently, in accordance with the percentages set out in the Paris Agreement of 14 January 1946, the resources of the Western zones and the German external assets were distributed among the eighteen contracting States by the Inter-Allied Reparation Agency, itself established by the

[10] Liesbeth Zegveld, 'Victims' Reparations Claims and International Criminal Courts', *Journal of International Criminal Justice* 8 (2010), 79–111 (86–7).

[11] Art. 28 of the Charter of the International Military Tribunal, Part of London Agreement of 8 August 1945, provided: 'In addition to any punishment imposed by it, the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany.'

[12] Shuichi Furuya, 'Victim Participation, Reparations and Reintegration as Historical Building Blocks of International Criminal Law', in Morten Bergsmo *et al.* (eds), *Historical Origins of International Criminal Law*, vol. 4 (Brussels: Torkel Opsahl Academic EPublisher, 2015), 837–63 (841).

[13] Hofmann, 'Compensation for Personal Damages' (n. 9), para. 7.

[14] Protocol of the Proceedings of the Berlin Conference, Berlin, 1 August 1945, Document No. 1383, in Richardson Dougall *et al.* (eds), *Foreign Relations of the United States: Diplomatic Papers, The Conference of Berlin (The Potsdam Conference), 1945*, vol. II (Washington: US Government Printing Office, 1960), 1479–98 (1485–7).

Agreement. Furthermore, each of the contracting States agreed to regard its respective reparation share 'as covering all its claims and *those of its nationals* against the former German Government and its Agencies, of a governmental or private nature, arising out of the war'.[15] When the Federal Republic of Germany was allowed to conduct its domestic and foreign affairs as a sovereign State, the Convention on the Settlement of Matters Arising out of the War and the Occupation of 1952 provided that, although the United States, the United Kingdom, and France would no longer assert any claim for reparation against the current production of the Federal Republic of Germany, the latter could raise no objections against the measures that had been or would be carried out with regard to German properties seized for the purpose of reparation or restitution.[16]

Unlike the several steps of the German reparation process, the issue of Japan's postwar reparations was basically settled through the Treaty of Peace with Japan, agreed in San Francisco in 1951.[17] Article 14(a) provided that '[i]t is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war'. Nevertheless, it proceeded to state that 'it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations'. The Treaty affirmed that the Allied Powers had the right to seize, retain, liquidate, or otherwise dispose of all property, rights, and interests of Japan and Japanese nationals that were subject to their jurisdiction. However, under Article 14(b), the Allied Powers pledged to waive all reparations claims and other claims, including those of their nationals, 'arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation'. Conversely, under Article 19(a), Japan was also obliged to waive 'all claims of Japan and its nationals against the Allied Powers and their nationals arising out of the war'. To this extent, the settlement with Japan is characterised by the waiver by all parties of possible reparations, including those of their nationals.

[15] Art. 2 of the Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, 14 January 1946, 555 UNTS 69 (emphasis added).

[16] Convention (with Annex) on the Settlement of Matters Arising out of the War and the Occupation, 26 May 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris on 23 October 1954), 332 UNTS 219 (278–80).

[17] Treaty of Peace with Japan, 8 September 1951, 136 UNTS 45.

This *en bloc* reparations waiver was also included in the bilateral treaties between Japan and those States that either did not participate in the San Francisco Peace Conference or refused to sign the Treaty agreed there. In 1952, Japan concluded the Treaty of Peace with the Republic of China (Taiwan). Although it contained no specific provisions on reparations, Article 11 provided that, 'unless otherwise provided for in the present Treaty and the documents supplementary thereto, any problem arising between the Republic of China and Japan as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty'.[18] Accordingly, reparations between Japan and the Republic of China were considered to be settled in accordance with Article 14(b) of the San Francisco Treaty – that is, the latter waived all reparation claims against Japan[19] except the right to seize, retain, liquidate, or dispose of all property, rights, and interests of Japan and Japanese nationals in Taiwan.

When, in 1972, the Japanese government recognised the government of the People's Republic of China (Beijing) as the sole legal government of China and established diplomatic relations,[20] the 1952 Peace Treaty with Taiwan 'lost the meaning of its existence and ceased to be valid'.[21] The Beijing government, in turn, declared in the Joint Communiqué that, 'in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan'.[22] The Joint Communiqué was a political document rather than a legally binding treaty. However, the preamble to the Treaty of Peace and Friendship of 1978 confirmed the compliance of both States with the principles stipulated in the Joint Communiqué by '[a]ffirming that the aforementioned joint statement constitutes the basis for relations of peace and friendship between the two countries and that the principles set out in that statement should be strictly observed'.[23] Thus Japan's reparations to the Beijing government were also settled by means

[18] Treaty of Peace between the Republic of China and Japan, 28 April 1952, 138 UNTS 3.

[19] Masahiko Asada, 'Tyugoku [China]', in Kokusaihou jirei kenkyukai [Research Group of International Law Practice] (ed.), *Sengo Hosyou: Nihon no kokusaihou jirei kenkyu* 6 kan [Post-War Compensation: Japanese Practice of International Law, vol. 6] (Tokyo: Mineruba, 2016), 247–89 (257) (in Japanese).

[20] Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, 29 September 1972, sections 2 and 4, available at www.mofa.go.jp/region/asia-paci/china/joint72.html.

[21] Remarks by Masayoshi Ohira, Foreign Minister of Japan, at the press conference held after the signing of the Japan–China Joint Communiqué on 29 September 1972, cited in Tetsuo Ito, 'Japan's Settlement of the Post-World War II Reparations and Claims', *Japanese Annual of International Law* 37 (1994), 38–71 (55).

[22] Joint Communiqué (n. 20), section 5.

[23] Treaty of Peace and Friendship, 12 August 1978, 1225 UNTS 257 (269).

of lump-sum agreements. Nevertheless, compared to the Peace Treaty with Taiwan's direct reference to the San Francisco Peace Treaty, the Joint Communiqué did not necessarily indicate whether the Beijing government's reparation waiver also covered the claims of its nationals. This issue arose later when Chinese nationals sought reparation for their forced labour by filing claims against Japanese private companies before a Japanese court.[24]

The Soviet Union, Poland, and Czechoslovakia refused to sign the San Francisco Peace Treaty, but agreed to reciprocal reparation waivers in their respective bilateral treaties with Japan.[25] Among the Southeast Asian States, Burma, having not participated in the San Francisco Peace Conference, concluded the bilateral Treaty of Peace in 1954. Although it contained a similar provision to Article 14(a) of the San Francisco Peace Treaty, recognising that Japan lacked sufficient resources to pay reparations, it obliged Japan to supply Burma with the services of Japanese people and Japanese products of an agreed value by way of reparations.[26] The same means of settlement was agreed with Indonesia, which signed the San Francisco Peace Treaty, but then refused to ratify it.[27] Japan's reparations to other Asian States were also settled through lump-sum agreements in bilateral treaties: some received an agreed amount of reparations from Japan (the Philippines and Vietnam), while others renounced their reparation claims in return for concluding other treaties with Japan concerning financial cooperation and support (Cambodia, Laos, Malaysia, and Singapore).[28]

The Republic of Korea was not invited to the San Francisco Peace Conference, having been under Japanese colonial rule up to 1945 and therefore not a member of the Allied States. After a long period of negotiation, Japan and Korea concluded the Agreement on the Settlement of Problems concerning Property and Claims and on Economic Co-operation in 1965. Under Article 1, Japan was obliged to supply Korea, *ex gratia*, with the services of Japanese people and Japanese products to a value fixed by the Agreement, in

[24] See section IV.C.

[25] Art. 6 of the Joint Declaration by the Union of Soviet Socialist Republics and Japan, 19 October 1956, 263 UNTS 99; Art. 4 of the Agreement concerning the re-establishment of normal relations between Japan and the Polish People's Republic, 8 February 1957, 318 UNTS 251; Art. 4 of the Protocol relating to the restoration of normal relations between the Czechoslovak Republic and Japan, 13 February 1957, 300 UNTS 119.

[26] Art. 5 of the Treaty of Peace between the Union of Burma and Japan, 5 November 1954, 251 UNTS 201.

[27] Art. 4 of the Treaty of Peace between Japan and the Republic of Indonesia, 20 January 1958, 324 UNTS 227.

[28] See Ito, 'Japan's Settlement' (n. 21), 51–4.

addition to providing long-term, low-interest loans.[29] Meanwhile, Article 2 set out a mutual waiver of reparation claims:

> The Contracting Parties confirm that the problem concerning property, rights and interests of the two Contracting Parties and their nationals (including juridical persons) and concerning claims between the Contracting Parties and their nationals, including those provided for in Article IV, paragraph (a) of the Treaty of Peace with Japan signed at the city of San Francisco on September 8, 1951, is settled completely and finally.

The scope of this provision was later disputed before Japanese courts in the cases concerning 'comfort women', whose existence was unknown, at least publicly, in 1965. It is certain, however, that both governments intended, as a basic policy, to settle the possible reparations claims by means of a lump sum.

C. *Lump-Sum Settlements before the 1990s*

The experiences with lump-sum settlements in the wake of World War II, based on the State-centred perspective of international law, still dominated social consciousness of the system of reparations during the Cold War. In settling the armed conflicts that occurred during this period, many States preferred to mutually renounce their reparation claims in peace treaties or simply to ignore the issue of reparations. Such compromises were motivated by the political difficulties of recovering losses, the desire to avoid formal scrutiny of responsibility for conflict (including resulting damage) and the will to avoid souring delicate post-conflict relations.[30]

For instance, to re-establish normal relations following the 1956 Suez Crisis, the General Agreement between France and the United Arab Republic simply provided that 'this Agreement and the annexes thereto … constitute a final settlement of their claims arising out of the events of October and November 1956'.[31] Following the Vietnam War, the compromise between the United States, who did not want to pay compensation implying the illegal use of force, and the Democratic Republic of Vietnam, who sought economic assistance for reconstruction, led to an agreement merely providing that 'the United States will contribute to healing the wounds of war and to postwar

[29] Art. 1 of the Agreement on the Settlement of Problems concerning Property and Claims and on Economic Co-operation between Japan and the Republic of Korea, 22 June 1965, 583 UNTS 173.

[30] Sullo and Wyatt, 'War Reparations' (n. 4), para. 27.

[31] Art. 7 of the General Agreement, 22 August 1958, 732 UNTS 86.

reconstruction of the Democratic Republic of Vietnam and throughout Indochina'.[32]

Furthermore, to end their so-called football war, El Salvador and Honduras concluded the General Peace Treaty in 1980, in which one provision stated that '[e]ach one of the Parties hereby pledges that it will not claim from the other any compensation or reparation for the damage and prejudice that may have arisen as a result of the events which occurred in the month of July 1969'.[33] A similar policy appears in the Joint Statement of Argentina and the United Kingdom in respect of the Falkland Islands War, confirming that '[e]ach Government undertook not to pursue any claim against the other, including nationals of the other, in respect of loss or damage arising from the hostilities and all other actions in and around the Falklands, South Georgia and the South Sandwich Islands before 1989'.[34]

These agreements clearly exhibit a State-centred approach to settlement of reparations, paying no attention to individual victims harmed in these armed conflicts. In short, no victims' voices were heard in these agreements.

III. A VICTIM-ORIENTED PERSPECTIVE OF THE RIGHT TO REPARATION: A TURNING POINT

It is difficult to identify a particular event that prompted an individual right to reparation, or a strong social consciousness of this right, to emerge in international law. Certainly, the tendency to focus on individual victims surfaced in the late 1980s and early 1990s, before bursting into bloom around the beginning of the 2000s, and hence some point towards the end of the Cold War as the trigger. While there may be truth in this assertion, in my view it only partly explains why the individual right to reparation attracted the attention of the international community. It is more likely that increasing sensitivity to human rights and an upspring of the victim-oriented perspective in various fields and organisations fostered awareness of the need to admit individual claims for reparation, and that such awareness then fuelled development of the mechanisms embodying the right to reparation, as will be explained in detail in the next section.

[32] Art. 21 of the Agreement on ending the war and restoring peace in Vietnam, signed at Paris on 27 January 1973, 935 UNTS 6.

[33] Art. 42 of the General Peace Treaty between the Republics of El Salvador and Honduras, signed at Lima on 30 October 1980, 1310 UNTS 213.

[34] Joint statement issued at Madrid on 19 October 1989 by the delegations of the Republic of Argentina and the United Kingdom of Great Britain and Northern Ireland, section 3, International Legal Materials 29 (1990), 1293–5 (1294).

A. A Growing Victim Focus in the United Nations

Since the mid-1970s, several organs of the United Nations and other UN-sponsored fora, including the UN Crime Prevention and Criminal Justice Programme and the UN Congresses on the Prevention of Crime and the Treatment of Offenders, have contributed to the development of victim-focused international programmes and standards.[35] For instance, the Fifth UN Congress on the Prevention of Crime in 1975 addressed victim-related issues by focusing on the economic and social consequences of crime.[36] Five years later, the Sixth UN Congress discussed the victims of abuse of power,[37] and then the Seventh UN Congress addressed several issues relating to victims among its main topics.[38]

In 1985, the increased attention on victims in the UN Congresses led the UN General Assembly to adopt the Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power.[39] Interestingly, the Victims Declaration comprises two parts: Part A is related to the victims of crime, while Part B addresses the victims of abuse of power. Both parts share the definition of victims as 'persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights', but Part B includes an additional phrase, defining victims as those who suffered harm 'through acts or omissions that do not yet constitute violations of national criminal law but of internationally recognized norms relating to human rights'.[40] Compared with Part A, Part B does not stipulate the detailed rights of victims; rather, it merely urges States to consider incorporating, in their domestic law, norms

[35] Raquel Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes', *Human Rights Quarterly* 26 (2004), 605–86 (617–18).

[36] Fifth UN Congress for the Prevention of Crime and the Treatment of Offenders (Geneva, Switzerland, 1–12 September 1975), *Economic and Social Consequences of Crime: New Challenges for Research and Planning*, Working paper prepared by the Secretariat, UN Doc. A/CONF.56/7, para. 37.

[37] Sixth UN Congress for the Prevention of Crime and the Treatment of Offenders (Caracas, Venezuela, 25 August–5 September 1980), *Crime and the Abuse of Power: Offences and Offenders beyond the Reach of the Law?*, Working paper prepared by the Secretariat, UN Doc. A/CONF.87/6, 22 July 1980, para. 8.

[38] See 'Main Principles of Justice and Assistance for Victims of Crime', annexed to the Seventh UN Congress for the Prevention of Crime and the Treatment of Offenders (Milan, Italy, 26 August–6 September 1985), *Victims of Crime*, Working paper prepared by the Secretariat, UN Doc. A/CONF.121/6, 1 August 1985, 59–62.

[39] Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power, Annex to GA Res. 40/34 of 29 November 1985.

[40] *Ibid.*, para. 18.

proscribing abuses of power and providing remedies to victims, including restitution and/or compensation, and necessary material, psychological, and social assistance and support.[41] Nevertheless, the adoption of the Victims Declaration was significant in furthering the individual right to reparation: not only was it the first international instrument to refer explicitly to the right of victims to access justice, and to present their views and concerns at the appropriate stage of proceedings, but also it indicates a broadening of the United Nations' attention beyond the victims of ordinary domestic crimes to include the victims of violations of international human rights law and international humanitarian law (IHL).

Following the adoption of the Victims Declaration, in 1988, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities began its work on reparations with Resolution 1988/11. This recognised that 'all victims of gross violations of human rights and fundamental freedoms should be entitled to restitution, a fair and just compensation and the means for as full a rehabilitation as possible for any damage suffered by such victims'.[42] In 1989, the Sub-Commission appointed Special Rapporteur Theo van Boven to undertake a study on the right to reparation for victims of human rights violations. Having presented his first text in 1993 and a revised draft in 1996, he submitted his final draft of the Basic Principles and Guidelines on the Rights to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law in 1997.[43] This draft was circulated among States and other interested parties, and it received many essential comments.

In 1998, M. Cherif Bassiouni succeeded van Boven as the independent expert assigned to finalise the document. Although he submitted his draft text to the UN Commission on Human Rights in 2000,[44] its actual adoption was considerably delayed, because many States were concerned it might imply responsibility to compensate victims of past events, including colonial rules.[45]

[41] *Ibid.*, para. 19.

[42] Resolution 1988/11, Compensation for victims of gross violations of human rights, 1 September 1988, para. 1, in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Fortieth Session, UN Doc. E/CN. 4/1989/3, E/CN. 4/Sub.2/1988/45, 25 October 1988, 35–6 (36).

[43] Basic Principles and Guidelines on the Rights to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, UN Doc. E/CN. 4/1997/104, 16 January 1997.

[44] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Doc. E/CN. 4/2000/62, Annex, 18 January 2000.

[45] M. Cherif Bassiouni, *Introduction to International Criminal Law* (New York: Transnational, 2003), 95.

After several exchanges between the expert and the Member States of the Commission,[46] the draft was eventually approved in 2005, as the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, and subsequently adopted in the General Assembly by consensus.[47]

The Basic Principles define victims as 'persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law'.[48] The first half of this definition almost echoes that of the Victims Declaration, but the second half elaborates the definition stipulated in the Declaration's Part B by explicitly referring to international human rights law and IHL.[49] To this extent, the Basic Principles indicate the shift in the United Nations' interest away from victims of domestic crimes towards those of violations of international law.

Under the Basic Principles, the remedies for violations of international human rights law and IHL include the victim's right to: (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms. Significantly, the remedies integrate substantive and

[46] Dinah Shelton, 'The United Nations Principles and Guidelines on Reparations: Context and Contents', in Koen de Feyter *et al.* (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Antwerpen/Oxford: Intersentia, 2005), 11–33 (17–18).

[47] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, annex to GA Res. 60/147 of 16 December 2005.

[48] *Ibid.*, para. 8.

[49] The Basic Principles refers separately to violations of international human rights law and those of IHL. The Explanatory comments, however, emphasise the victim-oriented perspective rather than the difference between two fields of law:

> Insofar as the principles and guidelines are victim oriented and are essentially predicated on the concept of social and human solidarity and not only on the concept of State responsibility, it would be difficult to link the rights of victims to the source of the conventional or customary law that is at the basis of victims' rights. Consequently, it must be understood that these principles and guidelines are not intended to reflect the legal differences between international human rights law violations and international humanitarian law violations.

Explanatory comments, in Report of the Second Consultative Meeting on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (Geneva, 20, 21 and 23 October 2003), UN. Doc. E/CN. 4/2004/57, 10 November 2003, 26.

procedural rights, and they place the latter before the former. This implies the fundamental philosophy that a substantive right is meaningless without access to an effective forum or mechanism through which it can materialise. Reflecting this philosophy, the Basic Principles also stress that, in addition to domestic proceedings, '[a]n adequate, effective and prompt remedy . . . should include all available and appropriate international processes in which a person may have legal standing'.[50]

Interestingly, the preamble to the Basic Principles emphasises that 'the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures, and methods for the implementation of *existing legal obligations* under international human rights law and international humanitarian law'.[51] Thus the rights of the victim they set out are not *lex ferenda*; rather, they are already established in international law.[52]

In exploring the emerging right to reparation for victims of armed conflict, it should be noted that it took seventeen years to complete the Basic Principles. The period from 1988 to 2005 witnessed dramatic changes in the field of international criminal law, with establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), other internationalised courts in Sierra Leone, Kosovo, Timor-Leste, and Cambodia, and finally the ICC. When drafting of the Basic Principles began, the main focus was on violations of international human rights law, as is symbolically evident in the UN Commission on Human Rights taking the initiative in its drafting. However, the scope of the Basic Principles was later expanded to include violations of IHL, inspired by the creation of these international criminal judiciaries and, above all, the terrible realities of the armed conflicts that compelled their creation.

[50] Basic Principles (n. 47), para. 14.

[51] *Ibid.*, preamble, para. 7 (emphasis added). The Explanatory comments also point out that:

> The principles and guidelines do not create new substantive international or domestic legal obligations. They provide for mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under human rights law and international humanitarian law. At the same time, they seek to rationalize through a consistent approach the means and methods by which victims' rights can be addressed, so as to maximize positive outcomes and minimize the diversity of approaches that may cause uneven implementation.

Explanatory comments (n. 49), 28.

[52] Furuya, 'Victim Participation' (n. 12), 847–8; Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge: Cambridge University Press, 2012), 127.

Another expansion of victims' right to reparation occurred in the mid-2000s. At almost the same time as the Basic Principles were adopted, the United Nations published two important instruments: first, the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, adopted by the UN Commission on Human Rights;[53] and second, the Secretary-General's report on the rule of law and transitional justice in conflict and post-conflict societies.[54] While both addressed reparation for victims of armed conflict, they framed this as a part of transitional justice in post-conflict States and local communities, which also includes a criminal tribunal, a non-judicial fact-finding body to investigate patterns of abuse in armed conflict (such as a truth commission), and the promotion of democracy and the rule of law. The Secretary-General explained it as follows:

> No single form of reparation is likely to be satisfactory to victims. Instead, appropriately conceived combinations of reparation measures will usually be required, as a complement to the proceedings of criminal tribunals and truth commissions. Whatever mode of transitional justice is adopted and however reparations programmes are conceived to accompany them, both the demands of justice and the dictates of peace require that something be done to compensate victims.[55]

Accordingly, from the United Nations' perspective, the purpose of reparation evidently shifted. The scope of its focus on reparation for the victims of domestic crimes broadened to reach the victims suffering harms from violations of international human rights law and IHL. Today, the United Nations views the programme of victims' reparation as one of the key measures in achieving transitional justice in a post-conflict situation. This shift was also driven by disastrous armed conflicts in the former Yugoslavia, Rwanda, and other States, which caused a huge number of casualties among innocent civilians and would, in turn, lead to reconstruction and reintegration efforts in the war-torn States.[56]

[53] Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, 8 February 2005, UN Doc. E/CN. 4/2005/102/Add.1.

[54] Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 23 August 2004, UN Doc. S/2004/616, para. 54.

[55] *Ibid.*, para. 55.

[56] As to the theoretical analysis of the relation between transitional justice and reparation, see Rama Mani, 'Reparation as a Component of Transitional Justice: Pursuing "Reparative Justice" in the Aftermath of Violent Conflict', in de Feyter *et al.*, *Out of the Ashes* (n. 46), 53–82.

B. *Advancement in the International Criminal Tribunals and Court*

1. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda

To trace the emerging process of the individual right to reparation since the 1990s, it is necessary to analyse practices in the ICTY and ICTR.[57]

When these two *ad hoc* tribunals were established in 1993 and 1994, respectively, the drafters of their statutes were less interested in reparation for victims and more focused on the fair and effective operation of criminal proceedings. For them, while the treatment of suspects and accused was important, victims were nothing more than the 'object-matter' within the procedures of these *ad hoc* tribunals.[58] It is certainly true that some proposed that the ICTY Statute should allow victims' compensation claims to be accepted and processed,[59] but none of these proposals were taken up.[60]

[57] See Evans, *The Right to Reparation* (n. 52), 89–94.

[58] Claude Jorda and Jerôme de Hemptinne, 'The Status and Role of the Victim', in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court*, vol. II (Oxford: Oxford University Press, 2002), 1387–419 (1389).

[59] For example, Proposal for an International War Crimes Tribunal for the Former Yugoslavia by Rapporteurs (Corell-Turk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia (9 February 1993), Annex 6, Draft Convention on an International War Crimes Tribunal for the Former Yugoslavia, Art. 30 (cited in Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol. II (New York: Transnational, 1995), 287); The National Alliance of Women's Organization, Re: Gender Justice and the Constitution of the War Crimes Tribunal pursuant to Security Council Resolution 808 (31 March 1993), paras 9–10 (cited *ibid.*, 403); Recommendation of the Organization of the Islamic Conference on the establishment of an *ad hoc* International War Crimes Tribunal for the territory of the former Yugoslavia, annexed to the Letter Dated 31 March 1993 from the Representatives of Egypt, the Islamic Republic of Iran, Malaysia, Pakistan, Saudi Arabia, Senegal and Turkey to the United Nations Addressed to the Secretary-General, 5 April 1993, UN Doc. A/47/920, S/25512, III. 4 (cited *ibid.*, 406).

[60] Morris and Scharf explain the reasons as follows:

> First, the Security Council decided to establish an international criminal tribunal to prosecute and punish the perpetrators of war crimes and other atrocities in Resolution 808 (1993). There was no indication that the Security Council intended this tribunal to deal with questions of victim compensation as a result of those crimes. Second, the International Tribunal will require substantial resources to conduct the investigation, prosecution and trial of major criminal cases. There was some question as to whether the International Tribunal would receive the necessary financial support to effectively perform its essential functions as a criminal tribunal. The proposal to have the International Tribunal also function as a claims commission could not be reconciled with existing financial constraints.
>
> Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, vol. I (New York: Transnational, 1995), 286.

Instead, the judges of the ICTY, recognising the need to provide victims with a way of pursuing compensation, adopted Rule 106 of the ICTY's Rules of Procedure and Evidence.[61] Under that Rule, the Registrar shall transmit to the competent authorities of the States concerned the judgment finding the accused guilty of a crime that has caused injury to a victim; a victim may then bring an action in a national court or other competent body to obtain compensation. For the purpose of this legal action, the ICTY's judgment shall be final and binding as to the convicted person's criminal responsibility. The ICTR followed the same path in Rule 106 of its own Rules of Procedure and Evidence. However, in the post-conflict situations of Yugoslavia and Rwanda, domestic courts were ill-prepared to handle such cases.[62] Consequently, neither the ICTY nor the ICTR has put its Rule 106 into effect.

The ICTY Statute does, however, contain a provision concerning the restitution of property. Article 24(3) provides that the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct to their rightful owners; Rule 105 of the ICTY's Rules of Procedure and Evidence entitles the Trial Chamber also to order provisional measures be taken to preserve and protect the property in question. However, the intended system of restitution has never been put into operation. In several cases, including *Milošević*[63] and *Kabuga*,[64] both the ICTY and ICTR ordered the seizure or freezing of substantial assets in perpetrators' possession – but such measures were taken solely to secure the arrest of accused rather than to enable the provision of reparation to victims.[65]

Matters changed in 2000 when Carla Del Ponte, then Chief Prosecutor of both Tribunals, challenged the vulnerable position of victims in the ICTY and ICTR, and proposed that the UN Security Council incorporate victims' compensation and participation in proceedings:

[61] Antonio Cassese, the first President of the ICTY, described the shared feeling of the judges when they had adopted Rule 106 thus: 'This is a sort of hint to the victim: please go to the national court and try to get some sort of vindication of your rights.' Comment by Antonio Cassese in 'Discussion (Part 1)', in Randelzhofer and Tomuschat, *State Responsibility* (n. 3), 48.

[62] M. Cherif Bassiouni, 'International Recognition of Victims' Rights', *Human Rights Law Review* 6 (2006), 203–79 (242–3).

[63] ICTY, *Prosecutor v. Slobodan Milošević, Milan Milutinović, Nikola Sainović, Dragoljub Ojdanić & Vlajko Stojiljković*, Decision on Review of Indictment and Application for Consequential Orders of 24 May 1999, Trial Chamber, Case No. IT-99-37-I, paras 26–9.

[64] ICTY, *Prosecutor v. Felicien Kabuga*, Decision (Appeal of the Family of Felicien Kabuga against Decisions of the Prosecutor and President of the Tribunal) of 22 November 2002, Appeals Chamber, Case No. ICTR-99-44B, Miscellaneous–Kabuga Family-01-A.

[65] Conor McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge: Cambridge University Press, 2012), 47.

> It is regrettable that the Tribunal's statute makes no provision for victim participation during the trial, and makes only a minimum of provision for compensation and restitution to people whose lives have been destroyed. And yet my office is having considerable success in tracing and freezing large amounts of money in the personal accounts of the accused. Money that could very properly be applied by the courts to the compensation of the citizens who deserve it. We should therefore give victims the right to express themselves, and allow their voice to be heard during the proceedings. ... I would therefore respectfully suggest to the Council that [the] present system falls short of delivering justice to the people of Rwanda and the former Yugoslavia, and I would invite you to give serious and urgent consideration to any change that would remove this lacuna in our process.[66]

Significantly, almost simultaneously, the ICTY judges examined the possibility of amending its Statute to create an effective system of victim reparation. Importantly, their report clearly identified the changing situation of international law concerning reparations to victims:

> There is a strong tendency towards providing compensation not only to States but also to individuals based on State responsibility. Moreover, there is a clear trend in international law to recognize a right of compensation in the victim to recover from the individual who caused his or her injury. This right is recognized in the Victims Declaration, the Basic Principles, other international human rights instruments and, most specifically, in the ICC Statute, which is indicative of the state of the law at present. ... Thus, in view of these developments, there does appear to be a right to compensation for victims under international law.[67]

Nonetheless, the report relinquished the idea of amending the Statute and Rules, because new procedures for victims would increase the Chambers' workload and further exacerbate the length of proceedings, thereby undermining efforts to provide the accused with fair and expeditious trials. Instead, the report proposed that an international claims commission should be established.[68] The ICTR judges, likewise, discussed compensation for victims in Rwanda, but reached virtually the same conclusion as the

[66] Address by Carla Del Ponte, Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, to the UN Security Council, Press Release, The Hague, 24 November 2000, JL/P.I.S./542-e, available at www.icty.org/sid/7803.

[67] Letter dated 12 October 2000 from the President of the International Criminal Tribunal for the Former Yugoslavia addressed to the Secretary-General, *annexed to* the Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council, 3 November 2000, UN Doc. S/2000/1063, paras 20–1.

[68] *Ibid.*, paras 47–8.

ICTY judges.[69] Following these negative conclusions, the idea of establishing a more victim-oriented system in the *ad hoc* tribunals did not come to fruition.

It is significant that the ICTY – whose establishment in 1993 explicitly had the '*sole purpose*' of trying those responsible for crimes under its jurisdiction[70] – consequently had to take seriously this new trend of respecting victims' interests in 2000, even if its consideration did not lead to amendments in those particular proceedings. This suggests that the victim-oriented perspective blossomed only in the mid-1990s, before rapidly becoming dominant in the late 1990s or early 2000s with the adoption of the Rome Statute.[71]

2. The Road to Victim Reparation under the Rome Statute

In drafting the statute for an international criminal court, the International Law Commission (ILC) took a more restrained approach in terms of victim reparation than that eventually established in the Rome Statute. In 1993, the ILC Working Group drafted provisions in line with the restitution system under ICTY Rule 105.[72] In its 1994 draft, however, the relevant provisions concerning forfeiture and restitution were completely omitted. The ILC's members considered that such a remedy was more appropriate in a civil, rather than a criminal, case, holding that allowing such a court to handle victims' remedies would be inconsistent with its primary function of prosecuting and punishing perpetrators of crimes. In its final analysis, the ILC decided that reparation for victims was a matter for national jurisdictions.[73]

[69] 'The judges wholeheartedly empathize with the principle of compensation for victims, but . . . believe that the responsibility for processing and assessing claims for such compensation should not rest with the Tribunal.' Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary-General, *annexed to* the Letter dated 14 December 2000 from the Secretary-General addressed to the President of the Security Council, 15 December 2000, UN Doc. S/2000/1198, 3.

[70] Resolution 827 of 25 May 1993 reads: 'The Security Council . . . decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace.' UN Doc. S/RES/827, para. 2.

[71] Furuya, 'Victim Participation' (n. 12), 857.

[72] Draft Statute of an International Criminal Court, Art. 53 and Commentary, in Report of the Working Group on a Draft Statute for an International Criminal Court, *Yearbook of the International Law Commission*, 1993, vol. II, pt 2, 125.

[73] Draft Statute of an International Criminal Court, Article 47 and Commentary, *Yearbook of the International Law Commission*, 1994, vol. II, pt 2, 60.

At the drafting stage in the Preparatory Committee, two proposals were made concerning reparation. The first virtually echoed ICTY Rule 106,[74] while the second, submitted by France, directly entitled the ICC to handle compensation and restitution for victims.[75] In response to the direct and more ambitious approach of the French proposal, concerns were raised that an international court's competence to award compensation may imply State responsibility for its nationals' crimes, leading eventually to reparation orders against States. While it had been accepted that the criminal responsibility of individuals was to be separate and distinct from the international responsibility of States, and that the former would not affect the latter, it was widely believed that the proposed reparations article was a 'stalking-horse' for reparation awards against States.[76] Nevertheless, in both the Preparatory Committee and the Rome Conference, subsequent discussions moved towards the French proposal, in support of a strong victim reparation regime. This was due, in no small measure, to the involvement of numerous non-governmental organisations (NGOs) in drafting the Rome Statute. Although officially participating in the negotiations as observers, NGOs made contributions far beyond that role, preparing expert analyses of crucial issues, disseminating opinions, and proposing draft texts. Such lobbying efforts undoubtedly wielded influence on State attitudes towards victim reparation.[77]

Consequently, the text forwarded to the Rome Conference took a positive approach, explicitly providing that '[t]he Court may make an order directly against a convicted person for an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'.[78] Conversely, there remained deep concern among many States that the Court's competence on reparation might be extended to the States whose nationals were found guilty. The final draft submitted to the Conference, even in bracketed form, provided that the Court may also order a State to make an appropriate form of reparations to, or in respect of, victims if the convicted

[74] Report of the Preparatory Committee on the Establishment of an International Criminal Court, vol. II (Compilation of proposals), General Assembly Official Record, Fifty-First Session, Supplement No. 22A, 13 September 1996, UN Doc. A/51/22, 224.

[75] *Ibid.*, 223.

[76] Christopher Muttukumara, 'Reparations to Victims', in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations and Results* (The Hague/Boston: Kluwer Law International, 1999), 262–9 (264).

[77] McCarthy, *Reparations* (n. 65), 52–3. See also Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), 71–4.

[78] Draft Statute of an International Criminal Court, Art. 73(2)(a), in Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Final Act, 14 April 1998, UN Doc. A/CONF.183/2/Add.1, 117.

person was, in committing the offence, acting on behalf of that State in an official capacity.[79] While several States supported this provision, a significant number strongly opposed it, contending that the reparation regime against States would be inconsistent with the Court's basic framework principle of individual responsibility. Moreover, they argued that, were this regime accepted, the draft Statute's provisions on jurisdiction and admissibility would require substantial reconsideration.[80] In view of such strong opposition, France and the United Kingdom jointly proposed a new provision omitting the power to make an order against States;[81] their proposal eventually became Article 75 of the Rome Statute.

As indicated by the complex negotiation process, the victim-oriented perspective became dominant when the drafting of the Rome Statute moved from the ILC to inter-State negotiations. At the same time, however, many States were deeply concerned that the individual right to reparation, if incorporated in the ICC, would be invoked against the State whose nationals were the perpetrators of crimes. Eventually, this concern led the ICC reparation system to be confined to the individual responsibility of convicted persons. However, the extensive expression of the victim-oriented perspective during negotiations clearly influenced the practices of *ad hoc* reparation mechanisms more directly related to State responsibility.

C. Ad Hoc *Reparation Mechanisms Created since the Early 1990s*

The last few decades have witnessed the establishment of several *ad hoc* mechanisms to resolve land and property rights disputes or to provide compensation to victims of international law violations in post-conflict situations. The structure and procedures of these reparation mechanisms have varied considerably, depending on the political and social circumstances of each conflict and the victims' needs.[82] These mechanisms have also differed according to the legal framework under which each was (or was proposed to be) established. Some reparation mechanisms were established in the traditional framework of inter-State agreements. Some were based on the instruments adopted by UN organs or other international organisations. Others were created through a combination of different legal instruments, including

[79] Draft Statute of an International Criminal Court, Art. 73(2)(b), *ibid.*

[80] Muttukumara, 'Reparations to Victims' (n. 76), 268.

[81] Proposal Submitted by the Delegations of France and the United Kingdom of Great Britain and Northern Ireland, 26 June 1998, UN Doc. A/CONF.183/C.1/WGPM/L.28.

[82] Pierre A. Karrer, 'Mass Claims Proceedings in Practice: A Few Lessons Learned', *Berkeley Journal of International Law* 23 (2005), 463–73 (463).

inter-State agreements, agreements between private parties and/or national legislation.[83]

Nevertheless, it should be noted that these mechanisms were established serially within a relatively short time frame. In chronological order, they emerged as follows.

1991 The United Nations Compensation Commission (UNCC) for claims resulting from the Gulf War (1990–1) was established and guided by Security Council Resolutions.[84]

1995 The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) was established by the Agreement on Refugees and Displaced Persons, annexed to the Dayton Peace Agreement.[85] However, the parties to this Agreement included non-State entities involved in the internal armed conflicts in Bosnia and Herzegovina.

1997 The Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-I), based on a Memorandum of Understanding[86] between the World Jewish Restitution Organization and the World Jewish Congress, on the one hand, and the Swiss Bankers Association, on the other, was established as an independent international arbitral tribunal under Swiss law.[87]

1998 The International Commission on Holocaust Era Insurance Claims (ICHEIC) was constituted by a Memorandum of Understanding[88] concluded between several European insurance

[83] Shuichi Furuya, 'Draft Procedural Principles for Reparation Mechanisms', in International Law Association, *Report of the Seventy-Sixth Conference Held in Washington D.C.* (London: ILA, 2014), 782–813 (786–8).

[84] Security Council Resolution 687 of 3 April 1991. The work of the UNCC is analysed in detail by Cristián Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, 118–121.

[85] Agreement on Refugees and Displaced Persons, Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina, available at www.nato.int/ifor/gfa/gfa-an7.htm.

[86] Memorandum of Understanding between the World Jewish Restitution Organization and the World Jewish Congress, representing also the Jewish Agency and Allied Organizations, and the Swiss Bankers Association, 2 May 1996, Appendix A to the Final Report of the Independent Committee of Eminent Persons (1999), A-1, available at www.crt-ii.org/ICEP/ICEP_Report_Appendices_A-W.pdf.

[87] Joint Press Release, 25 June 1997, Appendix D to Final Report of the Independent Committee of Eminent Persons (1999), A-9, available at www.crt-ii.org/ICEP/ICEP_Report_Appendices_A-W.pdf.

[88] Memorandum of Understanding, 25 August 1998, available at www.insurance.ca.gov/01-consumers/150-other-prog/05-hei/hei-mou.cfm.

companies, US insurance regulatory authorities, and Jewish and survivor organisations.

1999 CRT-II, a successor to the CRT-I, and the Holocaust Victim Assets Programme (HVAP) were created by a federal district court in the United States to implement part of a settlement agreement reached in a series of class action lawsuits known as the Holocaust Victim Assets Litigation.[89] Their functions were based on the settlement agreement and the Plan of Allocation and Distribution proposed by a Special Master.[90]

1999 The Housing and Property Claims Commission (HPCC) was established by regulations promulgated by the Special Representative of the UN Secretary-General within the mandate of the UN Interim Administration Mission in Kosovo (UNMIK).[91]

2000 The German Forced Labour Compensation Programme (GFLCP) was launched by an agreement between the United States and Germany concerning the Foundation 'Remembrance, Responsibility and Future'.[92] Subsequently, the German parliament passed the federal law creating the Foundation and its organisational framework.[93]

2000 The Eritrea–Ethiopia Claims Commission (EECC) was established pursuant to an agreement between Eritrea and Ethiopia.[94] Its proceedings were administered by the Permanent Court of Arbitration in The Hague.[95]

2004 A proposed Cyprus Property Board (CPB) was envisaged, to be based on a Foundation Agreement[96] to be concluded as part of the

[89] Class Action Settlement Agreement, 26 January 1999, available at www.crt-ii.org/court_docs/Settleme.pdf.

[90] Summary of Special Master's Proposed Plan of Allocation and Distribution, available at www.swissbankclaims.com/DistributionPlan.htm.

[91] Regulation No. 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission, UNMIK/REG/1999/23, 15 November 1999.

[92] Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation 'Remembrance, Responsibility and Future', 17 July 2000, 2130 UNTS 249.

[93] Law on the Creation of a Foundation 'Remembrance, Responsibility and Future', 2 August 2000, entered into force on 12 August 2000 (BGBl 2000 I 1263), last amended by the Law of 1 September 2008, entered into force on 9 September 2008 (BGBl 2008 I 1797), available at www.stiftung-evz.de/eng/the-foundation/law.html.

[94] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, available at http://pca-cpa.org/en/cases/71/.

[95] The work of the EECC is analysed in detail by Cristián Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, 121–126.

[96] Treatment of Property affected by Events since 1963, Annex VII to the Foundation Agreement, the Comprehensive Settlement of the Cyprus Problem, 31 March 2004, available

'Comprehensive Settlement of the Cyprus Problem', submitted by the then UN Secretary-General Kofi Annan (but never realised).

2004 The Iraq Property Claims Commission (IPCC), the predecessor of the Commission for the Resolution of Real Property Disputes (CRRPD) in Iraq, was based on a regulation promulgated by the Coalition Provisional Authority.[97]

2005 A proposed Compensation Commission for international crimes perpetrated in Darfur, Sudan (CCDS),[98] was envisaged to follow the example of the UNCC (but never realised).

2006 The Kosovo Property Claims Commission (KPCC) was established by regulations promulgated by the Special Representative of the UN Secretary-General, within the mandate of the UN Interim Administration Mission in Kosovo (UNMIK).[99]

As a rule, these mechanisms adopted two types of system for receiving claims from victims. In most of the mechanisms, including the CRPC, HPCC, GFLCP, and IPCC, victims had the capacity to submit their claims directly.[100] Conversely, the UNCC and EECC adopted a system of consolidated claims, under which only States were entitled to submit claims on behalf of their nationals and corporations.[101] It should be noted, however, that submission by States for their nationals was not based on the traditional rule of diplomatic protection; rather, those States merely assumed the role of collecting and transmitting individual claims to facilitate efficient and prompt

at www.peacemaker.un.org/sites/peacemaker.un.org/files/Annan_Plan_MARCH_30_2004.pdf.

97 Coalition Provisional Authority Regulation Number 12, Iraq Property Claims Commission, Annex A: the Statute Establishing of the Iraq Property Claims Commission, 24 June 2004, available at http://web.archive.org/web/20100712083422/http://www.cpa-iraq.org/. An Iraqi law later superseded the regulation and replaced the IPCC with the CRRPD, which is an entirely domestic organ.

98 Report of the International Commission of Inquiry on Darfur to the Secretary-General, 1 February 2005, UN Doc. S/2005/60, paras 590–603.

99 Regulation No. 2006/50 on the Resolution of Claims Relating to Private Immovable Property, including Agricultural and Commercial Property, UNMIK Regulation 2006/50, available at www.unmikonline.org/regulations/unmikgazette/index.htm.

100 In the HPCC, an individual claim is first submitted to the Housing and Property Directorate, and then the Directorate refers the claim to the HPCC. Section 1.2 of Regulation No. 1999/23 (n. 91).

101 Criteria for Expedited Processing of Urgent Claims, UN Doc. S/AC.26/1991/1, para. 19; Art. 5(1) of the Provisional Rules for Claims Procedure, annexed to the Decision taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth Session held on 26 June 1992, UN Doc. S/AC.26/1992/10; Art. 5(8) Agreement between Ethiopia and Eritrea (n. 94).

processing of a huge number of individual claims.[102] The UNCC provided an exception whereby an appropriate person, State, or international organisation appointed by its Governing Council could forward claims on behalf of refugees and stateless persons not in a position to submit through their State of nationality.[103]

The stream of these *ad hoc* mechanisms, established to receive individual victims' reparation claims, evidences an emerging individual right to reparation under international law. However, one may contend that the individual right to reparation under these mechanisms was a particular product of their constituting instruments and that, therefore, the existence of these mechanisms does not necessarily demonstrate a substantive individual right to reparation under international law. This criticism may be correct in the sense that, in these mechanisms, we cannot separate the substantive right from the procedural right to submit a claim, and we therefore cannot confirm whether a substantive right exists independently of the procedural right provided by the constituent instruments. However, this criticism overlooks the fact that the policy-makers chose to create mechanisms that individual victims had a right to access, rather than to adopt a more State-centred approach to settlement, such as the lump-sum agreement dominant until the 1980s. One therefore finds here an emerging victim-oriented consciousness among the policy-makers involved in addressing issues of reparation.

The policy-makers' choices were partly driven by a practical consideration related closely to the changing nature of armed conflict. In the past, armed conflicts were predominantly of an international nature and the issue of reparations ordinarily arose when a State harmed the nationals of a hostile State. In such a situation, the victims' State would likely settle reparation claims by means of an agreement with the responsible State. This allowed for the settlement of reparation claims through inter-State lump-sum agreements after World War II. However, in the context of non-international armed conflict now dominant in today's world, an official government or its military forces might harm individuals of the same nationality by violating international rules applicable in armed conflict. In such a situation, it is totally

[102] See Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991), S/22559, 2 May 1991, para. 21; Andrea Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations', *European Journal of International Law* 13 (2002), 161–81 (170).

[103] See Guideline relating to paragraph 19 of the Criteria for Expedited Processing of Urgent Claims, Decision taken by the Governing Council of the United Nations Compensation Commission during its Second Session, at the 15th Meeting, held on 18 October 1991, 23 October 1991, UN Doc. S/AC.26/1991/5, para. 3.

unrealistic to expect the victims' State, or its domestic courts, to settle reparations in the interest of those victims. This dilemma motivated policy-makers to create independent and impartial mechanisms to which victims were entitled to submit their reparation claims directly. The CRPC, HPCC, and IPCC are examples, as were the proposed CPB and CCDS.

Academically, the discussion of whether a victim's substantive right exists independently of the procedural right is meaningful; practically, however, a substantive right, if any, can function only if victims are guaranteed a procedural right to access an effective mechanism. Given the current trend of establishing a reparations mechanism in the wake of any armed conflict, the actual combination of both rights, substantive and procedural, is clearly indispensable.

Reflecting on all of these developments, it is evident that UN-led movements in drafting instruments concerning victims, the emergence of a reparation system in international criminal justice, and the establishment of *ad hoc* reparation mechanisms mutually reinforced one another, leading to an explicit shift to the victim-oriented perspective of reparations by, at the latest, the mid-2000s. In 2004, for instance, the International Court of Justice (ICJ), in its *Israeli Wall* advisory opinion, held as follows:

> Moreover, given that the construction of the wall in the Occupied Palestinian Territory has, *inter alia*, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. ... Israel is accordingly under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.[104]

Here, the ICJ did not take the view that reparation should be made to the Palestinian Authority, which was legally admitted as a self-government body for the Palestinians, finding it instead incumbent upon the responsible party to compensate the individual victims directly. Although the Court's finding is drafted in the language of obligations, it seems to be premised on Palestinian

[104] ICJ, *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory* (*Israeli Wall*), Advisory Opinion of 9 July 2004, ICJ Reports 2004, 198, paras 152–3.

victims possessing an individual right to reparation.[105] Against this view, one may argue that this was a special case in which the Palestinians did not have any State (if the Palestinian Authority was not a State) to intermediate their claims for reparation. However, this argument does not explain why only those individuals without a home State can be direct beneficiaries of the reparation that a responsible State has an obligation to make. Thus it may be more reasonable to consider that awareness of an individual right to reparation came to the surface in the ICJ's advisory opinion because the statehood of the Palestinian Authority was fragile.

Moreover, the ICC's Trial Chamber I expressed an important view in the *Lubanga* case, indicating the cross-fertilisation of developments in different fields on recognising the individual right to reparation:

> The Chamber accepts that the right to reparations is a well-established and basic human right, that is enshrined in universal and regional human rights treaties, and in other international instruments, including the UN Basic Principles; the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime; the Nairobi Declaration; the Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa; and the Paris Principles. These international instruments, as well as certain significant human rights reports, have provided guidance to the Chamber in establishing the present principles.[106]

Here, the Trial Chamber clearly affirmed the existence of a general individual right to reparation under international law, even beyond the framework of the Rome Statute. Further, it should be noted that, among the six instruments the Chamber enumerated, four were adopted after the Rome Statute: the Basic Principles, and the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime in 2005;[107] the Nairobi Declaration on Women and Girls' Right to a Remedy in 2007;[108] and the Paris Principles and Guidelines on Children Associated with

[105] Hofmann, 'Draft Declaration' (n. 2), 315.

[106] Situation in the Democratic Republic of the Congo in ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, Trial Chamber I, Case No. ICC-01/04-01/06, 7 August 2012, para. 185.

[107] Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, ECOSOC Resolution 2005/20 of 22 July 2005, esp. paras 35–7.

[108] The Nairobi Declaration was issued by women's rights advocates and activists, as well as survivors of sexual violence in situations of conflict, at the International Meeting on Women's and Girls' Right to a Remedy and Reparation, held in Nairobi 19–21 March 2007, available at www.fidh.org/IMG/pdf/NAIROBI_DECLARATIONeng.pdf.

Armed Forces in 2007.[109] These documents were clearly strongly influenced by the ICC system on victim reparation. Without the relevant provisions of the Rome Statute, these instruments would not have come to exist until much later, if at all. Conversely, as the Trial Chamber mentioned in its decision, it relied on these instruments for the concrete reparation principles applied to the victims of Lubanga's crimes. This is emblematic of the suggestion that the victim-oriented perspective in international law has been developed through cross-referencing[110] and, in addition, that it flourished around the mid-2000s.

D. *New Cases on Past Violations: Evaluating the Findings of Domestic Courts*

During the period of the shift from State-centred settlement to victim-oriented reparation claims, a series of findings by German and Japanese courts denied an individual right to reparation. Some scholars have relied on those findings to refute the assertion that the individual right has been established in international law.[111] The findings addressed one or more of three key issues concerning the claims of victims harmed by Germany or Japan during World War II:

1. whether an individual was granted a right to reparation, at the time of World War II, under the 1907 Hague Convention and customary international law;
2. whether a responsible State can enjoy immunity from other States' jurisdiction even for serious violations of international law applicable in armed conflict; and
3. whether a peace treaty provision waiving reparation claims deprives victims of their right to reparation.

For present purposes, this section will consider the cases mainly addressing the first of these issues.

The *Distomo* case against Germany initiated a series of lawsuits concerning reparations to individual victims. In Greece, a first-instance court found in 1997 that '[t]he suit is lawful as founded on the provisions of [A]rticle 3 of the

[109] The Paris Principles were adopted at the international conference 'Free Children from War' in Paris, February 2007, available at www.unicef.org/emerg/files/ParisPrinciples310107English.pdf.

[110] Furuya, 'Victim Participation' (n. 12), 862.

[111] Ian Brownlie, *Principles of Public International Law* (New York: Oxford University Press, 7th edn, 2008), 57.

1907 Hague IV Convention . . . the contested claims are admissibly presented in their individual capacity and not by the State whose citizens they are since that is not precluded from any rule of international law'.[112] In 2000, the Hellenic Supreme Court upheld this judgment, albeit without explicitly mentioning the relevant instruments, and denied the jurisdictional immunity that Germany had requested.[113] Nevertheless, in 2003, the German Federal Court of Justice ruled that the traditional conception of international law as an inter-State law does not consider an individual to be the subject of international law, but grants that individual only indirect international protection; in the case of a violation of international law, a claim does not belong to the person concerned, but only to that person's home State.[114] The Court further held that, by means of diplomatic protection, the State asserts its own right, claiming that international law is respected in the person of its national and that this principle of an exclusive State entitlement also applied between 1943 and 1945 for the violation of human rights.[115] In 2006, Germany's Federal Constitutional Court upheld this finding, stating that 'Article 3 of Hague Convention IV does not establish a direct individual right to compensation for breaches of the international law of war. . . . [I]t is still only the home state that is entitled to lodge claims for damages as a secondary right for acts against foreign nationals that a state has committed in breach of international law.'[116]

[112] Court of Levadia 137/1997, 30 October 1997, cited in Maria Gavouneli, 'War Reparation Claims and State Immunity', *Revue Hellénique de Droit International* 50 (1997), 595–608 (601).

[113] See Ilias Bantekas, '*Prefecture of Voiotia v. Federal Republic of Germany*. Case No. 11/2000. Areios Pagos (Hellenic Supreme Court), May 4, 2000', *American Journal of International Law* 95 (2001), 198–204. Subsequently, however, the Special Supreme Court found that:

> [A]t the present stage of international law development a generally acknowledged rule of international law, that allows, in exemption to immunity, to admissibly bring an action against a State before the courts of another State for compensation from any type of tort that took place in the territory of the forum and in which the armed forces of the defendant State are involved in any way, either in peace or in time of war, has not yet emerged.

Case 6/2002, 17 September 2002, cited in Maria Panezi, 'Sovereign Immunity and Violation of *Jus Cogens* Norms', *Revue Hellénique de Droit International* 56 (2003), 199–214 (203).

[114] German Federal Court of Justice [BGH], *Compensation for Distomo Massacre, Greek Citizens v. Germany*, Appeal judgment, BGHZ 155, 279, ILDC 389 (DE 2003), 26 June 2003, paras 35–8, in *Oxford Public International Law, Oxford Reports on International Law*, available at https://opil.ouplaw.com/home/oril.

[115] *Ibid*. See Sabine Pittrof, 'Compensation Claims for Human Rights Breaches Committed by German Armed Forces Abroad during the Second World War: Federal Court of Justice Hands down Decision in the *Distomo* Case', *German Law Journal* 5 (2004), 15–21 (19–20).

[116] German Federal Constitutional Court [BVerfG], *Distomo* Case, Joint constitutional complaint, 2 BvR 1476/03, ILDC 390 (DE 2006), 15 February 2006, paras 20–1, in *Oxford Public*

A similar ruling had been made in 2004 by the Federal Constitutional Court in the *Italian Military Internees* case.[117]

In Japan, too, since the mid-1990s the foreign victims of war crimes, forced labour, and sexual abuses have lodged a series of suits against the Japanese government and private companies before Japanese courts. However, in most of these cases, Japanese courts have denied the existence of an individual right to reparation under the 1907 Hague Convention and customary international law.[118] For instance, in a case instituted by former Dutch POWs, the Tokyo District Court held, after detailed examination of the drafting process of Article 3 of the 1907 Hague Convention and the annexed Regulations, that:

> Upon these facts it is acknowledged that, in the drafting process of Article 3 of the 1907 Hague Convention, the issue of reparation for individuals who suffered damages was also within the purview of this article. However, there is no evidence in the same process that might suggest an intention of States party to it to stipulate that article in a way that enables individuals to bring direct claims for compensation against the State. Nor were there any statements among them as to the creation of a provision that would stipulate individual right of claims.[119]

In the case lodged by three Korean sisters, whose father and brother were executed by the Japanese military police on a charge of spying, the Tokyo High Court ruled:

International Law, *Oxford Reports on International Law*, available at https://opil.ouplaw.com/home/oril. See Markus Rau, 'State Liability for Violations of International Humanitarian Law: The *Distomo* Case before the German Federal Constitutional Court', *German Law Journal* 7 (2005), 701–20 (707–10); Peters, *Beyond Human Rights* (n. 3), 205–6.

[117] BVerfG, *Italian Military Internees* Case, A (an Italian citizen) and 942 other claimants, Joint constitutional complaint, 2 BvR 1379/01, NJW 2004, 2357, ILDC 438 (DE 2004), 28 June 2004, para. 38, in *Oxford Public International Law*, *Oxford Reports on International Law*, available at https://opil.ouplaw.com/home/oril.

[118] Shin Hae Bong, 'Compensation for Victims of Wartime Atrocities: Recent Developments in Japan's Case Law', *Journal of International Criminal Justice* 3 (2005), 187–206 (188). In addition to the cases mentioned in the main text, see Tokyo High Court, *X et al. v. State*, Judgment, 6 December 2000, *Japanese Annual of International Law* 44 (2001), 173–5 (174–5); Tokyo High Court, *X et al. v. the Government of Japan*, Judgment, 8 February 2001, *Japanese Annual of International Law* 45 (2002), 142–4 (143–4); Tokyo High Court, *X et al. v. State of Japan*, Judgment, 18 March 2005, *Japanese Annual of International Law* 49 (2006), 149–55 (150–1); Tokyo High Court, *State of Japan v. Y*, Judgment, 23 June 2005, *Japanese Annual of International Law* 50 (2007), 194–209 (199–201); Nagoya High Court (Kanazawa Branch), *X v. State of Japan and Y*, Judgment, 8 March 2010, *Japanese Yearbook of International Law* 54 (2011), 514–22 (515).

[119] Tokyo District Court, *X et al. v. State of Japan*, Judgment, 30 November 1998, *Japanese Annual of International Law* 42 (1999), 143–51 (148).

> When the incident occurred, there was no evidence of any general practice, nor the existence of *opinio juris* that when a state acts in violation of the obligation of international human rights law or international humanitarian law, that state has the responsibility of compensating for the damages any individual who was a victim. Therefore, international customary law against which the appellants claim did not exist at the time of the incident, and there are no grounds for the allegation of the appellants based upon international law.[120]

Do these findings in Germany and Japan provide convincing evidence for denying the shift towards a victim-oriented perspective since the late 1980s or early 1990s? In my view, these cases rejecting the individual right to reparation share two characteristics: first, most, if not all, of them are related to violations allegedly committed during World War II;[121] and second, they were lodged between the late 1980s and early 2000s. In essence, they are all 'new cases on past violations'. Overall, the reparation settlements in the wake of World War II were made by means of lump sum. At least theoretically, then, all of these reparation claims were resolved at that time. However, the claimants in these cases were excluded from those settlements or, even if they were not, felt dissatisfied with the lump-sum approach. If the settlement of reparation claims had been more victim-oriented, with individual victims granted a capacity to access or participate in the settlement mechanisms, at least to a certain extent, they might not have lodged their suits in the courts of the responsible States. In this respect, the true problem in these cases is not legal ambiguity over the victims' substantive right to reparation at the time of World War II; rather, it is the international community's insufficient awareness of individual victims' procedural right to reparation. This also explains the second characteristic of the aforementioned legal actions – namely, their timing. From the end of World War II to the 1980s, there was no move towards reparation settlements that carefully considered the victims. In contrast, the victim-oriented

[120] Tokyo High Court, X *et al. v. State of Japan*, Judgment, 7 August 1996, *Japanese Annual of International Law* 40 (1997), 116–18 (117–18).

[121] An exception is the *Varvarin Bridge* case, in which the citizens of the former Federal Republic of Yugoslavia made a claim for the death of civilians caused by the attacks of NATO fighter planes on a bridge in the Serbian town of Varvarin in 1999. The German Federal Court of Justice denied the existence of individual right to reparation: BGH, *Varvarin Bridge* Case, 35 *citizens of the Former Federal Republic of Yugoslavia v. Germany*, Appeal judgment, III ZR 190/05, ILDC 887 (DE 2006), 2 November 2006, paras 5–18, in *Oxford Public International Law, Oxford Reports on International Law*, available at https://opil.ouplaw.com/home/oril. The Constitutional Court made a decision to the same effect in 2013: BVerfG, *Varvarin Bridge* Case, 36 *citizens of Yugoslavia v. Germany*, Constitutional Complaint, 2 BvR 2660/06, 2 BvR 487/07, ILDC 2238 (DE 2013), 13 August 2013, paras 41–7, in *Oxford Public International Law, Oxford Reports on International Law*, available at https://opil.ouplaw.com/home/oril.

perspective began to emerge gradually in the late 1980s, inspiring those victims to lodge their complaints against Germany and Japan more than forty years after they had suffered the harm.

Accordingly, the findings of the German and Japanese courts should be evaluated in this context. First, a series of domestic litigations by victims since the late 1980s provides evidence supporting the emergence of a victim-oriented perspective. Second, in rejecting the existence of an international rule affirming an individual right to reparation, the courts were adjudicating on alleged violations during World War II. In other words, the main purpose of their findings was to elucidate that, in light of 'a rule having existed at that time', the victims did not possess such a right. Indeed, some findings explicitly cited the condition 'at that time', although others did not.

In addition, many findings emphasised that an individual right to reparation may be admitted under international law only when the individual is entitled to bring their complaint through treaty-created international proceedings.[122] As argued earlier, the assertion that an individual's substantive right to reparation depends on the existence of their procedural capacity before an international forum is wrong in theory.[123] Practically, however, the combined implementation of both rights is necessary and, indeed, is the correct direction in which we are currently proceeding. Since the victims of World War II were not given any international mechanism through which to submit their reparation claims, they had no choice but to rely on domestic courts. For them, a domestic court was not necessarily the desired forum. From a wider standpoint, the rejection of claims by the German and Japanese courts implies the need for a more effective mechanism for victims than domestic courts; indeed, these judgments justify the creation of *ad hoc* reparation mechanisms for victims of the Holocaust and those of armed conflicts that have occurred since the 1990s.

This evaluation of domestic findings may fundamentally apply to the German judgments concerning alleged violations of IHL in the armed conflicts that took place after 1990s. In the 2013 *Varvarin Bridge* case, for instance, the German Constitutional Court found as follows:

> Neither in 1999 nor at present, there was and is a general rule of international law according to which individuals are entitled to claim for damages or

[122] See BVerfG, *Distomo* (n. 116), para. 21; Tokyo District Court, *X et al. v. State of Japan* (n. 120), 145.

[123] See n. 3. For criticism of the findings of Japanese courts on this point, see Masaharu Igarashi, 'Post-War Compensation Cases, Japanese Courts and International Law', *Japanese Annual of International Law* 43 (2000), 45–82 (79).

> compensation against the responsible State in violations of international humanitarian law. Such claims for acts of a state against foreign nationals contrary to international law are – as before – in principle only valid for the state of origin of the injured party or are to be asserted by the latter. . . . It is true that isolated cases can be found in international and national practice in which the victims of armed conflicts have been granted compensation by the responsible state. . . . However, it is not possible – at least for the time being – to identify these individual cases as part of a general rule of customary international law that entitles individuals to claim damages or compensation against the responsible state in the case of violations of international humanitarian law.[124]

In the sense that this judgment denied the existence of an individual right to reparation in 1999 as well as in 2013, it is evidently contrary to the shift towards a victim-oriented perspective since around the 1990s. However, while finding no evidence of a customary rule of the substantive right to reparation applicable before domestic courts, the German Court did not evaluate the prevailing practice of establishing reparation mechanisms as a whole. Those reparation mechanisms have come into existence because domestic courts are not expected to provide a sufficiently effective remedy to victims. Putting it another way, the negative responses of domestic courts such as the German Constitutional Court have motivated policy-makers to establish reparation mechanisms independent from ordinary domestic proceedings. Thus what is to be evaluated here is not whether the practice of establishing such mechanisms constitutes a customary rule, but whether it constitutes a course of social consciousness strengthening the victim-oriented perspective in resolving reparation issues. If the social consciousness is robust enough to provide an effective reparation to the victims of armed conflict, it would lead policy-makers to establish a reparation mechanism before which individual victims can make claims for their harms. Once the mechanism is set out, it is irrelevant whether a substantive right to reparation has crystallised into a customary rule.

IV. VICTIMS TO BE REDRESSED

In light of the common factors derived from relevant instruments,[125] if an individual is to be entitled to individual reparation, they must have suffered

[124] BVerfG, *Varvarin Bridge*, (n. 121), paras 41–3 (author's translation from the German original).
[125] Victims Declaration (n. 39), Art. 18; Basic Principles (n. 47), para. 8; Hofmann, 'Draft Declaration' (n. 2), 302.

harm as a result of a violation of the rules of international law applicable in a situation of armed conflict. This definition of 'victim' corresponds to four issues, each of which must be elaborated to clarify who has a right to reparation – namely, (a) the nature of armed conflict, (b) the applicable law in armed conflict, (c) the harm caused by violations of international law, and (d) the nature of the person.

A. *The Nature of Armed Conflict*

The definition of 'armed conflict' delimits the scope of victims granted the right to reparation. In general, an armed conflict is defined as protracted, large-scale violence between the armed forces of different States and between governmental forces and organised insurgent groups.[126] Depending on the hostile parties, it may be classified as an international armed conflict or a non-international armed conflict.

To date, the obligation to make reparation for violating IHL has been provided in Article 3 of the 1907 Hague Convention and Article 91 of the 1977 Additional Protocol I to the Geneva Conventions (AP I), both of which are applied in international armed conflicts. Thus there might be an argument that only the victims of *international* armed conflict are entitled to individual reparation. However, it is to be noted that AP I covers all of the violations of the 1949 Conventions, which also include the violations of common Article 3 applicable to *non-international* armed conflict.[127] Rule 150 of the Customary International Humanitarian Law project conducted by the International Committee of the Red Cross (ICRC) provides that '[a] State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused', while the commentary to this Rule states that '[t]here is an increasing amount of State practice from all parts of the world that shows that this rule applies to violations of international humanitarian law committed in non-international armed conflicts and attributable to a State'.[128] Looking at the commentary in detail, it cannot be denied that it is

[126] ICTY, *Prosecutor v. Duško Tadić a/k/a 'Dule'*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case No. IT-94-1-AR72, 2 October 1995, para. 70.

[127] Art. 91 reads: 'A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.'

[128] ICRC, Customary International Humanitarian Law, Rule 150, 'Reparation', available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule150.

https://doi.org/10.1017/9781108628877.002 Published online by Cambridge University Press

over-inclusive in the selection of relevant State practices, and its evaluation of them is also slightly rosy.

Nevertheless, there has been no substantial distinction between international or non-international armed conflict in the motivation of policy-makers establishing an *ad hoc* reparation mechanism. The establishment of the CRPC by the Dayton Peace Agreement, as well as that of the HPCC and KPCC under the UN Interim Administration Mission, definitely reflects the current trend that victims of non-international armed conflict should also be redressed. The plans to establish the CPB for Cyprus and the CCDS for Sudan were considered on the same basis. In addition, the Comprehensive Agreement on Human Rights, concluded as a result of the peace process in Guatemala in 1994,[129] and the 1998 Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines[130] provided for reparation to victims of non-international armed conflicts in both States.

B. *Applicable Law in Armed Conflict*

The law applicable in a situation of armed conflict is not confined to the rules of IHL; it is widely understood that some rules of international human rights law are also applicable in armed conflict. The ICJ, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, found that the protection of human rights law does not cease in times of armed conflict, except in cases of national emergency, when a derogation clause, such as Article 4 of the International Covenant on Civil and Political Rights (ICCPR), is applied.[131]

[129] Art. VIII of the Comprehensive Agreement on Human Rights, 29 March 1994, UN Doc. A/48/928 and S/1994/448, available at https://peacemaker.un.org/guatemala-humanrightsagreement94: 'The Parties recognize that it is a humanitarian duty to compensate and/or assist victims of human rights violations. Said compensation and/or assistance shall be effected by means of government measures and programmes of a civilian and socio-economic nature addressed, as a matter of priority, to those whose need is greatest, given their economic and social position.'

[130] Part IV, Art. 6, of the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines, 16 March 1998, available at https://peacemaker.un.org/philippines-agreement-human-rights98: 'The persons liable for violations of the principles of international humanitarian law shall be subject to investigation and, if evidence warrants, to prosecution and trial. The victims or their survivors shall be indemnified. All necessary measures shall be undertaken to remove the conditions for such violations and to render justice to and indemnify the victims.'

[131] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, para. 25.

This view was followed in the *Israeli Wall* advisory opinion[132] and in the *Armed Activities* judgment.[133] Because the international human rights treaties apply to a State's acts in exercising jurisdiction outside its own territory,[134] even military activities by a State in another State's territory, if alleged victims are regarded to be under the former's jurisdiction, may generate responsibility to make reparation under the violated treaties to which the responsible State is a party.

In a broad sense, the rules of international law applicable to armed conflict include those of *ius ad bellum*, which relate to the legality of using armed force under international law. This may raise the issue of whether a right to reparation arises for harms caused by violation of *ius ad bellum*. Some may insist that violating *ius ad bellum* does not allow for individual claims, since a State, not its individual nationals, is the victim of illegal use of force and that violation.[135] Others may counter by advising recourse to a wide definition of victims, including those of *ius ad bellum* violations, so as to include all persons adversely affected by a conflict. Otherwise, a civilian whose house was targeted (in violation of IHL) would be compensated, while a neighbour whose dwelling was destroyed by permissible collateral damage (not in violation of IHL) would not be.[136] It is true that reference to *ius ad bellum* may render unnecessary reliance on more specific rules of IHL and international human rights law or establishing responsibility for each isolated case of damage. This approach was actually taken in the UNCC, which handled 'any direct loss, damage – including environmental damage and depletion of natural resources – or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'.[137] However, using the violation of *ius ad bellum* as a criterion for victimhood may leave

[132] ICJ, *Israeli Wall* (n. 104), para. 106.

[133] ICJ, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Merits, Judgment of 19 December 2005, ICJ Reports 2005, para. 216.

[134] ICJ, *Israeli Wall* (n. 104), paras 109–11; ICJ, *Armed Activities* (n. 133), para. 216.

[135] van Houtte, Delmartino and Yi, *Post-War Restoration of Property Rights* (n. 3), 239.

[136] Emanuela-Chiara Gillard, 'Reparation for Violations of International Humanitarian Law', *International Review of the Red Cross* 85 (2003), 529–53 (551); Dieter Fleck, 'Individual and State Responsibility for Violations of the *Ius in Bello*: An Imperfect Balance', in Wolff Heintschel von Heinegg and Volker Epping (eds), *International Humanitarian Law Facing New Challenges* (Berlin/Heidelberg/New York: Springer, 2007), 171–206 (180).

[137] Resolution 687 (n. 84), para. 16. The EECC also covered the violations of *ius ad bellum*. See EECC, Final Award, Ethiopia's Damages Claims between the Federal Democratic Republic of Ethiopia and the State of Eritrea, 17 August 2009, paras 271–479, available at http://pcacases.com/web/sendAttach/767. See also EECC, Decision Number 7: Guidance Regarding *Jus ad Bellum* Liability, 27 July 2007, available at http://pcacases.com/web/sendAttach/749.

nationals of the State who violated *ius ad bellum* unprotected, such as Iraqi nationals under the UNCC.[138] It is therefore problematic.

Another important practice to consider is the activation of the crime of aggression, introduced through amendments to the Rome Statute adopted at the 2010 Kampala Review Conference.[139] Pursuant to Article 8 *bis*, if a person in a position to effectively exercise control over or to direct the political or military action of a State plans, prepares, initiates, or executes an act of aggression that, by its character, gravity, and scale, constitutes a manifest violation of the Charter of the United Nations, the ICC may exercise its jurisdiction over that person. However, the Kampala Amendments did not change Article 75 of the Rome Statute or the ICC Rules of Procedure and Evidence concerning reparation to victims. Consequently, victims of a crime of aggression may request reparations in exactly the same way as the victims of genocide, crimes against humanity and war crimes; the ICC may award reparations on an individualised basis or, where it deems appropriate, on a collective basis, or both. Thus the addition of the crime of aggression to the Rome Statute suggests that *ius ad bellum* is no longer a body of rules regulating only the rights and obligations between or among sovereign States, but now extends to individuals' rights. In the case of aggression, however, an entire population of the targeted State could be potential victims. Therefore, to deal with individual claims in respect of such aggression, it would be necessary to narrow the scope of eligible victims by obliging them to demonstrate the substantial harm personally suffered.[140]

C. *Harms Caused by Violations of International Law*

1. Violation

To meet the requirements for victimhood, a person must have suffered harm from another's violation of international law. In armed conflict, harms may be caused by both lawful and unlawful conduct. Under Articles 51(5)(b) and 57(2)(b) of AP I, States are obliged to refrain from an attack that may be expected to cause incidental loss of civilian life, injury to

[138] Rainer Hofmann and Frank Riemann, 'Compensation for Victims of War: Background Report', 17 March 2004, for International Law Association, Committee on Compensation for Victims of War, available at www.ila-hq.org/index.php/committees.

[139] The Crime of Aggression, Resolution RC/Res.6, 11 June 2010, available at https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

[140] See Zegveld, 'Remedies for Victims' (n. 3), 501–2.

civilians, and damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated. Conversely, conduct causing incidental loss is lawful provided it is not excessive in relation to the military advantage gained. As explained in the previous section, the rigid distinction between a lawful incidental loss and an unlawful one might raise unequal and unfair results among victims who suffered harm from the same attack. Practically, therefore, it is arguable that all of the victims who suffered damage from the same military activities should be treated equally, whether each attack is lawful or unlawful. Nevertheless, the distinction between lawful and unlawful conduct is important and indispensable when assessing whether an allegedly responsible party is legally *obliged* to make reparation to affected individuals. Removing the threshold of legality would obscure whether an attack entails the responsibility to make reparation and, if any, who bears it.

Another difficult question is whether there should be a threshold of gravity or seriousness. The Basic Principles are directed at *gross* violations of international human rights law and *serious* violations of IHL, which, 'by their very grave nature, constitute an affront to human dignity'.[141] In contrast, the 2010 Declaration of International Law Principles on Reparation for Victims of Armed Conflict adopted by the International Law Association (ILA) does not set a threshold of gravity. Instead, it points out that, 'from a normative point of view, there are no compelling reasons to a priori limit the right to reparation to infringements of a certain gravity. ... The introduction of a threshold, whose boundaries are not clearly defined, might also give responsible parties an excuse not to pay reparation.'[142] In fact, most of the reparation mechanisms created or planned to date did not set a requirement for the gravity or seriousness of violations, at least in their constituent instruments. An exception is the ICC's reparation system, confined to victims of those crimes within its jurisdiction[143] that are characterised as 'the most serious crimes of concern to the international community'.[144] Similarly, the CCDS for Darfur explicitly suggested its

[141] Basic Principles (n. 47), preamble, para. 7. See Theo van Boven, 'Victims' Rights to a Remedy and Reparations: The New United Nations Principles and Guidelines', in Carla Ferstman, Mariana Goetz, and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Leiden/Boston: Martinus Nijhoff, 2009), 19–40 (32–4).

[142] Hofmann, 'Draft Declaration' (n. 2), 304.

[143] According to Rule 85(a) of the Rules of Procedure and Evidence, 'victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.

[144] Rome Statute, preamble, para. 4.

jurisdiction be confined to injuries and losses caused by international crimes.[145] However, since reparations in the ICC and CCDS partner with the criminal responsibility of perpetrators of such crimes, these practices do not necessarily indicate that only violations of certain gravity or seriousness generate the right to reparation. In this respect, it seems correct that *any* violations of international law applicable in armed conflict generate the individual right to reparation.

From a practical point of view, however, it is conceivable that the policy-makers of an *ad hoc* reparation mechanism or procedure may set a threshold of gravity or seriousness to define violations subject to that mechanism. If a mechanism adopts a rather broad definition of violation, it might be overloaded with claims that surpass the responsible parties' economic capacities and cause enormous delays in processing. In this respect, it seems rational to impose additional requirements on the definition of violations to restrict a mechanism's caseload. In fact, in its awards on POWs, the EECC found as follows:

> It should also be stated at the outset that the Commission does not see its task to be the determination of liability of a Party for each individual incident of illegality suggested by the evidence. Rather, it is to determine liability for serious violations of the law by the Parties, which are usually illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims. These parameters are dictated by the limit of what is feasible for the two Parties to brief and argue and for the Commission to determine in light of the time and resources made available by the Parties.[146]

Thus, as a minimum core of reparation practice, it is settled that a reparation mechanism must be provided as a matter of international law for victims of *grave* or *serious* violations of a rule applicable in an armed conflict. However, it is still left to policy-makers' assessment of the political, social, and financial situations of war-torn States whether and, if so, to what extent the mechanism would cover less grave or serious violations.

[145] Report of the International Commission of Inquiry on Darfur (n. 98), paras 591 and 602.

[146] EECC, Partial Award, Prisoners of War, Eritrea's Claim 17, 1 July 2003, para. 56, available at http://pcacases.com/web/sendAttach/751; EECC, Partial Award, Prisoners of War, Ethiopia's Claim 4, 1 July 2003, para. 54, available at http://pcacases.com/web/sendAttach/752. See also George H. Aldrich, 'The Work of the Eritrea–Ethiopia Claims Commission', *Yearbook of International Humanitarian Law* 6 (2003), 435–42 (437); J. Romesh Weeramantry, 'Prisoners of War (*Eritrea v. Ethiopia*), Eritrea's Claim 17/Ethiopia's Claim 4, Partial Awards', *American Journal of International Law* 99 (2005), 465–72 (467).

2. The Occurrence of Harm

In terms of 'harm', the Victims Declaration[147] and Basic Principles[148] adopt a relatively broad notion by defining it as 'physical or mental injury, emotional suffering, economic loss and substantial impairment of their fundamental rights'. The ICC's Trial Chamber followed this view.[149] Conversely, the ILA Declaration does not explicitly mention any specific types of harm.[150] In its commentary, however, it expresses rather negative opinions on including 'emotional suffering' and 'substantial impairment of fundamental rights' in the notion of harm. It contends that reparation for emotional suffering other than mental injury might overly expand the concept of reparation and that recognising 'substantial impairment of fundamental rights' as harm risks conflating whether the law has been violated with whether harm has been caused.[151] The practice of reparation mechanisms also supports the narrower notion of harm.[152]

3. Causality between the Violation and Harm

The harm must have resulted from violation of international law. In other words, a sufficiently close causal relation is necessary between the harm suffered and the conduct violating international law. Harm that is too remote to the challenged conduct or too inconsequential is an inappropriate basis for establishing a right to reparation. The UNCC, for instance, limited its competence to cases of *direct* loss, damage, or injury to foreign governments, nationals, and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.[153] To this extent, the EECC's examination of various standards of legal causality used in past arbitrations and claims commissions is significant.[154] In concluding, the EECC ruled as follows:

> Given this ambiguous terrain, the Commission concludes that the necessary connection is best characterized through the commonly used nomenclature

[147] Victims Declaration (n. 39), 214.
[148] Basic Principles (n. 47), para. 8.
[149] ICC, *Lubanga*, Trial Chamber (n. 106), paras 228–30.
[150] Art. 4, Hofmann, 'Draft Declaration' (n. 2), 302.
[151] *Ibid.*, 304.
[152] For the normative justification of a prioritisation of claims and a rights-based hierarchy of reparation, see Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, 165 (emphasis added): 'A reparation process needs to prioritise the *most severe* violations of human rights – those affecting human dignity the most.' See also *ibid.*, 177: 'hierarchy derived from human rights'.
[153] Resolution 687 (n. 84), para. 16.
[154] EECC, Decision Number 7 (n. 137), paras 7–14.

> of 'proximate cause.' In assessing whether this test is met, and whether the chain of causation is sufficiently close in a particular situation, the Commission will give weight to whether particular damage reasonably should have been foreseeable to an actor committing the international delict in question. The element of forseeability [*sic*], although not without its own difficulties, provides some discipline and predictability in assessing proximity.[155]

The requirement of causality, however, does not necessarily exclude the possibility of a person not directly targeted by conduct violating international law making a reparation claim. The Basic Principles state that 'the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization'.[156] In the UNCC, its Governing Council entitled a spouse, child, or parent of an individual who was killed to claim compensation for pecuniary losses, including loss of income and medical expenses, as well as for non-pecuniary injuries resulting from mental pain and anguish.[157] Elsewhere, the Extraordinary Chambers in the Courts of Cambodia (ECCC) also ruled, in terms of reparation, that responsibility is not limited to persons against whom the crimes were committed, since they may also directly cause injury to a larger group of victims, including a victim's immediate family members.[158]

The causal relation between the violation and harm as required for eligible claims in a reparation mechanism may vary depending upon the nature of the claim and other circumstances. From a practical perspective, however, whether the required causality is rigid directly influences the number of claims to be settled. Thus it is still within the discretion of policy-makers to determine the necessary requirement of causality in establishing a reparation mechanism, in order to strike an appropriate balance of the demand for fair and effective reparation to victims with the need for prompt and efficient settlement of claims in a situation of limited financial resources.[159]

[155] *Ibid.*, para. 13. The ICC also accepted the standard of 'proximate cause' in the *Lubanga* case: ICC, *Lubanga*, Trial Chamber (n. 106), para. 249.

[156] Basic Principles (n. 47), para. 8.

[157] Decision taken by the Governing Council of the UN Compensation Commission during its Second Session, at the 15th Meeting, held on 18 October 1991, Personal Injury and Mental Pain and Anguish, 23 October 1991, UN Doc. S/AC.26/1991/3, 2.

[158] Extraordinary Chambers in the Courts of Cambodia (ECCC), *Kaing Guek Eav alias Duch*, Case File No. 001/18-07-2007/ECCC/TC, Judgment of 26 July 2010, paras 642–3, available at www.eccc.gov.kh/en/documents/court/judgement-case-001.

[159] See section VI.

D. *The Nature of the Person to Be Redressed*

1. Juridical Person

The victims to be redressed include not only natural persons but also juridical persons. In fact, the UNCC and EECC allowed submission of claims by juridical persons.[160] Nevertheless, from a practical standpoint, some reparation mechanisms, such as the CRPC[161] and HPCC,[162] have explicitly confined the capacity to make claims to natural persons. Although juridical persons possess a right to reparation if they suffered the harm as defined, whether they are actually granted the capacity to claim depends on the situation of the (often war-torn) responsible State and the financial resources available for reparation. Even the UNCC, despite granting juridical persons including corporations, NGOs, and international organisations the capacity to submit their claims, gave priority to the claims of natural persons in the processing and payment of reparations.[163]

2. Collectivity of Victims

The preamble to the Basic Principles states that 'contemporary forms of victimisation, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively'.[164] It also defines victims as 'persons who individually or collectively suffered harm'.[165] The Updated Set of Principles provides, in Article 32, that '[r]eparations may also be provided through programmes … addressed to individuals and to communities'.[166] In addition, the ICC may award reparations on a collective basis,[167] and it may order a convicted person to make reparation through the

[160] In the UNCC, Category 'E' claims were claims of corporations, other private legal entities and public sector enterprises: The Claims, Categories E, available at www.uncc.ch/category-e. In the case of EECC, Art. 5(1) of the Agreement between Ethiopia and Eritrea (n. 94) reads: 'The mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party … '

[161] Art. 10 of the CRPC Book of Regulations on the Conditions and Decision Making Procedure for Claims for Return of Real Property of Displaced Persons and Refugees, 4 March 1999, available at www.refworld.org/docid/3ae6b57c4.html.

[162] Section 1.2 of UNMIK Regulation No. 1999/23 (n. 91).

[163] Hofmann, 'Draft Declaration' (n. 2), 303.

[164] Basic Principles (n. 47), preamble para. 9.

[165] *Ibid.*, para. 8.

[166] Principle 32, Updated Set of Principles (n. 53), 17.

[167] Rule 97(1) of the Rules of Procedure and Evidence.

Trust Fund for Victims where the number of the victims and the scope, forms, and modalities of reparations make a collective award more appropriate.[168]

These instruments do not explicitly indicate the existence of a collective right to reparation granted to a group of persons, such as a local community. However, it has been established that if a group of persons suffered harm collectively, that group is granted the capacity to make claims independently of its individual members. In the *Lubanga* case, the ICC's Trial Chamber held that '[i]ndividual and collective reparations are not mutually exclusive, and they may be awarded concurrently'.[169] The Appeals Chamber also acknowledged this view:

> The Appeals Chamber notes that certain crimes may have an effect on a community as a whole. The Appeals Chamber considers that, if there is a sufficient causal link between the harm suffered by members of that community and the crimes of which Mr Lubanga was found guilty, it is appropriate to award collective reparations to that community, understood as a group of victims.[170]

Nevertheless, it should be noted that the Appeals Chamber required members of that community to have specifically suffered harm from the crimes committed by Lubanga; moreover, it criticised the Trial Chamber's rather broad formulations of 'community', which may include persons who were not targets of his crimes.[171] This view can be applied to a more general framework of collective reparations. Collective reparation for a community must be premised on all of the community's members having suffered harm caused by violations of international law. Put differently, one should clearly distinguish between a collective reparation and an assistance programme provided to a community comprising a broader scope of members.[172] The former is a legal consequence resulting from a violation of international law, while the latter is a matter of policy to support the people living in war-stricken regions. Under the ICC's reparation system, the Chambers award the former, while the board of directors of the Trust Fund for Victims consider and implement the latter.[173]

[168] *Ibid.*, Rule 98(3). See Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (Leiden/Boston: Martinus Nijhoff, 2010), 98–102.

[169] ICC, *Lubanga*, Trial Chamber (n. 106), para. 220.

[170] Situation in the Democratic Republic of the Congo in ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the Decision establishing the principles and procedures to be applied to reparations of 7 August 2012, with amended order for reparations (Annex A) and public Annexes 1 and 2, Appeals Chamber, ICC-01/04-01/06, 3 March 2015, para. 212.

[171] *Ibid.*, paras 211–14.

[172] Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, 172–4.

[173] See Edda Kristjánsdóttir, 'International Mass Claims Process and the ICC Trust Fund for Victims', in Ferstman, Goetz, and Stephens (eds), *Reparations for Victims* (n. 141), 167–96 (173–75).

Looking at reparation mechanisms other than the ICC, there has been no practice that admitted the collective right of community. Thus it does not yet constitute a minimum core of the right to reparation for policy-makers to take into account when they establish a mechanism.

V. THE OBLIGATION TO MAKE REPARATION

A. *Duty-Bearers of Reparation*

1. States

A State's obligation to make full reparation for injuries caused by an internationally wrongful act is well accepted.[174] This applies to violations of international law applicable in armed conflict. More specifically, the obligation to grant reparation is provided in Article 3 of the 1907 Hague Convention and in Article 91 of AP I. These provisions cover violations only of the 1907 Convention, of the 1949 Geneva Conventions, and of AP I. However, the principle on which they are based has general application to any violation of IHL, including customary rules.[175] Thus a State must also make reparation for the harms caused by violating the rules of non-international armed conflict.

In my view, an individual right to reparation has been accepted since the 1990s; therefore, under *current* international law, a State is obliged to make reparation to individual victims who suffered harm from its violations. Indeed, most of the reparation mechanisms created up to now other than the ICC have obliged States to make reparation.

2. Organised Armed Groups

Under common Article 3 of the 1949 Geneva Conventions and Article 1(1) of Additional Protocol II (AP II), an armed group with a certain organised structure may be bound by the treaties applicable in non-international

[174] See Art. 31 of the Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, vol. II, pt 2, 31–143 (91).

[175] ICRC, Commentary of 1987 on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, para. 3659, available at https://ihl-databases.icrc.org/ihl. See also ICRC, Rule 150 (n. 128), which provides: 'A State responsible for violations of *international humanitarian law* is required to make full reparation for the loss or injury caused' (emphasis added).

armed conflict.[176] This also applies to the rules of customary international law, as plainly stated by the Appeals Chamber of the Special Court for Sierra Leone (SCSL):

> It is well-settled that *all* parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties. Customary international law represents the common standard of behaviour within the international community, thus even armed groups hostile to a particular government have to abide by these laws.[177]

Thus, as a legal consequence, violation by an organised armed group of the rules of international law applicable in non-international armed conflict gives rise to the obligation to make reparation.[178] An example is the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines. It states that 'the Parties to the armed conflict shall adhere to and be bound by the generally accepted principles and standards of international humanitarian law', and it provides that the victims of violations of IHL shall be indemnified.[179] Within the United Nations, the UN Commission on Human Rights in 1998 urged 'all the Afghan parties' to 'provide sufficient and effective remedies to the victims of grave violations and abuses of human rights and of accepted humanitarian rules'.[180] In addition, the International Commission of Inquiry on Darfur stated that, in addition to Sudan's obligation to pay compensation for all the crimes committed in Darfur, '[a] similar obligation is incumbent upon rebels for all crimes they may have committed, whether or not the perpetrators are identified and punished'.[181] Following these practices, the Basic Principles also affirm that, '[i]n the case where a person, a legal person or *other entity* is found liable for reparation to a victim, such party should provide reparation to the victim'.[182]

[176] As to the nature of armed conflict in which victims are to be eligible for reparation, see section IV.A.

[177] SCSL, Prosecutor against Sam Hinga Norma, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL 2004-14-AR72(E), 31 May 2004, para. 22 (emphasis original).

[178] Jann K. Kleffner, 'The Collective Accountability of Organized Armed Groups for System Crimes', in Harmen van der Wilt and André Nollkaemper (eds), *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009), 238–96 (255–7).

[179] Part IV, Arts 1 and 6, Comprehensive Agreement in the Philippines (n. 130).

[180] Commission on Human Rights, Resolution 1998/70, Situation of Human Rights in Afghanistan, 21 April 1998, para. 5 (d).

[181] Report of the International Commission of Inquiry on Darfur (n. 98), para. 600.

[182] Basic Principles (n. 47), para. 15 (emphasis added).

From a financial point of view, it is not certain whether an organised armed group can actually contribute to full reparation for individual victims. Nevertheless, it may be able to make restitution or, at least, to provide satisfaction by, for example, making apology. Furthermore, if an armed group later becomes the new government of a State or succeeds in establishing a new State, it is obliged to make reparation to victims under the principles of State responsibility.[183]

3. Individuals

Under the ICC's system of reparation, the Chambers have competence to order a convicted person to make appropriate reparation for victims of their crimes. In other words, a convicted person is obliged to comply with an order of reparation. This suggests that an individual may also be a duty-bearer under international law in terms of victim reparation. In the *Lubanga* case, the Appeals Chamber stated that 'the conclusion that an order for reparation must be made against the convicted person is also indicative of that person's individual liability for the reparations awarded'.[184] However, it may be questioned whether there is a settled principle that violations of norms of international law that are not crimes renders the offender liable for reparation, as the Basic Principles state in the case of gross violations of human rights and serious violations of IHL, or even any other rule of international law addressed to individuals independently of their criminal responsibility for the breach.[185] In the same judgment, the ICC's Appeals Chamber held that 'reparations, and more specifically orders of reparations, must reflect the context from which they arise, which, at the Court, is a legal system of establishing individual criminal liability for crimes under the Statute'.[186] This statement indicates that the Chamber makes individual liability for reparation rigidly contingent on an individual's criminal responsibility. However, under the HPCC of Kosovo, when the Housing and Property Directorate delivers an eviction order issued by the Commission to the current occupant of the claimed property, if the occupant fails to obey the order to leave the premises, they may be removed by

[183] Compare Art. 10 of the Articles on Responsibility of States for Internationally Wrongful Acts (n. 174), 50–2.

[184] ICC, *Lubanga*, Appeals Chamber (n. 170), para. 99.

[185] Cf. Peters, *Beyond Human Rights* (n. 3), 152–64, on the non-criminal responsibility of individuals under international law.

[186] ICC, *Lubanga*, Appeals Chamber (n. 170), para. 65. See Carsten Stahn, 'Reparative Justice after the *Lubanga* Appeal Judgment: New Prospects for Expressivism and Participatory Justice or "Juridified Victimhood" by Other Means?', *Journal of International Criminal Justice* 13 (2015), 801–13 (806–7).

the local law enforcement authorities, who are obliged to support the Directorate.[187] This signals that an individual *could* be obliged to make restitution even beyond cases of criminal responsibility. Although the practice remains limited to ICC matters, one may detect a tendency to impose on individuals an obligation to make reparations if they violate the rules of international law applicable in armed conflict.

B. *Forms of Reparation*

According to the Basic Principles, reparation may take the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[188] The Updated Set of Principles and the ILA Declaration also refer to these forms.[189]

- *Restitution* aims to restore victims to the situation that existed prior to the violations of international law. Ordinarily, it involves the return of movable and immovable property and the repatriation of persons.[190]
- *Compensation* is a monetary payment for financially assessable damage arising from the violations.[191]
- *Rehabilitation* is a special form of reparation for harms likely to occur in situations of armed conflict, including medical and psychological care, as well as legal and social services.[192]
- *Satisfaction* may, for example, consist in acknowledgement of the breach, an expression of regret, a formal apology, or another appropriate modality.[193]
- Various possible forms of satisfaction exist, depending on the circumstances, which may include *guarantees of non-repetition*.

In practice, however, victims are inclined to prefer restitution or compensation to other forms.[194] Indeed, most of the *ad hoc* mechanisms to date have

[187] Sections 13.2 and 13.5 of Regulation No. 2000/60 on Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission, UNMIK/REG/2000/60 (31 October 2000), available at www.unmikonline.org/regulations/unmikgazette/index.htm.

[188] Basic Principles (n. 47), para. 18.

[189] Principles 34 and 35, Updated Set of Principles (n. 53), 17; Arts 7–10, Hofmann, 'Draft Declaration' (n. 2), 323–9.

[190] The HPCC, e.g., took the measure of restitution on various types of property. See sections 2–6 of Regulation No. 2000/60 (n. 187).

[191] Gillard, 'Reparation for Violations' (n. 136), 531.

[192] Basic Principles (n. 47), para. 21.

[193] Art. 37(2) Articles on Responsibility of States for Internationally Wrongful Acts (n. 174), 105.

[194] Interestingly, a data and empirical analysis comes to the conclusion that:

merely provided restitution and/or compensation to victims by way of reparation. In the CRT-I and CRT-II, restitution was the only available form of reparation. In contrast, reparation granted through the UNCC, GFLCP, HVA,P and ICHEIC was in the form of monetary compensation. The CRPC and HPCC were fundamentally restitution mechanisms, although monetary compensation was available in lieu of restitution.

A reparation mechanism may adopt other forms besides restitution and compensation. In fact, as the EECC held in its Decision No. 3:

> The Commission decides that, in principle, the appropriate remedy for valid claims submitted to it should be monetary compensation. However, the Commission does not foreclose the possibility of providing other types of remedies in appropriate cases, if the particular remedy can be shown to be in accordance with international practice, and if the Tribunal determines that a particular remedy would be reasonable and appropriate in the circumstances.[195]

In response, Eritrea actually requested that the EECC order a variety of remedies, such as the reinstatement of Ethiopian nationality, the restoration of property, the release of detained Eritreans and the nullification of numerous economic transactions.[196] The EECC denied these requests, finding that 'there is no showing that the additional remedies met the requirements of Decision No. 3 and the Commission is not prepared to grant them'.[197] This finding has been criticised because while not only Eritrea as a State but also individual victims may deem non-compensatory remedies, such as an apology, to be the best form of reparation, the EECC did not examine substantially why this form was not reasonable and appropriate in the circumstances of the

> [M]ost victims, regardless of their types of loss, tend to cite monetary compensation and punishment as more important than other forms of reparation. ... [I]ndividuals who suffered material loss (namely: land, livestock, crops, and homes), personal loss (namely: murder of a family member, abduction of a family member, physical and mental torture, and forced participation in rebel movement), and intangible loss (namely: jobs, salaries, and a child's education) all seem to perceive financial assistance as being important, perhaps in order to survive or rebuild their lives, along with punishment of the perpetrators, but not traditional nonmaterial forms of reparations that transitional justice processes tend to emphasize.
>
> Prakash Adhikari and Wendy L. Hansen, 'Reparations and Reconciliation in the Aftermath of Civil War', *Journal of Human Rights* 12 (2013), 423–46 (441).

[195] EECC, Decision No. 3: Remedies (24 July 2001), available at http://pcacases.com/web/sendAttach/771.

[196] EECC, Partial Award, Civilian Claims, Eritrea's Claims 15, 16, 23 and 27–32 (17 December 2004), para. 23, available at http://pcacases.com/web/sendAttach/755.

[197] *Ibid.*, para. 24.

case.[198] As this example shows, victims may conceivably seek an order for a responsible party to publicly apologise or a declaration of the illegality of that party's conduct. Thus, in determining an appropriate form of reparation, it is important to listen sufficiently to the victims' voices.[199]

C. *Waiver or Limitation of Reparation Claims*

A right to reparation entails a responsible party's obligation to make *full* reparation. In the words of the judgment in the *Factory at Chorzów* case, this must be sufficient to 'wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed'.[200] However, full reparation might exceed the responsible party's economic capacity,[201] which could destabilise a community in the post-conflict phase.[202] It is quite likely that a large number of victims will claim reparation in a short time period, and the responsible party may have only limited financial and human resources available to fund compensation or in-kind benefits.[203] In practice, therefore, it is necessary to establish a politically and financially feasible reparation mechanism by treaty, UN organ resolution, or domestic legislation, among other things, under which limited funds are effectively and efficiently distributed among eligible victims. In fact, the *ad hoc* reparation mechanisms established to date did not necessarily provide *full* reparation to victims; rather, as section VI will examine, they have sometimes introduced a system for fixed-amount compensation payments in return for expeditious processing of claims.

In other words, the individual right to reparation may be limited by the circumstances of the responsible State or community in the wake of armed conflict. Does this mean that the political and/or financial considerations of a responsible State or community always prevail over the right to reparation? If

[198] J. Romesh Weeramantry, 'Civilian Claims (*Eritrea v. Ethiopia*), Eritrea's Claim 15, 16, 23 & 27–32/Ethiopia's Claim 5, Partial Awards', *American Journal of International Law*, 100 (2006), 201–7 (206).

[199] See section VI.B.

[200] PCIJ, *Case concerning the Factory at Chorzów*, Merits, Judgment, 13 September 1928, Series A, No. 17 (1928), 47.

[201] W. Michael Reisman, 'Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas', in Randelzhofer and Tomuschat (eds), *State Responsibility* (n. 3), 63–108 (67).

[202] Hofmann, 'Draft Declaration' (n. 2), 320.

[203] Norbert Wühler and Heike Niebergall (eds), *Property Restitution and Compensation: Practices and Experiences of Claims Programmes* (Geneva: International Organization for Migration, 2008), 1–3.

so, can the individual right be entirely disregarded in extreme cases? This raises the issue of whether a reparation waiver, as part of an inter-State agreement, is permissible under current international law.

In the lump-sum agreements concluded in the aftermath of World War II, the economic capacity of each responsible State was taken into consideration. The San Francisco Peace Treaty with Japan, for instance, included a waiver by the Allied Powers of reparation claims against Japan.[204] The *en bloc* waiver was also used in Japan's subsequent treaties with other States, including China and the Republic of Korea.

In the so-called postwar compensation cases, in which individual victims claimed reparation for the harms caused by Japan's conduct, the 'claims' covered by these treaties' waivers were sometimes at issue. According to the judgments delivered to date, there are four different perspectives. The first view is that the San Francisco Peace Treaty, as well as other bilateral treaties, merely renounced a right of diplomatic protection, but not individuals' substantive right to reparation. This was the Japanese government's position in its pleadings in the *Shimoda* case,[205] and some judgments followed it.[206] The second, and diametrically opposite, view is that the San Francisco Peace Treaty renounced not only a State's right of diplomatic protection over its nationals, but also the nationals' substantive right to reparation.[207] The Japanese government has adopted this view since around 2000, which is approximately when the number of postwar compensation cases increased. The third view distinguishes between an individual right to reparation under domestic law and that under international law, and then insists that only the former was renounced by the San Francisco Peace Treaty. This was the view expressed by the Tokyo District Court in the *Shimoda* case.[208] The fourth view, expressed by the Japanese Supreme Court in 2007, is that the San Francisco Peace Treaty did not renounce the substantive claims of individuals, but did remove their ability to litigate

[204] Art. 14(a) Treaty of Peace with Japan (n. 17), 60–1.

[205] Tokyo District Court, *R. Shimoda v. the State*, Judgment, 7 December 1963, *Japanese Annual of International Law* 8 (1964), 212–52 (228–9).

[206] Hiroshima High Court, *X et al. v. Y*, Judgment, 9 July 2004, *Japanese Annual of International Law* 48 (2005), 154–9 (159).

[207] Tokyo High Court, *X et al. v. the Government of Japan*, Judgment, 8 February 2001, *Japanese Annual of International Law* 45 (2002), 142–6 (145); Tokyo High Court, *X et al. v. State of Japan*, Judgment, 18 March 2005, *Japanese Annual of International Law* 49 (2006), 149–55 (151–2).

[208] Tokyo District Court, *R. Shimoda v. the State* (n. 205), 248–9.

such substantive claims before Japanese courts.[209] Thus individual victims retain a substantive right to reparation, but cannot lodge a lawsuit in a Japanese court on the basis of this right.

Conversely, the government of the People's Republic of China insisted that section 5 of the Joint Communiqué, which declared the waiver of China's demand for war reparation from Japan,[210] does not include the claims of its nationals.[211] In the same manner, the government of the Republic of Korea announced that the 1965 Agreement on the Settlement of Problems concerning Property and Claims and on Economic Co-operation was not signed to claim compensation for Japan's colonial rule, but rather to resolve the financial and civil debtor–creditor relationship between Korea and Japan.[212] Thus the question of the right to claim reparation for unlawful acts against humanity involving the Japanese government, such as the issue of comfort women, has not been resolved by that Agreement.[213] This view was confirmed by the Korean Constitutional Court[214] and the Supreme Court.[215]

From a legal point of view, it is rational that a State not be able to waive the rights of its nationals under international law, since those rights are completely independent of that State's sovereign power. It might have been possible for a State to waive a right under domestic law by concluding a lump-sum

[209] Supreme Court of Japan, *X v. Y*, Judgment, 27 April 2007, *Japanese Yearbook of International Law* 51 (2008), 518–32 (526).

[210] Joint Communiqué (n. 20), section 5.

[211] However, Asada and Ryan have a different understanding of the reactions of the Beijing government to the findings of the Japanese Supreme Court. Masahiko Asada and Trevor Ryan, 'Post-War Reparations between Japan and China and Individual Claims: The Supreme Court Judgments in the *Nishimatsu Construction* Case and the Second Chinese "*Comfort Women*" Case', *ZJapanR* 27 (2009), 257–84 (281–2).

[212] Decision of the Joint Government–Private Committee, 26 August 2005, only Japanese translation, available at www.koreanbar.or.kr/pages/common/fileDown.asp?types=2&seq=7099.

[213] According to Pae-Keun Park, the Korean government took the position that all property, rights and interests, and claims rights of Korean nationals had been extinguished when the 1965 Agreement was concluded. However, the government changed its attitude and adopted the position that the Agreement did not extend to claims by individuals, and this position has been expressed repeatedly. Pae-Keun Park, 'The 1965 "Korea–Japan Claims Settlement Agreement" and Individuals' Claims Rights', *Hosei Kenkyu* 68 (2001), 678–48 (663).

[214] Challenge against the Act of Omission Involving Article 3 of 'Agreement on the Settlement of Problem concerning Property and Claims and the Economic Co-operation between the Republic of Korea and Japan', 30 August 2011, available at http://search.ccourt.go.kr/ths/pr/ths_pr0103_P1.do?seq=1&cId=010400&cname=%EC%98%81%EB%AC%B8%ED%8C%90%EB%A1%80&eventNo=2006%ED%97%8C%EB%A7%88788&eventNum=17450&pubFlag=0&selectFont=.

[215] Supreme Court Decision, 2009Da22549, 24 May 2012, available at https://library.ccourt.go.kr/site/conlaw/download/case_publications/decision(2011).pdf.

agreement under the prevailing international law during and just after World War II, but Article 51 of the 1949 Geneva Convention I stipulates that '[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave] breaches referred to in the preceding Article'. According to the ICRC commentary to this provision, all parties to armed conflicts, vanquished and victors alike, are obliged to make full reparation for the loss or injury caused by grave breaches. Thus Article 51 aims, in particular, to prevent the defeated Party from being compelled, in an armistice agreement or peace treaty, to abandon all claims in respect of grave breaches committed by persons in the service of the victor.[216] It is therefore clear that, under *current* international law, claims in relation to grave breaches cannot be waived at all. However, the commentary also emphasises that Article 51 does not cover special financial arrangements under which a State can liquidate a damages claim through an agreed lump-sum payment or a compensatory settlement, and States are free to negotiate between themselves any financial settlements relating to the end of an armed conflict.[217]

Some scholars argue that the waiver by means of lump-sum agreement of claims arising from violations of international law would be incompatible with general international law as it exists today.[218] In contrast, in the *Jurisdictional Immunities* case, the ICJ seemed to allow lump-sum agreements by holding as follows:

> Moreover, against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.[219]

The ICJ is correct in the sense that, under current international law, there is no practice demonstrating the existence of a *ius cogens* norm requiring full reparation to each and every individual victim. To this extent, States may

[216] ICRC, *Commentary on the First Geneva Convention* (Cambridge: Cambridge University Press, 2016), 1082–4.

[217] *Ibid.*, 1084.

[218] Marco Sassoli, 'State Responsibility for Violations of International Humanitarian Law', *International Review of the Red Cross* 84 (2002), 401–34 (419); Shin Hae Bong, 'Compensation for Victims' (n. 118), 203.

[219] ICJ, *Jurisdictional Immunities of the State* (*Germany v. Italy*: *Greece Intervening*), Judgment of 3 February 2012, ICJ Reports 2012, para. 94.

restrict the scope of reparation by concluding an agreement. However, in light of the practices indicating the shift from State-centred to victim-oriented reparation, the restriction is subject to some requirements.

1. A comprehensive waiver of reparation claims by agreement among relevant States/entities is completely incompatible with the individual right to reparation under current international law and is therefore impermissible.
2. Appropriate grounds are required to restrict the scope of reparation.[220]
3. In taking the measures for restriction, all eligible victims should be treated equally.[221]
4. The reparation, if not full, shall be effective to wipe out the harms suffered by the victims.[222]

In fact, these requirements have been taken into account in the *ad hoc* reparation mechanisms established to date.

VI. THE PROCEDURAL RIGHT TO REPARATION

As this chapter has outlined, the emerging victim-oriented social consciousness has developed in tandem with the consecutive establishment of reparation mechanisms over the past three decades. A growing recognition of the substantive right to reparation has been associated with increasing awareness of the procedural right to reparation among the policy-makers involved in developing those mechanisms. The procedural right mentioned here includes not only a right to access a mechanism (proceedings or programme) for effective reparation, but also a right to be heard in all phases of the reparation mechanism, including its establishment phase. The procedural right also includes entitlement to equal treatment without discrimination in all phases of the mechanism.

A. *The Right to Access an Effective Mechanism*

The victims' right to access a reparation mechanism is mentioned in various international instruments. The Basic Principles, for example, provide as follows:

[220] Peters, *Beyond Human Rights* (n. 3), 216.
[221] Roland Bank and Friederike Foltz, 'Lump Sum Agreements', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edn, 2013) paras 27–8.
[222] See Basic Principles (n. 47), paras 3 and 11; Principle 32, Updated Set of Principles (n. 53), 17.

https://doi.org/10.1017/9781108628877.002 Published online by Cambridge University Press

> A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. . . . An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies.[223]

The Victims Declaration, the Updated Set of Principles, and the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation[224] also stipulate a right to access a reparation mechanism. In addition, the Procedural Principles for Reparation Mechanisms adopted by the ILA in 2014 provide this right.[225]

These documents do not demonstrate that the right to access to an effective mechanism is *solidly* accepted and has *always* been realised in practice. In fact, as illustrated by the CPB and CCDS, which have never been realised, the actual creation of reparation mechanisms is undeniably dependent on the specific political and social circumstances of the armed conflict in question. Nevertheless, we also cannot deny the fact that policy-makers have been motivated or driven to establish *ad hoc* mechanisms for realising the reparation for individual victims. One may argue that those policy-makers were driven merely by political considerations or pressures from various quarters, not legally obliged to establish such mechanisms. This may be true. However, such considerations and pressures doubtless included increasing demand for ways of providing effective reparation to individual victims, leading to a growing awareness of the victim's right to access an effective reparation mechanism. The awareness of such a right then motivated (even if it did not strictly oblige) the policy-makers to establish such mechanisms. The repeated creation of similar mechanisms has strengthened the awareness of the right – and this explains the phenomenon we experienced from the late 1980s to the early 2000s.

As a result of the emerging right to access an effective reparation mechanism, it cannot be doubted that responsible States have gradually been pressed to provide such a mechanism to victims. One may even say that they are

[223] Basic Principles (n. 47), paras 12 and 14.
[224] Victims Declaration (n. 39), para. 4; Principle 32, Updated Set of Principles (n. 53), 17; Nairobi Declaration (n. 108), 2 ('Access to Reparation').
[225] Furuya, 'Draft Procedural Principles' (n. 83), 789.

obliged to do so under *current* international law.[226] Whether the obligation is firmly fixed or not, it is true that the sequential establishment of *ad hoc* mechanisms for victim reparation since the 1990s shows that the responsible States have been motivated or pressured, with an awareness of the victim's right, to create such mechanisms in the negotiation process for peace and reconstruction of States. The pressure to provide an effective reparation mechanism to victims is stronger at present than before.

Whether a new reparation mechanism should be established or an existing mechanism deployed also depends on the circumstances of the armed conflict in question, as well as the situations of the States and communities concerned. In either case, the procedure must be effective for victims. As the Basic Principles state, the procedure for reparation may include ordinary civil or administrative proceedings under domestic law. However, on surveying the past domestic practices of reparation for armed conflict victims, it is apparent that various obstacles, political or legal, may prevent victims from bringing reparation claims before domestic courts. For instance, in a State that is only just emerging from an armed conflict, the judicial system may lack sufficient capacity to provide justice. Moreover, if victims assert reparation claims before the court of a responsible State, they may suffer discrimination, especially in the aftermath of armed conflict fought on ethnic, racial, or religious grounds. There may also be other practical problems, such as the distances victims must travel to access the court, language barriers, and unfamiliarity with a foreign legal system.[227] Furthermore, victims often face significant legal and procedural hurdles at the domestic level, such as immunities, statutes of limitations, and thresholds for evidence.[228] Given the unsatisfactory results of the legal actions pursued by World War II victims in the domestic courts of Germany, Japan, and the United States, one must admit that the existing proceedings before domestic courts are only marginally effective (if not completely ineffective) as a reparation mechanism.

Given that victim reparation constitutes an important element of transitional justice for war-torn States and communities, the establishment of a fair

[226] Bassiouni, 'International Recognition of Victims' Rights' (n. 62), 232.

[227] van Houtte, Delmartino and Yi, *Post-War Restoration* (n. 3), 21.

[228] In the case of *Jurisdictional Immunities of the State*, the ICJ held that 'customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict' (para. 78) and that, 'under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict' (para. 91). ICJ, *Jurisdictional Immunities of the State* (n. 219), 135 and 139.

and impartial mechanism is essential. The then UN Secretary-General stressed this point in his report on the rule of law and transitional justice in conflict and post-conflict societies: 'Programmes to provide reparations to victims for harm suffered can be effective and expeditious complements to the contributions of tribunals and truth commissions, by providing concrete remedies, promoting reconciliation and restoring victims' confidence in the State.'[229] Providing effective remedies to victims, which (as he put it) is pivotal in promoting justice, peace, and reconciliation after armed conflict, is also a concern of the international community.[230] In most cases, the successful realisation of peace and stability in war-torn States depends on the international community's assistance; in fact, the *ad hoc* reparation mechanisms established to date were jointly coordinated by the responsible parties and the United Nations as representative of the interests of the international community. In this respect, the individual right to access a reparation mechanism can materialise not only by means of the responsible parties' performing their obligations, but also with the support and assistance of the international community. Accordingly, the individual right to reparation, characterised by closely intertwined substantive and procedural aspects, should be understood in light of the broader process of fostering transitional justice and is, in fact, accepted as such under current international law.

The right to access a reparation mechanism includes effective access to appropriate information concerning that mechanism.[231] A reparation mechanism has little practical value if potentially eligible victims are unaware of their opportunity to claim or not given information on how to do so in a language they understand.[232] In other words, in the event that a reparation mechanism is established, the responsible parties and the mechanism itself are obliged to conduct outreach activities to inform eligible victims of the existence of their right to reparation and the procedures they may invoke. This obligation is stipulated in the Victims Declaration, the Basic Principles and the Updated Set of Principles.[233] The *ad hoc* mechanisms established to date have involved such outreach activities. The Regulations of the CRPC, for instance, instructed its staff members to disseminate relevant information thus:

[229] Report of the Secretary-General (n. 54), para. 54.
[230] Hofmann, 'Draft Declaration' (n. 2), 331.
[231] ILA Procedural Principles, Principle 5, Furuya, 'Draft Procedural Principles' (n. 83), 794.
[232] Howard M. Holtzmann and Edda Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford: Oxford University Press, 2007), 141.
[233] Victims Declaration (n. 39), para. 5; Basic Principles (n. 47), para. 24; Principle 33, Updated Set of Principles (n. 53), 17.

> Before claims registration takes place, an authorized staff member is obliged to inform the potential claimant as to how to submit a claim, about evidence and other information relevant for submitting a claim. The authorized staff member is also obliged to ensure that the potential claimant has expressed his free will regarding the disposal of the claimed real property.[234]

The mechanisms providing reparation to victims of the Holocaust, including the ICHEIC, CRT-I and CRT-II, have also conducted outreach activities using various techniques, such as public service announcements, posters, brochures, press releases, newspaper advertisements, radio spots, websites, and press conferences to reach particularly disadvantaged victim communities.[235] Likewise, the ICC found such activities to be essential to the effectiveness of its reparation system.[236]

B. *Developing the Right to Be Heard*

To respond accurately to the needs of victims and to realise effective reparation, it is crucial to hear their voices in every phase of a reparation mechanism, including the stage of its planning and design. In particular, if one positions the right to reparation within the framework of transitional justice in a post-conflict society, listening to the voices of vulnerable victims, such as minority groups, as extensively as possible and then encouraging their participation in a reparation mechanism is indispensable to fostering reconciliation in that society. For this purpose, the Updated Set of Principles emphasises that '[v]ictims and other sectors of civil society should play a meaningful role in the design and implementation of programmes. Concerted efforts should be made to ensure that women and minority groups participate in public consultations aimed at developing, implementing, and assessing reparations programmes.'[237]

The involvement of victims or their representatives in the establishment and implementation of reparation mechanisms was prominent in the mechanisms concerning the Holocaust. In the case of CRT-I, relevant victim organisations – namely, the World Jewish Restitution Organization and

[234] Art. 25 CRPC Book of Regulations (n. 161).

[235] Holtzmann and Kristjánsdóttir, *International Mass Claims Processes* (n. 232), 144–7.

[236] The Trial Chamber found that '[o]utreach activities, which include, firstly, gender- and ethnic-inclusive programmes and, secondly, communication between the Court and the affected individuals and their communities are essential to ensure that reparations have broad and real significance'. ICC, *Lubanga*, Trial Chamber (n. 106), para. 205; see also *ibid*., paras 258–9.

[237] Principle 32, Updated Set of Principles (n. 53), 17.

World Jewish Congress – became parties to the Memorandum of Understanding that established the mechanism. Claimants' representatives also participated in the Settlement Agreement, and they submitted comments and proposals to the Special Master regarding the Plan of Allocation and Distribution, which contained proposals for the CRT-II's framework.[238] Global Jewish and survivor organisations were, likewise, parties to the Memorandum of Understanding creating the ICHEIC, and they were given the right to designate some of its members.[239]

However, such practices were quite limited in other mechanisms. The HPCC reflected the victims' needs to a certain extent, in that its constituent instrument, UNMIK Regulation 2006/60, was drafted by means of lengthy negotiations between the Special Representative of the UN Secretary-General and interim bodies established to represent the interests of local Kosovar populations.[240] No victims or victim representatives participated in the planning of the UNCC, EECC, and CRPC. Accordingly, the victims' right to be heard seems not yet well established in international law, but at least it appears to be progressively developing.[241]

C. *The Right to Equal Treatment without Discrimination*

The right to equal treatment without discrimination must be respected and guaranteed in every phase of the reparation mechanism. Several human rights treaties provide for a right to equal treatment,[242] the principles of which are likewise applicable to the reparation mechanism. More specifically, the Victims Declaration and the Basic Principles stipulate this right,[243] and it is also emphasised by the ICC.[244]

Nevertheless, the right to equal treatment does not mean that it would prohibit the provision of particular support to specific groups to make their access substantive and effective;[245] rather, such support may be justified and even required. In the report of the UN Secretary-General on the rule of law

[238] Holtzmann and Kristjánsdóttir, *International Mass Claims Processes* (n. 232), 92.
[239] Memorandum of Understanding (n. 88), paras 1 and 2.
[240] Holtzmann and Kristjánsdóttir, *International Mass Claims Processes* (n. 232), 93.
[241] See Furuya, 'Draft Procedural Principles' (n. 83), 790.
[242] See Art. 26 ICCPR; Arts 2 and 3 of the African Charter on Human and Peoples' Rights; Art. 24 of the American Convention on Human Rights; Art. 14 of the European Convention on Human Rights; Art. 1, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedom.
[243] Victims Declaration (n. 39), para. 3; Basic Principles (n. 47), paras 12 and 25.
[244] ICC, *Lubanga*, Trial Chamber (n. 106), paras 187 and 191.
[245] Furuya, 'Draft Procedural Principles' (n. 83), 792.

and transitional justice in conflict and post-conflict societies, it is emphasised that peace agreements and Security Council resolutions will take into account 'the differential impact of conflict and rule of law deficits on women and children and the need to ensure gender sensitivity in restoration of rule of law and transitional justice, as well as the need to ensure the full participation of women'.[246] Accordingly, a reparation mechanism must include gender-sensitive measures to address the difficulties that women and girls could face in seeking to access it, particularly if claiming reparation for harm caused by sexual and gender-based violence.[247] Any other vulnerable groups, including children,[248] should also be provided with special assistance and protection, as necessary.[249]

VII. COMMON PRINCIPLES OF *AD HOC* REPARATION MECHANISMS

As examined above, for the purpose of fostering the rule of law and realising transitional justice in post-conflict States and societies, it is advisable and, in certain circumstances, even essential to establish a reparation mechanism to substantialise victims' right to reparation.[250] Surveying the *ad hoc* reparation mechanisms established to date, we see that they have evidently varied to a considerable extent depending on the political and social circumstances of each armed conflict, the needs of victims, and the political and financial situations of responsible parties. Accordingly, there is no fixed *ideal* structure and procedure that would fit any post-conflict situation. Nevertheless, it is also true that most mechanisms have faced common fundamental dilemmas: some have had to resolve a very large number of claims within a restricted time, and with limited financial and human resources available to fund compensation and administer the

[246] Report of the Secretary-General (n. 54), para. 64(g).

[247] Nairobi Declaration (n. 108), General Principle 2. See Anne Saris and Katherine Lofts, 'Reparation Programmes: A Gendered Perspective', in Ferstman, Goetz, and Stephens (eds), *Reparations for Victims* (n. 141) 79–100 (87–93); Colleen Duggan and Adila Abusharaf, 'Reparation of Sexual Violence in Democratic Transitions: The Search for Gender Justice', in Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford: Oxford University Press, 2006), 623–49.

[248] Guidelines on Justice in Matters involving Child Victims (n. 107), para. 35. See also Art. 39 of the Convention on the Rights of the Child.

[249] Furuya, 'Draft Procedural Principles' (n. 83), 793.

[250] This section is almost entirely based on the author's analysis in the ILA Report on the Procedural Principles for Reparation Mechanisms: *ibid*., 796–813.

mechanism.[251] At the same time, potentially eligible victims usually have high expectations that their claims will be processed fairly and effectively. Processing claims quickly may reduce administrative costs, and thereby both maximise the funds available to victims and provide reparations sooner; however, the risk is that processing accuracy may be sacrificed, and victims may feel dissatisfied with the automated and impersonal treatment of their claims.[252] Thus, although reparation mechanisms may take many different forms, most have needed to address such common issues as how to expeditiously process a huge number of claims, and what is the fairest and most efficient method of evaluating the claims received. Within the special procedures and methods created by these reparation mechanisms to meet these challenges, certain common principles have therefore been evolving, which are increasingly motivating the policy-makers of victim reparation mechanisms to create more victim-oriented systems.[253]

A. *Collecting, Registering, and Processing Claims*

A reparation mechanism must process a huge number of claims within a limited time period, all while guaranteeing a minimum level of due process. It can provide victims with a meaningful opportunity to pursue reparation only if it collects and registers their claims inclusively and efficiently.

The *ad hoc* mechanisms have adopted two kinds of systems for claim submission.[254] Some have entitled eligible victims to submit their claims directly: the CRPC, HPCC, GFLCP, and IPCC adopted this system. The others, including the UNCC and EECC, have used a system of consolidated claims under which only States are entitled to submit the claims of their nationals and corporations. Under the latter system, however, victims are not obliged to exhaust local remedies as a prerequisite for submission through the mechanism. This is because the consolidated system is not based on the State's right of diplomatic protection; rather, the system of direct submission is more

[251] Veijo Heiskanen, 'Virtue out of Necessity: International Mass Claims and New Uses of Information Technology', in The International Bureau of the Permanent Court of Arbitration (ed.), *Redressing Injustices through Mass Claims Process: Innovative Responses to Unique Challenges* (Oxford: Oxford University Press, 2006), 25–37 (28); Hans Das, 'The Concept of Mass Claims and the Specificity of Mass Claims Resolution', in *ibid.*, 3–11 (9).

[252] Holtzmann and Kristjánsdóttir, 'International Mass Claims Process' (n. 232), 178.

[253] Such common principles have also emerged in *domestic* reparation programmes, as identified and systematised by Cristiàn Correa, 'Operationalising the Right of Victims'. Chapter 2 in this volume, 141–163. The task ahead is to bring both experiences together to establish best practices: see *ibid.*, 163–174.

[254] See *ibid.*, 163–174.

victim-oriented, giving victims a sense of satisfaction in personally exercising their right to reparation. However, where submission of a large number of claims is expected, the consolidated system is advantageous to victims, since it can contribute to prompt reparation by saving time in processing claims.[255] In the latter system, the State is obliged to take effective measures to disseminate relevant information on the mechanism to potentially eligible victims, using the most appropriate means to ensure that it will be easily understood. Moreover, when a mechanism awards an aggregated amount of compensation to the State, that State is obliged to distribute it to each victim in a fair and timely fashion. For this purpose, the State also needs to establish its own mechanisms or procedures for distributing compensation.

The processing and resolution of large numbers of claims inevitably require extensive time and resources, and are consequently very costly. Accordingly, individualised judicial proceedings examining all of the alleged facts and legal issues of each case, as is usual in a domestic court, are often not feasible in reparation mechanisms, which may be expected to accomplish their task with much greater efficiency. To meet this expectation, such mechanisms have to employ methods for processing claims *en masse*.[256] However, fair and impartial processing must also be guaranteed to avoid provoking dissatisfaction among victims. The need to strike an appropriate balance between efficiency and fairness has in the past led mechanisms to adopt special methodologies, facilitating the processing of large numbers of claims as swiftly as possible.

One of the effectual methods adopted by, among others, the UNCC was to divide the claims into different groups and to give priority to only some of them. Based on the type of claimants, the nature of their loss, and the claimed amount of loss, the Governing Council of the UNCC classified the claims into six categories:

- individuals forced to leave Iraq or Kuwait (category A);
- those who suffered serious personal injuries or whose spouse, child, or parent died (category B);
- those who suffered personal losses of up to 100,000 USD (category C);
- individual claims exceeding 100,000 USD (category D);
- corporations (category E); and
- governments and international organisations (category F).

The Council prioritised categories A, B, and C in both processing and payment of claims.[257] The UNCC's policy, here, is based on the fundamental

[255] Furuya, 'Draft Procedural Principles' (n. 83), 798.
[256] *Ibid.*, 799.
[257] Criteria for Expedited Processing of Urgent Claims (n. 101), para. 8.

consideration that economically disadvantaged victims should have priority: the claims of individual victims have priority over those of juridical persons, and the claims for smaller amounts were met before those for larger sums.

Nevertheless, there may be other considerations to be taken into account in the grouping and priority of claims. The ICC's Trial Chamber I, for instance, gave more attention to victims' vulnerability:

> The Chamber recognises that priority may need to be given to certain victims who are in a particularly vulnerable situation or who require urgent assistance. These may include, *inter alia*, the victims of sexual or gender-based violence, individuals who require immediate medical care (especially when plastic surgery or treatment for HIV is necessary), as well as severely traumatized children, for instance following the loss of family members. The Court may adopt, therefore, measures that constitute affirmative action in order to guarantee equal, effective and safe access to reparations for particularly vulnerable victims.[258]

Current armed conflicts share the distinct characteristics of women and children commonly being subjected to international law violations and even war crimes, whether intentionally targeted or embroiled in indiscriminate attacks. Thus gender and age are crucial elements that should be considered in grouping claimants and determining priority.[259]

Besides grouping and prioritisation, the reparation mechanisms have employed other methodologies, mostly based on information technologies. Although very large numbers of claims are submitted, most, if not all, of them arise from incidents that occurred at around the same period in almost the same geographical area; thus the legal and factual issues they raise are typically similar.[260] Recognising patterns among claims, reparation mechanisms have utilised various statistical programming methods enabling the expeditious processing of numerous claims at minimal transaction cost. These methods include sampling, computerised data matching and database facilities,

[258] ICC, *Lubanga*, Trial Chamber (n. 106), para. 200; Rule 65 of the Regulations of the Trust Fund for Victims also provides that, '[t]aking into account the urgent situation of the beneficiaries, the Board of Directors may decide to institute phased or priority verification and disbursement procedures. In such cases, the Board of Directors may prioritize a certain sub-group of victims for verification and disbursement.' Resolution ICC-ASP/4/Res.3, 3 December 2005.

[259] Furuya, 'Draft Procedural Principles' (n. 83), 800. See also Anne-Marie de Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families', *Leiden Journal of International Law* 20 (2007), 207–37.

[260] Heiskanen, 'Virtue out of Necessity' (n. 251), 28; Friedrich Rosenfeld, 'Mass Claims in International Law', *Journal of International Dispute Settlement* 4 (2013), 159–74 (162).

regression analysis, making precedent-setting decisions and applying them to similar claims, and standardised claim verification and valuation.[261]

B. *Valuing and Verifying Claims*

In terms of the valuing and verifying of victims' claims, the reparation mechanisms to date have adopted more victim-friendly methods than those of the domestic courts.

The conditions of armed conflict restrict, in various ways, the eligible victims' ability to produce evidence demonstrating their claims' validity. In situations of armed conflict, many of the documents and other items that could be used to substantiate claims may be destroyed, lost, or looted. Armed conflict often causes people to flee without securing the documents that could later prove their losses. Further, in some conflicts, the deliberate destruction or concealment of evidential records is an integral military strategy of hostile parties. In Bosnia, for instance, the official property records in many areas were destroyed, removed, or tampered with in an attempt to prevent minorities returning after the conflict.[262] Recognising and taking into account victims' difficulties in proving their claims, reparation mechanisms have adopted more flexible evidential requirements than those usually demanded in arbitration and domestic litigation.[263]

For instance, the UNCC employed more simplified verification procedures for urgent individual claims than for the larger claims of categories D, E, and F; it also applied different standards of proof for the claims of different amounts within each category.[264] For urgent claims for fixed amounts (2,500 USD) in cases of forced departure or serious personal injury not resulting in

[261] See Heiskanen, 'Virtue out of Necessity' 2006 (n. 251), 27–9; Holtzmann and Kristjánsdóttir, *International Mass Claims Processes* (n. 232), 244–7; Hans Das and Hans van Houtte, *Post-War Restoration of Property Rights under International Law, vol. II: Procedural Aspect* (Cambridge: Cambridge University Press, 2008), 147–257.

[262] *Ibid.*, 59–61.

[263] 'The circumstances in which the claimants' losses occurred, specifically those in Iraq or Kuwait, may have had a significant impact on claimants' abilities to provide evidence in support of their claims. Thus, e.g., consideration was given to the general emergency conditions prevailing in Kuwait and Iraq under which many thousands of individuals were forced to flee or hide or were held captive, without safely securing their possessions or retaining documents that later could be used to substantiate their losses.' Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages up to $100,000, 21 December 1994, UN Doc. S/AC.26/1994/3, 27.

[264] See Vejio Heiskanen, 'The United Nations Compensation Commission', *Recueil des Cours* 296 (2002), 255–397 (358–9).

death, it required claimants to provide simple documentation of the fact and date of their departure and injury. In the case of death, 2,500 USD was provided on provision of simple documentation confirming the death and the pertinent family relationship. In these claims, documentation on the actual amount of loss was not required.[265] In contrast, for individual claims exceeding 100,000 USD, claims of corporations and other entities, and those of governments and international organisations, the UNCC required supporting documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss.[266]

In Kosovo, victims also faced difficulty in proving their property right in land through official records, because cadastral records had been removed to Serbia. The Rules of Procedure and Evidence of the HPCC therefore provided that '[t]he Commission may be guided but is not bound by the rules of evidence applied in local courts in Kosovo. The Commission may consider any reliable evidence, which it considers relevant to the claim.'[267] The evidentiary standard used in the HPCC was, in effect, whether the evidence submitted by a purported victim was reliable, which was rather lower than the evidential threshold usually required in local courts.

Likewise, the reparation mechanisms for Holocaust victims adopted a lower standard of proof. These mechanisms were established some fifty years after victims had suffered the harms for which they were entitled to pursue claims. This lapse of time brought with it a range of delicate evidential problems: first-hand information had become rare and official records had been lost; many eligible witnesses had died; and statements taken from witnesses were not always credible in their entirety such a long time after the events. Evidence that might easily have been obtained immediately after the harms occurred was extremely difficult to collect at the time the mechanisms were created.[268] Thus most of the mechanisms adopted a rather innovative concept of a 'relaxed standard of proof', based on the test of what is 'plausible' in place of the traditional judicial standards according to which facts are determined by

[265] Criteria for Expedited Processing of Urgent Claims (n. 101), paras 11–12; Art. 35(2)(a) and (b) of the Provisional Rules for Claims Procedure, annexed to the Decision taken by the Governing Council of the United Nations Compensation Commission at the 27th Meeting, Sixth Session held on 26 June 1992, 26 June 1992, UN Doc. S/AC.26/1992/10.

[266] Criteria for Additional Categories of Claims, Decision taken by the Governing Council of the United Nations Compensation Commission during its Third Session, at the 18th Meeting, held on 28 November 1991, as revised at the 24th Meeting held on 16 March 1992, 17 March 1992, UN Doc. S/AC.26/1991/7/Rev.1, paras 8, 23 and 37.

[267] Section 21.1 of Regulation No. 2000/60 (n. 187).

[268] Das and van Houtte, *Post-War Restoration* (n. 261), 61.

a 'preponderance of the evidence'.[269] The CRT-I, for instance, stipulated in its Rules of Procedure that:

> The claimant must show that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the dormant account. The Sole Arbitrators or the Claims Panels shall assess all information submitted by the parties or otherwise available to them. They shall at all times bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long time that has lapsed since the opening of these dormant accounts.[270]

Besides a lower standard of proof, the mechanisms often employed presumptions and inferences to alleviate the victims' burden of proof. In the CRPC, it was presumed that claimants were refugees or displaced persons at the time of submitting their claims; only when there were clear indications to the contrary was the status of a victim examined. In addition, it was also presumed that the victims submitting their claims to the CRPC were not in possession of the real property they claimed.[271] The CRT-II, likewise, made use of several presumptions: when the specific value of an account was unknown, it was presumed to have the average value of that type of account; further, it was presumed that the victim submitting the claim had not received the proceeds of the account when it had been closed.[272] Moreover, to establish a claim for slave labour before the GFLCP, it was sufficient for potentially eligible victims to demonstrate that they had been held in a concentration camp, ghetto, or comparable place of confinement; if they did so, they were then assumed to have been subjected to slave labour. These examples indicate the existence of a number of victim-oriented rules of evidence: the victims benefiting from these presumptions are relieved of the burden of proving presumed facts, and it is incumbent upon the party responsible for reparation to present counterevidence rebutting the presumptions.[273]

In line with simplified verification, the mechanisms have adopted more simplified proceedings than those of domestic courts, which may hold hearings and provide the opportunity to confront witnesses, considered to be essential elements of due process in many legal systems. In this respect, there is a clear tendency, ranging from the relatively old mechanisms to

[269] Holtzmann and Kristjánsdóttir, *International Mass Claims Processes* (n. 232), 211.

[270] Art. 22(1) of the CRT-I Rules of Procedure for the Claims Resolution Process, available at www.crt-ii.org/ICEP/ICEP_Report_Appendices_A-W.pdf.

[271] Arts 11 and 12 CRPC Book of Regulations (n. 161).

[272] Arts 28 and 29 of the CRT-II Rules Governing the Claims Resolution Process (as amended), available at www.crt-ii.org/_pdf/governing_rules_en.pdf. See also Art. 25 on joint accounts.

[273] Das and van Houtte, *Post-War Restoration* (n. 261), 142.

more recent ones and certainly from smaller to larger mechanisms, for the use of hearings to be gradually reduced; in some mechanisms, they have been abandoned completely.[274] According to the UNCC Provisional Rules, 'each panel will normally make its recommendations without holding an oral proceeding, though the panel may determine that special circumstances warrant holding an oral proceeding concerning a particular claim or claims'.[275] In unusually large or complex claims, 'the panel considering such a claim may, in its discretion, ask for additional written submissions and hold oral proceedings'.[276] In practice, however, oral hearings were not held at all in the urgent claims categories, and they were rare even in the larger categories D, E, and F. For the CRT-I, its Rules of Procedure provided that the sole arbitrators and claims panels should, to the greatest possible extent, conduct the proceedings as a documents-only arbitration, although they could, if necessary, examine the parties, interview witnesses, and hear oral arguments.[277] In practice, all claims were decided without hearings. This is also true for the HPCC, granted competence to invite a party to present oral evidence and argument before it;[278] to date, no formal hearing has been held.[279] In contrast, the CRT-II, GFLCP, and ICHEIC were all conducted on the basis of documents only, and their constituent instruments and procedural rules did not provide for hearings at all.

Holding hearings is desirable to meet the requirements of due process and fair trial, and to enhance victims' satisfaction. It is evident, however, that hearings require considerable time and cost; therefore, in most situations, they would undermine victims' interests. Accordingly, where a mechanism must handle a large number of claims, hearings are inadvisable and actually unfeasible. In response to the need to realise victim-oriented reparation mechanisms, the conventional rules and standards for due process and fair trial have to change.

C. *The Victim's Choice of an Appropriate Mechanism*

When a reparation mechanism is established in the wake of an armed conflict, are all victims required to submit their claims only through this mechanism? In other words, should the mechanism have exclusive competence to process

[274] Furuya, 'Draft Procedural Principles' (n. 83), 803.
[275] Art. 37(c) Provisional Rules for Claims Procedure (n. 265).
[276] Art. 38(d) *ibid*.
[277] Art. 17(iv) CRT-I Rules of Procedure for the Claims Resolution Process (n. 270).
[278] Section 19.2 of Regulation No. 2000/60 (n. 187).
[279] Holtzmann and Kristjánsdóttir, *International Mass Claims Processes* (n. 232), 234–5.

the reparation claims it was established to settle? Or should each victim be allowed to choose their preferred forum?

On this issue, the mechanisms established to date can be classified into three models. In the first model, the mechanism has exclusive competence over claims falling within its jurisdiction and victims cannot submit their claims to any other fora. The EECC is an example of this model. In the second model, on the contrary, the mechanism is not an exclusive forum for claims and nothing prevents victims from submitting their claims to competent domestic courts. Examples include the UNCC and CRPC. The third model includes most of the mechanisms concerning reparation for Holocaust victims (the CRT-I, CRT-II, GFLCP, HVAP, and ICHEIC): when a victim decides to use a mechanism or when they receive an award, they are required to sign a waiver pursuant to which they are prevented from submitting any further claims on the same facts to national courts or other fora.[280]

For parties responsible for reparation, the exclusive competence of a reparation mechanism is preferable, allowing them to avoid being summoned to participate in another forum for claims for which the mechanism has been created. Moreover, if all claims are channelled before a single mechanism, they do not need to spread their resources in parallel proceedings before different fora.[281] For victims, exclusive competence may be advisable in promoting the equal treatment of all victims, regardless of their nationalities, and thereby securing consistency in the treatment of claims, for example as regards the amount of payments.

However, it is also true that granting exclusive competence to a mechanism raises several difficulties. If the mechanism is created by means of agreement among the States concerned, it is arguable whether the agreement can, without the victims' explicit consent, deprive them of their right to access another forum for reparation. As examined in section IV, a State may restrict the exercise of victims' right to reparation only where there are appropriate grounds for restriction; all eligible victims should be treated equally in taking the measures for restriction and, even subject to restrictions, the reparation is still sufficiently effective to wipe out the harms suffered by the victims. Thus if exclusive competence is merely based on considerations of expediency or the responsible parties' interests, it cannot be justified. Conversely, it is more likely that exclusive competence is permissible where this is more beneficial to the

[280] Furuya, 'Draft Procedural Principles' (n. 83), 806.
[281] van Houtte, Delmartino and Yi, *Post-War Restoration* (n. 3), 125.

victims. However, such a situation is rare, because the non-exclusive competence allows victims to freely choose their most advantageous forum.

The second difficulty is doubt over States' ability to prohibit third States' fora from accepting victims' claims. In principle, a treaty cannot impose any obligation on a third State unless that State expressly accepts the obligation in writing. Thus the mechanism cannot ensure exclusive competence unless this is also accepted by third States. If the mechanism is created through a Security Council Resolution, this would surmount the second difficulty, but not necessarily the first. For the victim's right to reparation, victims' preference should be paramount; thus it is most proper that, as is the case of mechanisms relating to Holocaust victims, a victim is granted a right to choose either to participate in the mechanism's proceedings or to pursue a claim wherever they consider most advantageous. Furthermore, if this right to choose is admitted, it may become a positive incentive for policy-makers to establish mechanisms that are more attractive than domestic fora in terms of procedure, remedies, and expeditiousness, which would avoid the responsible parties being forced to participate in another forum and spreading their limited resources across parallel proceedings. This would also be beneficial to victims.[282]

D. *The Financial Basis of the Mechanism*

A reparation mechanism must have a firm financial basis; otherwise, it could not contribute to effective reparation for victims until completion of its mandate.[283] There are various potential sources of funding, depending on the context of the social and political fabric surrounding a reparation mechanism, the victims' perceptions and expectations of the mechanism,[284] and the perspectives of third parties, including the United Nations, on the armed conflict in which victims suffered harm.

The basis of funding may be divided into two types: responsibility-based funding and solidarity-based funding. *Responsibility-based funding* means that the parties, whether State, organised armed group, or individual, responsible for the harms suffered by victims fund a reparation mechanism. As discussed in section IV.A, it is well accepted that a responsible party is obliged to make effective reparation to victims and therefore to fund the mechanism under which those victims' reparation claims are processed. In essence,

[282] Furuya, 'Draft Procedural Principles' (n. 83), 807.

[283] John R. Crook, 'Mass Claims Processes: Lessons Learned over Twenty-Five Years', in The International Bureau of the Permanent Court of Arbitration, *Redressing Injustices* (n. 251), 41–59 (57).

[284] van Houtte, Delmartino, and Yi, *Post-War Restoration* (n. 3), 131–2.

responsibility-based funding rests on the traditional model of 'right-holder' and 'duty-bearer' relations.

However, in the wake of armed conflict, this model does not necessarily work well. First, it may be difficult to identify the responsible parties, because States are usually reluctant to admit their responsibility in the aftermath of armed conflict. Second, certain political needs sometimes obscure violators' responsibility and frustrate identification of the responsible parties. This arises particularly in cases in which pointing a finger at a responsible party in a ceasefire agreement or peace treaty can be counterproductive and detrimental to ending an armed conflict. This point was made when the Security Council declared Iraq responsible for the unlawful invasion and occupation of Kuwait in its binding resolution, which led to the establishment of the UNCC. However, Security Council determination requires a high level of political consensus among its members, particularly the permanent members, and hence such determinations are rarely made in practice. Finally, the responsibility-based model relies on the responsible parties' solvency, but they sometimes lack sufficient assets to fund the mechanism.[285] This particularly applies to individuals or organised armed groups with limited assets available for reparation. From a legal perspective, indigence does not preclude imposing responsibility for reparation on a responsible party.[286] From a practical and financial standpoint, however, it is a serious problem that may jeopardise the entire scheme of reparation to victims.

To overcome these difficulties, *solidarity-based funding* is needed. The solidarity-based model involves raising funds in the public interest, irrespective of the legal or moral responsibility of the perpetrators of harm.[287] There may be various types of funding in this model, such as the voluntary contributions from third States, international organisations, corporates, NGOs, and individual donors. These contributions are commonly made to indicate solidarity with the victims, at least to an extent. In fact, several reparation mechanisms have been designed and actually operated on the basis of such voluntary contributions.

The International Commission of Inquiry on Darfur, for instance, suggested in its proposal on the establishment of the CCDS that '[f]unding for

[285] *Ibid.*, 132–3.

[286] Art. 23 Articles on Responsibility of States for Internationally Wrongful Acts (n. 174), 76; ICC, *Lubanga*, Appeals Chamber (n. 170), paras 102–5.

[287] The concept of a solidarity-based model is inspired by the analysis conducted by van Houtte, Delmartino, and Yi, but its meaning here is somewhat different from that of the original. See van Houtte, Delmartino, and Yi, *Post-War Restoration* (n. 3), 136.

compensation of victims of crimes committed by rebels (whether or not the perpetrators have been identified and brought to trial) should be afforded a Trust Fund to be established on the basis of international voluntary contributions'.[288] The Annan Plan for Cyprus also contemplated a reparation mechanism funded by voluntary contributions.[289] For the CRPC, the Agreement on Refugees and Displaced Persons annexed to the Dayton Peace Agreement provided that the parties to the Agreement should bear its expenses equally.[290] However, the CRPC did not receive any funding from them;[291] instead, the CRPC was operated through voluntary contributions from several European States, Canada, and the United States, as well as from international organisations, including the European Union and the World Bank.[292] Similarly, the HPCC, although partly funded by the Kosovo Consolidated Budget of the UNMIK, largely relied on voluntary contributions from international donors, including various States and the European Union.[293] The Trust Fund for Victims of the ICC is likewise funded by voluntary contributions from governments, international organisations, individuals, corporations, and other entities.[294]

Inevitably, the motives underlying such contributions, given the absence of a legal obligation, vary between donors. Some may consider it in their own long-term interest, while others may feel certain moral obligations to contribute or be guided by a spirit of dedication as a *neighbour* of the victims. Regardless, it is undeniable that donations are often unpredictable and related to external factors.[295] Private donors are easily influenced by changes in media

[288] Report of the International Commission of Inquiry on Darfur (n. 98), para. 603.

[289] Art. 17 of Attachment 2: The Cyprus Property Board and Compensation Arrangements to the Comprehensive Settlement of the Cyprus Problem (n. 96), 123–4.

[290] Art. X(2) Agreement on Refugees and Displaced Persons (n. 85).

[291] End of Mandate Report (1996–2003), Executive Summary, 13, available at www.pict-pcti.org/publications/Bibliographies/EMR-Part1-CoverExec1-Summary-EMR.pdf.

[292] See Chart: History of Funding of CRPC (US Dollars) Sorted by Largest Donor, *ibid.*, 14; see also Hans van Houtte, 'The Property Claims Commission in Bosnia-Herzegovina: A New Path to Restore Real Estate Rights in Post-War Societies', in Karel Wellens (ed.), *International Law: Theory and Practice – Essays in Honour of Eric Suy* (Boston: Martinus Nijhoff, 1998), 549–63 (553–4).

[293] According to the Kosovo Property Agency, direct funding from individual governments constituted 60 per cent of total contributions. UNMIK and the Kosovo Consolidated Budget covered 12 per cent and 28 per cent of the annual budget of 2006, respectively. The Housing and Property Directorate and the Kosovo Property Agency, Joint Annual Report 2006, 45, available at www.kpaonline.org/PDFs/AR2006.pdf.

[294] Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, Resolution ICC-ASP/1/Res.6, 9 September 2002, para. 2(a).

[295] van Houtte, Delmartino, and Yi, *Post-War Restoration* (n. 3), 135.

coverage from one armed conflict to another. There may also be a risk of donor fatigue. While States, corporates, and other organisations are often willing to pledge money during the early stages of a mechanism, this commitment normally wanes over time. To this extent, the reality of voluntary contributions to the reparation mechanisms cannot be regarded as perfectly following the solidarity-based model.

Nevertheless, the practices of the *ad hoc* reparation mechanisms and the ICC indicate a tendency within the international community to support victim reparation mechanisms by means of international voluntary donations, particularly in cases of non-international armed conflict. In this respect, victims' right to reparation is substantialised by the commitment of the international community not only to the initiatives of establishing a reparation mechanism, but also to drawing potential donors' attentions to post-conflict States and communities.

VIII. CONCLUSIONS

On the individual right to reparation, the academic arguments to date have two principal drawbacks. First, both supportive and negative views have focused on the substantive aspects of the right, always beginning their discussions by asking whether individuals actually have a substantive right to reparation under international law. More interestingly, academics for and against the substantive right's existence concur that individual victims' capacity to claim for harm suffered in armed conflict may be *exceptionally* permitted only when States agree, for example by concluding a special treaty. Their views differ on whether an individual has the substantive right even without being granted procedural capacity: one side maintains that the substantive right exists irrespective of procedural capacity; the other asserts that the former's existence depends on that of the latter.

However, as clarified in the foregoing analysis, the premise upon which both views are based is itself wrong. We must awaken to the fact that these views mainly derive from particular context – namely, the domestic litigation lodged by World War II victims against Germany and Japan. These victims had no choice but to assert that they possessed a substantive right that they could invoke before domestic courts, in the absence of any procedural capacity to access an international mechanism. In response, Germany, Japan, and several responsible companies had to argue that, absent an international procedural right, victims had no substantive right.

However, as demonstrated in section II, global momentum towards the individual right to reparation began in the late 1980s or early 1990s, and

https://doi.org/10.1017/9781108628877.002 Published online by Cambridge University Press

became prevalent no later than the early 2000s. Most significantly, the shift towards a more victim-oriented understanding of the right to reparation developed with the successive creation of international criminal judiciaries, as well as *ad hoc* reparation mechanisms, from the early 1990s, in parallel with the drafting of relevant UN instruments. In this context, there was no particular emphasis on the distinction between the substantive and procedural right(s) to reparation; rather, one central issue became how to materialise, or substantialise, the right to reparation. This later led to the ingenious creation of various procedures and methods enabling a huge number of claims to be processed in a short period of time.

In this respect, at least since the 1990s, the right to reparation has been regarded as an integrated right of substantive and procedural aspects. Moreover, from a practical point of view, the substantive right to reparation would be mere 'pie in the sky' without the procedural right to access an effective reparation mechanism. Accordingly, more attention should be paid to the procedural, rather than the substantive, aspect, and the practices of the *ad hoc* mechanisms and the ICC should be evaluated fairly and accurately as key components, rather than exceptional phenomena, of the current international law of reparation.

The second drawback is the inclination in the past to view the right to reparation only through the lens of the strict legal relationship between a right-holder (victim) and a duty-bearer (responsible party). This is correct in the sense that if a State or organised armed group harms victims by violating the rules of international law applicable in armed conflict, that State or group is obliged to make reparation to those victims. However, this narrow understanding is unconsciously linked with the overemphasis on a substantive right that, as pointed out above, has been dominant so far. By focusing on the *realisability* of the individual right to reparation, one would have to consider how to create an effective reparation mechanism, leading to recognition that the responsible parties' contribution is insufficient for this purpose and that, therefore, both political and financial support and assistance from the international community is indispensable.

The international community has become increasingly aware that transitional justice in post-conflict States and communities, including effective reparation for victims, is a vital matter of international concern.[296] This is particularly true of a State in which huge numbers of innocent civilians, including women and children, suffer ineffable harm from prolonged non-

[296] Bassiouni and Rothenberg put it thus:

https://doi.org/10.1017/9781108628877.002 Published online by Cambridge University Press

international armed conflict. This explains the United Nations' positive involvement in establishing *ad hoc* reparation mechanisms since the mid-1990s. To this extent, the individual right to reparation concerns not only the responsible States and groups, but also the international community, and hence the current international law of reparation should be understood as a triangular structure, in which the dynamic relations among victims, responsible parties, and the United Nations (representing the interests of the international community) may interact with one another. Although the strictly legal relation of right-holder (victims) and duty-bearer (responsible States and groups) remains, the United Nations now shoulders the main burden of urging responsible parties to create a reparation mechanism and to provide effective reparations to victims. In supporting victims, it should listen keenly to their voices and reflect those voices, as far as practicable, in the design and operation of reparation mechanisms. Of course, at the present time, the triangular relations do not rest assuredly on a well-established legal basis; in some situations, one must admit that political and/or financial obstacles may hinder those relations from functioning effectively. Nevertheless, the practices of those *ad hoc* mechanisms that, in recent decades, have met the expectations of victims more effectively and efficiently than prior reparation settlement schemes indicate that this is the underlying direction in which international law is advancing in the long term, even if it faces a standstill or backlash in the short term.

> Post-conflict justice is a relatively new concept whose coherence is only now emerging after two decades of theoretical and practical development. ... By the mid-1990s, a broad international consensus had developed regarding the need to link justice and reconciliation with the end of conflict and support for democratic transitions. This historic shift grew out of the increasing legitimacy of human rights discourse, the activities of international and domestic non-governmental organizations and a general expansion of states' legal commitments to fundamental human rights.

M. Cherif Bassiouni and Daniel Rothenberg, 'Facing Atrocity: The Importance of Guiding Principles on Post-Conflict Justice', in International Human Rights Law Institute, *The Chicago Principles on Post-Conflict Justice* (online 2007), 1–11 (5–6), available at https://law.depaul.edu/about/centers-and-institutes/international-human-rights-law-institute/projects/Documents/chicago_principles.pdf.

https://doi.org/10.1017/9781108628877.002 Published online by Cambridge University Press