

The UN Principles and Guidelines on
Reparation: is there an Enforceable Right to
Reparation for Victims of Human Rights and
International Humanitarian Law Violations?

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The UN Principles and Guidelines on Reparation: is there an Enforceable Right to Reparation for Victims of Human Rights and International Humanitarian Law violations?

The present thesis evaluates the international legal standing of the right to a remedy and reparation contained in the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law. It focuses on two aspects of the right to a remedy and reparation. First, it examines the application of state responsibility principles to the relationship between states and individuals when human rights and international humanitarian law violations are committed. Secondly, it analyses the convergence of norms of state liability in different branches of international law: human rights law, the law on diplomatic protection, international humanitarian law, and international criminal law. It advances the proposition that state responsibility for reparation in favour of individuals has crystallised in international law.

The thesis is divided in four chapters. The first is an introductory chapter. It defines the scope and objective of the study, and identifies and maps the existing scholarly positions on the right to a remedy and reparation for individuals under international law. Chapter 2 describes the law of state responsibility for injuries to aliens and its relationship to the right to reparation in human rights law. Chapter 3 explores the right to reparation for international humanitarian law violations. As a conclusion, Chapter 4 assesses whether the Principles and Guidelines reflect the standards of international law previously

analysed. It looks at whether principles of state responsibility can apply to the relationship between individuals and states – a basic presumption of this instrument that was also one of the main sources of contention during the drafting and adoption process at the UN. It concludes that individuals can invoke state responsibility directly under contemporary international law through an actionable right to reparation for serious violations of human rights and international humanitarian law that constitute international wrongful acts.

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List of Abbreviations

ACHPR African Commission on Human and Peoples' Rights

ACHR American Convention on Human Rights

API Additional Protocol I to the Geneva Conventions

ATCA Alien Tort Claims Act

CAT Committee Against Torture

CHR Commission on Human Rights

CIL Customary International Law

DPA Dayton Peace Agreement

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

EECC Eritrea-Ethiopia Claims Commission

GA United Nations General Assembly

HR Human Rights

HRC Human Rights Committee

IACHR Inter-American Commission on Human Rights

IACtHR Inter-American Court of Human Rights

ICC International Criminal Court

ICCPR International Covenant on Civil and Political Rights

ICJ International Court of Justice

ICL International Criminal Law

ICRC International Committee of the Red Cross

ICTR Ad hoc Tribunal for Rwanda

ICTY Ad hoc Tribunal for Former Yugoslavia

IHL International Humanitarian Law

ILC International Law Commission

IWA International Wrongful Act

NATO North Atlantic Treaty Organisation

NGO non-governmental organisation

OAS Organization of American States

OAU Organisation of African Unity

OHCHR United Nations Office of the High Commissioner for Human Rights

PCIJ Permanent Court of International Justice

RPE Rules of Procedure and Evidence

SCSL Special Court of Sierra Leone

TVPA Torture Victim Protection Act

UDHR Universal Declaration of Human Rights

UN United Nations

UNCAT Convention against Torture

UNCC United Nations Compensation Commission

VCCR Vienna Convention on Consular Relations

VCDR Vienna Convention on Diplomatic Relations

WWII Second World War

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Introduction

As the international legal advisor of REDRESS,¹ I lead the NGO coalition that lobbied for the drafting and adoption of the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law² (hereafter Principles and Guidelines). From 2001-2006, I had the opportunity to participate in this process directly, being present during all the consultative meetings as well as other formal and informal consultations. This initiative was part of the standard setting work of REDRESS. At the time, I was also in charge of other initiatives, including lobbying for victims' rights at the International Criminal Court (ICC) preparatory committees and the establishment of its Trust Fund; conducting research on thematic issues like the right to reparation; and representing victims of torture seeking remedies before national and international fora. While these undertakings were closely related to my work with the Principles and Guidelines, it was the casework program that mostly informed the content of my standard setting activities at the UN. As a lawyer representing torture survivors, I faced the innumerable legal and practical hurdles that victims have when seeking justice and other forms of reparation. From this experience, I learned that the lack of procedural avenues to access justice was a major obstacle to obtaining redress. The procedural aspects of reparation became a major focus of my strategy. During the drafting and adoption process

¹ REDRESS is a human rights organisation that helps torture survivors obtain justice and reparation. It works with survivors to help restore their dignity and to make torturers accountable (www.redress.org)

² UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law, GA Res 60/147 (16 December 2005) UN Doc A/Res/60/147 [Hereafter Principles and Guidelines].

of the Principles and Guidelines, I lobbied for the recognition and inclusion of international law principles establishing access to judicial remedies for gross violations of human rights (HR) and serious violations of international humanitarian law (IHL) or the inapplicability of statutes of limitations when serious breaches were committed. One of the most important aspects of the adoption of this instrument, in my view, was to clarify the existence of an international right to access to justice.

As Chapter 4 explains, the legal basis of the right to a remedy and reparation in the Principles and Guidelines is state responsibility. The instrument assumes that individuals as holders of international rights have a right to a remedy and reparation against states when these rights are breached (i.e. when states commit international wrongful acts (IWA) against individuals). However, as it will be analysed, this assumption is not universally accepted. Germany, for example, opposed such interpretation of international law during the drafting process as well as during the adoption of the instrument. One of the arguments put forward was that state responsibility applies to interstate relationships only. Chapter 1 details how some academics also challenge the proposition that state responsibility principles can apply to the relationship between states and individuals. Chapter 3 describes how the concept of individuals having an international right to a remedy and reparation has been questioned more sharply in the context of IHL, where individuals have no access to conventional international remedies and their role as right holders is less clear than in HR law.

These arguments are sometimes reflected in domestic and international judicial decisions on reparations. They also inform political and judicial forums on related topics like: enforcement of awards; liability of non-state actors; and the application of sovereign immunities when victims bring judicial claims against foreign officials/states. It is important therefore to review the premise that state responsibility principles apply to the relationship between individuals and states (and the consequent existence of an individual right to a remedy and reparation under general international law). Otherwise, the lack of consensus in this area of law will continue to hinder victims' access to justice and reparation.

The present work explores this question in the context of the Principles and Guidelines, the key document on reparations in international law. While the legal nature of this instrument is sometimes taken for granted, this unsettled question (state responsibility as its legal basis) continues to affect the implementation of the right to reparation in practice. As will be described, whether in courts or political forums, the underpinning theoretical and legal discrepancies continue to hinder progressive development in this area of law. This uncertainty affects other related areas. Particularly relevant are: a) the applicability of immunities in cases of serious HR and IHL violations, and b) the right to reparation for victims of international crimes committed by non-state actors.

In terms of immunities, it is difficult to separate the victims' right to access to justice from the states' right or obligation to afford immunity to other states or state officials. As long as there is ambiguity on the legal basis and status of the accountability of states towards

individuals and the procedural dimensions of such obligation, it will be hard to clarify the relationship between remedies and immunities. Similarly, while more and more victims suffer from non-state violence during armed conflicts or other situations of violence where IHL applies, it is unclear how these victims can claim reparation. First, it is difficult to conceive an autonomous non-state actors' obligation to afford remedies and reparations in the current state-focused international legal framework.³ Second, it seems challenging to address non-state actors responsibility to afford reparation without clarifying first the extent of the states' obligation towards victims.

For this reason, the present thesis focuses on the preliminary question whether *states* have an obligation under international law to provide access to justice and reparation to victims of serious HR and IHL violations. It analyses the legal basis of this obligation and its procedural scope. Can victims invoke state responsibility directly? Do the Principles and Guidelines reflect existing international law in this regard? Does this entail an *enforceable* right to reparation for victims of serious HR and IHL violations under CIL? This is already a broad and intricate topic and a question insufficiently addressed in existing literature, particularly within the specific context of the UN instrument. For this reason, the current work revisits this proposition. Questions surrounding immunities and non-state liability are vast and complex and go beyond the scope of the present work. These topics are only mentioned when necessary in relation to the overall argument that state responsibility principles apply to the relationship between states and individuals. While not specifically addressed, the applicability of immunities and the scope of non-

³ A separate question all together is whether non-state responsibility for HR violations enhances the protection of HR in general. For a brief discussion of this topic see footnote 711 and accompanying text

state liability are clearly outstanding questions that affect victims' access to justice and reparations. As this thesis concludes, more detailed research needs to be conducted in these areas of law. Hopefully, the present work will help clarify some of the preliminary questions necessary to explore these topics.

Finally, the current dissertation reflects some of my previous writings on the right to reparation. Notably, a segment of Chapter I was published as an article in *The International Journal of Human Rights*.⁴ Section 3.D.i of Chapter 3 is based on research I conducted for a preliminary case report for REDRESS⁵ and section four of Chapter 4 is based in great part on a REDRESS manual I wrote in 2006.⁶ Chapter 4 also reflects some of the conclusions of two articles I published after the adoption of the Principles and Guidelines: 'Redressing Torture: A Genealogy of Remedies and Enforcement'⁷ and 'Codifying the Rights of Victims in International Law: Remedies and Reparation'.⁸ Many of my reflections stem from the cases I litigated while I was working at REDRESS as well as with the Open Society Justice Initiative; some of them are cited in this thesis.

⁴ Gabriela Echeverria, Do victims of torture and other serious human rights violations have an independent and enforceable right to reparation? *The International Journal of Human Rights*. 2012;16(5):698–716.

⁵ The report analysed the possibility of obtaining compensation for a group of women survivors from the Omarska Camp that had testified before the ICTY (in file with author). Part of this report is published in REDRESS' website.

⁶ See: Implementing Victims' Rights: a Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation. Available at: <http://www.redress.org/downloads/publications/Reparation%20Principles.pdf> (accessed 17 April 16)

⁷ Gabriela Echeverria, 'Redressing Torture, A Genealogy of Remedies and Enforcement', *Torture (IRCT Journal)*, 16(3) (2006), 152–81 [hereinafter 'Genealogy'].

⁸ Gabriela Echeverria, 'Codifying the Rights of Victims in International Law: Remedies and Reparation' in Permanent Court of Arbitration (ed), *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges* (Oxford, New York: Oxford University Press) 2006 [hereinafter 'Codifying'].

1. Concept and context of the right to a remedy and reparation

It is generally recognised that victims of serious human rights violations have a right to reparation. For example, Article 14 of the UN Convention Against Torture, a widely ratified instrument, establishes that victims should obtain ‘redress and have an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible’.⁹ All major human rights instruments establish similar provisions. However, the details and applicability of the right to reparation for victims remain rather vague. While there is a consensus that an obligation to afford reparation exists when a violation of human rights is committed, it is still unclear who bears the obligation to afford reparation,¹⁰ to whom it should be awarded, and how such reparation can be claimed and enforced.

If a state commits a HR violation against a citizen of another state, in theory the breaching state owes reparation to the state of nationality of the individual victim. But what about the individual victim? And what happens when the state of nationality commits the breach? Are individuals also ‘subjects’ of international law with rights and

⁹ Convention against Torture and other Cruel Inhuman and Degrading Treatment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 [hereinafter UNCAT].

¹⁰ While state responsibility for human rights violations is well established in international law, there are scenarios where establishing concurrent responsibility for individual(s) and state(s) for acts that breach human rights is not necessarily straightforward. The question of reparation becomes very complex when dealing with non-state actors and the laws of war. Whether in regards to armed conflicts, internal disturbances, acts of terrorism, or other types of organised crime, many questions arise in respect to victims and reparation. Do post-war treaties or transitional accords prevail over individual claims? Can non-state actors commit human rights violations? How can international law make non-state actors accountable to afford reparation? If individuals are said to be responsible, does this mean that states should bear no responsibility? In sum, when non-state actors commit acts that can be qualified as international crimes, human rights violations, and/or international humanitarian law breaches, it is still unclear how regimes of state and individual responsibility/reparation operate in practice.

capacity to exercise such rights, like states? Can they bring autonomous claims independent of states' consent? How can these rights be enforced when there is no universal human rights court?

There are now numerous international norms, mostly conventional but also customary, which require states to protect fundamental HR. However, it is important to ask whether the state obligation to protect human rights under international law gives rise only to corresponding rights of other states or also to international rights of individuals. There are also various international conventional norms on HR that expressly establish obligations of reparation on states that have breached norms protecting individuals. According to these conventions, the obligation to afford reparation by wrongdoing states creates rights in favour of other states. But can we say nowadays that those obligations on wrongdoing states correspond also rights of the individual victims of the breach? If there is a conventional individual right to reparation, does this mean that individuals have a right to reparation for HR violations also under CIL?

The present study assumes that violations of customary HR and IHL give rise to an obligation under general international law on wrongdoing states to afford reparation. Its aim is to investigate if the individual victim can be the beneficiary of such obligation. To do this, it will analyse whether general rules of international law on state responsibility apply to individuals as they do to states: can individuals invoke state responsibility?

2. Aim of the study

Although research on reparations has gained increased attention, in general studies on reparation have looked into specific aspects of reparations rather than the overall right to reparation, and always in a state-focused framework. As Evans notes, research has generally been compartmentalised into HR, international criminal law (ICL), or IHL.¹¹ In the academic field, for example, attention has been given to: the right to a remedy and reparation under HR law (analysing the regional systems of protection of human rights and their implementation in national law);¹² the right to reparation in political transitions (i.e. the rights of victims in ‘transitional justice’ processes);¹³ reparation by individuals for international crimes;¹⁴ reparation for historical injustices;¹⁵ and the specific right to compensation in IHL.¹⁶

¹¹ C Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 8.

¹² See, for example, D Shelton, *Remedies In International Human Rights Law* (3rd edn, OUP 2015) 143-152; D Cassel, ‘The Expanding Scope and Impact of Reparations-Awarded by the Inter-American Court of Human Rights’ in M Bossuyt, P Lemmens, K De Feyt, and S Paramentier (eds), *Out of Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2006); P Sardaro, ‘Jus non dicere for Allegations of Serious Violations of Human Rights: Questionable Trends in the Recent Case Law of the Strasbourg Court’ (2003) 6 European Human Rights 601; N Roth-Arriaza, ‘Reparations decisions and dilemmas’ (2004) 27(2) Hastings International And Comparative Law Review 157.

¹³ See for example, P de Greiff (ed), *The Handbook of Reparations* (OUP 2006); see also Bossuyt (n 12), which generally deals with issues of post-conflict reparations.

¹⁴ For example, F McKay, ‘Are Reparations Appropriately Addressed in the ICC Statute?’ in D Shelton (ed), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (Transnational Publishers 2000).

¹⁵ For example, F Francioni, ‘Reparation for Indigenous People: is International Law ready to Ensure Redress for Historical Injustices?’ in F Lenzerini (ed), *Reparations for Indigenous People: International and Comparative Perspectives* (OUP 2008).

¹⁶ See, for example, R Bank and E Schwager, ‘Is there a Substantive Right to Compensation for Individual Victims of Armed Conflict against a State under International Law?’ (2006) GYIL 49; P d’Argent, *Les reparations de guerre en droit international public* (Bruylant 2002). Other studies on more general legal remedies for IHL violations include: A MacDonald, ‘Rights to Legal Remedies for Victims of Serious Violations of IHL’ (Doctoral thesis, Queen’s University of Belfast 2003); L Zegveld, ‘Remedies for Victims of Violations of International Humanitarian Law’ (2003) 85 International Review of the Red Cross 497; E. Gillard, ‘Reparation for Violations of International Humanitarian Law’ (2003) 85 International Review of the Red Cross 529, 536-537. Notably the ILA conducted a series of studies on the right to reparation and adopted two declarations on the substantive and procedural right to reparation (see Chapter 3).

The first analysis approaching the question of reparation as a whole from a victim's standpoint was the comprehensive study¹⁷ on the right to reparation carried out by Professor van Boven in 1993 in preparation of the Principles and Guidelines.

The subsequent draft instruments, the study by Professor Cherif Bassiouni updating the principles and guidelines, and the final instrument adopted by the General Assembly in 2005, were the first documents to merge the different legal regimes that involve issues relevant to the right to an effective remedy and adequate reparation in a comprehensive manner and from the perspective of the victim. After all, as Bassiouni notes, 'legal distinctions and technicalities surrounding various classifications of crimes ... are of little significance to victims in their quest for redress'.¹⁸

Evans makes a detailed study of reparation for HR and IHL violations from a victim's perspective in her book *The Right to Reparation in International Law for Victims of Armed Conflict*.¹⁹ However, the focus of Evans' study is on the right to substantive reparations rather than the right to a legal remedy/access to justice:

The study focuses on the reparations aspects of victims' rights rather than on their right to access to justice and their right to a legal remedy. The objective is to apply a victim-oriented approach by using as a key evaluation tool the comprehensive concept of the victims' right to reparations established in the UN Basic Principles on the Right to Reparation for Victims, rather than referring to the polarised 'truth versus justice' discourse, which until the Basic Principles were adopted tended to dominate in assessments of post-conflict and transitional justice initiatives.²⁰

¹⁷ T van Boven, 'Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report' (2 July 1993) UN Doc E/CN.4/Sub.2/1993/8.

¹⁸ M Cherif Bassiouni, 'International Recognition of Victims Rights' (2006) 6 Human Rights Law Review 204.

¹⁹ C Evans, *Reparation for Victims of Armed Conflict* (n 11) 8.

²⁰ Ibid.

The present thesis seeks to find out if there is a right to a remedy and reparation for victims of serious HR and IHL violations under general international law as purported by the Principles and Guidelines. Specifically, it examines whether individuals can be the beneficiaries of the secondary obligation to afford reparation of states for IWA under principles of state responsibility and whether individuals can bring claims directly under international law against states. According to van Boven,²¹ the essence of the right to a remedy and reparation is reflected in the general principle of law established in *Chorzów* of wiping out the consequences of the wrong committed.²² He argues that for this reason it is appropriate for the Principles and Guidelines to rely on the doctrine of state responsibility codified in the Draft Articles on the Responsibility of States for International Wrongful Acts adopted by the International Law Commission (ILC Responsibility Articles).²³

The present study also addresses reparation under ICL, but is not concerned with the obligation to afford reparation by individuals for international crimes. Instead, it focuses on the application of state responsibility principles in the area of ICL to help clarify the question of the existence of a right of individuals to reparation *vis-à-vis* the responsible state for IHL violations.

²¹ T van Boven, 'Victims' Rights to a Remedy and Reparations: The New United Nations Principles and Guidelines' in C Ferstman, M Goetz and A Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity: systems in place and systems in the making* (Martinus Nijhoff 2009).

²² 'Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.' See: *Chorzów Factory Case (Jurisdiction)* (1927) Series A no 22 [47] [hereinafter *Chorzów*].

²³ See: International Law Commission, 'Report of the International Law Commission on the work of its 53rd session' (23 April- 1 June, 1 June and 2 July- 10 August 2002) UN Doc A/56/10).

3. Structure and outline

After an introduction, the present study is divided in four chapters, followed by a list of general conclusions. The first is an introductory chapter, presenting preliminary questions that define the scope and objective of the study as well as identifying and mapping the existing scholarly positions on the right to reparation for individuals in international law. The second and third chapters are more specific. Chapter 2 describes the law of state responsibility for injuries to aliens and its relation to the right to reparation in international HR law. Chapter 3 describes the right to reparation for IHL violations. The fourth chapter is a concluding chapter: it assesses whether the Principles and Guidelines reflect current standards of international law on the right to a remedy and reparation for victims of serious HR and IHL violations, in particular, the question of whether principles of state responsibility can apply to the relationship between states and individuals – a basic presumption of this instrument that was also one of the main sources of contention during the drafting and adoption process at the UN.

A. Chapter 1

Chapter 1 gives a brief overview of the development of the right to reparation for individuals and addresses some relevant preliminary issues that define the scope of the present analysis: a) the distinction between the international obligation under HR law to afford remedies and reparation at the domestic level and the obligation to afford

reparation for an IWA; b) the different types of rights in international law, specifically, the difference between substantive and procedural rights and its treatment under international law; and c) the criminal responsibility of individuals and its relation to international personality and reparation.

Following these preliminary explanations, Chapter 1 is divided into three parts. First, it assesses the current legal position of the individual in international law by looking at whether individuals are subjects of international law and/or enjoy legal personality under this legal regime. After all, even if international responsibility is commonly considered in relation to states as the traditional subjects of international law, it is in essence a broader question, inseparable from that of legal personality in all its forms.²⁴ Second, it identifies and examines four different positions in regards to international norms containing individual primary and secondary rights and the relationship between these substantive rights and the right to reparation. Third, it assesses if the international community can be the guardian of individual rights and/or whether customary rules of international responsibility can be applicable to individuals.

B. Chapter 2

Chapter 2 examines the notion of diplomatic protection and its relationship to HR law. The focus of this dissertation is not to look at reparation obtained through inter-state agreement or inter-state legal action, but to investigate whether individuals have a right to

²⁴ I Brownlie, *Principles of Public International Law* (6th edn, OUP Press 2003) 435.

reparation under general international law for serious HR and IHL violations as presupposed by the Principles and Guidelines. For this reason, Chapter 2 analyses the relationship that exists between diplomatic protection and HR claims. In particular, it investigates the connection of diplomatic protection to the right to reparation and the right to an effective domestic remedy (denial of justice/access to justice). IHL claims on behalf of nationals injured by foreign nations during wartime, including claims as part of war settlements and peace treaties, are addressed in Chapter 3.

Before introducing the concept of state responsibility for injuries to aliens and diplomatic protection, Chapter 2 explains the terminology introduced by the ILC Responsibility Articles of ‘primary’ and ‘secondary’ obligations, as well as the concept of independent responsibility. This terminology is relevant to this study since the Principles and Guidelines also apply it. The aim of the Principles and Guidelines is to define the scope of the right to a remedy and reparation, and allow for the future development of procedural remedies and substantive reparations. Like the ILC Responsibility Articles, the instrument does not define what constitutes a substantive violation (in this case of international HR or IHL), but only describes the legal consequences (the rights and duties) arising from these violations and establishes appropriate procedures and mechanisms to implement them. Consequently, this terminology is also used in the present study (despite the limitations these terms carry as described in Chapter 2).

Following this introductory explanation, the chapter describes how diplomatic protection is both the predecessor to the right to reparation in HR law and a well-established

mechanism that allows states to obtain reparation on behalf of their nationals for HR violations. It addresses the difference between diplomatic protection and consular assistance, as well as providing an overview of the history of diplomatic protection. It includes a description of the abuse of this mechanism in the nineteenth century and the consequent entrenchment of principles like exhaustion of domestic remedies, sovereign equality, and immunities in the notion of diplomatic protection and in reparation procedures in general. Chapter 2 further describes the nature of denial of justice as a primary and secondary rule under the law of state responsibility and its similarity to the primary right to an effective domestic (procedural) remedy under HR law and the right to an international remedy when such primary right (access to justice) at the domestic level is breached. It concludes that in the same way that denial of justice is understood as a system failure, where exhaustion of domestic remedies is an inherent material element of the IWA of denial of justice, international HR violations materialise as IWAs after states fail to afford effective domestic remedies and reparation in accordance with international standards. The analysis of the law of state responsibility for injuries to aliens is particularly relevant as it shows that access to justice is an integral part of the minimum standard of justice. Before concluding, the chapter examines the elements of diplomatic protection to give context to the analysis of state responsibility principles when applied to reparation for individual victims of HR and IHL violations, including assessment of individual damage and forms of reparation.

C. Chapter 3

As described, the first two chapters analyse whether individuals have rights in international law and therefore an enforceable right to reparation when such rights are breached. Chapter 1 describes how the ILC Responsibility Articles do not exclude this possibility in cases of fundamental rights. The development of HR law and the law on diplomatic protection described in Chapter 2 also support this interpretation. However, recent events in the area of IHL seem to point in a different direction. The ICJ *Jurisdictional Immunities of the State* established that Italy violated Germany's sovereign immunity by allowing WWII claims to proceed in Italian courts. The Court did not find it necessary to address the question of individual reparation for serious violations of IHL;²⁵ it simply looked at whether Germany enjoyed immunity in Italian courts according to present customary international law (CIL). It answered this question affirmatively. However the court did 'regret' leaving the victims without a remedy.²⁶ While this decision is specific to the circumstances of the case (e.g. a WWII claim brought before a foreign court), it has been read as 'putting an end to a debate that arose out of the noble

²⁵ '[b]ecause immunity is upheld, no need to examine questions whether individuals are directly entitled to compensation for violation of IHL and whether states may validly waive the claims of their nationals in such cases' in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) (Judgment)* [2012] ICJ Rep 108. [Hereinafter *Germany v Italy*].

²⁶ 'It is a matter of surprise — and regret — that Germany decided to deny compensation . . .' (idem 99). Judge Yusuf in his Dissenting Opinion, strongly affirms that: 'It bears to be recalled in this connection that disputes between States are not submitted to an international adjudicatory body, and particularly to the principal judicial organ of the United Nations, for expressions of surprise and regret, but for their appropriate settlement on the basis of international law'. Dissenting Opinion of Judge Yusuf, *Germany v Italy case* (n 25) [10].

motive to improve the fate of victims of armed conflict but failed to fully grasp the complexity of financial settlement after armed conflict'.²⁷

The Principles and Guidelines recognise the existence of a right to a (procedural) remedy and (substantive) reparation for individual victims of gross violations of HR and serious violations of IHL (including, when applicable, a right to compensation). For this reason, Chapter 3 analyses the question of reparation and remedies for IHL breaches. It gives a brief description of the status of the law at the time that the set of principles and guidelines was drafted and the more recent developments in this area of law after its adoption by the UN General Assembly. The chapter mainly confines the discussion to compensation. Financial reward is among the most frequent issues arising in the context of the right of individuals to reparation in cases of serious violations of IHL.²⁸ Having this in mind, the chapter analyses: a) whether there is a right to a (procedural) remedy and (substantive) reparation for individuals directly under IHL; and b) whether there is a right to reparation for victims of serious violations of IHL under the general principles of state responsibility. The first part describes the ambiguities of the relevant provisions on compensation enshrined in the Hague Convention IV of 1907 (Hague IV) and Additional Protocol I of the Geneva Conventions (AP I) and investigates if these provisions can apply to individuals. It shows that while the evidence to establish that the IHL provisions on compensation apply to individuals is inconclusive, nothing in IHL prevents reparation

²⁷ C Tomuschat, 'State Responsibility and the Individual Right to Reparation before National Courts' in A Clapham and P Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014).

²⁸ P Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?' in Orna Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (OUP 2011).

to individuals. The second part asks if the traditional state-to-state reparation for victims of armed conflict is a matter of policy or a legal norm. It investigates whether the emergence of HR has altered the concept of state responsibility, adapting the modalities of reparation for IHL violations to the new developments of international law, or whether there is a rule that excludes reparation to individuals in cases of IHL breaches. It briefly re-examines individual reparation in the context of state responsibility (including an overview of these issues in the ILC Responsibility Articles) and provides examples of contemporary state practice, applying principles of state responsibility to individual reparation in cases of IHL violations. It then explores the question of individual reparation under ICL and its relationship to state liability. The recent developments in this area of law are succinctly discussed, to the extent that they may help clarify the question of the existence of the right of individuals to reparation *vis-à-vis* the responsible state for IHL violations.

D. Chapter 4

Chapter 4 starts with the origins and background of the Principles and Guidelines. It describes the start of the victimology movement after World War II, its stall during the Cold War years, and how this movement regained prominence in the 1980s and 1990s influencing international law in areas such as HRL, IHL, and ICL. It explains that it was in this context—the end of the Cold War and the general demands of reparative justice—that the Sub Commission on Human Rights appointed Theo van Boven as Special Rapporteur to study the question of victim reparation, with a view to drafting principles and guidelines on this subject. The chapter then describes in detail the context and the

fourteen-year process that led to the drafting and adoption of the instrument before the UN.

Following these introductory sections, Chapter 4 looks at two basic contentions implicit in the Principles and Guidelines: first, that the instrument reflects the perspective of the victims; and second, that the law on state responsibility is the legal basis of the right to a remedy and reparation for victims of serious HR and IHL violations.

It is generally agreed that the Principles and Guidelines have a victim-based perspective. However, as will be explained, the use of ‘victim perspective’ in the context of the Principles and Guidelines has more than one meaning. It refers on the one hand to how the instrument reflects the needs of the victims, and on the other, to how the victim is the point of departure. Both assertions are critically assessed to see whether the aim of reflecting the victim’s viewpoint and using the victim’s needs as a point of departure or drafting methodology is real or even possible. It describes the conceptual tension between a victim-oriented framework and a state-focused framework when determining state obligations. In particular, it examines how both the aim and methodology employed affected the scope of the instrument and the substance of the provisions making the process more flexible and inclusive of victims’ voices, but at the same time limiting the content and scope of some of its legal provisions.

Before analysing in detail the content and structure of the instrument, Chapter 4 addresses the question of state responsibility as the legal basis of the right to reparation for victims

of gross violations of HR and serious violations of IHL. It explores the relationship between the Principles and Guidelines and the law of state responsibility, including the similarities and differences between this instrument and the ILC Responsibility Articles. Finally, it gives an overview of the content of the instrument, including the provisions on prevention, investigation, prosecution, and punishment, as well as the right to procedural remedies (effective legal avenues of redress) and substantive reparations (in the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition).

E. Conclusion

The thesis finishes with a series of general conclusions, including that principles of state responsibility can apply to the relationship between individuals and states when fundamental rights are breached (i.e. when states commit IWA and individuals are the right holders) and, that the law on diplomatic protection has evolved and now recognises individual rights, including the right to reparation. It also concludes that the evidence is insufficient to demonstrate that IHL provisions contain a primary obligation to afford reparation to individuals in contemporary CIL. However, the dissertation resolves that this legal regime does not limit the application of HR affording such rights during armed conflict. More importantly, it demonstrates that there is no rule under IHL in particular or CIL in general that prevents reparation to individuals. When states commit violations of IHL that constitute IWA and individuals are the right holders, principles of state responsibility apply. States are obliged to afford reparation to the victim directly under international law.

Historically, reparation for victims of war has been afforded at the inter-state level and war reparations have been traditionally negotiated between the governments involved in the conflict. It is clear that there are policy considerations that affect the enforcement of individual rights in practice. However there is no norm of IHL or general international law establishing that reparation for violations committed during armed conflict can only be afforded to states. On the contrary, the tendency is to recognise an individual right to reparation for IHL breaches. It is clear as well that the right to a remedy and reparation under HR law applies during armed conflict. As implicit in the Principles and Guidelines, the right to reparation under principles of state responsibility belongs also to the direct victims of gross violations of HR and serious violations of IHL that constitute IWA.

After critically assessing the Principles and Guidelines, the thesis concludes that perhaps the instrument would have been clearer and stronger if the original scope of the instrument—addressing gross violations of HR and fundamental freedoms— had been maintained. Still, its adoption reflects recognition of victim-oriented policies as part of international law.

Since the General Assembly adopted the Principles and Guidelines without a vote, there is some basis to consider the text as declaratory of legal standards in the area of victims' rights, particularly the provisions on the right to effective remedies and adequate reparations. Despite the questions raised on the legal status of the Principles and Guidelines, its underlying premise of applying principles of state responsibility to the

relationship between individuals and states is consistent with current developments in international law.

4. Terminology and key concepts

Terms such as ‘remedy,’ ‘reparation,’ ‘redress,’ and other similar words in the context of violations of HR and IHL appear in a large number of international, regional, and domestic instruments, and in UN resolutions and reports. Sometimes the different terms are used to express identical or similar concepts, and at other times they are used without distinction. What is clear however is that states have a dual obligation towards victims: to make it possible for them to seek relief for the harm suffered and to provide a final result that actually addresses the harm. Still, while the dual dimension of the obligation is clear, different terminology is used when referring to the same concept. For example, Shelton uses the term ‘remedy’ as encompassing both the procedural obligation to afford legal avenues and the substantive relief afforded (i.e. she refers to the substance of the relief as remedies instead of reparations). On the other hand, the Principles and Guidelines clearly establish that victims have a right to a remedy and reparation. The translation of the term remedy in the other official UN languages indicates that the term refers to the procedural avenue to obtain the substantive relief.²⁹ In keeping with this terminology, the present study uses ‘reparation’ as a general term that refers to access to legal remedies (access to

²⁹ In the Spanish version, the term is translated as ‘*recurso*’, as opposed to ‘*remedio*’, clearly referring to the procedural avenue to obtain reparation. It is the same in the French version (‘*recours*’). See <http://www.ohchr.org/SP/ProfessionalInterest/Pages/RemedyAndReparation.aspx> and <http://www.ohchr.org/FR/ProfessionalInterest/Pages/RemedyAndReparation.aspx> (accessed on 10 April 16)

justice) as well as to substantive reparations. ‘Redress’ most commonly describes the action involved, but may also be used as a synonym for ‘reparations’.

Whether referred to as a right to reparation or remedy, what is important is to keep in mind that both aspects (procedural and substantive) of the obligation towards victims are inextricable. As explained by the Human Rights Committee (HRC): ‘Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged’.³⁰

As Chapter 1 describes, international HR law governs the effectiveness of the procedural remedies/recourse (e.g. civil, administrative, and criminal) and the adequacy of the substantive reparation/relief (e.g. compensation, rehabilitation, and satisfaction). However, the obligation to afford reparation at the domestic level should not be mistaken with the obligation to afford reparation for IWA. While obviously related, one is a primary international obligation in international HR law, and the other is a secondary obligation under general international law; the latter is governed by state responsibility principles applicable to all violations of international law. The terminology of primary

³⁰ ‘16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.’ Human Rights Committee, ‘General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant’ (2004) UN Doc CCPR/C/21/Rev.1/Add.13 16.

and secondary obligations is described in more detail in Chapter 2, as well as the relationship between the right of access to justice and denial of justice claims.

Finally, while the Principles and Guidelines refer to ‘gross’ violations of HR, the present study uses gross or serious HR violations to refer to breaches of HRL that also constitute crimes under international law.

Chapter 1: The legal position of the individual and the right to reparation

*Ubi Jus, Ibi Remedium**

1. Brief overview of the right to reparation for individuals

According to the Principles and Guidelines, the forms of reparation for individuals include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.³¹

The right to reparation for individuals is closely linked to state liability. However, international responsibility under the rules protecting individuals from official abuses has changed over time. Traditionally, state-centric international law safeguarded individuals only in respect of certain conduct by states other than their own – whether enemy nations (under the laws and customs of war) or states where they might reside or exercise commercial activities (under the law of state responsibility for injury to aliens). Under these norms, the right to reparation was attributed to the state of the injured national to claim against the offending state at the inter-state level.³² Whether in war or peacetime, a state had the right (but not the obligation) to take up the claims of its nationals before an international body.

* Where there is a right, there is a remedy.

³¹ Principles and Guidelines (n 2).

³² van Boven, ‘Study concerning the right to restitution’ (n 17) 42.

This understanding of the injury as perpetrated against the state of nationality, rather than the individual, followed the concept of international law as a legal system regulating the relationship between states. Individuals were perceived merely as objects of international law³³ and were thus not considered to be bearers of rights or obligations under international law.³⁴ However, after World War II, the state-centric approach of international law underwent a remarkable transformation. The international legal system became increasingly concerned with the individuals involved in atrocities. Attention was focused on both the individual criminal responsibility of perpetrators and the intrinsic rights of individuals as human beings. At Nuremberg, it was recognised that: '*crimes against international law are committed by men, not by abstract entities*'.³⁵ It was followed by the adoption on 10 December 1948 of the Universal Declaration of Human Rights, heralding the inherent rights of individuals to dignity and respect.

International law governing HR abuses has since developed rapidly.³⁶ With the establishment of the UN and the acceptance of its Charter as the principal instrument of international law, the international legal framework has gradually been transformed from a law of coexistence to one of cooperation.³⁷ The internationalisation of HR has been part of this process. Today there is an extensive body of law designed to protect all

³³ L Oppenheim, *International Law: A Treatise, Vol. I, Peace* (Longmans, Green, and Co. 1905) 200.

³⁴ P Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 1997) 100.

³⁵ *Judgment of the International Military Tribunal in The Trial of German Major War Criminals: Proceedings of the International Military Tribunal sitting at Nuremberg, Germany*, (H.M Stationery Office 1950) Vol. 22, p 447.

³⁶ For a discussion of the development of human rights law and the right to a remedy, see: Shelton, *Remedies* (n 12) p2-7.

³⁷ See generally, W Friedmann, *The Changing Structure of International Law* (Stevens 1964).

individuals from abuses of all governments, including ones' own, in both times of peace and war. At the same time, while states have traditionally invoked the responsibility of other states for breaching their international obligations, today it is also possible and widely practised for individuals and non-state entities to invoke state responsibility before international dispute settlement bodies (e.g. before commercial arbitration procedures, administrative bodies, human rights tribunals, etc.).³⁸

2. Some preliminary issues related to reparation and the individual

Considering the development of international law since World War II, is it fair to say that individuals now enjoy rights directly under international law? If so, do individuals have a secondary right to reparation when these primary rights are breached? Notably, individuals might be able to seek redress for HR violations under certain conventional regimes, like the European or American conventions on HR, or might be able to claim some form of relief before a domestic or international reparation mechanism. But do individuals have a right to reparation regardless of the existence of these treaties and *ad hoc* mechanisms established by states? What is the relationship between these conventional remedies and other remedies under general international law?

In order to establish whether individuals have a right to reparation under international law, it is necessary to establish first whether individuals enjoy international rights. Before

³⁸ E Brown Weiss, 'Invoking State Responsibility In The Twenty-First Century' (2002) 96 Am. J. Int'l L. 798; F Orrego Vicuna, 'Individuals and Non-State Entities before International Courts and Tribunals' (2001) 5 Max Planck Yearbook of United Nations Law 53.

analysing the existing sources of a possible right to reparation for individuals, it would seem necessary to assess the legal position of the individual in international law. After all, an international wrong presupposes the breach of an obligation under international law. The rights arising from an IWA are secondary rights deriving from a primary substantive right. Only by assuming that individuals are true holders of rights as personal entitlements can we argue that individuals have a right to reparation. But we must refer again to the traditional position that international law constitutes a pattern of mutual relationships among states. In this context, it is necessary to ask what the legal position of the individual is today, taking into account the recent development of international law – particularly of international HR law in the second half of the twentieth century. Do human beings truly enjoy human rights directly under international law or are they only the beneficiaries of international duties and rights of states?

A. International reparation and domestic reparation

The obligation to afford effective domestic remedies and adequate reparation is firmly embodied in all major international human rights treaties and declarative instruments.³⁹

³⁹ For example, Article 8 of the Universal Declaration of Human Rights, GA Res 217 A (III) of 10 December 1948; Article 2(3), Article 9(5) and Article 14(6) of the International Covenant on Civil and Political Rights (entry into force 23 March, 1976); Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (entry into force 4 January 1969); Article 39 of the Convention of the Rights of the Child (entry into force 2 September 1990); Article 14 of the Convention against Torture and other Cruel Inhuman and Degrading Treatment (entry into force 26 June 1987); Article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance (entry into force 23 December 2010) and Article 75 of the Rome Statute for an International Criminal Court (entry into force 1 July 2002, UN Doc A/CONF.183/9). It has also figured in regional instruments, for example, the European Convention on Human Rights (entry into force 3 September 1953, art 5(5), 13 and 41); the American Convention on Human Rights (entry into force 18 July 1978) (Articles 25, 68 and

The effectiveness of the procedural remedies/recourse (e.g. civil, administrative, and criminal) and the adequacy of the substantive reparation/relief (e.g. compensation, rehabilitation, satisfaction) are governed by international HR law.⁴⁰ However, this obligation to afford reparation at the domestic level should not be mistaken with the obligation to afford reparation for IWAs. While obviously related – both are based on the general principle of law that every violation entails the duty to afford reparation – one is a primary international obligation in international human rights law (e.g. Article 13 of the European Convention of Human Rights contains the right to a domestic remedy),⁴¹ and the other (the obligation to afford reparation for IWAs) is a secondary obligation under general international law. The latter is governed by state responsibility principles applicable to all violations of international law.

If states fail to comply with the primary international HR obligation to afford domestic remedies and reparation for acts or omissions contrary to international law, they commit an IWA and thus are liable to afford reparation at the international level. The present study investigates who would be the beneficiary of this secondary obligation to afford reparation.

63(1)); the African Charter on Human and Peoples' Rights (entry into force 21 October 1986) (Article 21(2)). See also, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power UNGA Res 40/34 (29 November 1985); Declaration on the Protection of all Persons from Enforced Disappearance (Article 19), UNGA Res 47/133 (18 December 1992); Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Principle 20), recommended by Economic and Social Council (24 May 1989 Res 1989/65); and Declaration on the Elimination of Violence against Women (adopted UNGA Res 48/104).

⁴⁰ See REDRESS, 'Enforcement of Awards for Victims of Torture and Other International Crimes' *The Redress Trust* (2006) available at: http://www.redress.org/downloads/publications/master_enforcement%2030%20May%202006.pdf accessed 4 March 2016 (hereinafter, 'Enforcement Report').

⁴¹ "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity." Article 13, European Convention of Human Rights [hereinafter ECHR] (n.39).

This is not to say that a state can only be held responsible under objective or non-fault responsibility; that is, merely when ‘having failed to fulfil its international obligation with respect to vigilance, protection and control’.⁴² Today it is also recognised that states have due diligence obligations: ‘[t]hus [...] states may be held responsible for domestic human rights violations – even violations in the private sphere – on an account of failure to legislate so as to prevent them’.⁴³

In any event, it is when a state fails to redress a violation in accordance with the principles of international law (e.g. effective investigation and prosecution; adequate compensation; etc.) that it commits an IWA and becomes liable under international law. Otherwise, states would be responsible under general international law every time an official or some other person connected to the state commits a violation. Instead, it is when the state fails to deal with the violation in question that it breaches general international law: ‘A State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question’.⁴⁴ This is consistent with human rights treaties and jurisprudence (individuals can only have recourse to an international human rights body after exhausting effective domestic remedies) and with the law of state responsibility for injuries to aliens, since states cannot exercise diplomatic protection

⁴² R Ago, ‘Fourth Report on State Responsibility’ (1976) 2(1) YB ILC 3, 120.

⁴³ M Koskenniemi, ‘Doctrines of State Responsibility’ (n. 51) 50, citing H Charlesworth and C Chinkin, *The Boundaries of International Law. A Feminist Analysis* (Manchester University Press 2000) 148.

⁴⁴ AA Cançado Trindade, *The Application of the Rule of Exhaustion of Local Remedies in International Law: Its Rationale in the International Protection of Individual Rights* (Cambridge University Press 1983) 1.

until the injured individual has exhausted all effective local remedies.⁴⁵ The rule of exhaustion of domestic remedies is in this context an inherent material element of an international human rights violation (or denial of justice in the case of diplomatic protection).⁴⁶

Chapter 2 explores in detail the understanding of exhaustion of domestic remedies as a substantive element of denial of justice and human rights claims. When analysing the origins and shaping of the rule of exhaustion of domestic remedies, the chapter looks at the debates in the early 20th century about the meaning of denial of justice that took place in the context of the wider dispute between capital exporting and importing states over the exercise of a minimum standard of treatment with respect to foreigners and their property. It looks in detail at the Calvo Doctrine espousing a national as opposed to international treatment and the Calvo Clause used by Latin American states requesting exhaustion of domestic remedies before recourse to international adjudication or retaliation.⁴⁷ Chapter 2 explains how the *Dredging*⁴⁸ decision interpreting the scope of the Calvo Clause, upheld the right of states to intervene diplomatically in cases of denial of justice but at the same time denied individuals that had signed a Calvo Clause the right

⁴⁵ The ICJ held in the *Interhandel* case that "the rule requiring the exhaustion of domestic remedies as a condition of the presentation of an international claim is founded upon the principle that the respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system the wrong alleged to have been done to the individual." ICJ Reports (1959), 27.

⁴⁶ There is a serious debate over the question of whether the exhaustion of local remedies rule is substantive or procedural or both. For a detailed analysis of the history, purpose, and use of the rule of exhaustion of domestic remedies in general international law and international human rights law, see S D'Ascoli and K Scherr, 'The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection' (2007) European University Institute Working Paper LAW No. 2007/02. See also J Dugard, 'Diplomatic Protection' in Crawford, *The Law of State Responsibility* (n 51) 1061. For a more detailed discussion on this topic, see Chapter 2 on state responsibility, diplomatic protection, and the duty to afford reparation to individuals.

⁴⁷ The Calvo Doctrine and Clause are analysed in detail in Chapter 2.

⁴⁸ *North American Dredging Company* (n 218)

to request such protection without prior exhaustion of local remedies (despite a waiver of such rule in the arbitration treaty). With these findings, the tribunal clarified the understanding of denial of justice as a systemic breach where the exhaustion of local remedies is a substantive part of the breach and not simply a question of admissibility that can be waived by the parties. Chapter 2 concludes that in the same way that denial of justice is understood as a system failure, where exhaustion of domestic remedies is an inherent material element of the IWA of denial of justice, international HR violations materialise as IWAs after states fail to afford effective domestic remedies and reparation in accordance with international standards.

Importantly, when the prohibited acts or omission are massive and/or systematic, there is no need to exhaust local remedies. As noted by the International Law Commission (ILC) ‘[...] International complaint procedures, for example in the field of human rights, attach different consequences to systematic breaches, e.g. in terms of the non-applicability of the rule of exhaustion of local remedies’.⁴⁹ When violations are massive and/or systematic, it is assumed that there are no effective domestic remedies and/or the violations committed are part of a direct policy of the state.⁵⁰ The ILC – when commenting upon former Article 19 on ‘crimes’ of states (now Article 40 of the ILC Responsibility Articles⁵¹) – considered that a telling example of a state crime was ‘a

⁴⁹ ILC Responsibility Articles, Commentary to Article 40 [7]. The Commentaries to the ILC Responsibility Articles are reproduced in Report of the ILC Responsibility Articles (n 23).

⁵⁰ ‘Human rights treaty bodies and courts have developed a consistent jurisprudence that on-going massive violation or recurring patterns of violations are indicative of ineffective domestic remedies, thereby relieving the complainant(s) of having to exhaust such remedies’. L Oette, ‘Bringing Justice to Victims’ in C Ferstman et al (n 21) 225.

⁵¹ Reproduced in Report of the ILC Responsibility Articles (n 23). According to the ILC Commentary to Part 3 and Article 40, since there has been no development of penal consequences for states, the ILC’s

large-scale or systematic practice adopted in contempt of the rights and dignity of the human being'.⁵² Similarly, the International Criminal Tribunal for the Former Yugoslavia (ICTY) held in *Furundzija*:

[i]f carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human beings, this constituting a particularly grave wrongful act generating State responsibility.⁵³

Even when violations are not widespread, if carried out in an organised and deliberate way, they are regarded as systematic. A state, for example, can be responsible for war crimes on the basis of a single case or a host of cases of killings of prisoners of war when it is established that these crimes are committed under a direct policy of the state: 'What suffices here is proof of the existence of a pattern of violence and the possibility of inferring from this pattern the acquiescence by the state's military and political authorities in or even approval of the criminal behaviour of their subordinates'.⁵⁴ It must also be borne in mind that certain 'state crimes', like the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.⁵⁵ It could be argued

adopted Articles do not differentiate between 'crimes' and 'delicts' of states anymore. However, Article 40 still reflects that when acts are gross or systematic there are certain implications for the secondary rules of state responsibility. See generally ILC Responsibility Articles, Commentary to Part III and Article 40. The Commentaries to the ILC Responsibility Articles are reproduced in Report of the ILC Responsibility Articles (n 23). See also M Koskenniemi, 'Doctrines of State Responsibility' in J Crawford et al (eds), *The Law of State Responsibility* (OUP 2010) 48-49.

⁵² See (1976) 2(2) YB ILC 121 [70].

⁵³ *Furundzija (Judgment)* ICTY-IT-95-17/1-T (10 December 1998) [141].

⁵⁴ P Gaeta, 'On What Conditions Can a State Be Held Responsible for Genocide?' (2007) 18(4) Eur J Int Law 631, 641 [hereinafter 'Genocide'].

⁵⁵ Commentary to Article 41 (8) reproduced in Report of the ILC Responsibility Articles (n 23). For a detailed discussion on the responsibility of states for the crime of genocide, see Gaeta 'Genocide' (n. 54), where she argues that state responsibility for international crimes is different than the international criminal liability of individuals. Her article criticises the ICJ ruling on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* on the basis that the Genocide Convention establishes obligations on states to criminalise individual acts of genocide and does not prohibit or regulate state acts of genocide. See also: *Application of the Convention on the Prevention and Punishment of the*

therefore that certain violations (so called state-crimes) by their very nature automatically entail state responsibility.⁵⁶

B. Different types of rights in international law: primary, secondary and tertiary rights

Disconnecting a subject's substantive rights from the procedural means to enforce such rights (e.g. separate primary and secondary rights) became commonplace in international law after the UN Charter recognised fundamental HR and freedoms of persons. At the time, no international mechanisms or treaties giving individuals any form of international standing existed; individuals could not assert any rights without the intermediation of states. Still, many advocated that even without individual standing, natural persons were the true holders of international rights. Lauterpacht, for example, insisted that individuals were subjects of international law with rights, notwithstanding that, as the law stood in 1947, they could not assert these rights directly in the international sphere.⁵⁷ This has

Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), International Court of Justice, 26 Feb. 2007.

⁵⁶ In terms of state responsibility in international law, there is a difference between 'state torture' and an isolated case of torture committed by a state official. The first case entails state responsibility when a pattern of 'system criminality' is proven. The second requires exhaustion of effective domestic remedies if available. The state commits an IWA when it fails to redress the torture. The same scenario applies to any violation of human rights that is not adequately redressed at the domestic level, regardless of the gravity of the act. The only difference would be that HR law requires specific remedies for serious violations of HR like access to judicial as opposed to administrative remedies. One can take the view that in the case of so-called state crimes the rule of exhaustion of domestic remedies is not applicable because the direct intent of the state can be proven. The state is breaching the international legal order directly. The IWA materialises irrespective of domestic remedies. It is also possible to argue that the rule of exhaustion of domestic remedies is not applicable because it is assumed that there are no effective remedies available. As observed in the conclusions, this nuanced difference can have an impact on the debate over non-state responsibility for human rights violations or the obligation to afford reparation for IHL violations (where non-state liability is recognised and no individual claims mechanism exists at the international level). Gaeta describes the special circumstances or particularities of state responsibility for international crimes. She argues that individual criminal responsibility is different from state responsibility at the international level. See Gaeta 'Genocide' (n. 54) 641.

⁵⁷ H Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947) 438. In 1950, Lauterpacht made himself the champion of the new concept of international law in his famous book *International Law and Human Rights*, where he wrote: 'The Charter of the United Nations, in recognising

changed considerably and today there are many treaties and mechanisms affording international standing to individuals. Still, as it will be analysed in detail below, some jurists argue that individuals have no right to reparation in international law.⁵⁸

The present chapter will show how, despite the development of international law since WWII, it is still debated whether individuals enjoy substantive rights directly under international law (e.g. whether the right not to be tortured is a right of the individual or a right of states to ensure that no other state commits torture). By the same token, it is still questioned whether even if individuals enjoy substantive international rights, they have a secondary right to reparation or/and a (tertiary) right to claim it when these primary rights are breached.

If one argues that individuals do not enjoy primary rights, then it follows logically that individuals do not have a secondary right to reparation (again, the right to reparation belongs to states and states can set up mechanisms to allow victims to seek reparation directly).⁵⁹ The protection of human rights is in this scenario completely dependent on the will of states and individual victims have no means to enforce these ‘state-human’ rights.⁶⁰ However, many commentators argue that individuals can be holders of substantive rights without necessarily being holders of the procedural rights to enforce

the fundamental human rights and freedoms, has to that extent constituted individuals subjects of the law of nations’. H Lauterpacht, *International law and Human Rights* (FA Praeger 1950) 61.

⁵⁸ See: Section 4 of Chapter 1

⁵⁹ The notion in traditional diplomatic protection that the injury to the individual is an injury to the state itself has been criticised as an exaggeration, ‘a “legal fiction”’. Still, according to John Dugard, Special Rapporteur on Diplomatic Protection, even if ‘diplomatic protection is premised on a fiction, it is an important institution of customary international law which serves as a valuable instrument for the protection of the persons and property aliens’ – Dugard, ‘Diplomatic Protection’ in Crawford, *The Law of State Responsibility* (n 51) 1052. Furthermore, human rights law has influenced the law on diplomatic protection. Today it is generally accepted that the right to a remedy belongs to both the state of nationality and the individual victim. See Chapter 2 for further discussion.

⁶⁰ ‘By establishing and consenting to human rights limitations on their own sovereignty, states actually define, delimit, and contain those rights, thereby domesticating their use and affirming the authority of the state as the source from which such rights spring’ – M Koskeniemi, *International Law (International Library of Essays in Law and Legal Theory)* (Aldershot 1991) 406.

them. This approach to individual rights leads to complex scenarios where the rights of victims and the victims' standing in international law become ambiguous. In general, four positions can be identified in regards to primary and secondary (human) rights and will be discussed in detail in this chapter:

- Position 1: Individuals only have primary rights when secondary rights can be enforced in established international mechanisms. So if there is a (established international) remedy, there is a right. If there is no (established international) remedy, there is no right. Since there is no established universal HR remedy, there is no right to reparation under CIL.
- Position 2: Individuals have primary rights but no secondary rights to reparation. Individuals can have rights without (established) remedies, so the right to reparation is independent and not a corollary of a primary right. Nowadays, HR treaties only afford a partial right to reparation and there is no right to reparation under CIL.
- Position 3: Individuals have primary and secondary rights but no tertiary rights to claim reparation directly in international law. Only states have such procedural capacity under international law and need to specifically grant this capacity to individuals (e.g. by setting human rights bodies, claims commissions, etc.) or espouse their claims through diplomatic protection. Consequently, individuals cannot bring claims before domestic tribunals solely on the basis of international law, unless the national legal system allows it.

- Position 4: Individuals have primary rights and a corollary secondary right to claim reparation. In other words, if there is no right there is no remedy. But if there is a right there should be a remedy.

C. Individual criminal responsibility and reparation

Chapter 3 of this thesis analyses in some detail the relation between ICL and the right to reparation. However, it is important at this point to offer a clarification on international crimes, particularly piracy, and its relation to international personality and reparation. There is a clear link between criminal responsibility under ICL and an individual's legal personality in international law (and therefore with individuals' right to claim reparation). In this context, the doctrine of *hostis humani generis* (or 'the enemy against all mankind') is one of the few principles of international law preceding the UN Charter that offers evidence of recognition of individuals as actors of international law. However, it is debatable whether piracy – which has been recognised as a 'crime against the law of nations' for centuries – should be seen as a jurisdictional rule allowing states to exercise jurisdiction or a rule conferring legal personality on individuals. Even if 'since Second World War real forms of individual criminal responsibility under international law have developed'⁶¹ and therefore it can be argued that the individual can be considered today a

⁶¹ '[...] First steps were taken with the establishment of the Nuremberg and Tokyo war crimes tribunals and the conclusion of the Genocide Convention in the immediate post-war period; after the end of the Cold War there followed in rapid succession the creation by the Security Council resolution of the International Criminal Tribunal for Yugoslavia (1992) and Rwanda (1994), and then the adoption of the Rome Statute of the International Criminal Court (1998) which entered into force on 1 July 2002'. J Crawford and S Olleson, 'The Nature and Forms of International Responsibility' in M Evans (ed), *International Law* (4th edn, Oxford University Press 2014) 445.

subject of international law with ICL obligations and its corollary rights,⁶² it still leaves the question of rights and reparation unanswered. Arguing that individuals are obliged to follow international law precepts does not necessarily mean that they can invoke them as the required standard of behaviour in other actors (e.g. such as states).⁶³ As will be explained in the following section, it is not sufficient to look at whether the individual is a subject, an actor, or a participant in international law to establish the existence of individual primary and secondary rights. It is necessary to determine first which conditions have to be fulfilled to qualify a rule under international law as a norm containing an individual right and then to examine whether any general regime of reparations has developed to cover the individual holders of such right(s). It is in this respect that looking at the developments of ICL and its recognition of international individual standing (e.g. the rights of victims under Article 75 of the Rome Statute to lodge claims of reparation directly before the International Criminal Court) can help clarify whether a general regime of reparations has been developed in respect to certain rules.

3. The subject/object discussion

⁶² See for example Cassese, who assumes corresponding rights to every individual obligation under general ICL. Footnotes 72-73 and accompanying text. Clapham goes further and argues that a progressive understating of international law recognises individual as subjects that have not only criminal law obligations and their corollary rights but that also have civil law obligations: ‘...individuals are now seen as having not only criminal law obligations but also rights under international law. If we do not want the development of international law to stagnate we should perhaps admit the progressive idea that individuals have, in addition to these rights and criminal law obligations, certain international civil law obligations; this step could help to build an international community which properly recognizes the role of the individual in international law’. A Clapham, ‘The Role of the Individual in International Law’ (2010) 21(1) *European Journal of International Law* 25.

⁶³ R Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 54.

While international law has traditionally been understood as a law of states, the issue of the role of the individual in international law has been a part of the debate over the nature of the international legal system for centuries. In 1532, Francisco de Vitoria considered that the indigenous peoples of America had some claim to protection under international (natural) law.⁶⁴ Still, the dominant view has been that individuals have no effective role in the international legal system. Rather, their role is determined by states and is entirely subject to states' consent. The leading positivist theories confirm such a construction. The position is that: 'Since the Law of Nations is a law between States only, and since the States are the sole exclusive subjects of International Law, individuals are mere objects of International Law, and the latter is unable to confer directly rights and duties upon individuals'.⁶⁵

Under this traditional view, individuals are objects, either in the same sense as territory or rivers are objects of the system because there are (state-created) legal rules about them, or in the sense that they are beneficiaries under the system, so that treaties on, for example, diplomatic persons or commerce, indirectly benefit individuals.⁶⁶ Yet, the classical doctrine of international law had to be reconsidered after the Charter of the United Nations opened the doors of international law to the individual. Hersch Lauterpacht, who continued Oppenheim's treatise, made himself the champion of the new concept of international law in his famous book *International Law and Human Rights*, in which he

⁶⁴ RA Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (OUP 1990) 93.

⁶⁵ Oppenheim, *International Law* (n 33) 341.

⁶⁶ R McCorquodale, 'The Individual and the International Legal System' in M Evans (ed), *International Law* (4th edn, OUP 2014) 286.

wrote: ‘The Charter of the United Nations, in recognising the fundamental human rights and freedoms, has to that extent constituted individuals subjects of the law of nations’.⁶⁷

Since the creation of the UN, numerous human rights treaties have been adopted. However, for many it is not sufficient to refer to the existence of human rights treaties in order to draw the conclusion that personality under international law exists. Given that states create these rights in the first place, the position of states as sole rights-holders in the international legal system seems to prevail. As Koskenniemi explains, ‘by establishing and consenting to human rights limitations on their own sovereignty, states actually define, delimit, and contain those rights, thereby domesticating their use and affirming the authority of the state as the source from which such rights spring’.⁶⁸ While Koskenniemi’s observation refers to the structure of international law as a whole, a number of customary rights of individuals in the international system are now, to some extent, separate from the specific control and direction of states, particularly those protected by *jus cogens*⁶⁹ norms that give rise to obligation *erga omnes*.⁷⁰ One could refer

⁶⁷ Lauterpacht, *Human Rights* (n 57) 61.

⁶⁸ M Koskenniemi, *International Law* (n 60) 406.

⁶⁹ Peremptory norms of international law (*jus cogens*): Some rules of international law are recognised by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character. See US Restatement (third) of Foreign Relations Law, 102 (1987).

⁷⁰ According to the ICJ judgment in *Barcelona*, an essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-a vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. *Barcelona Traction Case* (Second Phase), Belgium v. Spain, I.C.J. February 5, 1970 [33]. For a critique on the view that the breach of *jus cogens* norms give rise to obligations *erga omnes*, see P Picone, ‘The Distinction between *Jus Cogens* and Obligations *Erga Omnes*’ in E Cannizzaro (ed) *The Law of Treaties Beyond the Vienna Convention* (OUP 2011) 411.

to these as independent rights within the international legal system. For example, Kooijmans has said:

[S]ince we have seen that *erga omnes* obligations exist independently of State consent, the corresponding rights exist also independently of State consent. That means that the bearer of these rights, the individual, has an international legal status that cannot be dependent upon state consent either. The individual's status in international law, therefore, would not be derivative but original.⁷¹

In a similar way, when looking at individuals' obligations under international criminal law, Cassese argues that one can assume 'corresponding rights' to every individual's 'strict international obligation fully to respect some important values (maintenance of peace, protection of human dignity, etc.)'.⁷² He claims:

It would be not only consistent from the viewpoint of legal logic but also in keeping with new trends emerging in the world community to argue that the international right in respect of those obligations accrues to all individuals: they are entitled to respect for their life and limbs, and for their dignity; hence they have a right not to become a victim of war crimes, crimes against humanity, aggression, torture, terrorism.⁷³

The International Court of Justice (ICJ) clarified the issue of international personality and what a 'subject' of the international legal system is in its *Reparations for Injuries Opinion*, which concerned the question of whether the United Nations had the capacity to bring an international claim against a state for injuries of one of its agents. The Court concluded that 'the Organization is an international person'.⁷⁴ According to the Court, being an international person means that: 'it is a subject of international law and capable

⁷¹ P Kooijmans, 'Contribution to Discussion (Part 4)' in A Randelzhofer and C Tomuschat (eds), *State Responsibility And The Individual: Reparation In Instances of Grave Violations of Human Rights* (Martinus Nijhoff 1999) 248.

⁷² A Cassese, *International Criminal Law* (2nd edn, OUP 2005) 145.

⁷³ *Idem* 145.

⁷⁴ *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 1949, 174,179 [hereinafter *Reparations Opinion*].

of possessing international rights and duties, and that it has the capacity to maintain its rights by bringing international claims'.⁷⁵

The Court further clarified that there can be subjects of the international legal system that are not states, but these subjects do not all possess the same rights and duties, and not all of these rights and duties need to be on the international plane alone. It also explained how the international legal system has developed, and continues to develop, in ways that allow non-state actors to have international legal personality and so to act independently in the international legal system:⁷⁶

The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States...⁷⁷

But while one might think that the notion of international legal 'subjectivity' is a first port of call for anyone seeking to examine the existence of individual primary and secondary rights, the existing jurisprudence is not necessarily helpful. If we ask ourselves whether individuals are subjects of law in order to establish whether individuals have rights and duties and the capacity to challenge violations of their rights, then the definition of subjects of international law in the *Reparations for Injuries Opinion* will lead us nowhere. As Brownlie points out, the ICJ definition of a subject of international law as 'an entity capable of possessing international rights and duties and having capacity

⁷⁵ Idem 179 (emphasis added).

⁷⁶ McCorquodale (n 66) 285.

⁷⁷ *Reparations Opinion* (n 74) 178.

to maintain its rights by bringing international claims' is circular.⁷⁸ International law recognises the capacity to act at the international level of an entity that is already capable of acting at the international level.

The notion of subjects/objects of international law is being increasingly rejected in legal doctrine. For example, after looking at whether there are truly rules for determining who can be classed as a subject, Higgins concludes: '[t]he whole notion of "subjects" and "objects" has no credible reality, and... no functional purpose'.⁷⁹ Higgins seems to suggest that the whole enterprise is constructed by doctrine and consequently can be dismantled by doctrine: '[w]e have erected and intellectual prison of our own choosing and then declared it to be an unalterable constraint'.⁸⁰ A number of writers have criticised the 'subject' v 'object' dichotomy, not least, because it privileges certain voices and silences others.⁸¹ Clapham explains how these categories are used to exclude potential actors of international law: '[i]t seems assumed that increasing the categories of international legal persons recognised under international law will lead to an expansion of the possible authors of international law. This, of course, is seen to threaten the viable development of a decentralized, state-centred international legal order'.⁸²

Higgins offers an alternative approach, preferring the idea of the 'participant' in the international legal decision-making process. Under this view, there are many participants

⁷⁸ Brownlie, *Principles* (n 24) 57.

⁷⁹ Higgins, *Problems and Process* (n 63) 49.

⁸⁰ *Idem* 49.

⁸¹ Koskeniemi, 'Doctrines of State Responsibility' (n. 51) 50.

⁸² A Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 63.

in the international legal system, in the sense that there are many different entities – from states and international organisations to transnational corporations and natural persons – who engage in international activity. Participation may be extensive and over a wide range of international matters or it can be limited to a few issues. Participation will depend on the particular area of the international legal system concerned and the activity and involvement of entities in that area, rather than on the determination by states as to whether any non-states are ‘subjects’ for a specific purpose. McCorquodale points out that considering individuals as ‘participants’ rather than ‘objects’ or ‘subjects’ is a compelling and practical argument: a flexible framework to explore the involvement of the individual in the international legal system.⁸³ However, it still leaves open the question of whether individuals as ‘participants’ have direct rights in international law, and consequently, whether they have a right to reparation and the capacity to bring international claims. After explaining her approach on individuals as participants of the international legal order, Higgins still asks:

What exactly do we mean when we ask if international law *applies* to individuals? Do we mean, are they obliged to follow its precepts? Or do we mean can they *invoke* it as the required standard of behaviour in other actors, such as states? These are difficult questions, and we will need to approach the underlying issues step by step.⁸⁴

So whether we consider the individual a subject of international law or simply a participant, it is still necessary to determine which conditions have to be fulfilled to qualify a rule under international law as a norm containing an individual right. In

⁸³ Evans, *Reparation for Victims* (n 11) 302.

⁸⁴ Higgins, *Problems and Process* (n 63) 54.

addition, it is also necessary to examine whether any general regime of reparations has developed to cover individuals.

4. Analysing the different positions in regards to international norms containing individual primary and secondary rights

There are various international conventional norms on human rights that expressly establish obligations of reparation upon states that have breached norms protecting individuals. Clearly, other states and, in certain cases, the international community as a whole have corresponding rights against these wrongdoing states.⁸⁵ But can we nowadays say that individual victims of a breach equally have corresponding rights?

A. Position 1: Individual primary rights only exist when established procedural remedies are in place, therefore there are no individual primary and secondary rights under Customary International Law (CIL)

Logically, if a procedural avenue to claim a breach of an individual right is in place, then the existence of a primary right can be inferred. Based on this general premise, however, In a Kelsenian manner,⁸⁶ Tomuschat deduces that it is only when there are established international procedural remedies that true (human) rights exist. According to him, the existence of a right depends on the availability of a procedure to enforce the right under international law. Without the factual possibility of enforcement, one cannot talk about

⁸⁵ See Section IV.

⁸⁶ Since no international courts with compulsory jurisdiction existed back in 1945, Kelsen argues: “it may be doubted whether general international law really stipulates a duty of reparation [since] general international law does not provide a procedure by which the contents of this duty can be determined.” Hans Kelsen, *General Theory of Law and State* (Cambridge HUP 1945) p 357,

individual rights.⁸⁷ In his view, since rights in HR treaties are always conferred upon individuals by a sovereign national act, individuals only have ‘domestic’ rights unless there is an established international procedural remedy to enforce them. It is only then that the individual becomes independent of the will of the state: ‘[He]/she can then assert his/her rights directly, even if the respondent, the state of nationality, may disagree with “internationalizing” the dispute [...]’.⁸⁸

Tomuschat argues that since there is no universal human rights court, it is clear that individuals do not enjoy rights under CIL. Following Tomuschat’s rationale, the Tokyo High Court denied a reparation claim by the ‘comfort women’⁸⁹ based on international law, referring to the fact that no right can exist because there is no international procedure under which the individual could exercise such rights.⁹⁰

However, there is strong evidence showing that regardless of established procedural remedies, individuals can have rights under treaty and customary law. The PCIJ said in *Jurisdiction for the Courts of Danzig* that ‘it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adaptation by the parties of some definite rules creating individual rights and

⁸⁷ C Tomuschat, ‘Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law’ in Randelzhofer and Tomuschat (n 71) 1.

⁸⁸ C Tomuschat, *Human Rights: Between Idealism and Realism* (OUP 2003) 305.

⁸⁹ On the initiative of the Japanese military, ‘comfort stations’ were set up and operated between 1930 and 1945. Here an estimated 200,000 ‘comfort women’ were pressed into prostitution. For a discussion of the facts and the Japanese court rulings see M Igarashi, ‘Post-War Compensation Cases, Japanese Courts and International Law’ (2000) 43 Japanese Annual of International Law 45.

⁹⁰ High Court Tokyo, *So Shinto*, 30 November 2000, analysed by H Kasutani and S Iwamoto, Japan, (2000) 3 Yearbook of International Humanitarian Law 544 [hereinafter *So Shinto case*].

obligations...’.⁹¹ The ICJ held in *LaGrand* that Article 36(1) of the Vienna Convention on Consular Relations ‘creates individual rights’.⁹² Article 33(2) of the ILC Responsibility Articles has corroborated the view that individuals can be the beneficiaries of treaty provisions. The ILC Commentary on this rule makes it clear that individuals may be regarded as the ultimate beneficiaries of international norms and thus the holders of the relevant rights.⁹³

In the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁹⁴ the ICJ does seem to acknowledge that certain secondary individual rights exist under CIL when the fundamental rights of individuals are breached. The Court stated in this case that Israel was obliged under international law to afford reparation to all natural and legal persons injured by the construction of the wall.⁹⁵ The Court seems to

⁹¹ *Jurisdiction of the Courts of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration) (Advisory Opinion)* (1928) PCIJ Series B no 15 [17], [18], [37]. [Hereinafter *Danzig*].

⁹² *LaGrand (Germany v. United States of America)* [2001] ICJ Rep 29 [77]. As explained in more detail in Chapter 4, while states can protect their nationals through consular assistance and diplomatic protection, there are fundamental differences between these two mechanisms. Any intervention, including negotiation, on inter-state level on behalf of a national *vis-à-vis* a foreign state for an international wrongful act is ‘diplomatic protection’. While something that starts as consular assistance may end up as diplomatic protection at a later stage, the latter forms part of the secondary rules of international law and belong only to states. States and not individuals have a right to exercise diplomatic protection. In contrast, consular assistance forms part of a body of primary rights to which states and individuals may be the holders. If these (primary) rights are breached, then the state is allowed to exercise its right to reparation directly (when its state-rights are breached) or indirectly, through its secondary right of diplomatic protection on behalf of its national. For a detailed analysis of the difference between consular assistance and diplomatic protection see: A Kunzli, ‘Exercising Diplomatic Protection: the fine line between litigation, demarches and consular assistance’ (2006) 66 *ZaöRV/HJIL* 321.

⁹³ ‘This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State’, Article 32 (2), Report of the ILC Responsibility Articles (n 23). See also the Commentary to Article 32, reproduced in the Report of the ILC Responsibility Articles (n 23). [3-4].

⁹⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 131. [hereinafter *Wall Opinion*].

⁹⁵ *Wall Opinion* (n 94) 198 [152-153].

derive this obligation from general international law. Firstly, it cites the *Chorzów* case to refer to the appropriate forms of reparation, applying, therefore, state responsibility principles to reparation to individuals.⁹⁶ Secondly, it can only be derived from CIL since there is no treaty between Israel and Palestine that explicitly provides reparation to individuals for the breaches alleged (and as will be shown below, the Court does not derive this right from the treaties in force in Israel).⁹⁷

The Court found violations of the Hague Regulations of 1907, Articles 46 and 52, as well as the Fourth Geneva Convention of 1949, Articles 49 and 53. These provisions do not contain any references to an obligation to make reparation to individuals. In fact, some commentators contend that these provisions do not even contain individual rights.⁹⁸ On the other hand, it has been argued that these norms do contain individual rights⁹⁹ – or that

⁹⁶ *Wall Opinion* (n94).

⁹⁷ Following the *Wall Opinion* (n94), the ICJ has given reparations for HR and IHL violations in two subsequent occasions. In the *Armed Activities Case* against Uganda, the Court considered that given the nature and gravity of the violations, ‘those acts resulted in injury to the DRC and to persons on its territory’, and thus imposed upon Uganda an obligation to make reparations accordingly. In reaching that conclusion, the Court relied generally on its previous decisions, including the *Chorzów* (n 22), and *Case Concerning Armed Activities Case in the Territory of the Congo (Democratic Republic of Congo v. Uganda)(Judgment)* [2005] ICJ Rep 82 [259] [hereinafter *Armed Activities Case*]. On the other hand, by acknowledging the responsibility of Uganda for injuries suffered by persons in the DRC, the Court implicitly seems to acknowledge the obligation to repair that harm accordingly. The DRC therefore arguably has the right to request individual reparations on behalf of its citizens who were wronged by Uganda’s conduct. In *Diallo*, a diplomatic protection case brought by Guineas against DRC, the Court recalled the fundamental character of the human rights obligations breached when affording reparation in accordance with the *Chorzów* principle. *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Judgment)* [30 Nov 2010] IJC Rep 639 [161].

⁹⁸ R Hofmann, ‘Victims of Violations of International Humanitarian Law: Do they Have an Individual Right to Reparation against States under International Law?’ in P-M Depuy et al (eds) *Völkerrecht als Wertordnung/Common Values in International Law: Festschrift für/Essays in Honour of Christian Tomuschat* (NP Engel Verlag 2006) 341; R Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press 2005) 27.

⁹⁹ See e.g.: F Kalshoven, ‘State Responsibility for Warlike Acts of the Armed Forces’ (1991) 40 ICLQ. 827.

today they must be interpreted as containing individual rights¹⁰⁰ – and that Article 3 of The Hague Regulations and Article 91 of the Additional Protocol I to the Geneva Conventions provide for an obligation to make reparation to individuals.¹⁰¹ The Court is silent in this regard. It only mentions that these IHL violations are fundamental and give rise to *erga omnes* obligations.¹⁰²

The Court also determined that Israel had breached several HR treaty obligations by constructing the wall, including Article 12 of the International Covenant on Civil and Political Rights (ICCPR) and several other rights under the International Covenant on Economic, Social and Cultural Rights. Yet, the Court does not refer to these treaties as the source for a secondary right to reparation. It determines nonetheless that the manner in which Israel is breaching these obligations constitutes a violation to the right to self-determination, which is a fundamental right giving rise to *erga omnes* obligations.¹⁰³ In other words, the ICJ seems to be implying that there is an obligation under international law to make reparation to individuals for violations of HR and IHL in breach of *erga omnes* obligations. Not even the Separate Opinion of Judge Higgins, which is highly critical of the Court's analysis of human rights and IHL, disagrees on this point.¹⁰⁴

¹⁰⁰ The report of the *International Commission of Inquiry on Darfur* states that even if Article 3 of the Hague Convention IV was not initially intended to provide compensation for individuals, it does so in the present day, as the emergence of human rights in international law has altered the concept of state responsibility. See: 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (25 January 2005) Security Council Res 1564 [593 et seq.]. [Hereinafter *Darfur Report*].

¹⁰¹ See, for example, the Preamble of the UN Principles and Guidelines (n 2) and Expert Opinions by F Kalshoven, E David, and C Greenwood in H Fujita, I Suzuki, and K Nagano (eds) *War and the Rights of Individuals, Renaissance of Individual Compensation* (Nippon Hyoron-sha 1999), 31, 49, 59. See further discussion in Chapter 3.

¹⁰² *Wall Opinion* (n94) [154-159].

¹⁰³ *Wall Opinion* (n94) [122].

¹⁰⁴ Separate Opinion of Judge Higgins, *Wall Opinion* (n94) [24-37].

Interestingly, Tomuschat recognises a set of core individual rights under customary international law: ‘It is indeed my conviction that the crimes listed in the draft Code of Crimes and in article 19 of the draft Articles on State responsibility – you could call them also crimes or *erga omnes* violations – prove that the individual can be considered a holder of rights under international law if he or she is protected by such basic rules’.¹⁰⁵ So one is left wondering whether Tomuschat actually acknowledges that individuals do have some fundamental rights under CIL (but no secondary right to reparation). However, this conclusion would contradict his previous premise that an established procedural international remedy is a precondition to proving the existence of a primary right.

B. Position 2: Regardless of primary rights, individuals only have a partial right to reparation under some treaty regimes and have no secondary rights under CIL

For some commentators, the *Chorzów* principle does not apply to individuals.¹⁰⁶ It is not sufficient to establish that individuals have primary rights to assert that they also have corresponding secondary rights to reparation. ‘Secondary’ rights need to be specifically established by treaty or customary law.¹⁰⁷ Pisillo-Mazzeschi, for example, considers the European and Inter-American HR protection systems as exceptional and in no manner reflecting general international law or contributing to the formation of a right to

¹⁰⁵ Randelzhofer and Tomuschat, *State Responsibility and the Individual* (n 71) 250.

¹⁰⁶ *Chorzów* (n. 22)

¹⁰⁷ See, for example, Pisillo-Mazzeschi, ‘International Obligations to Provide for Reparation Claims’ in Randelzhofer and Tomuschat, *State Responsibility and the Individual* (n 71) 149.

reparation under CIL.¹⁰⁸ Likewise, Tomuschat believes that the existence of international remedies in human right treaties is not sufficient to create a secondary right outside the treaty regimes.¹⁰⁹

Tomuschat backs this proposition by arguing that under universal and regional human rights treaties individuals do not enjoy a ‘full right to reparation’ because the reparations awarded do not always include ‘financial compensation’. In his view, even though the European Court of Human Rights (ECtHR) changed its reparation practice after *Papamichalopoulos v Greece*,¹¹⁰ it still ‘considers that in a vast group of cases the official acknowledgment of a violation constitutes sufficient reparation’.¹¹¹ He also points out that the Court refuses to afford compensation if, in its view, the victim was engaged in reprehensible activity.¹¹² For Tomuschat, this is evidence that the individual does not hold a true right to reparation under the ECHR.¹¹³

In a similar way, Tomuschat sees Article 63 of the American Convention of Human Rights (ACHR) enjoining the Court to ‘rule, if appropriate, that the consequences of the

¹⁰⁸ Idem 160-164.

¹⁰⁹ Tomuschat *Between Idealism* (88) 296.

¹¹⁰ Series A no 260-B, App no 14556/89 16 EHRR 440.

¹¹¹ C Tomuschat ‘Individuals’, in J Crawford et al, *State Responsibility* (n 51) 987.

¹¹² The ECtHR has denied compensation when the victims are engaged in misconduct or organised crime. For example, in *McCann v. United Kingdom*, the Court found it inappropriate to make an award because ‘the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar’. *McCann v. United Kingdom* (n 112).

¹¹³ Note that when establishing the compensation for Guinea on behalf of Mr Diallo, the ICJ, in a departure from its usual style, actively looked to the practice in other international bodies; including the European Court of Human Rights. It established that these bodies have applied general principles governing compensation when fixing its amount. The Court referred in detail to the practice of the ECtHR in affording compensation for human rights violations. *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Compensation Judgment)* [19 June 2010] ICJ [13], [24], [33], [40], [49], [56]. [hereinafter *Diallo (Compensation)*].

measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party’, as introducing a considerable measure of discretion. He explains that if individuals do not enjoy a ‘full right to reparation’ under treaty law, no such entitlement can exist under general international law, ‘as customary law does not go further in scope than the most advanced treaties on that same subject’.¹¹⁴

While he acknowledges the Inter-American Court’s clear pronouncement in favour of victims’ right to reparation, he argues that ‘the jurisprudence is not yet sufficiently consolidated to definitive conclusions to be drawn from it’.¹¹⁵ He reaches this conclusion despite the fact that the Inter-American Court of Human Rights (IACtHR) has, according to many, made extensive use of Article 63.¹¹⁶ More recently, Tomuschat has explained that the IACtHR has not handled many cases (therefore there is not sufficient jurisprudence to draw definitive conclusions) but more importantly, that the Court’s jurisprudence on reparations ‘is predicated on a basic misunderstanding’.¹¹⁷ According to Tomuschat, the IACtHR doesn’t understand that the principle that every violation of an international obligation entails the duty to make reparation only applies in inter-state relations. In his view, the well-known *Velasquez Rodriguez*¹¹⁸ dictum, as well as the

¹¹⁴ Tomuschat, *Between Idealism*, (n 88) 306.

¹¹⁵ Tomuschat ‘Individuals’, (n 111) 987.

¹¹⁶ See, for example, R Bernhardt, ‘Just Satisfaction under the European Convention on Human Rights’ in M Ragazzi, *International Responsibility Today: Essays in memory of Oscar Schachter* (Martinus Nijhoff 2005), citing B Saul, ‘Compensation for Unlawful Death in International Law: A Focus on the Inter-American Court of Human Rights’ (2004) 19 *American University International Law Review* 523, 85.

¹¹⁷ Tomuschat, *Between Idealism* (n 88) 407.

¹¹⁸ *Velásquez Rodríguez* (n 164)

Court's references to the *Chorzów*¹¹⁹ principle, are erroneous since neither the PCIJ nor the ICJ have said that states are under an obligation to fully compensate their own citizens where they have suffered harm at the hands of public authorities.¹²⁰

On the other hand, he views the jurisprudence of the HRC under the ICCPR as the boldest in respect of an individuals' right to reparation in universal (UN) treaties. However, he claims that the Committee's 'Views' are not decisions with binding effect, but constitute recommendations or suggestions, and that this is the way in which state parties to the ICCPR perceive them.¹²¹

There seem to be several flaws in Tomuschat's analysis, particularly because both the powers of international HR bodies and tribunals to afford reparation and the actual reparations afforded generally reflect international law practice – specifically on state responsibility for injury to aliens.¹²² So HR bodies generally follow the practice of international tribunals, affording reparation to individuals according to principles of general international law. This is not only the practice of HR courts and bodies, but also a practice accepted by states in general.

It is hard to understand how the discretion enjoyed by HR bodies to assess the nature of violations and the appropriate form of reparation demonstrates that individuals do not have a full right to reparation under these treaty regimes. International jurisprudence

¹¹⁹ *Chorzow* (n 22).

¹²⁰ Tomuschat, *Between Idealism* (n 88) 407.

¹²¹ Tomuschat 'Individuals' (n 111) 988

¹²² Shelton, *Remedies* (n 12) 56. See also Chapter 2.

recognises that judicial discretion is important to assess the nature of a breach and the type of reparation needed on a case-by-case basis.¹²³ It is the common practice of international courts and bodies to rule that no further reparation (e.g. compensation) is applicable when they consider that a declaratory judgement is sufficient relief. The ICJ has ruled that an authoritative finding of a breach constitutes sufficient satisfaction.¹²⁴ There are numerable examples of HR cases where the monitoring courts have followed the practice of the ICJ, even when in some cases more substantial remedies might have seen justified.¹²⁵

In addition, ‘restitution’, as opposed to ‘compensation’, is the traditional form of reparation in international law: ‘It is only where restitution is not possible that other forms are substituted’.¹²⁶ Financial compensation is only a subsidiary remedy.¹²⁷ The Commentary on the ILC Responsibility Articles explains that the role of compensation is to fill in any gaps to ensure full reparation for the damage suffered – as long as the damage is financially assessable.¹²⁸ For example, the ECtHR has always insisted on its competence to decide whether ‘just satisfaction’ is necessary, and it has underlined that ‘just satisfaction’ means that also the extent and amount of compensation can vary and depends upon circumstances of each case. The ECtHR has often awarded financial

¹²³ See, for example, *Avena and other Mexican Nationals (Mexico v. United States of America)* (Judgment) [2004] ICJ Rep 12 [119].

¹²⁴ See, for example, the *Corfu Channel* (n 343), *Avena and other Mexican National* (n.123), and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n. 55).

¹²⁵ For an analysis of national and international practice see Shelton, *Remedies* (n 12) 255-268.

¹²⁶ Crawford and Olleson, ‘International Responsibility’ (n 61) 467.

¹²⁷ Bernhardt, ‘Just Satisfaction’ (n 116) 251.

¹²⁸ Commentary, Report of the ILC Responsibility Articles (n 23) cph. IV.E.

compensation for moral damage under Article 41 (before Article 50) of the ECHR.¹²⁹ It is not obvious that the texts of this article permit such compensation, but the practice of the Court and the acquiescence of the state parties to the Convention leave no doubt that such compensation can and should be awarded.¹³⁰ In other words, the ECtHR is applying principles of state responsibility in awarding reparation to individuals.

It is undeniable that the discretion claimed, for example by the ECtHR, cannot exclude some arbitrariness. But if compensation is not included in some reparation awards, it does not necessarily demonstrate that individuals do not have a full right to reparation under these treaty regimes. It might simply show that compensation was not necessary in the specific case; and/or that the damage was not financially assessable; and/or that indeed the specific award failed to comply with international law principles on state responsibility. Certainly the ICJ has indicated that the basic principle of reparation articulated in the *Chorzów* case applies to reparation for injury to individuals, even when a specific jurisdictional provision on reparation is contained in the statute of the tribunal.¹³¹ In any case, the jurisprudence of both the European and the Inter-American Courts of HR afford in most cases compensation for moral and/or material damage caused by serious human rights violations.¹³²

¹²⁹ ECHR (n 39).

¹³⁰ Bernhardt, 'Just Satisfaction' (n 116) 247.

¹³¹ *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Advisory Opinion* (1973) ICJ Rep 166, 197-98 [hereinafter *Application for Review*] (citing *Chorzów Factory (Germany v. Poland) (Indemnity)* [September 2013] 1928 PCIJ Ser A) No. 17 [hereinafter *Chorzów (Indemnity)*]). In the *Chorzów* case, the Court found that its jurisdiction extends to method of payment, beneficiaries, and other aspects of reparation. See: *Chorzów*, (n 22) 61–62.

¹³² Shelton, *Remedies* (n 12) 56 -58.

While it is true that decisions under treaty-based individual complaints procedures are not *stricto sensu* legally binding, the monitoring bodies' Views cannot be seen as mere recommendations or suggestions. For example, the HRC has established that when states parties ratify the Optional Protocol in good faith, they intend to respect its Views. Indeed, the HRC, which applies general principles of state responsibility,¹³³ has emphasised the close link between the good faith fulfilment of the treaty obligations contained in Article 2(3) of the ICCPR and compliance with the Views concerning remedies when a violation has been found in an individual case. Some domestic courts have implemented the Views accordingly.¹³⁴ Additionally, some countries have adopted specific legislative procedures to give effect to the HRC views in individual cases.¹³⁵

Van Alebeek and Nollkaemper, after a thorough examination of the status of decisions of UN treaty bodies in national law, reach two conclusions. Firstly, that from an international law perspective, states '[...] have an obligation to allow Views and interim measures to take legal effect within their national legal order'.¹³⁶ Secondly, that '[T]reaty bodies are the principal interpreters of the UN human rights treaties. They clarify the normative content of the often broadly phrase rights and obligations in these treaties'.¹³⁷

Referring specifically to the Views of the HRC, Steiner also explains that this monitoring

¹³³ D McGoldrick, 'State Responsibility and the International Covenant on Civil and Political Rights' in M Fitzmaurice & D Sarooshi (eds), *Issues of State Responsibility Before International Judicial Institutions* (Hart Publishing 2004) 161-199.

¹³⁴ See Enforcement Report (n 40) 42.

¹³⁵ See Enforcement Report (n 40) 42. For a detailed analysis of enabling legislations, see R van Albeek and A Nollkaemper, 'The legal status of decisions by human rights treaty bodies in national law' in H Keller and G Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press 2012) 362-367.

¹³⁶ Van Albeek and Nollkaemper 'The legal status' (n 123) 358.

¹³⁷ *ibid.*

body confronts the ICCPR's 'ambiguities and indeterminacy, [resolve] conflicts amongst its principles and rights [and work] out meanings of its grand terms'.¹³⁸

In this respect, the ICJ recently acknowledged in *Diallo* the interpretative capacity of the HRC:

The interpretation above is fully corroborated by the jurisprudence of the Human Rights Committee established by the Covenant to ensure compliance with that instrument by the States parties (see for example, in this respect, *Maroufidou v. Sweden*, No. 58/1979, para. 9.3; Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant).

Since it was created, the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its findings in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its 'General Comments'.¹³⁹

C. Position 3: Individuals have no capacity to make international law claims under CIL despite having primary and secondary rights

Even commentators agreeing that individuals enjoy secondary rights under treaty or/and customary law still disagree on whether individuals have the capacity to bring claims directly under international law. As will be explained, some commentators argue that individuals do not have 'claims rights' or 'tertiary rights' to assert their international entitlements without the mediation of a state.

¹³⁸ HJ Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee' in P Alston and J Crawford (eds), *The Future of UN Treaty Monitoring Bodies* (Cambridge University Press 2000) 39.

¹³⁹ *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, (Preliminary Objections: Judgment) [24 May 2007] ICJ Rep 2007 [66].

Under this position, individuals have a right to reparation under CIL, but only states can claim reparation for them. Today there is no international mechanism where individuals can bring claims under general international law (i.e. there is no universal human rights court). The only option to bring such claims would be before domestic (national or foreign) courts. According to this view, individuals have no procedural capacity to bring a claim before a domestic court on the basis of international law. States can therefore establish procedures for individuals to claim international reparations (e.g. through HR conventions). However, where no such procedure is in place, individuals have to rely on the state of their nationality to bring diplomatic protection claims on their behalf.¹⁴⁰

Contrary to the principle that acknowledges the capacity to bring claims as inherent in the substance of a right (*ubi jus ibi remedium*), this approach distinguishes between: 1) the duty of states to provide reparation to other states; 2) the duty to provide reparation owed by states to an individual; and 3) the right of an individual to claim such reparation from a state. Even if a state has an international obligation towards an individual – and it must be assumed that the state is responsible if it violates that obligation – it is argued that state practice does not support the proposition that there is an individual right under international customary law to *claim* reparation in case of a breach.¹⁴¹

¹⁴⁰ According to Article 48 of the ILC Responsibility Articles (n. 23), in cases of serious breaches of *erga omnes* obligations any state could in principle espouse a claim on behalf of injured individuals. However, there is no international practice in this regard and it is not clear how such claims would relate to the practice of diplomatic protection.

¹⁴¹ See, for example, R Pisillo-Mazzeschi, 'International Obligations to Provide for Reparation Claims?' in Randelzhofer and Tomuschat (n 71) 171.

McCorquodale¹⁴² argues that Hohfeld (1913) demonstrated that a ‘right’ could mean a claim-right, a privilege, a power, or immunity (or a number of these at once). He further observes that the PCIJ in the *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal* case declared that ‘it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself’.¹⁴³ Additionally, he points out that many of the international institutions that determine claims, such as the ICJ, are barred to individuals even when cases arise from actions by or against individuals, like in the *East Timor* case.¹⁴⁴ The two cases cited as evidence that international law can afford individual rights without granting individuals the capacity to claim/exercise those right themselves will be examined in detail to show that they are by no means conclusive in regards to such a proposition.

In the *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal*, the PCIJ in fact disagreed with the position of Czechoslovakia that the Royal Hungarian Peter Pázmány University did not enjoy legal personality in Hungarian Law to claim restitution before the Hungaro/Czechoslovak Mixed Arbitral Tribunal, i.e. an international procedural remedy. The PCIJ highlighted that:

...it is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself. **No argument against the University’s personality in law can therefore be deduced from the fact that it did not enjoy the free disposal of the property in question.**¹⁴⁵

¹⁴² McCorquodale (n 66) 284-310.

¹⁴³ *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal, Judgement* (1933) PCIJ Series A/B no 61, 208, 231 [hereafter *Hungaro/Czechoslovak Tribunal*].

¹⁴⁴ *East Timor Case (Portugal v Australia) (Judgment)* [1995] ICJ Rep, 90 [hereinafter *East Timor Case*].

¹⁴⁵ See *Hungaro/Czechoslovak Tribunal* (n 143) 208, 2031(emphasis added).

The first part of this sentence has often been cited to argue that individuals and other non-state entities can have international rights without the capacity to exercise them; that is, to bring claims based on international law when these are breached.¹⁴⁶ But when making the statement, the Court is specifically looking at the domestic law of Hungary not at international law. It concludes that the fact that the University could not exercise civil rights in domestic legislation did not affect its personality in domestic law. The University therefore still had capacity as legal person to submit an international claim to the Mixed Arbitral Tribunal for the property in question.

So even if the above statement is considered as ‘not confined to civil law, but typical of any legal order’,¹⁴⁷ the Court may only be saying that the fact that juridical entities cannot exercise their rights themselves in certain circumstances does not mean that they have no legal personality. This is a different proposition than the one maintaining that individuals can have rights under international law but can only exercise them and claim redress via the state of their nationality. There are important differences between domestic and international law, and arguing today that individuals can only claim violations of their human rights through their state of nationality – when international law recognises that states can breach the human rights of their own citizens – would be like arguing that children could only claim parental abuse through the parents themselves. At the international level, there is no supranational state that could seize jurisdiction in cases

¹⁴⁶ In addition to McCorquodale, see, for example, A Randelzhofer, ‘The Legal Position of the Individual under Present International Law’, in Randelzhofer and Tomuschat (n 71) 233-234.

¹⁴⁷ Randelzhofer says that a closer reading of the judgment shows that the Court is ‘of the opinion that this proposition is not confined to civil law, but typical of any legal order’. Ibid 234.

where the state of nationality is the wrongdoing party, and as it will explained in Part IV, there is no real prospect of other states bringing claims even in cases where serious breaches of *erga omnes* obligations are committed.

It is important therefore to understand the court's statement as referring to the capacity of a juridical entity to exercise its rights in Hungarian law. The Court only establishes that despite having limited civil rights under domestic law, the University still enjoys legal personality and, arguably, rights, albeit unenforceable at the national and perhaps international level. Importantly, the PCIJ looks specifically at whether the University itself has the right to submit an international claim to the Mixed Arbitral Tribunal for the property in question, which it answered in the affirmative. In other words, this case confirms the validity of an arbitral judgment recognising the University of Budapest's right to claim and obtain reparation before an international procedure (in the form of restitution in kind). Hence, this judgment can be read as acknowledging the validity of claims by legal persons for violations of international law against states at the international level.

The other case often cited as evidence that individuals may have rights in international law but cannot claim any violations thereof is the *East Timor* case.¹⁴⁸ However, the ICJ never examined the 'claim question' of non-state entities in this case. It never looked at

¹⁴⁸ For example, P Kooijmans points out: '[I]n the East Timor case, the International Court of Justice explicitly said that the people of East Timor are indisputably entitled to the right of self-determination as a right *erga omnes*. Actually the Court says here that entities which themselves have no right to bring a claim, like the people of East Timor, are entitled to a right which must be respected by everyone. [...] If one has the primary right, however, one has also the secondary right to compensation if this primary right is not respected; this does not coincide, however, with the right to bring a claim as is clear from the East Timor case'. See: 'Discussion (Part 1)' in Randelzhofer and Tomuschat (n 71) 45.

whether the people of East Timor could actually claim an injury of their right to self-determination caused by the treaty between Australia and Indonesia. It simply rejected Portugal's claims as administering power based on the Court's lack of jurisdiction.¹⁴⁹ It applied the *Monetary Gold*¹⁵⁰ principle and concluded that it could not decide on the merits of the case in the absence of Indonesia, as this would have required the Court to determine the rights and obligations of a third state in the absence of the consent of that state.

It is true that while the Court explicitly said that the people of East Timor were entitled to the right to self-determination as a right giving rise to *erga omnes* obligations,¹⁵¹ in practice, it denied East Timorians access to an international remedy through their administering power. But it would be wrong to infer from this decision that individuals can be subjects of international law with primary and secondary rights without the capacity to claim a breach of international law. The Court simply avoided this legal question. As explained by Judge Werramanty in his Dissenting Opinion: 'The Court's Judgment stops, so to speak "at the threshold of the case" [...]'.¹⁵² It fails to examine for example the duties flowing from Australia from the right to self-determination of the people of East Timor or the *jus standi* of Portugal to bring a claim on behalf of them. In this sense, the *East Timor* case, if anything, just proves that certain relief mechanisms like the ICJ are barred even to states representing individuals. More importantly, this case

¹⁴⁹ *East Timor Case* (n 144) [36-37].

¹⁵⁰ *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)* [1954] ICJ Report 19.

¹⁵¹ *East Timor Case* (n 144) [102].

¹⁵² Dissenting Opinion of Judge Weeramantry, *East Timor Case* (n 144) [56].

shows how the international law model where individuals rights are in principle protected by states (whether by the home state or third ones) is not always functional. Judge Weeramanthy further explains: ‘The preliminary objection to the *ius standi* of Portugal calls into question the adequacy of the entire protective structure fashioned by the UN Charter for safeguarding the interests of the non-self governing territories [...]’.¹⁵³

While it is true that in practice, the people of East Timor were left with no remedy when the ICJ rejected Portugal’s claim on behalf of them, it would seem inappropriate to draw far-reaching conclusions from this decision.¹⁵⁴ The same result would have occurred if, for example, Australia had rejected the jurisdiction of the ICJ. Importantly, the ICJ recently confirmed that states do have a duty to afford reparation directly to natural or legal persons for, among others, the breach of their right to self-determination.¹⁵⁵

D. Position 4: If individuals have primary rights, they also have the corresponding actionable secondary right to reparation

As explained, the view that individuals are also holders of rights in international law is increasingly accepted. Already in 1928, the PCIJ said in *Jurisdiction for the Courts of Danzig* that ‘it cannot be disputed that the very object of an international agreement,

¹⁵³ *ibid* 56.

¹⁵⁴ Kooijmans goes further and proposes that a distinction between ‘legal personality’ and ‘subjectivity’ can be made based on this judgment: ‘If for arguments’ sake we assume that international legal personality (eg of a state or an international organisation, like in the *Reparation Case*) entails the capacity to bring a claim, then the lesson of the *East Timor Case* is that the concepts of international legal personality and that of being a subject of international law are not by necessity identical or interchangeable’. See ‘Discussion (Part 1)’ in Randelzhofer and Tomuschat (n 71) 45.

¹⁵⁵ *Wall Opinion* (n94) [152-153].

according to the intention of the contracting parties, may be the adaptation by the parties of some definite rules creating individual rights and obligations...'.¹⁵⁶ The ICJ held recently in *LaGrand* that Article 36(1) of the Vienna Convention on Consular Relations 'creates individual rights'.¹⁵⁷ Article 33(2) of the ILC Responsibility Articles has corroborated the view that individuals can be the beneficiaries of treaty provisions. The ILC Commentary on this rule makes it clear that individuals may be regarded as the ultimate beneficiaries of international norms and thus the holders of the relevant rights.

Equally, there is evidence that a set of 'core individual rights' exist under CIL. Indeed, recent ICJ jurisprudence confirms that there are certain customary rights of the individual.¹⁵⁸ On the other hand, as Kooijmans asserts, 'already in 1968 the international community stated in the Declaration of Tehran that the Universal Declaration [of Human Rights] constitutes an obligation for all States'.¹⁵⁹ Such a statement can be read as an acknowledgment that fundamental human rights are part of CIL. He views this assertion as *opinio juris* and argues that the constant denial of human rights violations by the states that are accused of such violations reflects state practice. Like in *Nicaragua*,¹⁶⁰

¹⁵⁶ *Danzig* (n 91) [36].

¹⁵⁷ *LaGrand* (n 92) [76].

¹⁵⁸ See: *Wall Opinion* (n94) and *Armed Activities Case* (n 97) and accompanying text.

¹⁵⁹ P Kooijmans, 'Contribution to Discussion (Part 4)', Tomuschat and Randelzhofer (n 71) 247.

¹⁶⁰ 'It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognised rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule' – *Case Concerning the military and paramilitary activities in and against Nicaragua*

Kooijmans argues that it is not the widespread violations but the constant denials of human rights violations that constitute state conduct. Such denials are a confirmation of the norm in support of the *opinio juris*. For him, this means that a great part of human rights law is customary law. He further explains that in cases of *erga omnes* obligations, the bearers of the corresponding substantive rights – that is, the individuals – have ‘an international legal status that cannot be dependant upon state consent’.¹⁶¹

Even Tomuschat, who affirms that individuals do not have primary rights unless they have access to an international procedural remedy, acknowledges a set of fundamental individual rights under CIL (despite a lack of universal human rights remedy). He goes even further by explaining that states tend to deny any role of individuals in international law because it is not convenient to them:

[...] legal positions of the individual can be derived that are not dependent on the will of any State. Yet States do not like these constructs. They wish to remain the masters of international law. The concept of an individual acting independently on the international level is to them more a nuisance than an achievement as became manifest in the *Francovich* case under the law of the European Communities which did not meet with unreserved welcome by all governments of the member States.¹⁶²

Similarly, when looking at the traditional sources of international law, it becomes clear that the legal basis for a right to reparation for individual victims has become firmly enshrined in the elaborate corpus of international HR instruments, now widely accepted by states.¹⁶³ Not only is this right firmly embodied in international HR treaties and

(*Nicaragua v. United States of America*) (*Judgment*) (*merits*) (27 June 1986) ICJ Rep 98 [186] [hereafter *Nicaragua Case*].

¹⁶¹ P Kooijmans, ‘Contribution to Discussion (Part 4)’ Randelzhofer and Tomuschat (n 71) 248.

¹⁶² *ibid.*

¹⁶³ See (n 39) and accompanying text.

declarative instruments, but it has also been further refined by the jurisprudence of a large number of international and regional courts, as well as other treaty bodies and complaints mechanisms.¹⁶⁴

The bearing of a right has to be differentiated from the delivery and enforcement of such right. In the *Jurisdiction of the Courts of Danzig*, the PCIJ affirmed the existence of a right for an individual under international law, even though it could not be enforced by the individual at the international level:

[...] it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adaptation by the parties of some definite rules creating individual rights and obligations **and enforceable by national courts**.¹⁶⁵

Accordingly, the enforcement of rights of individuals could in principle be pursued before domestic courts. While Lauterpacht considered this decision to be evidence of individual personality,¹⁶⁶ Friedmann disagreed. Not only did he write that Lauterpacht's view of the *Danzig Opinion* was 'somewhat overenthusiastic',¹⁶⁷ but he also said that the precedents established were 'products of a power of victors in a major war, to impose, by virtue of their temporary political or military superiority, not only their political conditions, but also their legal concepts'.¹⁶⁸ Of course, this criticism has been said of almost every post-WWII judicial precedent, including those decisions from the

¹⁶⁴ See I-ACtHR, *Velásquez Rodríguez v Honduras, Compensatory Damages* (21 July 1989) Series C no 7 [174] [hereafter *Velásquez Rodríguez*]. See also *Papamichalopoulos vs. Greece* (n 110) 36.

¹⁶⁵ *Danzig* (n 91) (emphasis added).

¹⁶⁶ Lauterpacht, *Human Rights* (n 57) 21, 28.

¹⁶⁷ W Friedmann, *The General Course in Public International Law*, 127 *Recueil des Cours* at 125-126 (1969).

¹⁶⁸ *Ibid.* 238.

Nuremberg and Tokyo Tribunals. Importantly, the ICJ recently reaffirmed in *LaGrand* that individuals can have international rights despite their lack of general international standing and that these rights should be enforced domestically.¹⁶⁹ Equally, the ICTY judges seem to acknowledge that there can be a right under international law irrespective of an international procedural remedy. For them, '[t]he question...is not so much is there a right to compensation but how can that right be implemented'.¹⁷⁰ The Tribunal has already taken an approach in favour of a secondary actionable right of individuals in cases of serious human rights violations. In *Furundzija*, the Tribunal addressed the question of compensation for individuals in the case of a violation of the prohibition of torture as a norm of *jus cogens* character, holding that:

[...] Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act.¹⁷¹

One can deduce from the ICTY decision that the individual victim of a violation of a norm with *jus cogens* character is entitled to claim reparation before an international or national judicial body, as well as a foreign national court. The wording quoted above shows that the Tribunal assumes the existence of an actionable secondary right to reparation under international law in the absence of any requirement for national measures to provide for the respective right.

¹⁶⁹ *LaGrand* (n 92) [77].

¹⁷⁰ Victims' Compensation and Participation, Appendix to the Letter from the Secretary-General addressed to the President of the Security Council, UN Doc S/2000/1063, 12, [22].

¹⁷¹ *Furundzija* (n 53) 155.

Furthermore, in the *Wall Opinion*, the ICJ stated that Israel is obliged under general international law to afford reparation to the natural and legal persons injured by the construction of the wall.¹⁷² It would appear that the Court, following the reasoning of its predecessors in *Danzig*,¹⁷³ recognised that there can be individual rights in international law regardless of whether these are enforceable through international procedural remedies or by domestic courts.

There would be a clear gap in the human rights protection system if one recognised the existence of individual rights under customary law but contested the existence of a corollary right to reparation. Put simply, if one refutes the idea that individuals enjoy primary rights under CIL, it seems reasonable to maintain that individuals do not enjoy a right to reparation under general international law either. The paradox lies, however, in recognising some basic individual rights under general law but not believing that reparation is owed to the individuals when these rights are breached. *What happens when the state of nationality is the wrongdoer? Who has the secondary right to reparation?*

i. Can the international community be the guardian of individual rights?

In the *Barcelona Traction* case, the ICJ made it clear that human rights obligations, or at least some of them, are due to the international community as a whole.¹⁷⁴ However, the international community is not a subject of law. So while it is in the interest of the community of nations to protect and enforce these rights, it is difficult to argue that all

¹⁷² *Wall Opinion* (n94)198 [152-153].

¹⁷³ *Danzig* (n 91) [17].

¹⁷⁴ *Barcelona Traction, Light and Power Company, Limited (Judgment)* [1970] ICJ Rep 33.

states should be the beneficiaries of the actual reparations owed. The tension between the bilateral origins of international law and its current aim of protecting community interests was evident during the drafting process of the ILC Responsibility Articles. For example, while Ago held that the correlation of obligations with subjective rights ‘admit[ted] of no exception’, he had no doubt that some rights belonged to *all* states and that the wrongfulness of an act in breach of *jus cogens* would not be precluded by the consent of the injured state.¹⁷⁵ Finding a balance between the bilateralism and communitarianism aspects of state responsibility and reparation, the ILC adopted as a ‘measure of progressive development’¹⁷⁶ Article 48(2)(b) of the ILC Responsibility Articles.¹⁷⁷ This rule allows any state in cases of serious *erga omnes* violations to claim reparation from the responsible state. Such a claim must be made in the interest of the injured state, if any, or of the beneficiaries of the obligations breached. According to the ILC Commentary on Article 48, this measure is justified since it provides a means of protecting the community or collective interest at stake.¹⁷⁸

However, it is still unclear how the ‘Article 48 system’ would operate in practice: how it relates to traditional diplomatic protection and to procedural rules like the exhaustion of local remedies norm or the requirement of a nationality link. For example, the ICJ recently acknowledged the existence of rules of *jus cogens* in the *Armed Activities on the*

¹⁷⁵ R Ago, ‘Third Report on State Responsibility’, YB ILC (n 41) 3, 199, 221; R Ago, ‘Eighth Report on State Responsibility’ (1979) 2(1) YB ILC 3, 38.

¹⁷⁶ Article 48(2)(b) (n 32).

¹⁷⁷ Koskenniemi, ‘Doctrines of State Responsibility’ (n 51) 49.

¹⁷⁸ Commentary to Art 48, Report of the ILC Responsibility Articles, (n 23) [12].

Territory of the Congo case.¹⁷⁹ However, it rejected a counterclaim brought forward by Uganda concerning the ill treatment of individuals by the Democratic Republic of the Congo because Uganda had failed to establish the relevant, Ugandan, nationality of the individuals concerned.¹⁸⁰ Judge Simma, in a strong separate opinion to the judgment, argued that the nature of the breaches of international law provided Uganda with legal standing regardless of nationality links:

The specific construction of the rights and obligations under the Fourth Geneva Convention as well as the relevant provisions of Protocol I Additional to this Convention not only entitles every State party to raise these violations but even creates an obligation to ensure respect for the humanitarian law in question. The rules of the international law of State responsibility lead to an analogous result as concerns the violations of human rights of the persons concerned by the Congolese soldiers.¹⁸¹

But while there has been willingness on behalf of third states to request cessation and/or non-repetition, the entitlements provided for in Article 48 do not have much weight in practice.¹⁸² The lack of clarity regarding which rules of state responsibility are applicable in these limited number of cases makes it hard to see how third states could claim reparation on behalf of individuals under Article 48.¹⁸³ On the other hand, there are only a few instruments of general application which provide for the enforcement of *erga omnes partes* obligations by other states, and even when these instruments are applicable, states are reluctant to exercise such rights.¹⁸⁴

¹⁷⁹ *Armed Activities Case* (n 97).

¹⁸⁰ *Armed Activities Case* (n 97) [333].

¹⁸¹ Separate Opinion Judge Simma, *Armed Activities Case* (n 97) [37].

¹⁸² I Scobbie, 'The Invocation of Responsibility for the Breach of Obligations under Peremptory Norms of General International Law' (2002) 13(5) EJIL 1201.

¹⁸³ A Vermeer-Künzli, 'A Matter of Interest: Diplomatic Protection and State Responsibility *Erga Omnes*' (2007) 56 *International and Comparative Law Quarterly* 553-581.

¹⁸⁴ For a detailed analysis on *erga omnes* obligations and reparation, see: A Bird, 'Third State Responsibilities for Human Rights Violations' (2010) 21(4) EJIL 883.

Thus, even if it is recognised that *erga omnes* obligations exist and that in a limited number of cases, states can exercise the corresponding rights to reparation for the benefit of individuals, in practice the current legal framework cannot sufficiently secure individual rights. States may either have no standing or may not be interested in pursuing remedies. There is nothing individual victims can do to ensure these claims are pursued and/or that their perspectives are taken into consideration. This lack of a realistic mechanism for enforcement at the inter-state level has the unfortunate effect of rendering *erga omnes* obligations largely theoretical. For this reason, if it is recognised that today there are truly human rights under customary law, then arguing that individuals do not have a right to reparation when these are breached – but only states – leaves a big gap in the human rights protection system.

ii. Can customary rules of state responsibility be applicable to the relationship between states and individuals?

The fact that HR protection has been confined under specific treaty regimes does not mean that state responsibility is inapplicable to human rights breaches.¹⁸⁵ In this context, it seems valid to ask whether the customary rules of state responsibility, including the obligation to afford and the right to receive reparation, could be applicable to individuals. After all, while there has been a tendency to view international responsibility as essentially a bilateral matter between states (without wider consequences for others or for the international system as a whole), ‘international law now contains a range of rules

¹⁸⁵ Koskenniemi, ‘Doctrines of State Responsibility’ (n 51) 47.

which cannot be broken down into bundles of bilateral relations between states but cover a much broader range'.¹⁸⁶

As mentioned earlier, Article 33 of the ILC Responsibility Articles confirms that reparation by the liable state may be owed both to other states and to injured individuals. In addition, the Commentary affirms that, at the international level, individuals can invoke the responsibility of a state on their own account and without the intermediation of any state.¹⁸⁷

The *Wall Opinion* seems to acknowledge that there are certain fundamental HR under general international law and that all natural and legal persons are entitled to reparation if states breached these rights.¹⁸⁸ In the *Furundzija* case, the ICTY also assumed that an individual secondary right to reparation under international law arises when there is a breach of peremptory norm.¹⁸⁹ The Judges specifically expressed in a separate report that there is a secondary individual right under international law, which includes compensation.¹⁹⁰

In 2005, the UN General Assembly adopted the Principles and Guidelines.¹⁹¹ As explained in its preamble, this set of principles and guidelines recognise that an

¹⁸⁶ Crawford and Olleson, 'International Responsibility' (n 61) 470.

¹⁸⁷ See: Article 33(2) and its Commentary [233], Report of the ILC Responsibility Articles (n 23). For further discussion on this article and its commentary see Chapter 4, section 3 "State responsibility as the legal basis of the right to a remedy and reparation".

¹⁸⁸ See: *Wall Opinion* (n94) and accompanying text.

¹⁸⁹ *Furundzija* (n53) [155].

¹⁹⁰ Victims' Compensation (n 170) 12.

¹⁹¹ Principles and Guidelines (n.2).

obligation to afford reparation to victims exists under HR and IHL. Its purpose is therefore to ‘identify mechanisms, modalities, procedures and methods for the implementation’ of these existing legal obligations’.¹⁹² To a certain extent therefore, the adoption of this instrument reflects an acknowledgment by the international community of the existence of a secondary right to reparation for victims under CIL. However, Tomuschat sees the specific provisions only as ‘a collection of recommendations, and not a codification of existing customary law’.¹⁹³

While the *Chorzów* principle¹⁹⁴ was originally applied to inter-state reparation, the ICJ indicated that it applies equally to reparation for injury to individuals.¹⁹⁵ The IACtHR refers in its decisions to the principle of state responsibility, according to which reparation has to be made for every violation of a right under international law, which results in a loss.¹⁹⁶ It usually mentions the *Chorzów* decision as a reference. In this sense, the *Chorzów* judgment, as well as the principles of state responsibility clarified in it, are understood to also apply in the relationship between individuals and states. The ICJ recently confirmed this approach in its advisory opinion concerning the Israeli Wall in the occupied territories.¹⁹⁷

¹⁹² ‘*Emphasizing* 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 which are complementary though different as to their norms’, Principles and Guidelines, Preamble (n 2).

¹⁹³ Tomuschat, ‘Individuals’ (n 111) 988. For a more detailed analysis of the provision in the Preamble, see Chapter 4.

¹⁹⁴ *Chorzów* (n 22).

¹⁹⁵ *Application for Review* (n 131) 197-198.

¹⁹⁶ *Velásquez Rodríguez* (n 164) [25]; I-ACtHR, *The Mayagna (Sumo) Awas Tingni Community* (31 August 2001) Series C, no 79 [162].

¹⁹⁷ *Wall Opinion* (n94) [152 et seq].

It therefore seems possible for individuals to have rights in international treaty and customary law. In principle, if these are breached, individuals have an actionable secondary right to reparation. Individual claims can be pursued at the international level by the home state representing its national or, when possible, by the individual him/herself (e.g. before a HR court, monitoring body, claims commission or arbitral tribunal). Otherwise, individual claims can be pursued at the domestic level before national courts or before foreign courts when the claims involve fundamental breaches.

Chapter 2: State responsibility, diplomatic protection and the obligation to afford reparation to individuals

'Now, both the "international standard of justice" and the principle of equality between nationals and aliens, hitherto considered as antagonistic and irreconcilable, can well be reformulated and integrated into a new legal rule [...] The basis of this new principle would be the "universal respect for, and observance of, human rights and fundamental freedoms" referred to in the Charter of the United Nations and in other general, regional and bilateral instruments.'^{*}

1. The notion of diplomatic protection and its relationship to human rights law

Under the doctrine of state responsibility, when a state commits an international wrong it becomes liable to a) cease the wrongful conduct and b) afford adequate reparation. The leading opinion in this regard is set out in the *Chorzów* judgment of the PCIJ: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form'.¹⁹⁸

According to the Court, this is not only 'a principle of international law', but is 'even a general conception of law'.¹⁹⁹ The Court further explained: 'reparation must, as far as

^{*} FV García Amador, 'First Report on State Responsibility' (1956) 2 YBILC 202, [156].

¹⁹⁸ *Chorzów* (n 22) 47.

¹⁹⁹ *ibid* 47.

possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed'.²⁰⁰ Reparation thus may be defined as the various forms to redress an international wrong and discharge the liable party from international responsibility towards the injured party. In this sense, reparation as a consequence of state responsibility is understood as a secondary obligation/right of states.

This understanding of primary and secondary rules in the context of state responsibility was applied by the ILC when drafting the Responsibility Articles. Specifically, Roberto Ago introduced the idea as a central organising device of the articles.²⁰¹ He explained '[I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation'.²⁰² The ILC created a set of articles dealing with the secondary obligations associated with breach since it did not believe that there was a possibility of codifying the substantive international law of obligations in a general way. Still, the ILC believed that international law emerged as a general conception of the rights and duties of states, and of the consequences of breaches of those rights. The codification of the secondary obligations therefore aimed to generalise international law.²⁰³ According to James Crawford, Ago's distinction responded to what the ILC

²⁰⁰ *ibid* 47.

²⁰¹ J Crawford, 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect' (2002) 96 *Am. J Int'l L.* 876.

²⁰² R Ago, 'Second report on State Responsibility' (1970) 2 *YB Int'l L. Comm'n* 177, 306 (UN Doc A/CN.4/1970/Add.1).

²⁰³ Crawford, 'The ILC's Articles' (n 201) 877.

Commentary now refers as the principle of independent responsibility²⁰⁴: *the principle that State responsibility is specific to the State concerned*.²⁰⁵ He further explains:

[T]he key idea is that a breach of a primary obligation gives rise, immediately by operation of the law of state responsibility, to a secondary obligation or series of obligations (cessation, reparation...). The articles specify the default rules that determine when a breach occurs and, in general, the content of the resulting secondary obligations. In their final form they also specify when other states may do to invoke responsibility, by claiming cessation or reparation or, in default, by taking countermeasures.²⁰⁶

While there was much criticism of the differentiation between primary and secondary rules in this context, and specifically in relation to the concept of independent responsibility,²⁰⁷ the ILC Responsibility Articles have been well received and have been applied by numerous international tribunals, including the ICJ. Additionally, the distinction between primary rules and secondary rules of state responsibility is also invoked in the Principles and Guidelines, which are the main object of analysis of this thesis. Therefore, despite the many flaws that this distinction might create in theory and in practice (as will be discussed, for example, in the case of denial of justice), the present study uses the same classification of primary and secondary rules used by the ILC Responsibility Articles. It aims to investigate if individuals, as opposed to states, can be the beneficiaries of the secondary obligation to afford reparation.

²⁰⁴ *ibid* 877.

²⁰⁵ Commentary, Report of the ILC Responsibility Articles, (n 23).

²⁰⁶ Crawford, 'The ILC's Articles' (n 201) 876.

²⁰⁷ See generally, P Allot, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harvard International Law Journal* [1]. Higgins was also very critical of the ILC's approach to the project. See: Higgins, *Problems and Process* (n 63) 146. For assessments of the Final ILC Responsibility Articles, see 'Symposium: The ILC's State Responsibility Articles' (2002) 96 *AJIL* 773; and 'Symposium: Assessing the Work of the International Law Commission on State Responsibility' (2002) 13 *EJIL* 1037.

Before the WWII and the advent of HR treaties there were no formal procedures available to the individual under international law to challenge treatment by his or her own state. On the other hand, if the individual suffered abuses by a foreign state while abroad, the individual's national state had the option to intervene to protect him or her or to claim reparation for the injuries that he or she suffered. Under these norms, the right to reparation was attributed to the state of the injured national to claim against the offending state at the inter-state level.²⁰⁸ Whether in war or peacetime, a state had the right (but not the obligation) to take up the claims of its nationals before an international body.

The establishment of human rights law after WWII widened the concept of international law in respect of the rights of individuals – both procedural and substantive rights. Today the individual is protected under international law against acts of states that breach his or her human rights, including those committed by the state of nationality. Notwithstanding, individual procedural remedies in international human rights law are scarce. State responsibility for injuries to aliens still protects natural and legal persons from abuses by foreign nations. In this sense, diplomatic protection – the procedure employed by the injured alien's state of nationality to secure redress in cases of denial of justice – is not only the predecessor to the individual right to reparation in HR law, but it is also a co-existing and well-established mechanism that allows foreign states to obtain reparation on behalf of its nationals for human rights violations.

²⁰⁸ van Boven 'Study concerning the right to restitution' (n 17) 42.

It is in this context that the present chapter will look at the notion of diplomatic protection and its relationship to human rights law. The focus of this dissertation is not to look at reparation obtained through inter-state agreement or inter-state legal action, but to investigate whether individuals have a right to reparation under general international law for human rights and humanitarian law violations as presupposed by the Principles and Guidelines. For this reason, the present chapter analyses the relationship that exists between diplomatic protection and human rights claims. In particular, it investigates the relationship between diplomatic protection and the right to reparation and the right to an effective domestic remedy. IHL claims on behalf of nationals injured by foreign nations during wartime, including claims as part of war settlements and peace treaties, will be addressed in Chapter 3.

The current chapter concludes that denial of justice entails an obligation to afford foreigners access to a system of justice that guarantees due process in accordance with the international minimum standard. The rule of exhaustion of domestic remedies therefore is not a procedural precondition that can be waived; it is an inherent part of the international wrong of denial of justice. The chapter also advances the proposition that in the same way that denial of justice is understood as a system failure, where exhaustion of domestic remedies is an inherent material element of the IWA of denial of justice, international HR violations also materialise as IWAs after states fail to redress the breaches in accordance with international standards.

As already mentioned, states have nowadays an obligation to protect aliens and nationals alike from acts or omissions that breach international law (like torture, slavery, arbitrary detentions, undue process, unfair trials, enforced disappearances, and so on). If states are unable to protect individuals and then fail to redress these violations in accordance with international standards, they commit an international wrong (a denial of justice/international human rights violation) and are responsible under international law to afford reparation. Clearly, if the violations are committed against aliens, the state of nationality has the right to exercise diplomatic protection to obtain reparation on their behalf. But what happens to the nationals of the state or to the aliens directly injured when the state of nationality refuses to exercise diplomatic protection on their behalf? By doing a comparative analysis between the law on diplomatic protection and human rights law, the current chapter helps clarify if the reparation is also due to the injured individuals (as opposed to only the state of nationality or the community of states) and whether individuals can claim reparation directly under international law. It investigates how state responsibility principles apply to the relationship between individuals and states and assesses in this context the understating of breaches of HR and IHL as IWA of states.

2. Diplomatic protection: the predecessor to reparation claims under human rights law

A. Notion of diplomatic protection

A state is not obliged to admit aliens into its territory, but if the aliens are already in its territory then 'it is under an obligation toward the alien's state of nationality to provide a degree of protection to his or her person or property in accordance with an international minimum standard of treatment for aliens'.²⁰⁹ diplomatic protection is the procedure employed by the injured alien's state of nationality to secure compliance with the primary rules of international law governing the treatment of aliens and to claim reparation under the rules of state responsibility (secondary rights) for the injury inflicted upon the alien.

Although often confused with consular assistance, diplomatic protection is different.²¹⁰ While both are exercised for the benefit of a national, there are fundamental differences between the two, as reflected by the fact that diplomatic relations and consular relations are regulated by two separate conventions.²¹¹ Consular activities are purely of a representative nature at the local level and are limited by the non-intervention principle in Article 55 of the VCCR. A consul does not have the power to intercede in a judicial process to prevent a denial of justice. As pointed out by Shaw: '[Consuls] have a particular role in assisting nationals in distress with regard to, for example, finding lawyers, visiting prisons and contacting local authorities, but they are unable to intervene in the judicial process or internal affairs of the receiving state or give legal advice or investigate a crime'.²¹² Diplomatic agents are also not to interfere with domestic affairs of the receiving state in accordance with Article 41 (1) of the VCDR. But diplomatic

²⁰⁹ Dugard 'Diplomatic Protection' in Crawford, *The Law of State Responsibility* (n 51) 1061.

²¹⁰ J Dugard, 'First Report on Diplomatic Protection, International Law Commission' (52nd session) (2000) A/CN.4/506 [43].

²¹¹ The Vienna Convention on Diplomatic Relations, 1961, UN Treaty Series, vol. 500, 95 [hereinafter VCDR] and the Vienna Convention on Consular Relations, 1963, UN Treaty Series, vol. 596, 262 [hereinafter VCCR].

²¹² MN Shaw, *International Law* (Cambridge 2003) 688.

protection, if exercised in accordance with international law, is never an interference with the domestic affairs of the receiving state, since the sending state exercises diplomatic protection in its own right.²¹³ After exhaustion of local remedies it is no longer a dispute between an individual and a state, but between two states; it is not an internal affair, but an international dispute.²¹⁴

In sum, any formal intervention, including negotiation, on an inter-state level on behalf of a national *vis-à-vis* a foreign state for an international wrongful act is ‘diplomatic protection’. While something that starts as consular assistance may end up as diplomatic protection at a later stage, the latter forms part of the state responsibility rules of international law and belongs only to states. States and not individuals have a right to exercise diplomatic protection. In contrast, consular assistance forms part of a body of rights of which states and individuals may be the holders.

The distinction between consular assistance and diplomatic protection becomes more obvious if we apply the concept of primary and secondary rules used by the ILC Responsibility Articles.²¹⁵ Consular assistance involves a number of primary rights. These rights belong to states and, as recognised by recent international jurisprudence, also to individuals.²¹⁶ Diplomatic protection on the other hand is the mechanism used by states to exercise their secondary right to reparation for denial of justice to one of their nationals. Denial of justice to a foreigner is an international wrongful act. Therefore, if

²¹³ A Kunzli, ‘Exercising Diplomatic Protection’ (n 93) 321, 333.

²¹⁴ *ibid* 333.

²¹⁵ See: section ‘1. The notion of diplomatic protection and its relationship to human rights law’, Chapter 2.

²¹⁶ *LaGrand* (n 92) [75-77].

the (primary) rights to consular assistance are breached, state responsibility arises and the victim-state is allowed to exercise its (secondary) right to reparation. It can claim reparation directly when its state-rights are breached (e.g. for a breach of a bilateral or a multilateral convention). But it can also claim reparation indirectly, through diplomatic protection on behalf of its national when the host state fails to afford his or her consular rights.

Consular assistance often has a preventive nature and takes place before the exhaustion of effective local remedies (e.g. before an international wrong has occurred). As stipulated in the VCCR, consular assistance will only be provided if the individual concerned so requests.²¹⁷ In contrast, a diplomatic demarche intends to bring the matter to the international level and is ultimately capable of resulting in international litigation. The individual concerned cannot prevent his national state from taking up the claim or from continuing procedures.²¹⁸

The ICJ clearly distinguished between consular assistance and diplomatic protection in *La Grand*, accepting Germany's assertion that individual rights arising under a treaty on consular relations could be claimed through the vehicle of diplomatic protection.²¹⁹

²¹⁷ VCCR Article 36(1)(b).

²¹⁸ When interpreting the scope of the Calvo Clause, the Commission in the *North American Dredging Company of Texas Case* established that an alien cannot 'deprive the government of this nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government frequently has a larger interest in maintaining the principles of international law than in recovering damages for one of its citizens in a particular case, and manifestly such citizen can not by contract tie this respect the hands of his Government' – *North American Dredging Company (USA) v. United Mexican States* (31 March 1929) IV Reports of International Arbitral Awards 26, 29. [Hereinafter *Dredging*].

²¹⁹ *LaGrand* (n 92) [75-77].

Diplomatic protection is thus a mechanism that states can resort to after an internationally wrongful act (denial of justice) has occurred causing an injury to an alien.

B. Overview of diplomatic protection

The roots of diplomatic protection can be traced back to the eighteenth-century.²²⁰ However, ‘it was mainly the nationals of the powerful Western states that enjoyed the privileged position of exercising it, as it was those states that most readily intervened to protect their nationals who were not treated ‘in accordance with the ordinary standards of civilization’ set by Western states’.²²¹ In the 19th and early 20th centuries, a flurry of activity occurred in the field of diplomatic protection, mainly in regards to the protection of investments/companies abroad. The means by which states exercised this protection was not yet limited by the prohibition of the use of force and the obligation to settle disputes peacefully.²²² This resulted in the frequent indiscriminate and disproportionate

²²⁰ E de Vattel expressed the idea that a state has a right to protect its subjects who are abroad in his treatise ‘The Law of Nations’: ‘Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen’ – E de Vattel, ‘The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns (1758)’ (Liberty Fund 2008) 298 [71]. See footnote 278 and accompanying text.

²²¹ Dugard, ‘Diplomatic Protection’ in Crawford, *The Law of State Responsibility* (n 51) 1061.

²²² As Paulsson points out, the twentieth century brought about a consecration of the principle that international conflicts may not be resolved by force, or ‘intervention’ as the term was used in international law. He notes among the numerous authorities: Article 8 of the Montevideo Convention on the Rights and Duties of States [1933] 16 L.N.T.S. 19; Article 3 of the International Law Commission’s Draft Declaration on the Rights and Duties of States [1949] 287 YB ILC UN Doc A/1251. See: J Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005) 17.

abuse of power.²²³ In its rawest form, state protection of foreign nationals was the pretext for substantial gunboat diplomacy.²²⁴

The international law of state responsibility would not have developed so vigorously but for Western colonialism and economic imperialism that reached their zenith during this period. Transnational business operations centred in Europe, and later in the United States, penetrated those regions now known as the ‘Third World’ or ‘developing’ countries. Given the links between the success and wealth of corporations in their foreign ventures and national wealth and power, the security of the person and property of a national or corporation operating in a foreign part of the world became a concern of his or its government.²²⁵

Many emerging nations, and in particular, Latin American countries, were wary of these interferences, which resulted in strong criticism and several efforts to neutralise the abusive effects of diplomatic protection.²²⁶ For example, the Drago doctrine – conceived

²²³ See, for example, DR Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy* (University of Minnesota Press 1955) 11.

²²⁴ See: C Force, ‘The Capacity to Protect: Diplomatic Protection of Dual Nationals in the War on Terror’ (2006) 17 EJIL 369, 375, citing RB Lillich, *The Human Rights of Aliens in Contemporary International Law* (Manchester University Press 1984) 14–15, as well as Dugard, ‘First Report’ (n 210) [5] (observing that ‘diplomatic protection has been greatly abused and citing its use as a pretext by the British in the Boer War and by the United States in its interventions in Latin America, as recently as the invasion of Panama in 1989).

²²⁵ H J Steiner, P Alston, and R Goodman, *International human rights in context: law, politics, morals: text and materials* (OUP 2008) 87-88.

²²⁶ Like the Calvo Clause and the Drago Doctrine. The Calvo Clause will be described in detail below; the Drago Doctrine was a response to action taken by Italy, Germany and Great Britain against Venezuela in 1902 following its failure to pay contractual debts owed to the nationals of those states. It resulted in the 1907 Porter Convention Respecting the Limitation of the Employment of Force for the recovery of Contract Debts (Convention II of the 1907 Hague Peace Conference). See: Convention Respecting the Limitation of the Employment of Force for the recovery of Contract Debts (done 18 October 1907, entered

in the aftermath of the German, British and Italian intervention in Venezuela in 1923 – sought to establish the principle that the public debt of a state could never justify armed intervention provided that the borrowing state accepted international arbitration.²²⁷

A passage by Judge Padilla Nervo's separate opinion in the *Barcelona Traction* case reflects the disapproval that the developing world had of the way that powerful nations were applying the principle of protection of aliens:

The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded [...].²²⁸

According to Garcia-Amador:

The origin of the alien treatment standard can be traced back to the sort of reasoning which gave rise to the system of capitulations or extraterritoriality that was for long imposed upon the peoples of Asia and Africa by European nations. The consequent discrimination in favour of the foreign groups of the population, and the infringement of the principle of equality among nations, became repugnant to public opinion and to legal thinking in the countries concerned.²²⁹

into force 26 January 1910) (1908) 2 AJIL Suup 81 (Drago-Porter Convention) (Convention II of the 1907 Hague Peace Conference)

²²⁷ Luis Maria Drago, then the Argentinian Minister of Foreign Affairs, wrote his celebrated note on 29 December 1902 on the occasion of the joint intervention of Great Britain, Italy, and Germany against Venezuela. He published a monograph entitled *Cobro coercitivo de deudas publicas* in 1906 (LM Drago, *Cobro coercitivo de deudas publicas* (Buenos Aires: Coni hermanos editores, 1906)); his argument is most accessible in English in 'State Loans and their Relation to International Policy' (1907) 1 AJIL 692. The Drago Doctrine was reflected in the Porter Convention of 1907; see: AS Hersley, 'The Calvo and Drago Doctrines' (1907) 1 AJIL 26. See also: GW Scott, 'Hague Convention Restricting the Use of Force to Recover Contract Claims' (1908) 2 AJIL 78; EM Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks Law Publishing Co. 1919) 308.

²²⁸ Judge Padilla Nervo, Separate Opinion, *Barcelona Traction* (n 174) 246.

²²⁹ FV Garcia Amador, 'First Report on State Responsibility' (1956) 2 YBILC 202, [154].

Paulson on the other hand explains that prior to diplomatic protection, controversies in respect of the denial of justice to aliens would be solved through the medieval regime of reprisals.²³⁰ With the emergence of the modern state, the system of reprisal fell into disuse; the injured alien did not need to seek his or her government's license to authorise private justice because the foreign state was bound by the law of nations. In the case of denial of justice, it would be held to its international responsibility at the initiative of the complainants of its own state, which, rather than issuing letters of marque, could exercise the right of diplomatic protection. He explains that the '[a]cceptance of international authority to control national dispensation of justice was neither instant nor universal. To the contrary, many states maintained that foreigners should not have any greater entitlement than citizens to challenge the national system'.²³¹

According to Paulson, to understand the context of the reluctance to international scrutiny and the insistence on national treatment, which found its historical spokesman in the Argentinean Carlos Calvo, 'one must be aware of another difficulty in the transition from the regime of reprisal to that of diplomatic protection, namely the draping of violent interventions in the raiments of international law'.²³² The problem was that the old methods of reprisals were revived in the form of gunboat diplomacy and the continued tendency of the powerful to view the right of protection as a warrant for the use of

²³⁰ 'The objective of the reprisal was typically to compel the original delinquent to make reparations since the legal system had proved itself unwilling to do so' Paulsson (n 222) 13-16.

²³¹ *ibid* 14.

²³² *ibid* 15.

unilateral force: ‘The *diplomatic* component of the expression “diplomatic protection” was, in such circumstances, an ironic but hardly subtle fiction’.²³³

i. The Calvo Doctrine: international standard v. national treatment

The main problem with the ‘international treatment’ standard – setting a baseline below which state conduct could not fall – was that its content and scope (e.g. the primary rules of international law defining what constituted ‘international’ denial of justice) was utterly vague.²³⁴ Garcia Amador observed in his first report as Special Rapporteur on State Responsibility:

[T]he principle of the “international standard of justice”, whether it is taken on its own merits or as a complement of diplomatic protection, has always suffered from a fundamental defect: its obvious vagueness and imprecision. None of the international bodies which have accepted and applied the principle have been able to define it: either no attempt to do so has been made, or, in the few cases where it has been made, it has been with little success. They have usually merely referred to it as a ground for their decision, or applied it to particular cases on which they tried to build up a general rule by means of inductive reasoning [...].²³⁵

This view reflected the core of the claim by Latin American countries: that the vague definition of what constituted international minimum standards allowed stronger countries to intervene almost without limitation, simply arguing that its nationals had not

²³³ Paulsson (n 222) 15.

²³⁴ Despite the ambiguity of the international standard, its existence and application in the context of diplomatic protection has traditionally been accepted by scholars and international tribunals. See: generally AH Roth, *The Minimum Standard of International Law Applied to Aliens* (Leiden 1949). See also Brownlie, *Principles* (n 24) 502-505; Shaw (n 212) 734-736; and Higgins, *Problems and Process* (n 63) 159.

²³⁵ Garcia Amador, ‘First Report’ (n 229) 154.

received adequate treatment.²³⁶ Even the most determined advocates of the alien standard at the time recognised that ‘powerful States have at times extracted from weak States a greater degree of responsibility than from States of their own strength’.²³⁷ Following Calvo’s principles, Latin American states called for a ‘national treatment’ standard, i.e. complete equality between foreigners and nationals under the laws of the countries concerned.²³⁸

The Calvo Doctrine sought to achieve equality of states in international relations through: treating foreigners and nationals equally; setting the treatment of aliens to a national treatment standard; affording aliens only those rights and privileges extended to nationals; and seeking relief only in national courts. For most of the twentieth century, there was a lack of international consensus on whether treatment of foreigners was ruled by the national treatment principle and the international treatment standard or whether both were conflicting and irreconcilable principles. While the PCIJ recognised in 1926 ‘[t]he existence of a common or generally accepted international law respecting the treatment of aliens....which is applicable to them despite municipal legislation’,²³⁹ the

²³⁶ D Manning-Cabrol, ‘The imminent death of the Calvo Clause and the rebirth of the Calvo Principle: Equality of foreign and national investors’ (1994-1995) 26 Law & Policy Int’l Bus 1175.

²³⁷ Borchard, *Diplomatic Protection* (n 227) 178.

²³⁸ According to Shea, there are two cardinal principles that constituted the core of Calvo’s theory: First, that sovereign states, being free and independent, enjoy the right, on the basis of equality, to freedom from ‘interference of any sort’ by other states, whether it be by force or diplomacy, and second, that aliens are not entitled to rights and privileges not accorded to nationals, and that therefore they may seek redress for grievances only before the local authorities. These two concepts of non-intervention and absolute equality of foreigners with nationals are the essence of the Calvo Doctrine –Shea (n 223) 19-20.

²³⁹ *Case Concerning Certain German Interests in Polish Upper Silesia* (1926) PCIL Rep Ser A No. 7, 22.

1929 Conference on the Treatment of Foreigners used a draft Convention generally based on the principle of national treatment.²⁴⁰

Many industrialised states had no interest in supporting the Calvo Doctrine for political and economic reasons. An extreme example of a ‘colonial’ understanding of the ‘international minimum standard’ can be found in the 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens, prepared by Harvard Law School.²⁴¹ Under the heading ‘Adverse decisions and judgments’, Article 8 paragraph (b) makes clear that the authors of the draft were proposing that a judgement should be held internationally wrongful ‘if it unreasonably departs from the principles of justice recognised by the principal legal systems of the world’.²⁴² On the other hand, as capital importers, Latin American nations were eager to follow Calvo’s theories to protect their sovereignty. But opponents to this doctrine observed that the principle of equality or non-discrimination affirmed by Calvo set no affirmative standards for state behaviour, leaving aliens open to abuse where states chose to treat their own citizens equally poorly. As observed by Brierly, ‘facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an alien.

²⁴⁰ ‘*Conference on the Treatment of Foreigners*,’ (October 1947) 41(4) United Nations Documents on the Development and Codification of International Law, Supplement to the American Journal of International Law 60.

²⁴¹ ‘Draft Convention on the International Responsibility of States for Injuries to Aliens’ (1961) 55 AJIL 548. This text was to a considerable degree based on the ‘Draft Convention on the Law of Responsibility of States for Damages Done in their Territory to the Person or Property of Foreigners’, Harvard Law School, Research in International Law, II, Responsibility of States (Cambridge, MA 1929) 23 AJIL 133 (Special Supplement).

²⁴² As observed by Paulsson: An ICSID tribunal in *Amco II* presided by Rosalyn Higgins referred to this Draft Convention generally as being of ‘doubtful weight as persuasive authority of international law’. *Amco Asia Corporation and others v. Republic of Indonesia* (1988) ICSID Case No. ARB/81/1 [123]. Paulsson, (n 222) 96

But such equality is not the ultimate test of the propriety of the acts of the authorities in the light of international law'.²⁴³ Still, the abuse of diplomatic protection led to a scenario where Latin American nations began to implement the principles of the Calvo Doctrine unilaterally. These countries routinely placed a clause of national treatment in foreign investment contracts as well as in some of their constitutions and legislations.²⁴⁴ The Calvo Clause became a required contractual stipulation for foreign investors doing business in Latin America.²⁴⁵

ii. Shaping the exhaustion of local remedies rule

While the Latin American criticism of state responsibility did not question the principle of denial of justice but the arbitrariness of its application, it was often perceived as a direct attack on international law.²⁴⁶ The so-called Guerrero Report, arguing for an unreasonable limitation to the scope of denial of justice, was often cited as evidence of the intention of Latin American countries to deconstruct international law.²⁴⁷ Most commonly, however, jurists in the region – perceiving the rule of minimum treatment as too readily traduced into hypocritical cover for arbitrary intervention – often referred to the narrowest possible view of the scope of denial of justice (without denying it was an international delict) and took the broadest possible view of the exhaustion of local

²⁴³ J Brierly, *The Law of Nations an Introduction to the International Law of Peace* (Clarendon Press 1963) 279.

²⁴⁴ L Morgan Summers, 'The Calvo Clause' (1932) 19 Va. L. Rev. 464, 461.

²⁴⁵ Manning-Cabrol (n 236).

²⁴⁶ See, for example, AV Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law' (1946) 40 AJIL 122.

²⁴⁷ That document was characterised by the following conclusion, which many view as indefensible from the standpoint of positive law and dominant doctrine: 'A judicial decision, whatever it may be, and even if vitiated by error or injustice, does not involve the international responsibility of the State'. 'Guerrero Report' (1927) V.Legal,V.I. Document C.196.M.70.1927.V 104 [6b]. See: Paulsson (n 222) 24.

remedies as a precondition of the exercise of diplomatic protection. Indeed, when the Second International Conference of American States adopted the Convention relative to the Rights of Aliens in Mexico City in 1902, its general rule of national treatment explicitly reserved an exception for international claims in the case of ‘manifest denial of justice, or unusual delay, or evident violation of the principles of international law’.²⁴⁸

This understanding of the Calvo Doctrine – that is, the demands to resort to national remedies first as opposed to international proceedings – strengthened the reasonability of offering the host state the possibility of redressing the wrong through its domestic judicial system before claiming its international responsibility.²⁴⁹ As explained by Jimenez de Arechaga:

[O]therwise, the foreigner would be a privileged individual for whom neither the internal law nor local courts would exist, and who would interpose at once the political influence of the State of his nationality upon the emergence of the slightest difficulty with another government. A premature diplomatic intervention of this type would constitute an affront to the independence of the local sovereign and to the competence of its laws and courts over all the people submitted to its authority.²⁵⁰

The Calvo Doctrine was born when international law offered no options other than local courts or foreign warships. The 1907 Convention for the Peaceful Resolution of International Disputes, which promoted the institution of compulsory bilateral arbitration treaties, created a new tool to ensure equality between states at the moment of dispute

²⁴⁸ Quoted in Dugard, ‘The Addendum to the Third Report on Diplomatic Protection’ (2002) International Law Commission UN Doc A/CN.4/523/Add.1, 4 [8].

²⁴⁹ See, for example, Freeman, ‘Calvo Doctrine’ (n 246) 121,131.

²⁵⁰ E Jimenez de Arechaga, ‘El Derecho Internacional Contemporaneo’ (Madrid: Editorial Tecnos 1991) 37. Cited in English in Sepulveda Amor, Bernardo, ‘International law and national sovereignty: the NAFTA and the claims of Mexican jurisdiction’ (1997) 19(3) Houston Journal of International Law, 586.

resolution, notwithstanding vast differences in economic or military power. The Latin American states en masse signed the convention. Examples of the type of inter-state arbitration of the time abound in the well-known mixed claims commissions constituted to deal with alleged expropriations in the region, notably in Venezuela and Mexico. But such tribunals were not necessarily evidence of conformity or harmony. As Paulson notes:

Latin Americans still resented the fact that agreements to such adjudication were negotiated out of what was for them a position of weakness, and were offended by the eagerness and presumptuousness with which some claimants were obtaining redress for what the local governments simply were not, with the best will in the world, able to ensure for their own citizens.²⁵¹

In the late 19th and early 20th centuries, some such arbitrations occurred under the pressure of actual or threatened military force by the claimant states.²⁵²

In 1926, the validity of the Calvo Clause was contested in the North American Dredging Company claim where the US-Mexican Claims Commission sought a balance between freedom of a corporation to decide on the contents of a contract and the right of its state of nationality to exercise protection. The final award reads: '[u]nder the rules of international law may an alien make such a promise? The Commission holds that he may, but at the same time holds that he cannot deprive the government of his nation of its

²⁵¹ Paulsson (n 222) 22. To show that not all representatives of the industrialised world displayed unfair or impartial assessments, Paulsson cites the speech of the US Secretary of State Elihu Root, before the American Society of International Law in 1910 (two years before winning the Nobel Peace Prize), where he criticised the superfluous complaints of denial of justice – 'denied justice' – by U.S. nationals in developing nations. See: E Root, 'The Basis of Protection of Citizens Abroad,' (1910) 4 AJIL 517, 526-527 in Paulsson (n 222) 23,24.

²⁵² Steiner, Alston, and Goodman, *Human Rights in context* (n 225) 88.

undoubted right of applying international remedies to violations of international law committed to his damage'.²⁵³

Accordingly, the rights protected in the exercise of diplomatic protection may belong to the individual national, but the right to exercise diplomatic protection belongs to the state of nationality.²⁵⁴ The Commission established, however, that the Calvo Clause commitment precluded the individual from presenting to its government any claim relative to the interpretation or fulfilment of the contract.²⁵⁵ The Commission stated: 'As the claimant voluntarily entered into a legal contract binding itself not to call as to this contract upon its Government to intervene in its behalf, and as all of its claims relates to this contract, and as therefore it can not present its claim to its Government for interposition or espousal before this Commission'.²⁵⁶

Despite the fact that the treaty under which the Commission operated contained a waiver of exhaustion of domestic remedies, the Dredging decision limited the claims to those 'rightfully presented', with the effect of barring a claimant who had failed to comply with the fundamental contractual term, namely the Calvo Clause. Since the contractual obligation under this clause was precisely to resort to national remedies, this aspect of the case has been criticised by some scholars.²⁵⁷ Still, as Shea points out, the Dredging formula, holding the right of the state of nationality to intervene diplomatically in cases

²⁵³ *Dredging* (n 218) 29.

²⁵⁴ Borchard, *Diplomatic Protection* (n 227) 805-806.

²⁵⁵ *Dredging* (n 218) 30.

²⁵⁶ *ibid* 33.

²⁵⁷ Freeman, 'Calvo Doctrine' (n 246) 121-147 and 481-482; EM Borchard, 'Decisions of the Claims Commissions, United States and Mexico' (1926) XX AJIL 540; and K Lipstein, 'The Place of the Calvo Couse in International Law' (1945) 22 BYIL 130, 144-145.

of denial of justice but denying to the individual the right to request such protection on his own initiative without prior exhaustion of local remedies, ‘became the understating between the leading nations towards the Calvo Clause’.²⁵⁸

Dredging differentiated between breaches of national law (related to the investment contract) and international law (denial of justice). If the Calvo Clause had not been included in the contract, the Commission could have reviewed the case without looking at the exhaustion of local remedies given that the US and Mexico had waived this requirement. No matter the type of breach alleged (municipal or international) the Commission would have looked into the question. However, the Commission distinguished in this case a diplomatic protection claim based on an international wrong (denial of justice) and a claim of breach of contract. Since the individual agreed to the terms of the Calvo Clause, the Commission argued that it prevented him from bringing a claim before the Commission in regards to anything related to the contract. While the Clause was not binding on the state of nationality, the government could only bring a claim of diplomatic protection and not a claim for simple breaches to the contract. The Commission argued that the Calvo Clause barred the right of the individual to bring the claim before its government unless it exhausted domestic remedies, in which case, the breach would be a denial of justice (an IWA) and the state of nationality would have the right to bring an international (diplomatic) claim regardless of any contractual obligation binding on the individual.

²⁵⁸ Shea (n 223) 221.

The Commission noted that the Calvo Clause could not take from a foreign national: ‘his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law’.²⁵⁹ But since the claimant’s grievance arose under a contract which it had agreed should be subjected to the authority of the Mexican courts, the Commission refused to recognise the claim because it was not ‘based on an alleged violation of any rule or principle of international law’ and therefore fell under the authority of the local courts which the claimant had wrongfully ignored.

This decision has been simultaneously praised and criticised for trying to balance the right of states to exercise diplomatic protection and the obligation of individuals signing the Calvo Clause. As mentioned earlier, some scholars censured this decision as a political compromise, establishing a legally unsound formula in regards to the Calvo Clause and a waiver to the exhaustion of local remedies.²⁶⁰ Paulson on the other hand notes that the nuanced manner in which the award in this case upheld the relevant Calvo Clause was so successful in terms of articulating a viable distinction that it may be described as a watershed. From 1926 onward, it became exceedingly difficult for foreigners to deny the validity of the Calvo Clause, and equally difficult for the local government to insist that its scope extended to alleged violations of international law.²⁶¹

²⁵⁹ *Dredging* (n 218) 30.

²⁶⁰ ‘While, in my opinion, the *Dredging* case is by far the most important decision in the jurisprudence that has involved the Calvo Clause, and while it enjoys great authority because of its acceptance by statesmen and jurists, it is nevertheless not a well-reasoned or logically consistent decision [...]’, Shea (n 223) 211. See also, Borchard, ‘Claims Comissions’ (n 257) 540.

²⁶¹ Paulsson (n 222) 31.

A controversial aspect of this decision is the understanding of denial of justice as a systemic breach where the exhaustion of local remedies is a substantive part of the breach (and not simply a question of admissibility that can be waived by the parties).²⁶² Within this understanding, the delict of denial of justice requires exhaustion of domestic remedies irrespective of any general waiver. Paulson advances this proposition. According to him, there can be no denial before exhaustion: 'States do not have an international obligation to ensure that no individual judge is ever guilty of a miscarriage of justice. The obligation is to establish and maintain a system which does not deny justice; the system is the whole pyramid'.²⁶³ In a similar way, Francioni explains that: [O]nly when 'justice' is not delivered either because judicial remedies are not available or the administration of justice is so inadequate, deficient, or deceptively manipulated as to deprive the injured alien of effective remedial process, can the alien invoke 'denial of justice': a wrongful act for which international responsibility may arise and in relation to which an interstate claim and diplomatic protection may be made by the national state of the victim.²⁶⁴

Paulson further explains that denial of justice is by definition to be distinguished from situations where international wrongs materialise before exhaustion of local remedies.

²⁶² 'The fundamental effect of such [Calvo] Clauses, generally accepted as such since the *North American Dredging* case, is to deny to international tribunals the power to try (or review) dispositions of national law. Conduct that is alleged to generate international responsibility may of course be brought to such international forums as may have jurisdiction *ratione personae*. But claims that arise because of the manner in which the national system has administered justice do not fall within the scope of authority of claims submitted to it, and such an international wrong is not consummated until its remedies have been exhausted' – Paulsson (n 222) 112.

²⁶³ *ibid* 111.

²⁶⁴ F Francioni, 'Access to Justice, Denial of Justice and International Investment Law' (2009) 20 (3) EJIL, 731.

‘[T]here is no impediment to perceiving that exhaustion of local remedies, [...] with respect to such wrongs is a waivable procedural precondition’.²⁶⁵ Paulson recognises that actions of a lower court may breach international obligations under a treaty. He makes reference to the point made by Jimenez de Arechega that ‘State responsibility for acts of the Judiciary does not exhaust itself in the concept of denial of justice’.²⁶⁶ He then gives the example that a treaty may contain promises of ‘fair and equitable treatment’, which are held not to be confined to matters covered by the exhaustion of local remedies. But such grievances must according to Paulson ‘find their basis in the *lex specialis* of the treaty; for want of the exhaustion of local remedies, they have not matured as claims of denial of justice’.²⁶⁷ Modern bilateral or multilateral investment treaties contain waivers of the customary international law requirement that disputing investors exhaust local remedies available to them prior to filing an international claim.²⁶⁸ In contrast, all human rights treaties require exhaustion of effective and available domestic remedies when submitting a claim before an international monitoring body or court.²⁶⁹

²⁶⁵ Paulsson (n 222) 111.

²⁶⁶ E Jimenez de Arechaga, 'International Responsibility' in M Sorensen, *Manual of Public International Law* (St. Martin's P. 1968), 555.

²⁶⁷ Paulsson (n 222) 111.

²⁶⁸ ‘[F]our key features of investment treaties: they permit investor claims against the state without exhausting local remedies; they allow claims for damages; they allow investors to directly seek enforcement of awards before domestic courts; and they facilitate forum-shopping. [...] investment arbitration is best analogized to domestic administrative law rather than to international commercial arbitration, especially since investment arbitration engages disputes arising from the exercise of public authority by the state as opposed to private acts of the state’ – G van Harten and M Loughlin, ‘Investment Treaty Arbitration as a Species of Global Administrative Law’ (2006) 17(1) EJIL 121. On the other hand, Francioni makes the point that ‘[T]he major leap forward in the field of foreign investment law is represented by the recognition and consolidation of an indisputable right of access to international justice by private investors and by the extension of this right to the courts of third states to the extent that their cooperation is necessary in order to enforce international investment awards’. Francioni, ‘Access to Justice’, (n 264) 731.

²⁶⁹ For an overview see: Shelton, *Remedies* (n 12).

iii. The renaissance of denial of justice claims under human rights law

Contrary to the belief that HR law would supersede diplomatic protection²⁷⁰ –since it affords individual rights for nationals and foreigners alike and allows in many instances direct individual claims before international bodies – the post WWII establishment of human rights law revived the significance of this institution precisely as a means of protection of such rights.²⁷¹ As explained in the introduction of this chapter, human rights law widened the concept of international law in respect of rights of individuals. At present, individuals are protected under international law against acts of states that breach their HR, including acts or omissions of their state of nationality. Nevertheless, individual procedural remedies in international human rights law are scarce. These remedies still depend on states establishing them and then complying with their decisions. In addition, the great majority of the world population does not have access to a regional HR court and there is still no universal HR court under the UN system.

In this context, it is not surprising that aliens have turned to diplomatic protection as an option to enforce human rights. The *Diallo*²⁷² case discussed below is a recent

²⁷⁰ Amador and Bennouna questioned the relevance of diplomatic protection in current international law. The former attempted to create a synthesis between the international minimum standard and the doctrine of national treatment. See: Garcia Amador 'First Report' (n 229) [151-159]. The latter questioned the relationship between diplomatic protection and the position of the individual in international law, the discriminatory nature of diplomatic protection and the measure of discretion invested in states with the decision to exercise protection. See: Bennouna, 'Preliminary Report on Diplomatic Protection' (1998) Document A/CN.4/484, 10-11 [33-37]; [14-15], [49-54]; 3 [8]; and 13 [47] respectively).

²⁷¹ M Salazar Albornoz, 'Legal Nature and Legal Consequences of Diplomatic Protection. Contemporary Challenges' *Anuario Mexicano de Derecho Internacional* 2. (Vol 6 2006) 380.

²⁷² *Diallo*, (*Preliminary Objections*) (n 139).

example.²⁷³ Even when this mechanism pertains to states as opposed to individuals (the espousal of a claim of diplomatic protection is completely discretionary on the will of the state of nationality), it is a well-established institution under customary international law. As long as states are willing to bring claims on behalf of their nationals, diplomatic protection can function as an avenue to seek redress for human rights violations.

At the same time, HR law has influenced the law on diplomatic protection in many different aspects. In 1985, the UN General Assembly adopted the Declaration on Human Rights of Individuals who are not Nationals of the Country in which They Live (Declaration of not Nationals).²⁷⁴ The Declaration provides no machinery for its enforcement, but it does reiterate the right of the alien to contact his or her consulate or diplomatic mission for the purpose of protection. As will be described below, the concept that the injury claimed at the international level is an injury of the state as opposed to an injury of an individual has departed from its traditional understanding.²⁷⁵ Likewise, the notion that individuals have a right to have their claims espoused by their state of nationality through diplomatic protection is increasingly accepted. It has been argued before domestic courts with a relative degree of success that the obligation to provide

²⁷³ The ICJ cases of *LaGrand* (n 92) and *Avena* (n 123) are arguably human rights cases. However, while the Court asserted that the right to consular assistance was an individual right, it did not find it necessary to answer the question of whether it was also a human right. See also *Armed Activities Case* (n 97) [133], where the ICJ rejected a counterclaim brought forward by Uganda concerning the ill treatment of individuals by the Democratic Republic of the Congo because Uganda had failed to establish the relevant, Ugandan, nationality of the individuals concerned.

²⁷⁴ GA Res 40/144, 13 December 1985.

²⁷⁵ As shown by the drafting history of Article 1 of the ILC Draft Articles on Diplomatic Protection and the reference to this provision by the ICJ in the *Diallo case*, there has been a departure from the traditional *Mavromatis* (n 279) understanding of diplomatic protection. While it was not evident that the innovative element of the definition of diplomatic protection in the ILC Draft Articles would be accepted – i.e. leaving out the part stipulating that a state was ‘adopting in its own right’ the claim of its national – the ICJ reference to this provision seem to confirm that it is indeed the up-to-date understating of diplomatic protection. See: (n 283-287) and accompanying text.

access to justice and effective remedies under international human rights law should be construed to oblige states to exercise diplomatic protection in case of serious human rights violations.²⁷⁶

At the same time, the conceptualisation of HR challenged some of the traditional foundations of the law of diplomatic protection (such as the discriminatory treatment between locals and foreigners). It facilitated the acceptance of international scrutiny or adjudication in cases of protection of aliens. The international minimum treatment standard, while not replaced by human rights law in its entirety, has been clearly supplemented by this branch of international law. HR have given a clearer content to the minimum treatment standard and the primary rules protecting foreigners. In this sense, the introduction of human rights law has improved the notion of what kind of treatment aliens and nationals should be accorded.²⁷⁷

3. Conditions for the exercise of diplomatic protection

A. Injuries to aliens as international wrongful acts

²⁷⁶ A Vermeer-Künzli, 'Restricting Discretion: Judicial Review of Diplomatic Protection' (2006) 75(2) *Nordic Journal of International Law* 279, 29.

²⁷⁷ The focus is less on why aliens should be entitled to treatment in accordance with international standards and more on why their own citizens should not be accorded the same level of protection even as a matter of national law. As Higgins notes, '[t]he national's standards must be moved up to those required for the foreigner under international law; they must not be tied down in misery together'. Higgins, *Problems and Process* (n 63) 159. Sometimes the customary international norms on treatment of aliens and human rights treaties require higher than national standards of treatment, sometimes not. That is a matter of substance, to be enforced by the competent jurisdiction. This means today: international adjudication.

As early as 1758, de Vattel claimed in his treatise, *The Law of Nations*, that ‘whoever uses a citizen ill indirectly offends the State which is bound to protect this citizen’.²⁷⁸ This notion was confirmed in the *Mavrommatis Palestine Concessions Case*, where the PCIJ held that ‘a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels’.²⁷⁹ In extending such protection, reasoned the Court, a state was merely preserving its own rights; namely, ‘its right to ensure, in the person of its subjects, respect for the rules of international law’.²⁸⁰ In this sense, the understanding of diplomatic protection has a broader meaning than simply consular access in foreign states. It includes an international proceeding, constituting ‘an appeal by nation to nation for the performance of the obligation of the one to the other, growing out of their mutual rights and duties’.²⁸¹

i. An injury to the state?

Human rights law has influenced the understating of diplomatic protection in a different way. The notion that an injury to the individual is an injury to the state itself is not consistently maintained in judicial proceedings. When states bring proceedings, they seldom claim that they assert their own rights and often refer to the injured individual as the ‘claimant’. In addition, the transfer of compensation received to the injured individual

²⁷⁸ de Vattel (n 220) 298.

²⁷⁹ *Mavrommatis Palestine Concessions Case* [1924] PCIJ Rep, Ser. A, No 2, at 12 [hereinafter *Mavrommatis*].

²⁸⁰ *ibid* 16.

²⁸¹ Borchard, *Diplomatic Protection* (n 227) 354.

is widely supported in state practice.²⁸² Thus, it has been suggested that the state acts as agent on behalf of the injured individual. As shown by the drafting history of Article 1 of the ILC Draft Articles on diplomatic protection and the reference to this provision by the ICJ in the *Diallo* case,²⁸³ the understanding of diplomatic protection has arguably departed from the traditional *Mavrommatis* conception. In the first ILC Draft Articles on Diplomatic Protection, draft Article 1 reflected the exact language of *Mavrommatis* and was adopted at the first reading:

Article 1
Definition and Scope

Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State **adopting in its own right** the cause of its national in respect of an injury to that national arising from an internationally wrongful act of another State.²⁸⁴

Despite the lack of willingness on behalf of the Special Rapporteur to re-open the debate on this draft article, the comments and observations received from governments and suggestions from other ILC members triggered a substantial discussion on this point.²⁸⁵

Italy, in its comments and observations to the draft articles, stated that:

The Government of Italy believes that draft article 1, in giving a definition of the concept of ‘diplomatic protection’ and of its scope of application, adopts a wording which is too traditional, especially when it speaks of a State ‘adopting in its own right the cause of its national’. The wording implies not only that the right of diplomatic protection belongs only to the State exercising such protection, but also that the right that has been violated by the internationally wrongful act belongs only to the same State. However, the latter concept is no longer accurate in current international law. The International Court of Justice, in the *LaGrand*

²⁸² J Dugard, ‘Seventh Report on Diplomatic Protection’ 2006 A/CN.4/567 [93-103]

²⁸³ *Diallo (Merits)* (n 97) [639].

²⁸⁴ Dugard, ‘Seventh Report’ (n 282) 5. (emphasis added).

²⁸⁵ A Vermeer-Künzli, ‘The protection of individuals by means of diplomatic protection: diplomatic protection as a human rights instrument’ (Doctoral Thesis, Leiden University 2007) 55. <<https://openaccess.leidenuniv.nl/handle/1887/12538>>, accessed 15 March 2016.

case and in *Avena* and other Mexican Nationals (*Avena*), has established that the breach of international norms on treatment of aliens may produce both the violation of a right of the national State and the violation of a right of the individual. The same conclusion has been reached by the Inter-American Court of Human Rights, in its Advisory Opinion OC-16/99.

Therefore the Government suggests that draft article 1 be modified in order to codify more clearly current international law. The new wording (which has been extracted from the *Avena* case, para. 40) could be the following:

Diplomatic protection consists of resort to diplomatic action or other means of peaceful settlement by a State claiming to have suffered the violation of its own rights and the rights of its national in respect of an injury to that national arising from an internationally wrongful act of another State.

One should note that this wording leaves unchanged the basic concept according to which the right to exercise diplomatic protection belongs to the State.²⁸⁶

While not adopting the Italian proposal in its entirety, its underlying idea, that of the right of the individual and of abandoning too much focus on the state as the supreme holder of all international rights, received some support in the ILC. As a result, the wording was changed significantly to bring the definition on diplomatic protection more in line with a modern approach to international law. It left out the part stipulating that a state was ‘adopting in its own right the claim of its national’:

Article 1 Definition and Scope

For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.

²⁸⁶ Diplomatic Protection: Comments and Observations Received from Governments, 58th Session (2006) A/CN.4/561/Add.2 2.

While it was not evident that the innovative element of the definition of diplomatic protection would be accepted (i.e. leaving out the part stipulating that a state was ‘adopting in its own right’ the claim of its national), the ICJ reference to this provision in *Diallo* seems to confirm that it is indeed the up-to-date understanding of diplomatic protection.²⁸⁷ Judge Cançado Trindade stressed in his Separate Opinion that, although the formal claimant in the case was Guinea exercising diplomatic protection, ‘the subject (titulaire) of the rights breached in the present case is not the applicant State, but the individual concerned, Mr A.S. Diallo, who is also the ultimate beneficiary of the reparations due’.²⁸⁸ Similarly, Judge Greenwood noted in his Declaration that although Guinea had brought the action in the exercise of its right of diplomatic protection, ‘the case is in substance about the human rights of Mr. Diallo’.²⁸⁹ The Court itself emphasised the point when it stated ‘that the sum awarded to Guinea in the exercise of diplomatic protection of Mr Diallo is intended to provide reparation for the latter’s injury’.²⁹⁰

Nevertheless, the right to diplomatic protection (i.e. the right to exercise it) belongs to or is vested in the state,²⁹¹ and for a claim to be espoused by a state there must be an international wrong attributable to the injuring state. Diplomatic protection can only be exercised by states in response to an internationally wrongful act.

²⁸⁷ The ILC Commentary to this provision however states that it ‘is formulated in such a way as to leave open the question whether the State exercising diplomatic protection does so in its own right or that of its national – or both’—Commentary to Article 1, [5] 26. Draft Articles on Diplomatic Protection with Commentaries, (2006) 2(2) Yearbook of the International Law Commission. [Hereinafter *ILC Diplomatic Protection Articles*].

²⁸⁸ Separate Opinion, *Diallo (Compensation)* (n 113) [203].

²⁸⁹ Greenwood’s Declaration, *Diallo (Compensation)* (n 113) [1].

²⁹⁰ *ibid* [57].

²⁹¹ ‘A State has the right to exercise diplomatic protection in accordance with the present draft articles’. Art 2 of the *ILC Diplomatic Protection Articles* (n. 287).

The recognition that it is an injury to the individual and not to the state is consistent with the development of human rights law and the acknowledgment of the role that individuals have in international law. Paradoxically, the rationale behind Vattel's legal fiction is ultimately coherent. If the injury is to the state and not to the individual (because the other state failed to afford the minimum treatment required by international law to its national), then the state should be the one to have a remedy for such a breach. However, if the legal or natural person is the injured party, the party whose rights have been breached, shouldn't the individual have access to remedy directly under international law (regardless of the capacity of states to 'represent' them in diplomatic procedures)?

ii. The nature of denial of justice: primary and secondary norms

For a state to exercise diplomatic protection, one of its nationals abroad must have suffered a denial of justice in accordance with the international minimum standard. Put differently, minimum treatment precludes a 'denial of justice'.

Exactly what sort of treatments constituted an international wrong in the context of state responsibility for injuries to aliens prior to the emergence of modern human rights has been rather obscure.²⁹² However, the development of human rights law – the definition

²⁹² 'Denial of justice' had a broad meaning including any internationally cognizable injury befalling an alien. See: Brownlie, *Principles* (n 24) 429 noting that the expression 'has been employed by claims tribunals so as to be coextensive with the general notion of responsibility for harm to aliens'; Restatement 3rd of the Foreign Relations Law of the US (1987), para 71. See also Brierly, *The Law of Nations* (n 243)

of which rights individuals are entitled to under international human rights law and what types of state acts are prohibited— has certainly clarified the content and understanding of the ‘international minimum standard’. The content of the minimum treatment are concepts now generally covered by international human rights law (e.g. due process violations, arbitrary government use of force, curtailing of freedom of speech, and failure to afford effective domestic remedies), but their violation in relation to an alien remains a justification for diplomatic protection (for example, the Declaration of not Nationals ²⁹³ or the recent *Diallo* case²⁹⁴).

States do not have an international obligation to ensure that no individual judge is ever guilty of a miscarriage of justice. However, they do have an obligation to establish and maintain a system which does not deny justice; the system is the whole pyramid.²⁹⁵ But while diplomatic protection is clearly a mechanism to enforce a secondary rule of international law (i.e. the procedural action responding to a breach to claim reparation), denial of justice is sometimes considered a primary rule and sometimes a part of the procedure to claim reparation and therefore a secondary rule (there is a well-established obligation to exhaust domestic remedies prior to bringing an international claim). Whereas the local remedies rule is a criterion of admissibility, it is closely related to the concept of denial of justice/access to justice. Still, denial of justice has generally been

286 ([t]he term ‘denial of justice’ is sometimes loosely used to denote any international delinquency towards and alien for which a state is liable to made reparation . . . There are many possible ways in which a court may fall below the standard fairly to be demanded of a civilized state . . . [including] corruption, threats, unwarrantable delay, flagrant abuse of judicial procedure, a judgment dictated by the executive, or so manifestly unjust that no court which was both competent and honest could have given it’).

²⁹³ (n. 274)

²⁹⁴ *Diallo (Merits)* (n 97) 639.

²⁹⁵ Paulsson (n 222) 109.

regarded as part of the primary rules. As Francioni points out, an integral part of the ‘minimum standard of justice’ is the principle of access to justice, since this principle presupposes that the individual who has suffered an injury in a foreign country at the hands of public authorities or private entities must be afforded the opportunity to obtain redress before a court of law or appropriate administrative agency.²⁹⁶

Access to justice therefore forms part of the content of the minimum standard of justice that states need to afford to foreigners residing in their territories. If these primary rights are not afforded then the state of nationality has a right to bring an international claim. However, in order to institute an international claim of reparation (secondary right) the individual has to exhaust all domestic remedies as matter of admissibility. Only if there is no effective domestic remedy will the state be able to claim that there was a denial of justice. The failure to afford justice is both the procedure to bring and the substance of the claim.

In sum, the occurrence of a denial of justice as a primary rule has a bearing on the requirement to exhaust local remedies as a secondary rule, but the two are not always easily distinguishable. The same occurs in human rights law. The right of access to justice (right to an effective remedy) and the obligation to exhaust domestic remedies interconnect in a complex relationship where it is difficult to distinguish one from the other. All human rights treaties allowing international claims for alleged breaches guarantee access to justice and also require as a matter of admissibility prior exhaustion

²⁹⁶ Francioni, ‘Access to Justice’ (n 264) 731.

of domestic remedies. For example, Article 13 of the ECHR provides that everyone is entitled to an effective remedy before a national authority.²⁹⁷ On the other hand, Article 35 of the ECHR establishes that the Court ‘may only deal with the matter after all domestic remedies have been exhausted’.²⁹⁸ In this sense, the substantive/primary right to an effective remedy is closely connected to the procedural (admissibility) requirement to exhaust local remedies. The ECtHR has acknowledged this relationship: ‘The rule (of exhaustion of local remedies) is based on the assumption, reflected in Article 13 of the Convention – with which it has close affinity – that there is an effective remedy available in respect of the alleged breach in the domestic system whether or not the provisions are incorporated in national law’.²⁹⁹

Complex questions arise as to the inter-relationship between these two articles (and with similar provisions in other human rights treaties). The Court is obliged by Article 35 to determine whether an application is ‘manifestly ill-founded’, which can involve taking a position on the legal and/or factual merits of a claim.³⁰⁰ In this sense, if a complaint is declared ‘manifestly ill-founded’, it will not satisfy the threshold test for reliance on Article 13. At the same time, if there is no remedy that complies with Article 13, then there can be no obligation to have recourse to it.³⁰¹

²⁹⁷ Article 13, Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (4 November 1950) ETS 5 <<http://www.refworld.org/docid/3ae6b3b04.html>> accessed 11 February 2016.

²⁹⁸ Article 35, *idem*.

²⁹⁹ *Akdivar and Others v. Turkey* (16 September 1996) ECHR 65.

³⁰⁰ D J Harris, M O’Boyle, and C Warbrick, *Law of the European convention on human rights* (OUP 2009) 561.

³⁰¹ *ibid*.

Under customary rules of state responsibility, the occurrence of an internationally wrongful act is both a criterion of admissibility and the primary rule, being part of the merits of the claim. The questions of nationality and local remedies will generally be dealt with first since failure to comply with the nationality of claims rule or the requirement to exhaust local remedies will render the claim inadmissible. If both criteria are fulfilled, the merits phase will consider the occurrence of an internationally wrongful act. Denial of justice, however, may be a source of international legal responsibility independently of the act that created in the first place the basis for resorting to the courts. Sometimes, '[...] the international responsibility of the State is not engaged by the action complained of: it can only arise out of a subsequent act of the State constituting a denial of justice to the injured party seeking a remedy for the original action of which he complains'.³⁰² Indeed, it may be that the denial of justice is the result of the failure of domestic remedies and therein lies the international wrong.

B. Exhaustion of domestic remedies

i. Effective remedies

Under the law on diplomatic protection, a state may not bring an international claim arising out of an injury to a national before the injured national has exhausted all available and effective local legal remedies in the state alleged to be responsible for the injury. In the *Interhandel* case the ICJ stated that:

The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the

³⁰² JES Fawcett, 'The exhaustion of Local Remedies: Substance or Procedure?' (1954) 31 BYIL 452, 456.

rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system.³⁰³

The court has reiterated that it is ‘an important principle of customary international law’.³⁰⁴ Article 44(b) of the ILC Articles on Diplomatic Protection provides that the responsibility of a state may not be invoked if ‘the claim is one to which the rule of exhaustion of local remedies applies and any available and effective remedy has not been exhausted’.³⁰⁵

Local remedies include all effective remedies available to natural or legal persons under the domestic law of the state concerned and capable of redressing the situation complained of, whether judicial or administrative, at the first, second, or third instance, including procedural means and other formal remedies. Extralegal remedies or remedies as of grace or favour do not qualify as local remedies.³⁰⁶ In the *Ambatielos* claim, the Arbitral Tribunal declared that ‘it is the whole system of legal protection, as provided by municipal law, which must have been put to the test’.³⁰⁷

Ineffective remedies, i.e. those that hold out no real prospects of obtaining the redress sought, need not be used: ‘There can be no need to resort to the municipal courts if those

³⁰³ *Interhandel Case (Preliminary Objections)* [1959] ICJ Rep. 6, 27.

³⁰⁴ *Elettronica Sicula Spa (ELSI) (United States of America v. Italy)* [20 July 1989] ICJ 15, 42.

³⁰⁵ ILC Responsibility Articles (n 16).

³⁰⁶ *Finnish Ships Arbitration (Finland v. United Kingdom)* [1934] 3 R.I.A.A. 1479; and see: AP Fachiri, ‘The Local Remedies Rule in Light of the Finnish Ships Arbitration’ (1936) 17 Brit Y B Int’l L 19.

³⁰⁷ *Ambatielos Case (Greece v. UK)* [1956] 12 R.I.A.A. 91, 12.

courts have no jurisdiction to afford relief; nor is it necessary again to resort to those courts if the result must be a repetition of a decision already given'.³⁰⁸ The remedies must, moreover, be available, effective, and not futile both in theory and practice.³⁰⁹ The 'futility rule' is well established³¹⁰ and it involves the case where the body allegedly able to grant the remedy is in fact limited in its powers and not free to decide upon the question that lies at the heart of the complaint. For example, 'where it is clear that a national law justifying the acts of which the alien complains would have to be applied by the local organs or courts thus rendering recourse to them obviously futile, local remedies need not be exhausted'.³¹¹

ii. Direct, indirect and mixed claims

The exhaustion of local remedies rule applies only to cases in which the claimant state has been injured 'indirectly', that is, through its national. It does not apply where the claimant state is directly injured by the wrongful act of another state. In practice, it is difficult to decide whether the claim is 'direct' or 'indirect' where it is 'mixed', in the sense that it contains elements of both injury to the state and injury to the nationals of the state.

³⁰⁸ *Panevezys-Saldutiskis Railway Case* (1939) P.C.I.J., Ser. A/B, No. 76, 18.

³⁰⁹ *Interhandel* (n 303) (determining whether plaintiff has exhausted all probable remedies before reaching the stage of litigating the case in the United States courts). See also: U.S. case *Sarei v. Rio Tinto, PLC*, (Sarei IV) 550 F. 3d 822, 831-32 (9th Cir. 2008) (en banc) where the Court analysed the principle of exhaustion of domestic remedies in international law and concluded that the 'remedy must be available, effective, and not futile' (Sarei IV, 550 F. 3d at 832).

³¹⁰ (i) *Forest of Central Rhodope Case* (1933) 3 UNRIAA 1405: Local remedies did not have to be exhausted where the individual sought to challenge confiscation of forest areas under a national law permitting such confiscation; (ii) ILC Third Report on Diplomatic Protection (A/CN.4/523), para 40: 'where for instance legislation has been adopted to confiscate the property of an alien and it is clear that the courts are obliged to enforce this legislation there will be no need to exhaust local remedies'.

³¹¹ CF Amerasinghe, *Local Remedies in International Law* (2nd edn, CUP 2004) 208.

The *Diallo* case is a recent example of a classic diplomatic protection case, where the injury is to the individual national of the claimant state. But the ICJ has also dealt recently with the question of mixed claims (direct and indirect injuries) in the context of diplomatic protection. Most notably are the decisions in the *LaGrand* and *Avena* cases, both dealing with the same violation (Article 36.1.b. of the VCCR) but deciding the issue in different ways. In *LaGrand*, the ICJ remarkably qualified Article 36.1.b of the VCCR as an individual right, therefore allowing Germany to claim responsibility for a violation of this right vis-à-vis its nationals. In *Avena* the situation was different. Mexico had advanced a ‘mixed claim’ argument, implying there were both direct and indirect injuries present. However, the ICJ decided that diplomatic protection was not the mechanism Mexico needed to resort to in order to protect its nationals. Instead, it accepted Mexico’s claim only as a direct claim, based on direct injury.³¹²

The Court found that the VCCR creates special circumstances through the ‘interdependence of the rights of the State and of individual rights’, an interdependence already established in *LaGrand*: ‘Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the implementation of the system of consular protection’.³¹³ This interdependence, or ‘interrelatedness’, is supposed to exist between Article 36(1)(b) as an individual right on the one hand and Article 36(1)(a) and (c) as a state’s right on the

³¹² It is worth noting that the ICJ avoided in both cases any decisions regarding the request by Germany and Mexico respectively in regards to the qualification of Article 36(1)(b) as a human right. See, for example, E Milano, ‘Diplomatic Protection and Human Rights before the International Court of Justice: re-fashioning tradition?’ (2004) 35 NYbIL 85, 127.

³¹³ *LaGrand* (n 92) 492 [74].

other. According to the Court, those rights do not exist separately, but should be seen as parts of one regime for consular protection. It is by virtue of this regime that a violation of Article 36(1)(b) necessarily entails a violation of Article 36(1)(a) and (c). Mexico therefore ‘may, in submitting a claim in its own name, request the Court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on Mexican nationals...’.³¹⁴

Accordingly, it was not necessary to exhaust local remedies and the Court would not ‘deal with Mexico’s claims of violation under a distinct heading of diplomatic protection’.³¹⁵ Vermeer-Künzli finds that the Court’s construction of this case as a direct injury to the state as opposed to indirect injury (and therefore a case of diplomatic protection) is artificial: ‘[...] what is exactly the difference between an indirect injury and an injury through nationals? Indeed the phrasing “both direct and through the violations of individual rights” suggests that there is a difference’.³¹⁶

Avena does seem at odds not only with the judgment in *LaGrand*, but also with some of the previous practice of the Court in respect of mixed claims. When presented with this type of case, the ICJ generally examined the different elements of the claim and decided whether the direct or the indirect element was preponderant. In doing this, it gave regard to factors such as the subject of the dispute, the nature of the claim and the remedy

³¹⁴ *Avena* (n 123), 35-36 [40].

³¹⁵ *ibid* [40].

³¹⁶ A Vermeer-Künzli (n 285)144 <<https://openaccess.leidenuniv.nl/handle/1887/12538>> accessed 15 March 2016.

claimed. From the jurisprudence in the *Hostages*,³¹⁷ *Interhandel*,³¹⁸ and *ELSI*³¹⁹ cases, it would seem that where a subject of the dispute is a diplomatic official or state property the claim would normally be direct, but where the state seeks monetary relief on behalf of its national the claim would be indirect. While Mexico was not seeking monetary relief in *Avena* (and neither did Germany in *LaGrand*), it was clearly bringing a case on behalf of its nationals who were not diplomatic officials and seeking a remedy on their behalf. In the *ELSI* case, the Court rejected the argument of the United States that part of its claim was premised on the violation of a treaty and that it was therefore unnecessary to exhaust local remedies, holding that: ‘The Chamber has no doubt that the matter which colours and pervades the United States claim as a whole is the alleged damage to Raytheon and Machlett [United States corporations]’.³²⁰

The view that *Avena* was indeed a case of diplomatic protection was expressed by some of the judges in their separate opinions.³²¹ Specifically, Judge *ad hoc* Sepulveda observed that in keeping with the Court’s previous recognition of violations of individual rights in the *LaGrand* case:

[...] the Court, in response to Mexico’s submission, should have recognised, as a matter of its right to exercise diplomatic protection, the espousal by Mexico at the international level of the claims of the 52 Mexican nationals whose individual rights have been denied, amounting to the denial of justice through the judicial process of the United States. [...] since the application of the doctrine of procedural default by United States

³¹⁷ *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* [1980] ICJ Rep 3.

³¹⁸ *Interhandel* (n 303).

³¹⁹ *ELSI* (n 304).

³²⁰ *ELSI* (n 304) 43 [52].

³²¹ See generally: Separate Opinion Judge Toka and Separate Opinion Judge *ad hoc* Sepulveda, *Avena* (n 123).

courts means, for all practical purposes, that there are no remedies to exhaust, and that the futility rule becomes fully operative. [...].³²²

It goes without saying that in deciding upon the futility of the local remedies a court may find itself in a difficult situation.³²³ However, the ICJ had already discussed the procedural default rule in *LaGrand*, concluding that the rule rendered appeals to local remedies ineffective. In *Avena*, the Court recognised that no fundamental change had been made to the rule, implying that the continued application of the procedural default rule made resort to local remedies ineffective. The Court therefore could simply have concluded that the procedural default rule barred effective recourse to local remedies and that the remedies had to be regarded as exhausted accordingly. In contrast, by choosing to qualify *Avena* as direct violation, it failed to address the denial of justice claim and the continuing failure of the United States to afford effective remedies for aliens.

On the other hand, as observed by Vermeer-Künzli, the Court did not answer the question of whether the right to consular notification and communication under the VCCR is a human right. Without considering that it should be, she makes the point that if the Court had answered in the affirmative, the case would have been an example of the function of diplomatic protection as an instrument to protect human rights.³²⁴

³²² Separate Opinion Judge *ad hoc* Sepúlveda, *Avena* (n 123) [22].

³²³ The Chamber of the Court in the *ELSI* case acknowledged that ‘it is never easy to decide, in a case where there has in fact been much resort to the municipal courts, whether local remedies have truly been “exhausted”’, *ELSI* (n 304) [63].

³²⁴ Vermeer-Künzli (n 285) 156-157 <<https://openaccess.leidenuniv.nl/handle/1887/12538>> accessed 15 March 2016.

C. Nationality of claims

The state's right to exercise diplomatic protection is based on the link of nationality between the individual and the state. This is reflected in Article 3(1) of the Draft Articles on Diplomatic Protection, which provides that: 'The State entitled to exercise diplomatic protection is the State of nationality'.³²⁵ This is one of the main criticisms of diplomatic protection as a tool to protect human rights.³²⁶ The institution is inherently discriminatory as it only protects nationals of states that are aliens in the wrongdoing state and not everyone suffering from the same international wrong. In contrast, human rights conventions protect all individuals under the jurisdiction of the wrongdoing states.

In the *Armed Activities* case³²⁷ the ICJ rejected a counterclaim brought forward by Uganda concerning the ill treatment of individuals by the Democratic Republic of the Congo because Uganda had failed to establish the relevant, Ugandan, nationality of the individuals concerned³²⁸:

333. [...] The Court is of the opinion that in presenting this part of the counter-claim Uganda is attempting to exercise its right to diplomatic protection with regard to its nationals. It follows that Uganda would need to meet the conditions necessary for the exercise of diplomatic protection as recognised in general international law, namely the requirement of Ugandan nationality of the claimants and the prior exhaustion of local remedies. The Court observes that no specific documentation can be found

³²⁵ *ILC Diplomatic Protection Articles* (n. 287).

³²⁶ See, for example, Bennouna who questioned the relationship between diplomatic protection and the position of the individual in international law, the discriminatory nature of diplomatic protection and the measure of discretion invested in states with the decision to exercise protection [Bennouna (n 270) 10-11 [33-37]; 14-15 [49-54]; 3 [8]; and 13 [47] respectively).

³²⁷ *Armed Activities Case* (n 97).

³²⁸ *ibid* [333].

in the case file identifying the individuals concerned as Ugandan nationals. The Court thus finds that, this condition not being met, Uganda's counter-claim concerning the alleged maltreatment of its nationals not enjoying diplomatic status at Ndjili International Airport is inadmissible.

Judge Simma, in a strong separate opinion to the judgment, argued that the *jus cogens* nature of the breaches of international law provided Uganda with legal standing regardless of nationality links:

The specific construction of the rights and obligations under the Fourth Geneva Convention as well as the relevant provisions of Protocol I Additional to this Convention not only entitles every State party to raise these violations but even creates an obligation to ensure respect for the humanitarian law in question. The rules of the international law of State responsibility lead to an analogous result as concerns the violations of human rights of the persons concerned by the Congolese soldiers.³²⁹

As explained in Chapter 1, it is unclear if or how international law allows any state in cases of serious *erga omnes* violations to claim reparation on behalf of the injured individuals (irrespective of nationality) from the responsible state.³³⁰ What is clear is that international custom and general principles of law set limits in the conferral of nationality for the purpose of diplomatic protection by describing the linkages between states and individuals, which will result in the nationality conferred by a state being recognised by international law. Birth (*jus soli*), descent (*jus sanguinis*), and naturalisation are the connections generally recognised by international law. When drafting the Articles on diplomatic protection, the ILC considered whether in addition to one of these connecting

³²⁹ Separate Opinion Judge Simma, *Armed Activities Case* (n 97) [37].

³³⁰ See: Article 48(2)(b) of the ILC Responsibility Articles (n 23). This rule allows any state in cases of serious *erga omnes* violations to claim reparation from the responsible state. Such a claim must be made in the interest of the injured state, if any, or of the beneficiaries of the obligations breached. According to the ILC Commentary on Article 48, this measure is justified since it provides a means of protecting the community or collective interest at stake. Commentary to Article 48, in Report of the ILC Responsibility Articles (n 23) [12].

factors – and particularly in the case of naturalisations – there must be a ‘genuine’ or ‘effective’ link between the state asserting the claim and the individual.

The *Nottebohm* case, in which Liechtenstein sought unsuccessfully to claim reparation on behalf of a naturalised national from Guatemala, with which the national (Nottebohm) had had a close ties for over thirty-four years, is seen as authority for the proposition that there should be an ‘effective’ or ‘genuine’ link between the individual and the State of nationality, not only in the case of dual or plural nationality, but also where the national possess only one nationality.³³¹

In codifying the law of diplomatic protection, the ILC took the view that a state is not required to demonstrate an effective or genuine link between itself and its national.³³² In

³³¹ According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred either directly by the law or as a result of an act of the authorities, is in fact more closely connected with the population of the state conferring nationality than with that of any other state. Conferred by a State, it only entitles that State to exercise protection *vis-à-vis* another State, if it constitutes a translation into juridical terms of the individual’s connection that has made him its national. [*Nottebohm (Liechtenstein v Guatemala)* [1955] ICJ Rep 4, 23].

³³² The Commentary to Article 4 of the Draft Articles on Diplomatic Protection states: ‘Despite divergent views as to the interpretation of the case [*Nottebohm*], the Commission took the view that there were certain factors that served to limit Nottebohm to the facts of the case in question, particularly the fact that the ties between Mr Nottebohm and Liechtenstein (the Applicant State) were ‘extremely tenuous’ compared with the close ties between Mr Nottebohm and Guatemala (the Respondent State) for a period of over 34 years, which led the International Court of Justice to repeatedly assert that Liechtenstein was ‘not entitled to extend its protection to Nottebohm *vis-à-vis* Guatemala’. This suggests that the Court did not intend to expound a general rule applicable to all States but only a relative rule according to which a State in Liechtenstein’s position was required to show a genuine link between itself and Mr Nottebohm in order to permit it to claim on his behalf against Guatemala with whom he had extremely close ties. Moreover, it is necessary to be mindful of the fact that if the genuine link requirement proposed by Nottebohm was strictly applied, it would exclude millions of persons from the benefit of diplomatic protection as in today’s world of economic globalization and migration there are millions of persons who have moved away from their State of nationality and made their lives in States whose nationality they never acquire or have acquired nationality by birth or descent from States with which they have a tenuous connection’. Commentary to Article 4, *ILC Diplomatic Protection Articles* (n. 287). [5].

its view, the Court was determined to propound a relative test only, i.e. that *Nottebohm*'s close ties with Guatemala trumped the weaker nationality link with Liechtenstein. In these circumstances, the *Nottebohm* requirement of a 'genuine link' should be confined to the peculiar facts of the case and not seen as a general principle of all cases of diplomatic protection.³³³

The ILC articles also deal with other aspects of nationality and diplomatic protection. Article 6 describes the principles of multiple nationality and claims against a third state. Article 9 recognises that incorporation confers nationality on a corporation, but provides an exception for cases where there is no significant connection between the corporation and its state of incorporation. This article, together with Article 11, outlines clear exceptions to the rule expounded in the *Barcelona Traction*,³³⁴ specifically in cases in which the court will lift the corporate veil in order to allow the state of nationality of the shareholders to exercise diplomatic protection. Where an exception applies, as the shareholders in a company may be nationals of different states, several states of nationality may be able to exercise diplomatic protection. Article 11 outlines the exceptions in favour of the right of the state of the shareholders of a corporation to intervene against the state of the incorporation when it is responsible for causing injury to the corporation. In the *Diallo* case,³³⁵ the ICJ left open the question of whether the rule contained in Article 11(b), which requires the claimant state to show that the company

³³³ See: Commentary to Article 4, *ILC Diplomatic Protection Articles* (n. 287). [5].

³³⁴ *Barcelona Traction* (n 174). For a brief explanation of the ILC reasoning, see: Dugard 'Diplomatic Protection' in Crawford, *The Law of State Responsibility* (n 51). See also Commentary to Article 9[4]; Commentary to Article 11[3], *ILC Diplomatic Protection Articles* (n. 287).

³³⁵ *Diallo (Preliminary Objections)* (n 139).

was compelled to incorporate in the respondent state, is a rule of customary international law.³³⁶

Finally, the ILC considered the codification of the rule of continuous nationality – that a state may exercise diplomatic protection only on behalf of a person who was a national of that state at time of the injury on which the claim is based and who had continuously been a national of that state up to and including the time of the presentation of the claim. According to Dugard, the ILC refused to accept the dictum in *Loewen Group Inc. v USA*,³³⁷ which proclaims an absolute requirement of continuous nationality, but Article 5³³⁸ does accept the principle which formed the basis for the Tribunal’s factual finding that a state may no longer exercise diplomatic protection in respect of a person who

³³⁶ *ibid* [91-93].

³³⁷ (2005) 7 ICSID Reports 442, 485 [225].

³³⁸ *Continuous nationality of a natural person*

1. A State is entitled to exercise diplomatic protection in respect of a person who was a national of that State continuously from the date of injury to the date of the official presentation of the claim. Continuity is presumed if that nationality existed at both these dates.
2. Notwithstanding paragraph 1, a State may exercise diplomatic protection in respect of a person who is its national at the date of the official presentation of the claim but was not a national at the date of injury, provided that the person had the nationality of a predecessor State or lost his or her previous nationality and acquired, for a reason unrelated to the bringing of the claim, the nationality of the former State in a manner not inconsistent with international law.
3. Diplomatic protection shall not be exercised by the present State of nationality in respect of a person against a former State of nationality of that person for an injury caused when that person was a national of the former State of nationality and not of the present State of nationality.
4. A State is no longer entitled to exercise diplomatic protection in respect of a person who acquires the nationality of the State against which the claim is brought after the date of the official presentation of the claim.

acquires the nationality of the state against which the claim is brought after the date of presentation of the claim.³³⁹

D. Assessment of individual damage

In reality, despite compensation being the most commonly sought form of reparation in international practice,³⁴⁰ it is not so in the practice of ICJ cases. It is the declaration of non-compliance that is most often sought. Still, the Court has laid plenty of guidelines to assess individual damage and the adequate forms of reparation that need to be afforded by states.

The ICJ has indicated that the basic principle of reparation articulated in the *Chorzów* case applies to reparation for injury to individuals, even when a specific jurisdictional provision on reparation is contained in the statute of the tribunal.³⁴¹ In the *Chorzów*, the Court found that its jurisdiction extends to method of payment, beneficiaries, and other aspects of reparation.³⁴² Later, in the *Corfu Channel* case, the ICJ decided that it had competence to assess the actual amount of damages due in any case where it had competence to say that there was a duty to pay compensation.³⁴³ The Court relied on the principle of effectiveness in finding that it was required to set the amount: 'If, however, the Court should limit itself to saying that there is a duty to pay compensation without deciding what amount of compensation is due, the dispute would not be finally decided.

³³⁹ Dugard, 'Diplomatic Protection' in Crawford, *The Law of State Responsibility* (n 51) 1061.

³⁴⁰ See: ILC commentary to Article 36 of the ILC Responsibility Articles (n 23).

³⁴¹ *Chorzów (Indemnity)* (n 131).

³⁴² *Chorzów* (n 22) 61–62.

³⁴³ *Corfu Channel Case (UK v. Alb.) (Merits)* [9 April 1949] ICJ Rep 4, 23–24.

An important part of it would remain unsettled'.³⁴⁴ The Court afforded compensation once more in the *Diallo* case, this time for individual non-material damage. The context and criteria of this decision will be analysed below.

Non-material and moral damage to states may, in several cases, be redressed by satisfaction. In the *Rainbow Warrior* arbitration, the tribunal noted:

There is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities.³⁴⁵

On the other hand, it is generally accepted that where restitution is not provided or does not fully eliminate the consequences of the harm, the state responsible must compensate for any financially assessable damage, including loss of profits, that its wrongful act caused the injured state or its nationals.³⁴⁶ Prior practice firmly supports this rule.³⁴⁷ In the same way, an award of compensation should redress moral damage caused to individuals as long as is assessable in economic terms.³⁴⁸ The applicable principles of

³⁴⁴ *ibid* 26.

³⁴⁵ *Rainbow Warrior*, France-New Zealand Arbitration Tribunal, 82 I.L.R. 500 (1990), 272–73; see also: *Arrest Warrant* finding by the Court of international responsibility deemed satisfaction for the moral injury suffered by the Congo, *Democratic Republic of the Congo v Belgium* (Case concerning Arrest Warrant of 11 April 2000) [2002] ICJ Rep 3 [48] [hereinafter *Arrest Warrant*]; *Corfu Channel (Merits)* (n 343) 35–36 (finding the declaration of a violation in itself appropriate satisfaction).

³⁴⁶ Article 36 of the ILC Responsibility Articles (n 23). The commentary to Article 36 specifies in paragraph 1 that compensation is intended to exclude moral damage to a state, which is the subject matter of satisfaction and is dealt with in Article 37. The Commentaries are reproduced in the Report of the ILC Responsibility Articles (n 23).

³⁴⁷ *Chorzów (Indemnity)* (n 131) 47; *Corfu Channel (Merits)* (n 343).

³⁴⁸ See: Commentary to Article 36, Report of the ILC Responsibility Articles (n 23).

international law for moral damage caused to individuals were first reflected in the

Lusitania opinion:

That one injured is, under the rules of international law, entitled to be compensated for an injury resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or to his reputation, there can be no doubt... Such damages are very real, and the mere fact that they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefore as compensatory damages....³⁴⁹

Apart from the *Corfu Channel* case in 1949, the ICJ judgment of *Diallo* is only the second time that the ICJ has awarded an amount of compensation owed by a state to another with respect to violations of international law found by the Court.³⁵⁰ However, *Diallo* is the first time that the Court itself had to come up with an amount of compensation. In *Corfu Channel*, Albania refused to appear at the compensation stage since it had contested the jurisdiction of the Court to fix an amount of compensation on the basis of the Special Agreement.³⁵¹ Notwithstanding, the ICJ held that the Special Agreement could not be regarded as narrowing the ICJ's jurisdiction for a case it had already decided. The Court

³⁴⁹ *Lusitania case, (United States v. Germany) (1923) 7 R.I.A.A. 32, 40.*

³⁵⁰ Sometimes parties have reserved the right to ask the Court for compensation but then have failed to do so. For example, in the late 1980s, Nicaragua was poised to pursue its compensation claim after its successful case against the U.S. with regard to the 'Military and Paramilitary Activities in and Against Nicaragua' - *Nicaragua Case* (n. 160). In fact, Nicaragua had filed its memorial on compensation in which it claimed billions of US dollars, and the Court had written to Nicaragua to say it was minded to fix oral hearings on compensation for October 1990. However, in 1990 there was a change of government in Nicaragua that led to a decision to drop the compensation claim. See: D Akande, 'Award of Compensation by International Tribunals in Inter-State Cases: ICJ decision in the Diallo Case' <<http://www.ejiltalk.org/award-of-compensation-by-international-tribunals-in-inter-state-cases-icj-decision-in-the-diallo-case/>> accessed 9 April 2013.

³⁵¹ The Compromise did not explicitly authorise the ICJ to decide on the amount of damages. In a letter dated 29 June 1949, the Agent for the Albanian Government informed the Court that in the opinion of his Government: 'in accordance with the Special Agreement signed between the Agents of the People's Republic of Albania and of Great Britain, on March 25th, 1948, and presented to the Court on the same day, the Court had solely to consider the question of whether Albania was, or was not, obliged to pay compensation for the damage caused to the British warships in the incident of October 22nd, 1946, and the Special Agreement did not provide that the Court should have the right to fix the amount of the compensation and, consequently, to ask Albania for information on that subject' - *Corfu Channel Case (Assessment of the Amount of Compensation)* [Dec 1949] ICJ 15, 245.

applied Article 53, para. 2, of the Statute³⁵² and through an expert opinion decided the amounts claimed by the UK were ‘well founded in fact and law’.³⁵³ The Court did not have to make an evaluation of its own. Albania was ordered to pay the UK £843,947 in compensation, establishing a first precedent for the award of damages for material injury. With respect to the UK’s violation of Albania’s sovereignty, the ICJ found that its declaration of illegality served as satisfaction for immaterial damage.³⁵⁴

In *Diallo*, the Court for the first time decided the amount of compensation. In a judgement of 19 June 2012, the ICJ noted that Guinea required compensation under four heads of damage: non-material injury and three heads of material damage. It sought a total of US\$11,590,148 [US\$250,000 for mental and moral damage, including injury to his reputation; US\$6,430,148 for loss of earnings during his detention and following his expulsion; US\$550,000 for other material damage; and US\$4,360,000 for loss of potential earnings] plus a further US\$500,000 for its ‘unrecoverable costs’ as a result of instituting the proceedings. In contrast, the DRC argued that only US\$30,000 was due to Guinea to make good the non-pecuniary injury suffered by Mr Diallo as a result of his detentions and expulsions in 1995-1996.³⁵⁵

³⁵²Article 53(2). ‘The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law’. Statute of the International Court of Justice, <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&>, Accessed 10 April 2013.

³⁵³ *Corfu Channel (Compensation)* (n 351) 245.

³⁵⁴ *ibid.*

³⁵⁵ *Diallo, (Compensation)* (n 113) [10].

The Court rejected as unfounded the material damages claimed by Guinea, either for lack of evidence³⁵⁶ or because they fell beyond the scope of the proceedings, except for the claim of loss of property from his apartment. While according to the Court, Guinea had also failed to prove concrete losses in this respect, it was satisfied that the DRC's unlawful conduct had caused some material injury. For this reason it decided on the basis of equitable considerations to award US\$10,000.³⁵⁷

Notably, the Court made it clear that 'non-material injury can be established even without specific evidence'³⁵⁸ and that 'quantification of compensation for non-material injury necessarily rests on equitable considerations'.³⁵⁹ The Court said it was 'reasonable to conclude that the DRC's wrongful conduct caused Mr Diallo significant physiological suffering and loss of reputation'.³⁶⁰ In order to decide upon the amount of compensation for moral damage, the Court took into account various factors, including the arbitrary nature of his arrest and detentions, the unjustifiably long periods during which he was detained, the unsupported accusations against him, and his wrongful expulsion from a country where he had resided for thirty-two years and where he had engaged in significant business activities. It also gave weight to the link between Mr Diallo's expulsion and the fact that he had attempted to recover debts which he believed were owned to his companies by the Zairean state or companies in which the state held a

³⁵⁶ See, in particular, the Declaration by Judge Greenwood, where he is highly critical of the amounts sought by Guinea and the contradictory evidence on the merits and the compensation stages regarding the financial situation of Mr Diallo. Declaration, (*Compensation*) (n 113) [3-5]. Available at: <<http://www.icj-cij.org/docket/files/103/17044.pdf>> accessed 11 April 2013.

³⁵⁷ *Diallo*, (*Compensation*) (n 113) [30-60].

³⁵⁸ *ibid* [21].

³⁵⁹ *ibid* [24].

³⁶⁰ *ibid* [22].

substantial portion of the capital. Still the Court took into account ‘[...] its earlier conclusion that it had not been demonstrated that Mr. Diallo was mistreated in violation of Article 10, paragraph 1, of the Covenant (ibid., p. 671, para. 89)’.³⁶¹ It decided that ‘With regard to the non-material injury suffered by Mr. Diallo, the circumstances outlined in paragraphs 21 to 23 lead the Court to consider that the amount of US\$85,000 would provide appropriate compensation [...]’.³⁶²

There is an immense gap between the amount of compensation sought by Guinea (more than US\$11.5 million) and the compensation ordered by the Court of a total of US\$95,000, less than 1 percent of that claim. Two reasons seem to be given in the Judgement for this decision. First, Guinea was unsuccessful in convincing the Court to reconsider its restrictive ruling in the two earlier judgements (preliminary objections and merits), where the Court rejected the claim for alleged infringements of the rights to Diallo’s two companies and then of Diallo’s rights as a shareholder of the companies.³⁶³ The second reason for the Court’s award was the lack of supporting evidence. Indeed, Guinea did not offer any specific evidence on most of the claims. While the ICJ noted that the abruptness of Mr Diallo’s expulsion from the DRC made it difficult for him and Guinea to locate certain documents,³⁶⁴ the award was wholly based on ‘equitable considerations’.³⁶⁵ Finally, referring to Article 64 of the Statute, the Court also decided

³⁶¹ ibid [22].

³⁶² ibid [25].

³⁶³ For a more detailed analysis, see: M Andenas, ‘Ahmadou Sadio Diallo’ (January 2013) 107(1) AJIL 178-183.

³⁶⁴ *Diallo, (Compensation)* (n 113) [16].

³⁶⁵ ibid [24] and [33].

each party should bear its own costs. The Judgment was by a strong majority of 15-1 and was a clear win for the DRC with regards to the quantum of damages.

Diallo highlights the challenge of calculating damages for injuries suffered by an individual within the framework of the ICJ, a court designed to settled questions of international law in inter-state disputes. In a departure from its usual style, the ICJ actively looked to the practices of other international bodies,³⁶⁶ including the ECtHR, the IACtHR, the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission (EECC), and the UN Compensation Commission (UNCC). As noted by Judge Greenwood in his Declaration, the sums awarded for moral damage in human rights courts are usually quite small.³⁶⁷ This is one of the reasons he highlights in order to explain why Guinea recovered ‘what seems at first sight to be so little’.³⁶⁸

The correctness of the Court’s reliance on the jurisprudence of regional human rights courts as a reference to the assessment of compensation for non-material injuries is a complex question. While these bodies undoubtedly have the most qualified expertise in affording reparation for international human rights violations, compensation for individual non-material damage varies greatly in domestic jurisdictions. Sometimes the awards afforded by domestic tribunals are starkly higher than those of international human rights tribunals; sometimes they are lower. In addition, the criteria used by human

³⁶⁶ *ibid* [13].

³⁶⁷ Greenwood’s Declaration, *ibid* [9].

³⁶⁸ *ibid* [1].

rights courts when affording compensation for non-material damage is generally blurred since the amount is always difficult to quantify or assess.³⁶⁹

It is also worth considering that *Diallo* is the first time that a violation of the ICCPR carried an undoubtedly legally binding order of compensation for an individual. It is also the first case where a state brought a classic diplomatic protection claim (i.e. on behalf of its national) based on breaches of human rights treaties. Clearly, this was a relatively lengthy and probably much more costly litigation than similar cases before regional human rights courts. Given the amount of compensation afforded to Guinea, it is difficult to imagine analogous cases being brought before the ICJ in the future. Perhaps the Court was not interested in setting this case as general precedent for this type of litigation. After all, Judge Greenwood makes it clear that ‘this case is very far from being one of the gravest human rights violations’.³⁷⁰

4. Relationship between diplomatic protection and human rights claims

In its historical evolution, the ‘minimum standard of treatment to aliens’ is inseparable from the right to access to justice. The rule requiring prior exhaustion of local remedies as a precondition for diplomatic protection proves this symbiotic relation. This rule presupposes the international obligation of every state to ensure that aliens have access to courts and to administer justice in accordance with minimum standards of fairness and due process. In a similar way, and obviously influenced by the law on protection of aliens, international human rights law also requires the exhaustion of effective domestic

³⁶⁹ See: Shelton, *Remedies* (n 12) 301.

³⁷⁰ Greenwood’s Declaration, *Diallo (Compensation)* (n 113) [11].

remedies prior to bringing individual claims before international HR bodies. The local remedies rule presupposes access to justice for everyone under the jurisdiction of any state.

It is clear therefore that state responsibility for treatment of aliens and reparation for human rights violations are closely related. Evidence shows that there has been ample cross-fertilization between the two bodies of law (e.g. in addition to exhaustion of domestic remedies, human rights law also allows inter-state claims). But the notion that an international (HR) standard of justice applies to individuals at home and foreigners abroad led some to argue that diplomatic protection would be superseded by human rights law.³⁷¹ Clearly, the international HR standard, which accords to nationals and aliens the same standard of treatment, covers the equality-of-treatment-with-nationals-standard and the international minimum standard of treatment of aliens.³⁷² However, as pointed by John Dugard, Special Rapporteur on Diplomatic Protection, '[w]hile the individual may have rights under international law his or her remedies are limited[...]'.³⁷³ The position of the alien abroad is no better. Outside the field of foreign investment, there is no multilateral convention that seeks to provide remedies for the protection of his or her rights.³⁷⁴ Dugard argues therefore that until the individual acquires comprehensive

³⁷¹ Garcia Amador attempted to create a synthesis between the international minimum standard and the doctrine of national treatment based on the new law of human rights and fundamental freedoms Amador (n 229) [151-159].

³⁷². *Idem*

³⁷³ '...The sad truth is that only a handful of individuals, in a limited number of States that accept the right of individual petition...have obtained or will obtain satisfactory remedies from these conventions'. Dugard 'Diplomatic Protection' in Crawford, *The Law of State Responsibility* (n 51) .

³⁷⁴ The Special Rapporteur follows Lillich rationale that 'pending the establishment of international machinery granting third party determination of disputes between alien claimants and States, it is in the interest of international lawyers not only to support the doctrine [of diplomatic protection] but to oppose

procedural rights under international law, it would be a setback for human rights to abandon diplomatic protection.³⁷⁵

There is no doubt that a substantial gap exists between theory and practice when it comes to remedies for human rights violations. Despite the general recognition that victims of violations of human rights have a right to reparation in international law, there is an abundance of inter-related legal, political, and practical hurdles that continue to hinder the fulfilment of this right in practice. When bringing complaints in the state where the violation occurred, victims often encounter obstacles like immunities of the state and its agents, amnesties, short limitations periods, non-enforcement of judgments, lack of protection of victims and witnesses, intimidation campaigns, and so on. These obstacles multiply when human rights violations are widespread and/or systematic. In addition, international remedies are limited and it is not clear whether individuals can bring human rights claims before domestic or foreign courts based solely on international law.

In this context, it is true that diplomatic protection may serve as a tool to assist victims of human rights violations seeking remedies and reparation. Recent ICJ jurisprudence on diplomatic protection confirms this possibility.³⁷⁶ The court affirmed in *Diallo*: '[o]wing

vigorously any effort to cripple or destroy it' – R Lillich, 'The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law under Attack' (1975) 69 AJIL 359, cited in Dugard 'Diplomatic Protection' (n 51).. See also: N Rodley, 'Nationalization by Peru' in Rodley and Ronning (eds) *International Law in the Western Hemisphere* (Nijhoff 1974) 112, where he distinguishes human rights and economic interests in the context of diplomatic protection.

³⁷⁵ Dugard 'Diplomatic Protection' in Crawford, *The Law of State Responsibility* (n 51).

³⁷⁶ In addition to *Diallo*, the ICJ dealt with individual rights in *LaGrand* (n 92) and *Avena* (n 123), although it did not establish whether these were human rights. The Court also examined human rights law in the *Wall Opinion* (n94) and *Armed Activities* (n 97). In the latter the Court also examined the question of diplomatic protection.

to substantive development in international law over recent decades in respect of the rights it accords to individuals, the scope *ratione materiae* of diplomatic protection ...has subsequently widened to include, *inter alia*, internationally guaranteed human rights'.³⁷⁷

After all, state responsibility for injuries to aliens is a well-established rule of customary international law, albeit only protecting individuals from foreign governments (and not others who may suffer from the same situation). But the exercise of diplomatic protection is completely discretionary. It protects only nationals of states that are willing to use it – a decision that will be influenced by economic and political factors. Under the norms of state responsibility for injuries to aliens, states have no obligation to represent their citizens in any sort of diplomatic or judicial forum. The severity of the violations plays no role in the decision of states to exercise this remedy. There is nothing individuals can do to force states to take diplomatic action and to take their perspective into account when bringing claims. As such, diplomatic protection cannot be considered a HR remedy but only a subsidiary machinery to enforce (some) HR. As long as diplomatic protection is conceived as a well-established mechanism that can fill the gap that exists due to the lack of recognition of procedural standing of the individual in international law, diplomatic protection should be encouraged and strengthened. But it should not be confused with an effective remedy in accordance with HR standards and certainly should not bar the implementation or development of independent and enforceable remedies under human rights law.

³⁷⁷ Diallo, Preliminary Objections, (n 139) [39]

Finally, to conclude this chapter, it is worth considering the following paradox. As clearly shown by the history of diplomatic protection, the strengthening of the exhaustion of the local remedies rule as a way to protect state sovereignty was born in response to the practice of abusive inter-state commercial activities. It was in this context that the principle of equality and state sovereignty was vigorously upheld and reinforced (e.g. the Calvo Doctrine). However, it is more common nowadays to apply a restrictive reading of the exhaustion of domestic remedies rule and the protection of sovereign equality in HR cases than in cases involving transnational commercial activities. To begin with, international HR law applies the exhaustion of local remedies rule for all individual claims before international bodies. Likewise, sovereign and diplomatic immunity generally bar HR claims before third state courts,³⁷⁸ as well as before the courts of the state where the violations occurred (forum state) when the perpetrators are officials of another state or the state itself is being sued.³⁷⁹ In contrast, modern commercial arbitration allows direct claims by legal persons (without exhaustion of local remedies) and binds third states to enforce their judgements. Similarly, commercial activity is an exception to the principle of sovereign and diplomatic immunity when governments or state officials are sued in foreign courts.³⁸⁰

³⁷⁸ See, for example, *Al-Adsani v United Kingdom*, Merits, App No 35763/97, ECHR 2001-XI; *Jones and Others v The United Kingdom* App nos. 34356/06 and 40528/06 (ECtHR, 14 January 2014). The ICJ established that even in criminal cases, diplomatic immunity would bar the jurisdiction against acting heads of governments and other officials such as the minister for foreign affairs. See: *Arrest Warrant* case (n 345)

³⁷⁹ See: *Germany v Italy* (n 25) 143.

³⁸⁰ For an insight into the relationship between human rights law and trade law in the context of access to justice, see: Francioni, 'Access to Justice' (n 264).

Chapter 3: Is there an individual right to reparation for violations of International Humanitarian Law against states?

Kill one man, and you are a murderer. Kill millions of men, and you are a conqueror. Kill them all, and you are a god.
Jean Rostand, Thoughts of a Biologist (1939)

1. Reparation and remedies for IHL breaches

Previous chapters analysed whether individuals have rights in international law and therefore an enforceable right to reparation when such rights are breached. As shown, the ILC Responsibility Articles do not exclude this possibility in cases of fundamental rights. The development of human rights law and the law on diplomatic protection also support this interpretation. However, recent events in the area of IHL have been interpreted as pointing into a different direction. The ICJ *Jurisdictional Immunities of the State* established that Italy violated Germany's sovereign immunity by allowing WWII claims to proceed in Italian courts. The Court did not find it necessary to address the question of individual reparation for serious violations of IHL;³⁸¹ it simply looked at whether Germany enjoyed immunity in Italian courts according to present customary international law and answered this question affirmatively. However it did 'regret' leaving the victims without a remedy.³⁸² While this decision is specific to the circumstances of the case (i.e. a WWII claim brought before a foreign court), it has been read as 'putting an end to a

³⁸¹ '[B]ecause immunity is upheld, no need to examine questions whether individuals are directly entitled to compensation for violation of IHL and whether states may validly waive the claims of their nationals in such cases' – *Germany v Italy* (n 25) [108].

³⁸² See: (n 26).

debate that arose out of the noble motive to improve the fate of victims of armed conflict but failed to fully grasp the complexity of financial settlement after armed conflict'.³⁸³

The Principles and Guidelines recognise the existence of a right to a (procedural) remedy and (substantive) reparation for individual victims of gross violations of HR and serious violations of IHL (including, when applicable, a right to compensation). For this reason, the present chapter will analyse the question of reparation and remedies for IHL breaches. It will give a brief description of the status of the law at the time the set of Principles and Guidelines was drafted and the more recent developments in this area of law after its adoption by the UN General Assembly. The chapter will confine the discussion mainly to compensation. Financial reward is among the most frequent issues arising in the context of the right of individuals to reparation in cases of serious violations of IHL.³⁸⁴ Having this in mind, it will analyse a) whether there is a right to a (procedural) remedy and (substantive) reparation for individuals directly under IHL, and b) whether there is a right to reparation for victims of serious violations of IHL under the general principles of state responsibility. The first part describes the ambiguities of the relevant provisions on compensation enshrined in the Hague Convention IV of 1907 (Hague IV) and Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts ('AP I')³⁸⁵ and investigates if these provisions can apply to individuals. It shows that while the evidence is inconclusive to establish that the IHL provisions on compensation apply to individuals, nothing in IHL prevents

³⁸³ Tomuschat, 'The Individual before National Courts' (n 27) 826.

³⁸⁴ Gaeta, 'Compensation' (n 28) 307.

³⁸⁵ Adopted at Geneva on 8 June 1977, entered into force on 7 December 1978; 1125 UN Treaty Series, 3.

reparation to individuals. The second part asks if the traditional state-to-state reparation for victims of armed conflict is a matter of policy or a legal norm. It investigates whether the emergence of human rights has altered the concept of state responsibility, adapting the modalities of reparation for IHL violations to the new developments of international law, or whether there is a rule that excludes reparation to individuals in cases of IHL breaches. It briefly re-examines individual reparation in the context of state responsibility (including an overview of these issues in the ILC Responsibility Articles) and provides examples of contemporary state practice, applying principles of state responsibility to individual reparation in cases of IHL violations. It then explores the question of individual reparation under ICL and its relationship to state liability. The recent developments in this area of law are briefly discussed, to the extent that they may help clarify the question of the existence of the right of individuals to reparation *vis-à-vis* the responsible state for IHL violations.

2. Is there an obligation for states to provide individual reparation under IHL provisions?

It is well known that if a state commits a wrongful act under international law, it is liable to make reparation,³⁸⁶ and that reparation consists of various forms, including but not limited to monetary compensation.³⁸⁷ The principle of responsibility with a view to compensation for violations of international humanitarian law is set forth in Article 3 of the Hague IV:

³⁸⁶ See the dictum of the PCIJ in the *Chorzów* (n 22) [21].

³⁸⁷ See Articles 28 to 39 of the ILC Responsibility Articles (n 16).

A belligerent party which violates the provisions of the said Regulation 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.³⁸⁸

Article 91 of AP I almost literally reproduced this rule:

‘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’.³⁸⁹

While these provisions clearly state that a breach of the law of armed conflict by a belligerent party entails a duty to pay compensation, it does not clarify to whom it should be paid to (the individual victim or the belligerent state) or for what type of IHL violations. There has been much debate over these articles in regards to both its intent and scope. The debate can broadly be divided into two positions: that this provision does not apply to individuals (the traditionalist approach) and that it does (the modern approach). The following paragraphs will give a brief overview of these two approaches.

A. The Traditionalist Approach: Article 3 of the Hague Convention IV does not apply to individuals

³⁸⁸ Convention Respecting the Laws and Customs of War on Land, adopted on 18 October 1907 in The Hague, entered into force on 26 January 1910, in A Roberts and R Guelff (ed), *Documents on the Law of War*, (3rd edn, OUP 2000) 69 et seq.

³⁸⁹ Responsibility of states for IHL violations is also recognised in Article 51 of Geneva Convention I, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Article 52 Geneva Convention II, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; Article 131 Geneva Convention III, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; and Article 148 Geneva Convention IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

The traditional understanding is that Article 3 of the Hague IV and Article 91 of AP I simply codify the rule of international law according to which, when private individuals are injured by an international wrongful act, the responsible state is liable to provide reparation (and therefore compensation) to their state of nationality, and not to the individuals who have suffered concrete damage.³⁹⁰ Therefore, when a violation of the Regulations annexed to Hague IV or a rule contained in AP I occurs, the obligation to pay compensation enshrined in these two provisions is towards the other belligerent party³⁹¹ to which the individuals belong and not to the individual victims as such.

This reading is consistent with the traditional approach to international law, where the rules of international humanitarian law are considered standards of treatment or conduct, rather than rights of protected persons.³⁹² The individual is seen merely as a beneficiary of the rules rather than the holder of a right.³⁹³ Within this context, individuals cannot claim reparation for losses suffered as a result of an infringement of a rule of international humanitarian law.

³⁹⁰ See: Provost (n 98) 45.

³⁹¹ Since the Hague Convention IV and AP I only regulate international armed conflicts, the belligerent parties are only states.

³⁹² Provost (n 98) 27 et seq.

³⁹³ KJ Partsch, 'Individuals in International Law' in R Bernhardt (ed), *Encyclopaedia of Public International Law II* (1995) 957, 959. However, Lopes and Quenivet argue that the regime of 'protected persons' under IHL offer protection and assistance in the form of certain rights to individuals who do not play a role in the hostilities. They also contend that treaty law also holds special rights for individuals by virtue of the Geneva Conventions and their Additional Protocols. See: C Lopes and N Quenivet, 'Individuals and Subjects of International Humanitarian Law and Human Rights Law' in R Arnold and N Quenivet (eds), *International humanitarian law and human rights law: towards a new merger in international law* (Nijhoff 2008) 214.

The traditionalist approach is, however, more complex. As the analysis of the domestic case law below shows, the debate surrounding rights of individual victims in IHL is not divided into two opposing positions: in other words, that individuals on the one hand do not enjoy (substantive) rights in IHL and therefore they do not have a (secondary) right to reparation; and on the other, that individuals do have rights in IHL and therefore do have a right to reparation. There is a third position acknowledging protection rights of victims under IHL (substantive rights) but no (secondary) right to reparation and/or standing under international law. While this position acknowledges post-WWII developments regarding individual rights in IHL, it still maintains that reparation for IHL violations falls within the traditional ambit of state-to-state relations. As it will be explained, the end result is the same as if no recognition of substantive rights is acknowledged in this area of law.

i. Case law

The traditionalist approach has been followed by some domestic courts, particularly in the courts of states sued directly for violations of IHL (as opposed to claims brought before domestic courts against other states). The cases below show how individual claims have been rejected on the basis that there is or was no individual right to reparation for damages caused by a violation of IHL. Whereas in certain cases, the courts explicitly state that individual victims under IHL have no procedural standing, in other cases, the judgements seem to presuppose the absence of substantive individual rights altogether.

Japanese courts have dealt with claims arising out of the Second World War and especially out of the fate of the ‘comfort women’.³⁹⁴ Generally, the courts did not consider norms of international humanitarian law self-executing and consequently capable of conferring individual rights to persons protected by the respective treaties.³⁹⁵ The Tokyo High Court held in *So Shinto* that the damage to an individual should be considered as one of the state to which the individual belongs.³⁹⁶ It ruled that: ‘Article 3 of the Hague Convention should be interpreted, from its wording itself, to provide state responsibility between states, not individual rights for compensation’.³⁹⁷ The Tokyo High Court refers also to the fact that there is no procedure under which the individual could exercise his/her rights.³⁹⁸

Similarly, U.S. courts have ruled that the Hague Convention IV is not self-executing and therefore it does not grant individuals the right to seek damages for violation of its

³⁹⁴ On the initiative of the Japanese military, ‘comfort stations’ were set up and operated between 1930 and 1945, where an estimated 200,000 ‘comfort women’ were pressed into prostitution. For a discussion of the facts and the Japanese court rulings see Igarashi, ‘Post-War Compensation’ (n 89) 45-82. Non-governmental organisations have organised a ‘Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery’ and held proceedings in Tokyo in 2000. They found Emperor Hirohito guilty and ruled that Japan’s international responsibility was engaged and recommended reparations. C Chinkin, ‘Women’s International Tribunal on Japanese Military Sexual Slavery’ (2001) 95 ACIL 335, 338.

³⁹⁵ *Shimoda et al v. The State*, District Court of Tokyo, Judgment of 7 December 1963, 32 ILR (1964), 626; *X et al. v. the State of Japan*, Tokyo High Court, Judgment of 7 August 1996, 40 Japanese AIL (1996) 117, 188.

³⁹⁶ *So Shinto case* (n 90).

³⁹⁷ High Court Tokyo, 8 February 2001, 45 Japanese AIL (2002), p. 143, see also High Court Tokyo, *X et al. v the Government of Tokyo*, 11 October 2001, 45 Japanese AIL (2002), p. 145; *So Shinto case* (n 90).

³⁹⁸ High Court Tokyo, 8 February 2001, 45 Japanese AIL (2002), p. 143. In *Hwang Geum Joo v Japan*, the ‘comfort women’ also brought their claim for compensation before US courts. On remand from the Supreme Court, the Court of Appeals for the District of Columbia Circuit held that the case presented a ‘nonjusticiable political question, namely, whether the governments of the appellants’ countries foreclosed the appellants’ claims in the peace treaties they signed with Japan’. US Court of Appeals for the District of Columbia Circuit, *Hwang Geum Joo, et al., v. Japan, Minister Yohei Kono, Minister of Foreign Affairs*, Case No. 01-7169, 28 June 2005. As the U.S. Court denied its jurisdiction, it did not have to deal with the question of rights for individuals to compensation.

provisions.³⁹⁹ In *Tel-Oren et al v Libyan Arab Republic*, Judge Bork argued further that such ‘lawsuits might be far beyond the capacity of any legal system to resolve at all’, and that ‘the prospect of innumerable private suits at the end of a war might be an obstacle to the negotiation of peace and the resumption of normal relations between nations’.⁴⁰⁰

The German Federal Supreme Court found in the *Distomo* case – which concerned claims of dependents of a German massacre in 1944 in the Greek village of Distomo – that, at least at the time of WWII, the individual was not directly protected by international law and that international law did not therefore provide an individual right to compensation.⁴⁰¹ Similarly, in 1996, the Tokyo High Court rejected the existence of a private right to compensation, grounding its decision on existing customary international law at the time of the incident. The Court implicitly admitted that the existence of such a rule could not be excluded at present.⁴⁰² However, when judging a claim for compensation of victims of the North Atlantic Treaty Organisation (NATO) intervention in Yugoslavia, a German Regional High Court dismissed the claim by arguing that the individual neither has any rights under international humanitarian law nor can avail him

³⁹⁹ *Tel-Oren et al v. Libyan Arab Republic*, 726 F.2d 774 (US App.D.C. 1984), 810; *Goldstar (Panama) SA v. United States* (4th Cir. 1992), 96 ILR (1994), 55, 58-59; *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (US App.D.C. 1994).

⁴⁰⁰ *Tel-Oren et al v. Libyan Arab Republic* (n 399) 810; See also *L Handel v A Artukovic*, ‘District Court for the Central District of California’, in M. Sassòli and A.A. Bouvier, *How Does Law Protect in War?* (1999) 713.

⁴⁰¹ *Distomo case*, Bundesgerichtshof, III ZR 245/98, 26 June 2003, (2007) 129 ILR 556.

⁴⁰² ‘When the incident occurred, there was no evidence of any general practice, or the existence of *opinio juris* that when a state acts in violation of the obligation of international human rights law or humanitarian law, that state has the responsibility of compensating for the damages of any individual who was a victim. **Therefore, international customary law against which the applicants’ claim did not exist at the time of the incident**’ (emphasis added). The decision in *X et al. v. The State of Japan* (n 395).

or herself of any procedure to enforce them.⁴⁰³ Citing Article 2 of the Hague Convention,⁴⁰⁴ the Regional High Court emphasised that the Hague Convention would only apply between the State parties to the treaty.⁴⁰⁵ The ruling in this respect was confirmed by the Court of Appeal, which held that there are no individual claims under international humanitarian law.⁴⁰⁶

In contrast, some national courts have recognised the existence of individual primary rights in the field of IHL but still deny the existence of an individual (secondary) right to seek compensation for a violation of the (primary) rights. For example, in its decision on claims of the ‘Italian Military Internees’,⁴⁰⁷ the German Federal Constitutional Court acknowledged that individuals enjoy rights under international humanitarian law.⁴⁰⁸ Still, the Court ruled that there is no individual right to compensation. The Federal Constitutional Court of Germany established:

[...] claims for damages under secondary law exist only in the international legal relationship between states concerned. The claim for

⁴⁰³ *NATO intervention in Yugoslavia*, Regional High Court, LG Bonn, decision of 10 December 2003, NJW 2004, 526.

⁴⁰⁴ ‘Article 2. The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention’. Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

⁴⁰⁵ *NATO intervention in Yugoslavia* (n 403) 526.

⁴⁰⁶ *NATO intervention in Yugoslavia*, OLG Köln, decision of 28 July 2005, 7 U 8/04.

⁴⁰⁷ Contrary to their POW legal status, this term was assigned by Hitler to members of the Italian Forces who were captured by the German army immediately after Italy had quit the Axis and had concluded a truce with the Allied Powers. Several hundred thousand soldiers were detained by Germany and – after they had refused to join in on the side of the German forces – were regarded as traitors by the German Reich and often treated harshly. In order to avoid the supervision by the International Committee of the Red Cross and any claims that they should be treated in accordance with international humanitarian law, Hitler applied the term ‘military internees’ which used to be applied to combatants detained by a neutral power. See: Bank and Schwager, ‘Compensation for Victims of Armed Conflict’ (n 16) citing G Schreiber, *Die italienischen Militärinternierten im deutschen Machtbereich 1943-1945* (1990) 97 et seq.

⁴⁰⁸ *Italian Military Internee* case, Federal Constitutional Court of Germany, Joint Constitutional Complaint, 28 June 2004, (English translation at Oxford Reports on International Law). Available at: <http://oxfordlawreports.com> accessed 10 April 2016

damages accordingly differs from the claim under the primary law of the persons concerned to adherence to the obligations under humanitarian international law, as existing in the international legal relationship between the state occupying a territory and the population living in that area.⁴⁰⁹ (emphasis added)

The Court ruled that Article 3 of the Hague Convention IV does not contain an individual right; rather, the Court argued that the article simply reiterates the general principle under international law according to which liability for infringements of a treaty obligation exists only between the states concerned. The Court mentioned Article 1 of the ILC Responsibility Articles as a reference for its statement and did not provide further argumentation.⁴¹⁰ Article 1 of the ILC Responsibility Articles reads: ‘Every internationally wrongful act of a State entails the international responsibility of that State’.⁴¹¹

Further confirming this view, the German Federal High Court of Justice explained in the *Bridge of Varvarin* case:

Article 3 of the Hague Convention, which originally – due to the then predominant legal view on the mediatization of the individual – without a doubt was only of an inter-State character (comp. Federal Court of Justice, judgement of 26 June 2003, III ZR 245/98, ‘Distomo case’), does not give rise to a direct individual compensation claim for violations of the international law of war, even if taking into account the change of view of international law regarding the rights of the individual in the meantime (Federal Constitutional Court, decision of 26 October 2004, BVerfGE 112, 1, 32 et seq.; Federal Constitutional Court, decision of 15 February 2006, 2 BvR 1476/03, ‘Distomo case’). Indeed, the drafting history of the norm shows that it is intended to protect the individual and is therefore of a nature indirectly protecting human rights. However, it does not follow from

⁴⁰⁹ *ibid* [39a].

⁴¹⁰ *ibid*.

⁴¹¹ ILC Responsibility Articles (n 23).

this that the provision is the basis of a direct, originally international law compensation claim of the concerned individual vis-à-vis the State. According to the case law of the Federal Constitutional Court, it is still only the home State which is entitled to secondary compensation claims due to international wrongful acts of a State against foreign nationals, irrespective of the development on the level of human rights protection, which has led to the recognition of the individual as a partial subject of international law as well as to the establishing of individual complaint procedures under treaty law (Federal Constitutional Court, decision of 28 June 2004, 2 BvR 1379/01, ‘Italian military detainees’; Federal Constitutional Court, decision of 15 February 2006, 2 BvR 1476/03, ‘Distomo case’).⁴¹²

Accordingly, this and other courts recognise the existence of individual rights in IHL, but still reject claims that individuals have a right to reparation when these rights are breached. The rationale is that secondary rights belong to the state of nationality even if the primary rights now belong to the individual.

ii. Are ‘war reparations’ relevant state practice for violations of IHL rules?

It is often argued that post-war settlements dealing with war related claims have shown that states have considered the issues on compensation to be regulated within an inter-state framework, as a matter of purely inter-state concern.⁴¹³ However, as Gaeta points out, the inter-state post-war settlement establishing schemes of ‘war-reparations’ are ‘patently at odds with the obligation to compensate violations of the rules of jus in bello’.⁴¹⁴ As she explains, the post-war settlements were aimed at repairing the injuries stemming from the war, regardless of whether the injuries resulted from the infringement

⁴¹² Germany, Federal Court of Justice, *Bridge of Varvarin* case, Judgement, 2 November 2006, para 10a (English translation of relevant paragraphs available at the ICRC website https://www.icrc.org/customary-ihl/eng/docs/v2_cou_de_rule150). (emphasis added)

⁴¹³ R Dolzer and A Stefan, ‘The Settlement of War-Related Claims: Does International Law Recognize a Victim’s Private Right of Action?’ (2002) 20 Berkley Int’l L 296. See also Tomuschat ‘The Individual before National Courts’ (n 27).

⁴¹⁴ Gaeta ‘Compensation’ (n 28) 310-311.

of a rule of IHL. The latter is, however, a condition for the applicability of the obligation set forth in Article 3 of Hague IV and Article 91 of AP I.⁴¹⁵ Additionally, war reparations were imposed on the vanquished country, and did not cover any injury or loss inflicted by the victorious states as a result of a violation of IHL. Gaeta refers to the ICRC Commentary on AP I to show that the purpose of both Article 3 of Hague IV and of Article 91 of AP I ‘is specifically to prevent the vanquished from being compelled in an armistice agreement or peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor’.⁴¹⁶ The Commentary states:

On the conclusion of a peace treaty, the Parties can in principle deal with the problems relating to war damage in general and those relating to the responsibility for starting the war ... On the other hand, they are not free ... to deny compensation to which the victims of violations of the rules of the Conventions and the Protocol are entitled.⁴¹⁷

Accordingly, Gaeta argues, post-conflict settlements dealing with war-related claims have no bearing on the interpretation of the relevant provisions of Hague IV and AP I. This practice does not relate to the application of the obligation to provide for compensation enshrined in those provisions, being in clear contrast with their wording, scope, and purpose.

iii. CIL on reparation for IHL violations

Tomuschat argues that post-war settlements dealing with war-related claims have shown that states have considered the issues on compensation to be regulated within an inter-

⁴¹⁵ *ibid.* 311

⁴¹⁶ See ICRC Commentary to AP I (Art 91) (n 441) 3640, 3651.

⁴¹⁷ *ibid* 3651 (emphasis added).

state framework, as a matter of purely inter-state concern.⁴¹⁸ As explained earlier, it is important to differentiate between ‘war reparations’ (*jus ad bellum*) and reparation for IHL violations (*jus in bello*). Specifically on the latter, d’Argent argues that since Article 3 of Hague IV was adopted at a time when it was unthinkable that individuals might enjoy rights under international law, this provision cannot but reflect the inter-state structure of the international legal order.⁴¹⁹ Hence, since nothing in the text of Article 3 of Hague IV expressly provides that individuals must be compensated, it cannot be maintained that such provision lays down the right of individual victims to obtain compensation from the responsible state. The same argument is made as regards Article 91 of AP I, which simply mirrors Article 3 of Hague IV.⁴²⁰ According to d’Argent subsequent state practice confirms this conclusion and notes that national case law has refused to recognise that these provisions grant individuals the right to compensation.⁴²¹

However, Gaeta notes that while important, these arguments are not conclusive. She stresses that some scholars have tried to demonstrate on the basis of the *travaux préparatoires* that the scope of Article 3 of Hague IV and Article 91 of AP I implies that the individual victims are the beneficiaries of the obligation to make compensation (these analyses will be described in detail in the following section). Gaeta demonstrates on the other hand that the reasoning of domestic courts often amounts to *petition prinipii*. She explains that it is often simply maintained that Article 3 of Hague IV and Article 91 of

⁴¹⁸ Tomuschat, ‘The Individual before National Courts’ (n 27) 826-827. See also Dolzer and Stefan (n 413) 296.

⁴¹⁹ d’Argent *Reparations de guerre* (n 16) 536-537.

⁴²⁰ d’Argent *Reparations de guerre* (n 16) 748.

⁴²¹ d’Argent *Reparations de guerre* (n 16) 785-788.

API restate the rule on state responsibility, according to which only a state can present an international claim towards another state to enforce the latter's international responsibility. However, these judicial decisions fail to look into the developments in the field of international law on state responsibility. As Gaeta notes, 'If one assumes that those provisions on compensation intended to codify the rules of customary international law on state responsibility, it is therefore necessary to examine what the content of these rules is at present'.⁴²²

As shown in the analysis of the jurisprudence of domestic courts above, the majority of the findings deal with WWII claims. Most judgments simply rule that there was no right to compensation for individuals at that time. These decisions do not exclude that, at present, the aforementioned provisions may be interpreted differently, so as to recognise the right of individuals to compensation for violations of rules of IHL. For example, the decision in *X et al v the State of Japan*, as mentioned earlier, did not afford compensation to the claimants but it recognised that current CIL on the obligation to afford compensation to individuals did not exist at the time of WWII:

When the incident occurred, there was no evidence of any general practice, or the existence of *opinio juris* that when a state acts in violation of the obligation of international human rights law or humanitarian law, that state has the responsibility of compensating for the damages of any individual who was a victim. Therefore, international customary law against which the applicants' claim did not exist at the time of the incident.⁴²³

On the other hand, those decisions that establish that there is currently no right to compensation for individuals based their reasoning on the fact that Article 3 of Hague IV

⁴²² Gaeta 'Compensation' (n 28) 305.

⁴²³ *X et al. v. The State of Japan* (n 395) (emphasis added)

and Article 91 of AP I simply restate the law on state responsibility; they fail to analyse whether this law has evolved to now include the liability of state towards the individual victims.

B. The Modern Approach: Article 3 of the Hague Convention IV does apply to individuals

Referring to the *travaux préparatoires* of the Hague Conventions, *Kalshoven* found that Article 3 of Hague IV was intended to contain an individual right to compensation in the case of violations of the *jus in bello vis-à-vis* the state responsible for such violation.⁴²⁴ Other scholars follow this approach,⁴²⁵ and the Principles and Guidelines affirm this interpretation.⁴²⁶ In Paragraph 1 of its Preamble, the Principles and Guidelines name Article 3 of Hague IV and Article 91 of the AP I as provisions establishing a right to a remedy for victims.⁴²⁷ The report of the *International Commission of Inquiry on Darfur* states that even if Article 3 of Hague IV was not initially intended to provide

⁴²⁴ Kalshoven, 'State Responsibility' (n 99).

⁴²⁵ C Greenwood, 'International Humanitarian Law (Law of War)' in F. Kalshoven (ed), *The Centennial of the First International Peace Conference* (2000) 161,250; Zegveld, 'Remedies for victims of IHL (n16) 506; David, 'Expert Opinion' (n 99); different view from d'Argent, *Reparations de guerre* (n 16).

⁴²⁶ Principles and Guidelines (n 2).

⁴²⁷ The provision reads: 'Recalling the provisions providing a right to a remedy for victims of violations of international human rights law found in numerous international instruments, in particular article 8 of the Universal Declaration of Human Rights, 1 article 2 of the International Covenant on Civil and Political Rights, 2 article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and of international humanitarian law as found in article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court'.

compensation for individuals, it does so in the present day, as the emergence of HR in international law has altered the concept of state responsibility.⁴²⁸

i. The *travaux préparatoires* of the Hague Convention

As mentioned, scholars have claimed that the discussions during the negotiation of Hague IV generally show that the concept of individual rights was not alien at the time.⁴²⁹ They argue that the obligation to provide reparation is enshrined in its Article 3— a right that the drafters intended be afforded to individuals. The article reads as follows ‘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 forming part of its armed forces’.⁴³⁰ Kalshoven explains that the preparatory works during the drafting process show clearly that the states’ intention was to recognise an individual’s right to obtain compensation for violations of the Regulations imputable to a belligerent Party.⁴³¹

Like Article 3 of Hague IV, the records of the Conference of 1907 are also silent on the procedure to be followed in order to give effect to the rules of compensation for victims of a violation of the laws of war. However, as noted by Kalshoven, the original German proposal differentiates between compensation of neutral persons (to grant them compensation as soon as possible) and persons belonging to an adverse party (to be

⁴²⁸ *Darfur Report* (n 100).

⁴²⁹ See: Expert Opinions by Kalshoven; David; Greenwood (n 100).

⁴³⁰ Hague Convention IV Respecting the Laws and Customs of War on Land and Annexed Regulations, Article 3, Oct. 18, 1907, 36 Stat. 2277, T.S. 539.

⁴³¹ Expert Opinion; Kalshoven (n 100) 51.

settled at the conclusion of peace).⁴³² The reasoning for the provision given by the German delegate is as follows:

The situation, which will most frequently occur, will be the one where the Government will not be directly liable of negligence. If, in this case, individuals injured by breach of the Regulations, could not ask for compensation from the Government, and instead they had to turn against the officer or soldier responsible, they would, in the majority of cases be denied their right to obtain compensation.⁴³³

The object of the proposed provision was to allow individuals injured to obtain compensation for an act by an officer or soldier by addressing himself directly to the responsible government. Further, it was clear in the debate that the individual was vested with this right. In referring to the distinction between nationals of the enemy and nationals neutral countries, the Swiss representative observed that beyond that distinction the proposal conferred a 'right to compensation' in favour of individuals:

(...) with regards to the German Proposal, it would be wrong to say that it created an unacceptable privilege in favour of neutrals. The principle that it lays down is applicable to each injured individual, whether nationals of neutral States or nationals of enemy States. The only distinction established between these two categories of victims and of rightful claimants concerns the regulation of compensation, and the distinction between them, on this point, is in the very nature of things. The payment of compensation due to neutrals could most often take place without delay, for the simple reason that the warring State responsible is at peace with their country and continues peaceful relations which will enable both states to settle easily all cases. The same facility or possibility does not exist between Parties at war, by the very fact of the war, and even though the right to compensation arises in favour of their respective nationals as well as in favour of neutrals, the payment of compensation between those

⁴³² 'La Partie belligérante qui violera les dispositions de ce Règlement, au préjudice de personnes neutres, sera tenue de dédommager ces personnes du tort qui leur a été causé.' Deuxième Conférence internationale de la Paix: actes et documents III (1908) 144. For an English translation see: Y. Sandoz, "Unlawful Damages in Armed Conflicts and Redress under International Humanitarian Law", 22 ICRC (1982), 137.

⁴³³ Deuxième Conférence (n 432) 145.

at war could scarcely be established or provided for until peace is concluded.⁴³⁴

The British delegate added:

Article 1 [of the German Proposal] accords to neutral persons a right against the belligerent Party to claim compensation for the wrong cause to them...I do not contest the obligation which exists for a belligerent Power to compensate those who have been victims of violations of the law and customs of war and Great Britain does not wish to in any way to avoid its obligation.⁴³⁵

In the report about the discussion, the German delegate speaks of a ‘right’ of the neutral person,⁴³⁶ and concludes that no difference should be made between the right of a neutral person and an enemy person.⁴³⁷ Indeed, the original German proposal was only criticised in respect of this differentiation⁴³⁸ and thus it was abandoned by drafting a single article dealing with compensation.⁴³⁹ In this short version, which is Article 3 of the Hague Convention IV in its current form, the bearer of the right to compensation is no longer mentioned.

ii. State practice

Gaeta observes that in recent times, countries have established specific funds to make reparation to the victims of violations of humanitarian law and other human rights abuses. As she points out, these funds clearly indicate that the relevant states considered that victims are entitled to obtain redress outside inter-state settlements or mechanisms. But

⁴³⁴ Cited and emphasised in the Expert Opinion of David (n 83) (emphasis added).

⁴³⁵ Deuxième Conférence (n 432) 147. Kalshoven ‘Expert Opinion’ (n 100) 35-39.

⁴³⁶ Deuxième Conférence (n 432) 103,147.

⁴³⁷ *ibid* 104

⁴³⁸ *ibid* 103

⁴³⁹ *ibid* 104

for Gaeta this practice is of no avail to the interpretation of the obligation to compensate under IHL. She points out that states that have established these funds considered that they were not acting to fulfil a specific obligation arising from the laws of *jus in bello*, and therefore no inference may be drawn from this practice.⁴⁴⁰

However, the picture of compensation schemes, as with domestic cases, is far from straightforward and/or uniform. There are two reasons why it is important to examine this practice. First, a close look at compensation schemes in general shows that while compensation funds have traditionally been created under state-to-state mechanisms, the intention has largely been to compensate individual victims (therefore the state to state practice can show a policy concern rather than the aim and intention of a legal norm). Second, the lack of *opinio juris* in order to establish state practice as evidence of CIL in cases of ex-gratia payments for IHL violations is questionable. Recent compensatory funds were created to settle or avoid litigation for damages caused by HR and IHL breaches. It is important therefore to question the legal source of this practice and its impact on the formation of CIL.

The ICRC study on Customary International Humanitarian Law has several examples of domestic reparation programmes affording compensation and other forms of reparation directly to individuals. While not all of them are evidence of states affording reparation to fulfil an IHL obligation, they certainly show a ‘tendency to recognize the exercise of

⁴⁴⁰ Gaeta ‘Compensation’ (n 28) 311.

rights by individuals’.⁴⁴¹ Post-WWII Germany provides ample examples of compensation programmes that created individual rights. As early as 1953, eight years after the end of World War II, the Federal Republic of Germany adopted the Federal Law on Compensation, providing individual compensation for victims of Nazi persecution based on an individualised assessment of the loss suffered.⁴⁴² However, the official position of Germany today is that while such rights were created under domestic law, there are no corresponding rights in international law. This approach was confirmed by the Federal Constitutional Court in its decision of 13 May 1996 concerning forced labour claims. According to the Court, the individual was not a subject of international law at the time of World War II:

The traditional concept of international law as law applying between states does not accord the role of a subject of international law to the individual but only provides for indirect international protection: In the case of violations of international law vis-à-vis foreign nationals, the claim does not pertain to the individual but to his home state. (...) This principle of an exclusive entitlement of the state also applied to violations of human rights in the years 1943 to 1945.⁴⁴³

The Federal Republic of Germany addressed its post-WWII compensatory payments to the State of Israel and the Commission for Jewish Claims against Germany – an NGO composed of numerous Jewish member organisations. This shows, to some extent, that it

⁴⁴¹ Back in 1987, the ICRC noted that ‘[...] persons with a foreign nationality who have been wronged by the unlawful conduct of a Party to the conflict should address themselves to their own government, which will submit their complaints to the Party or Parties which committed the violation. However, since 1945 a tendency has emerged to recognize the exercise of rights by individuals’ – Y Sandoz et al, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (International Committee of the Red Cross 1987) 1067, MN 3656. This tendency has taken further steps, as reported in the ICRC Commentary by J-M Henckaerts and L Doswald-Bexk, *Customary International Humanitarian Law, vol 1: Rules* (CUP 2005) 549.

⁴⁴² Bundesentschädigungsgesetz (Federal Compensation Law) of 18 September 1953, Bundesgesetzblatt (BGBl. - Federal Law Gazette) I 1953, 1387

⁴⁴³ *Forced Labourers Case*, Federal Constitutional Court of Germany, decision of 13 May 1996, 2 BvL 33/93, BVerfGE 94, 315, 329. See: Bank and Schwager, ‘Compensation for Victims of Armed Conflict’ (n 16), 57-59. English translation by the authors of the cited article.

was not the 'state to state' relationship which inspired the compensation programmes, but rather, the obligation towards the individual victims.⁴⁴⁴ On the other hand, even if such activities were conditional on the non-recognition of any rights existing independently from the corresponding treaties, the wording of these and other similar treaties makes clear that the payments afforded by the Federal Republic of Germany were intended for the compensation of individual victims.⁴⁴⁵

Another example is the 1999 compensation fund for Nazi-era forced and slave labour. Following a substantial number of compensation claims filed in U.S. courts, the German government and a group of sixty-five German corporations agreed in December 1999 to commit 10 Billion DM (approximately US\$4.4 billion) to a fund to compensate individuals who had been forced to work for the companies as forced and slave-labourers during the Nazi era. The German Prime Minister conceded that the threat of U.S. litigation finally brought Germany to reverse its previous position on the issue.⁴⁴⁶ In July 2000, the German Bundesrat adopted a law establishing a foundation to provide financial compensation to these former slave and forced labourers, and certain other victims of Nazi injustice.⁴⁴⁷ The law finally adopted carefully seeks to avoid granting a legal right to

⁴⁴⁴ As Bank and Schwager note, victims of the Nazis in Central and Eastern European States were not similarly taken into account. Bank and Schwager, 'Compensation for Victims of Armed Conflict', (n 16), 57

⁴⁴⁵ *ibid.* 58.

⁴⁴⁶ Prime Minister Schroeder announced in February 1999 the establishment of a fund for those subjected to slave labour. He explicitly stated that the fund was established 'to counter lawsuits, particularly class action suits, and to remove the basis of the campaign being led against German industry and our country'; see R Cohen, 'German Companies Set up Fund for Slave Laborers under Nazis' *New York Times* (7 February 1999) A1, cited in M Frulli, 'When are states liable towards individuals for serious violations of humanitarian law? The Markovich case', in *Journal of International Criminal Justice*, Vol. 1, 2003, 417

⁴⁴⁷ Law on the Creation of a Foundation 'Remembrance, Responsibility and Future' (Federal Law Gazette BGBl. I 2000, 1263). For an analysis of this programme, as well as parallel programmes addressing Nazi

beneficiaries vis-à-vis the German State or the Foundation; there is no direct legal relationship between the claimant and the Foundation or the German State.⁴⁴⁸ Instead of this, the law seeks to provide only for an ex-gratia entitlement.⁴⁴⁹

While Germany maintained throughout the process of adopting this law that the establishment of the Foundation was voluntary, it was the forced labour claims against German companies brought in the U.S. that ultimately resulted in the adoption of the agreement.⁴⁵⁰ The latter example begs the question of whether a state establishing a fund to prevent legal suits can simply argue that it is compensating victims out of a moral

injustice, see R Bank, 'The New Programmes for Payments to Victims of National Socialist Injustice' (2001) 44 GYIL 307. Other examples include the programme established in Canada in 1988 to compensate Canadian nationals of Japanese descent for their forced removal and internment during the Second World War. As 'symbolic redress', the Canadian government offered CAN\$21,000 for each person of Japanese ancestry who was subjected to internment, relocation, deportation, loss of property, and/or otherwise deprived of full enjoyment of fundamental rights and freedom solely on the basis of his/her Japanese ancestry (Agreement between the Government of Canada and National Association of Japanese Canadians, Japanese Canadian Redress Agreement, 22 September 1988). In the same year, the U.S. passed a law with the similar aim of acknowledging the fundamental injustice of the evacuation, relocation, and internment of U.S. citizens and permanent resident aliens of Japanese ancestry during the Second World War. Under the act, each eligible individual was entitled to US\$20,000; the restitution of any position, status, or entitlement lost because of any discriminatory act by the Government and the review of any conviction based on wartime legislation (Civil Liberties Act (1988), 10 August 1988, Public Law 100-383, [H.R.442], paras 1, 102-104, 108). This fund also included redress for the Aleuts as well as the agreement resolving a 1996 civil suit filed by four Japanese Latin Americans who were deported from their homes in Latin America during WWII and held in internment camps in the U.S. *Mochizuki v. United States* 43 Fed. Cl. 97 (1999) was a class action lawsuit brought by survivors of Japanese Latin Americans interned during World War II by the U.S. government.

⁴⁴⁸ In particular, Section 10 paragraph 1 of the Foundation Law provides: 'The approval and disbursal of one-time payments to those persons eligible under Section 11 will be carried out through partner organizations. The Foundation is neither authorized nor obligated in this regard.'

⁴⁴⁹ A similar situation occurred in Austria. On the basis of an agreement concluded with the United States, the Austrian Reconciliation Fund (now Fund for Reconciliation, Peace and Cooperation) was created 'to make a contribution toward reconciliation, peace, and cooperation through a voluntary gesture of the Republic of Austria to natural persons who were coerced into slave labour or forced labour by the National Socialist regime on the territory of the present day Republic of Austria'. See http://www.zukunftsfondsautria.at/download/book_reconciliationfund_ForcLaborInAustria.pdf accessed 10 April 2016.

⁴⁵⁰ Hofmann, 'Victims of Violations of IHL' (n 98).

obligation. The ICRC study on CIL examines similar cases.⁴⁵¹ Should the legal context in such cases play a role in establishing the necessary element of *opinio juris* when forming customary international law?

iii. Case law

As it will be shown from the case law analysed in this section, while the majority of domestic courts do not explicitly recognise an individual right to compensation under Article 3 of Hague IV or Article 91 of AP I, some do recognise individual rights under IHL, and there are in fact some court decisions acknowledging an individual right to compensation under these provisions.

As early as 1952, a German Higher Administrative Court ruled that Article 3 of Hague IV provides for an individual right to compensation.⁴⁵² The decision did not address a claim arising directly out of an armed conflict, but dealt with the claim of a German individual who was seriously injured by a vehicle of the British occupying power. Compensation was granted, *inter alia*, based on Article 3 of Hague IV.

In 1997, a Greek court dealing in the first instance with the *Distomo* case (*Prefecture Voiotia v Federal Republic of Germany*) found that the victims, and respectively the dependents of the victims of the massacre, had a right to claim compensation under

⁴⁵¹ https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule150 accessed 10 April 2016

⁴⁵² OVG Münster, 9 April 1952, ILR (1952) 632-634.

Article 3 of the Hague Convention IV.⁴⁵³ Germany appealed to the Greek Supreme Court but the *Areios Pagos* dismissed its jurisdictional immunity claim.⁴⁵⁴ The decision however did not deal with Article 3 of Hague IV since it did not discuss war crimes but judged the massacre as a crime against humanity.⁴⁵⁵

The efforts to enforce the *Leivadia* judgment eventually failed because the Minister of Justice denied his approval – a necessary prerequisite for executing a judgment against a foreign state under Greek law.⁴⁵⁶ This decision was upheld by the Athens Court of Appeal on 14 September 2001. A complaint before the ECtHR was lodged but was equally unsuccessful; the Court ruled that the application was inadmissible.⁴⁵⁷ In 2003,

⁴⁵³ *Prefecture Voiotia v Federal Republic of Germany*, Court of First Instance of Leivadia 137/1997, 30 October 1997, analysed by I Bantekas, 'International Decisions, Prefecture of Voiotia v Federal Republic of Germany' (1998) 1 ACIL 92, 765. The Court of First Instance of Leivadia gave a verdict holding Germany liable for the Distomo massacre and damages in the amount of approximately US\$30 million. The ruling of the *Areios Pagos* (Greek Supreme Court) in the same matter does not deal with Article 3 of the Hague Convention IV (4 May 2000) Case no 11/2000, analysed by Gavounelli and Bantekas (2001) 95 ACIL 198. The *Areios Pagos* does not discuss war crimes, but judges the massacre as a crime against humanity, which can also be committed in time of peace. The reason for this approach can be seen in the exception of state immunity in peace time, E Micha, 'Correspondent's Reports, Cases' (2000) 3 YIHL 511; M Gavounelli and I Bantekas, 'International Decisions, Prefecture of Voiotia v Federal Republic of Germany' (2001) 95 ACIL 198, 198-204.

⁴⁵⁴ The Court denied German immunity applying Article 11 of the European Convention on State Immunity. According to the court Article 11 reflects customary international law. Moreover, the Court held that violation of peremptory norms would have the legal effect of implicitly waiving the jurisdictional immunity. It reasoned that torts in breach of rules of peremptory international law cannot be claimed to be acts *jure imperii*, concluding that Germany, by breaching *jus cogens*, had implicitly waived its immunity. *Prefecture of Voiotia v Federal Republic of Germany*, *Areios Pagos* (Supreme Court), Greece, Case No. 11/2000, 4 May 2000, analysed by Gavounelli and Bantekas 'International Decisions' (n 453) 198.

⁴⁵⁵ A crime against humanity can also be committed in time of peace. While several international provisions stipulate immunity for foreign troops for acts committed during war, they do not apply during peacetime, E Micha, 'Correspondent's Reports, Cases' (2000) 3 YIHL 511; M Gavounelli and I Bantekas (n 453) 198.

⁴⁵⁶ Article 923 of the Code of Civil Procedure.

⁴⁵⁷ 'Referring to judgment no. 11/2000 of the Court of Cassation, the applicants appeared to be asserting that international law on crimes against humanity was so fundamental that it amounted to a rule of *jus cogens* that took precedence over all other principles of international law, including the principle of sovereign immunity. The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity (see *Al-Adsani*, cited above, §

the German Federal Supreme Court rejected the enforcement of the Greek judgment in Germany,⁴⁵⁸ ruling that, at least at the time of the WWII, the individual was not directly protected by international law and that international law did not therefore provide an individual right to compensation.⁴⁵⁹ The German Constitutional Court in 2006 affirmed the decision of the *Bundesgerichtshof*.⁴⁶⁰

In the meantime, the Special Supreme Court of Greece indirectly overruled the *Areios Pagos* in parallel proceedings granting immunity to Germany for WWII claims.⁴⁶¹ Importantly though, the *Margellos* decision, while granting immunity, considered the possibility that compensation could be claimed in Germany either by the home state of the victims or the victims themselves.⁴⁶²

The Italian *Corte Suprema di Cassazione* in *Ferrini* had to answer the question of whether Germany could claim immunity in Italian courts against legal action initiated in Italy arising out of situations involving war crimes and crimes against humanity (deportation and submission to forced labour).⁴⁶³ Even though the scope of the decision

66). The Greek Government cannot therefore be required to override the rule of State immunity against their will. This is true at least as regards the current rule of public international law, as the Court found in the aforementioned case of *Al-Adsani*, but does not preclude a development in customary international law in the future'. App. No. 59021/00, *Kalogeropoulou v. Greece and Germany* (12 December 2002) 129 ILR (2007) 537 et seq.

⁴⁵⁸ *Distomo* (n 401) 556.

⁴⁵⁹ *Distomo* (n 401) 3491.

⁴⁶⁰ BVerfG, 2 BvR 1476/03, 15 Feb. 2006.

⁴⁶¹ *Margellos and Others v. Federal Republic of Germany*, Anotato Eidiko Diskastirio (Greek Special Supreme Court), 6/2002, 129 ILR (2007) 526.

⁴⁶² *Federal Republic of Germany v. Miltiadis Margellos*, Highest Special Court, decision of 17 September 2002; in: M Panezi, 'Sovereign Immunity and Violation of Ius Cogens Norms' (2003) 56 RHDI 199.

⁴⁶³ *Corte Suprema di Cassazione* (Italy), *Ferrini v Federal Republic of Germany*, 11 March 2004, 87 *Rivista di diritto internazionale* (2004) 540.

was limited to the issue of immunity, which had to be resolved before any other legal question in the respective case could be addressed, the Court explicitly presumed a possibility of individual rights to compensation to be enforced through civil litigation.⁴⁶⁴

After the *Ferrini* decision, the *Distomo* plaintiffs instituted proceeding in Italy to execute the Greek judgment against Germany there, and registered a legal charge over a property near Lake Como owned by Germany.⁴⁶⁵ In response to these developments, Germany instituted proceedings against Italy in the International Court of Justice.⁴⁶⁶ The ICJ rejected Italy's claims and fully agreed with Germany's point that customary international law holds that states are immune from the jurisdiction of foreign national courts.

Importantly, however, *Germany v Italy* does not look at the question of reparation and does not analyse the IHL provisions on compensation, namely Article 3 of Hague IV and Article 91 of AP I. The Court simply followed its *Arrest Warrant* precedent stating that immunities are merely a procedural bar that may be waived and may not be permanent:

[...] as the Court has said, albeit in the different context of the immunity of State officials from criminal proceedings, the fact that immunity may bar the exercise of jurisdiction in a particular case does not alter the applicability of the substantive rules of international law (*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 25, para. 60; see also *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 244, para. 196). In that context, the Court would point out that whether a State is entitled to

⁴⁶⁴ *ibid* [9].

⁴⁶⁵ Corte di Cassazione (Italy), *Federal Republic of Germany v. Prefecture of Voiotia*, Judgment no. 4199 (29 May 2008). *Rivista di diritto internazionale* (2009), 594

⁴⁶⁶ *Germany v Italy* case (n 25).

immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation.⁴⁶⁷

The Court concluded that at the moment, states enjoy immunity in the courts of other states as a matter of customary international law: ‘The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress’.⁴⁶⁸

Judge Yusuf is very critical of the decision of the Court in its Dissenting Opinion. He disagrees with both the finding that Italy violated its obligation to respect the immunity of Germany and the reasoning and consideration on which this finding is based:

My disagreements relate in particular to the marginal way in which the core issues in dispute between the Parties have been dealt with in the Judgment; the lack of an adequate analysis of the obligation to make reparations for violations of international humanitarian law (hereinafter IHL), which is intimately linked to the denial of State immunity in the dispute before the Court; the reasoning and conclusions of the majority on the scope and extent of State immunity in international law and the derogations that may be made from it; and the approach adopted in the Judgment towards the role of domestic courts in the identification and evolution of international customary norms, particularly in the area of State immunity.⁴⁶⁹

While there is not enough space to go into the details of this and other dissenting opinions, it is important to note that Judge Yusuf does look into the obligation to make

⁴⁶⁷ *Germany v Italy* (n 25) [100].

⁴⁶⁸ *ibid* [101].

⁴⁶⁹ Dissenting opinion of Judge Yusuf, *Germany v Italy* (n 25) [3].

reparation for violations of IHL and concludes that the Article 3 of Hague IV and Article 91 of AP I should be interpreted in light of the recent evolution of international law.

It may therefore be stated that Article 3 of the Hague Convention IV — or for that matter, Article 91 of Protocol I — does not exclude the right of individuals to make claims for compensation for damages arising from breaches of IHL, despite the fact that the practice of States has been for a very long time to establish bilateral mechanisms through peace treaties and other agreements, and to have the issue of compensation handled by the State whose nationals have suffered damage as a result of such breaches.⁴⁷⁰

He differentiates between policy and practical reasons resorted to after mass atrocities like inter-state treaties or commissions and whether individuals are or were intended to be the ultimate beneficiaries of the compensation awarded:

16. Historically, there is ample evidence that compensation for such breaches was for a long period of time handled at the inter-State level [...] This does not however mean that individuals are not or were not intended to be the ultimate beneficiaries of such mechanisms; or that they do not possess the right to make claims for compensation. It only indicates that the national State of the victims receives a lump sum to be distributed to the victims of such breaches. Such arrangements appear to have been resorted to for policy or practical reasons aimed at avoiding the prospect of innumerable private suits, or a delay in the conclusion of peace treaties and the resumption of normal relations between formerly belligerent States.

The ICJ judgement has been both praised and criticised for its stance on sovereign immunity. There has been an ample array of responses and comments from scholars and practitioners.⁴⁷¹ In terms of states' reactions, it is interesting to note that on 22 October 2014, only eight months after the ICJ ruling, an Italian Constitutional Court Judgment declared 'customary international law on state immunity inapplicable in the Italian legal

⁴⁷⁰ *ibid* [9].

⁴⁷¹ See, for example, A Peters, E Lagrange, S Oeter, and C Tomuschat (eds), *Immunities in the Age of Constitutionalism* (Martinus Nijhoff 2014).

order as far as war crimes and crimes against humanity are concerned'.⁴⁷² Even though the ICJ decision would have seemed to satisfy both governments involved in the dispute,⁴⁷³ the highest judicial body in Italy appears to disagree with the outcome of the inter-state litigation and has declared unconstitutional the laws enacted by the Italian parliament to comply with the ICJ judgment.

The Italian Constitutional Court did not directly question the ruling of the ICJ, but rather applied its 'counter-limits' doctrine. It declared that the customary international norm of immunity does not apply in the Italian legal order in cases concerning war crimes and crimes against humanity in breach of fundamental human rights. The Court explained that it conflicts with the 'qualifying essential principles' of the Italian constitutional order – in particular, the right of access to justice enshrined in Article 24 of the Constitution, in conjunction with the principle of protection of fundamental human rights in Article 2 of the Constitution.⁴⁷⁴ While the decision recognises the ultimate authority of the ICJ's interpretation, as observed by de Sena, the Constitutional Court also 'recalls the decisive support given by the Italian case law to the restrictive doctrine of state immunity, and

⁴⁷² P de Sena, 'The judgment of the Italian Constitutional Court on State immunity in cases of serious violations of human rights or humanitarian law: a tentative analysis under international law' (2014) QIL, Zoom Out II, 17-31.

⁴⁷³ While the Government of Italy had to defend the decision of its courts in *Ferrini* and subsequent cases before the ICJ, as O'Keefe notes, it is no secret that its position on the issue was that of the Government of Germany. He explains that the view expressed by the Italian government in the joint declaration issued in Trieste on 18 November 2008 at the conclusion of German Italian governmental consultations on the matter, quoted in *Germany v Italy*, Application Instituting Proceedings (noting in the relevant part: 'Italy respects Germany's decision to have recourse to the International Court of Justice for a pronouncement on the principle of State immunity . . . [I]t considers that a pronouncement by the International Court on State immunity will be useful in clarifying a complex question'. (O'Keefe translation) – R O'Keefe, 'State Immunity and Human Rights: Heads and Walls, Hearts and Minds' (2011) 44 Vanderbilt J of Transnational Law 999.

⁴⁷⁴ Italy's Diplomatic and Parliamentary Practice on International Law, <http://italyspractice.info/judgment-238-2014/>, Accessed 10 April 16

advances the idea that its judgment ‘may also contribute to a desirable – and desired by many – evolution of international law itself’.⁴⁷⁵ He further notes that such statement means ‘the Court is well aware that it is infringing the current customary regime on State immunity, but also that it hopes to be able to promote a change of this regime, insofar as such a change is clearly perceived – by the Court itself – as being imposed by a sort of widespread opinio necessitatis’.⁴⁷⁶ It might be too early to evaluate, but given the reaction by the Italian Constitutional Court, it would seem that that the ICJ judgement has failed to bring ‘certainty’⁴⁷⁷ on this matter.

C. Nothing in treaty or customary IHL excludes the possibility of an individual right to reparation

As observed by the ICRC in its commentary on Additional Protocol I, ‘since 1945 a tendency has emerged to recognize the exercise of rights by individuals’.⁴⁷⁸ A close look at the jurisprudence, compensation schemes, and the drafting history of Articles 3 of Hague IV and Article 91 of AP I show that nothing in treaty or CIL of IHL excludes the possibility of an individual right to reparation for victims of armed conflict (including compensation).

⁴⁷⁵ De Sena (n 472) 17-31.

⁴⁷⁶ *ibid.*

⁴⁷⁷ Soon after the ICJ decision, Bianchi stated that, ‘At last we have certainty. After almost twenty years of heated debate on how to reconcile the law of state immunity with human rights, we now know. State cannot be sued for serious human rights violations before the municipal courts of another state. The International Court of Justice by its holding in the *Jurisdictional Immunities of the State* (Germany v Italy) case provided us with a two-fold certainty. It told us what the law is on a controversial point and, at the same time, it reassured us, as international lawyers, that the Court is always there to tell us what the law is. As long as we know this, all the rest can be set aside’. A Bianchi, ‘On Certainty’ (EJIL Talk) <<http://www.ejiltalk.org/on-certainty/>> accessed 10 April 16

⁴⁷⁸ ICRC Commentary on the APs by Sandoz (n 441). This tendency has taken further steps, as reported in the ICRC Commentary on IHCL by Henckaerts and Doswald-Bexk (n 441).

The idea of individual rights was discussed during the drafting discussions of Article 3 of the Hague IV. At the same time, even if post WWII settlements were inter-state agreements aimed at repairing the injuries from war (regardless of whether these resulted from the infringement of a rule of IHL), as described earlier, the intention of the payments and sometimes the actual practice were to compensate individual victims.⁴⁷⁹ This shows that the aim of compensation in these cases was to remedy individual victims of armed conflict even when the vehicle to do so was at the inter-state level. On the other hand, while states establishing funds to compensate WWII victims specifically for IHL violations have avoided legal recognition of any individual rights, the funds were created as a result of litigation and/or to settle judicial claims. Their *ex-gratia* nature is therefore questionable.

Finally, a close look at the jurisprudence shows that the cases where no individual entitlement is recognised under Article 3 of Hague IV and 91 of API are generally WWII cases. Since these provisions are silent on who is the beneficiary of the compensation (e.g. the state or the individual victim), the judgments typically look at CIL of Article 3 of Hague IV and 91 of API at the time of WWII and establish that individual rights did not exist in international law. However, these decisions fail to examine contemporary CIL on the right to reparation to see if the relevant IHL provisions can apply today to individual victims *vis-à-vis* the responsible state.⁴⁸⁰ Other judgements do not look into the

⁴⁷⁹ See Section 2.B.ii. of this chapter.

⁴⁸⁰ As described in Part 1, some courts have ruled that Article 3 of Hague IV and Article 91 of AP I do not grant an individual right to compensation because international humanitarian law, as international law in

substantive question of individual reparation. They simply reject reparation claims based on procedural aspects like sovereign immunity and lack of jurisdiction (i.e. act of state or political question doctrine).⁴⁸¹ Importantly, however, many decisions upholding sovereign immunity in cases of individual claims consider that an alternative remedy for the victims exists in other forums.⁴⁸² The material question of whether an individual right to reparation exists has therefore rarely been addressed on the merits.⁴⁸³

Domestic courts have not found it difficult to state that individuals have primary rights under IHL. The controversy lies in whether individuals have a right under international law to bring claims against states for IHL breaches. As described, there are a few court decisions acknowledging an individual right to compensation under relevant IHL provisions⁴⁸⁴ and there are a few cases establishing specifically that individuals do not

general, should be understood as a law between states. On the other hand, some courts have ruled that individuals had no rights under international law during WWII, but that the law of nations has evolved and today individuals have certain rights under international law. On some occasions, courts have acknowledged that individuals do enjoy rights under IHL. Still, these courts argue without analysing contemporary CIL, that IHL does not afford secondary/procedural rights to individuals, and therefore, that Article 3 of the Hague Convention and Article 91 of the AP I cannot be interpreted as affording a private right of action.

⁴⁸¹ US courts have ruled that the Hague Convention IV is not self-executing and that therefore it does not grant individuals the right to seek damages for violation of its provisions: *Tel-Oren et al v. Libyan Arab Republic*, (n. 399), 810; *Goldstar (Panama) SA v. United States* (n 399) ; *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir.1976); *Handel v. Artukovic*, 601 F Supp. 1421, 1425 (C.D.Cal.1985). *Princz v. Federal Republic of Germany* (n 399). See also analysis of *Markovic case* in M. Frulli, 'When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The Markovic Case', 1 IJCL (2003) 406 at 417.

⁴⁸² For example, the Slovenian Constitutional Court decision, cited by the ICJ in *Germany v Italy*, considered immunity as a proportional limitation to the right to judicial remedy, but based on the erroneous premise that the plaintiff could claim compensation before German courts. For an analysis of these and other examples, see M Bothe, 'Remedies of Victims of War and Crimes against Humanities: Some Critical Remarks on the ICJ's Judgement on the Jurisdictional Immunity of States' in A Peters et al (n 471).

⁴⁸³ Exceptions concern, for example, the decision rendered by the German Federal Court in the *Distomo* case (n 401), the *Italian Military Internees* case (n. 412) and the Federal Court of Justice *Bridge of Varvarin* case (n. 412). In both decisions, the court held that Article 3 of the Hague Convention IV applies only between states; it denied an individual right to reparation based on this provision.

⁴⁸⁴ In the *Distomo case*, the first instance Court found that the victims had a right to claim compensation under Article 3 of the Hague Convention IV. *Prefecture Voiotia v Federal Republic of Germany*, Court of

have secondary rights in contemporary IHL.⁴⁸⁵ While there is a general tendency to recognise individual rights in contemporary international law, a review of the jurisprudence shows that relevant IHL case law is still inconclusive.

IHL has traditionally contemplated that harms committed in armed conflict would be compensated between states and that the receiving state in turn would be responsible for affording compensation to its citizens. However, this policy was developed for international armed conflicts between states, and such compensation regime is not well suited for remedying harms in modern non-international armed conflicts between states and non-state armed groups. International law now recognises non-state actors as parties to a conflict with international rights and obligations. While armed groups may share similar features with states—like being collective entities, organised, exercising control over a territory, etc.—they are not legal entities, nor do they have the permanency of

First Instance of Leivadia, Greece, Case No. 137/1997, 30 October 1997. The Areios Pagos appeal dismissing Germany's jurisdictional immunity claim did not deal with Article 3 of the Hague Convention IV since it did not discuss war crimes but judged the massacre as a crime against humanity. *Prefecture of Voiotia v Federal Republic of Germany*, Areios Pagos (Supreme Court), Greece, Case No. 11/2000, 4 May 2000. The Italian Corte Suprema di Cassazione in the Ferrini case explicitly presumed a possibility of individual rights to compensation to be enforced through civil litigation. Corte Suprema di Cassazione, Ferrini, 11 March 2004, 87 *Rivista di diritto internazionale* (2004) 540. Mantello and Milde corroborate the Ferrini view: *Germany v Mantello and others*, (Preliminary order on jurisdiction, No 14201/2008; ILDC 1037 (IT 2008), 29 Mai 2008); *Milde v. Italy*, (Supreme Court of Cassation, Cass. sez. I pen. Sentenza n. 1072 ud. 21/10/2008, (IT 2008), 21 October 2008)]; and on 22 October 2014, the Italian Constitutional Court rendered Judgment 238/2014. In this decision, the Court declared the unconstitutionality of certain domestic provisions that obliged Italian courts to comply with the Judgment of the International Court of Justice in the case of *Germany v. Italy* (n 25), and thus to deny their jurisdiction in cases concerning actions for damages for war crimes and crimes against humanity, in breach of fundamental human rights, committed by German military forces during World War II (Judgment no. 238 of 2014, Italian Constitutional Court).

⁴⁸⁵ German courts have consistently rejected individual claims for IHL violations. While some decisions denied WWII claims on the basis that there were no individual rights at the time [*Distomo* (n 401)], more recent decisions have established that either there are no individual rights under IHL [*LG Bonn* (n 403) 526; Judgment confirmed by the Court of Appeal in *OLG Köln* (n 381)] or that while individuals enjoy primary/substantive rights, they do not enjoy secondary rights to reparation. See 'Italian Military Internees case' and *Bridge of Varvarin* case (n. 412).

states.⁴⁸⁶ The traditional policy of state-to-state reparations therefore fails to take into account the new characteristics of modern conflicts. While liability of non-state actors for IHL breaches is widely acknowledged, the asymmetrical nature of the conflict as well the varying degree of liability of the different actors in the conflict (e.g. whether acts of non-state entities can be attributed to states or whether armed groups can be directly liable under international law) makes the traditional reparations framework obsolete.⁴⁸⁷ At the same time, HR case law on the right to a remedy, the right to an investigation, and the right to reparation have influenced the understating of humanitarian law.⁴⁸⁸ The limitation of affording reparations to states only has been significantly eroded in the European and Inter-American human rights systems, both of which have applied the individual remedial provisions of the regional human rights conventions to states' violations arising in armed conflict settings.⁴⁸⁹ Finally, as it will be explained in the section on 'Reparations for IHL violations in the context of individual responsibility under ICL', the ICC has confirmed

⁴⁸⁶ Jann K. Kleffner 'The collective accountability of organized armed groups for system crimes' in H. Wilt and A. Nollkaemper (eds.) *System criminality in international law*, (CUP 2009) 238-269, p265. Reparation is possible when armed opposition groups become the new government of a state (e.g. under Article 10 of the ILC Responsibility Articles) conduct of an 'insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law'). See n 23.

⁴⁸⁷ A number of studies have explored the topic of armed groups and reparations looking at options to hold non-state actors accountable for reparations. See for example R Dudai, 'Closing the Gap: Symbolic Reparations and Armed Groups', *International Review of the Red Cross* 93 (2011): 783-808; L Moffett, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda', *Queen's University Belfast Law Research Paper No. 20* (2013), and M. Sassòli 'Taking armed groups seriously: ways to improve their compliance with international humanitarian law' *International Humanitarian Legal Studies*, Vol. 1, 2010, p.6

⁴⁸⁸ C Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in situations of armed conflict' (2007) 40(2) *Israel Law Review*.

⁴⁸⁹ See e.g. analysis of the relationship between the ECHR and IHL in C Droege and L Arimatsu, 'Conference on the European Convention on Human Rights and International Humanitarian Law: conference report', in *Yearbook of International Humanitarian Law*, Vol. 12, (2009), 435-449, and with the ICHR in F Martin, 'The application of international humanitarian law by the Inter-American Court of Human Rights', *International Review of the Red Cross*, No. 844 (2009).

that victims (as opposed to only states) have a right to reparation for international crimes, including those committed in armed conflicts.⁴⁹⁰

In sum, there is nothing in IHL preventing individual reparation. On the contrary, the idea of individual remedies was present during the drafting discussions of the IHL compensation provisions. Equally, the intention and sometimes the practice of post-WWII settlements were to compensate individual victims. Additionally, human rights law has influenced the understating of IHL in the context of individual entitlements. The following section therefore looks at recent developments in international law to investigate if reparation to individuals for serious IHL breaches is possible under the principles of state responsibility or whether there is a norm (as opposed to a post-conflict policy) that excludes individual reparation. It will also question whether the state-to-state reparation is the most adequate regime in contemporary IHL, considering the applicability of human rights law during wartime and the IHL regulation of non-international armed conflicts.

1. Is there an obligation to afford reparation to individual victims of IHL breaches under the law on state responsibility?

In the *Chorzów* case in 1928, the PCIJ stated that: ‘It is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation ... Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention

⁴⁹⁰ *Lubanga* (n. 599)

itself'.⁴⁹¹ The ILC Responsibility Articles provide that 'the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act'.⁴⁹²

The duty to make reparation for violations of IHL is explicitly referred to in the Second Protocol to the Hague Convention for the Protection of Cultural Property.⁴⁹³ As the ICRC notes, it is also implied in the rule contained in the Geneva Conventions, according to which states cannot absolve themselves or another High Contracting Party of any liability incurred in respect of grave breaches.⁴⁹⁴

Clearly, the ICJ applied a 'general conception of law' to the relationship between states in *Chorzow* (liability to make reparation for a breach of an engagement). This principle is the essence of the ILC Responsibility Articles and there is no question that the *Chorzow* dictum applies to violations of IHL that constitute IWA.⁴⁹⁵ In this sense, if it is recognised that individuals today enjoy rights in IHL *vis-à-vis* states (as well as *vis-à-vis* other non-state actors), then reparation – as a general rule of international law – should in principle apply to a breach of an engagement towards the holder of the right, whether it is

⁴⁹¹ *Chorzow* (n 22) [102]; see also PCIJ Statute, Article 36, which states that 'the States Parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: ... (d) the nature or extent of the reparation to be made for the breach of an international obligation'. Article 36 of the ICJ Statute contains similar wording.

⁴⁹² ILC Responsibility Articles (n 23), Article 31, [86]

⁴⁹³ Second Protocol to the Hague Convention for the Protection of Cultural Property (n 757) Article 38, [80]

⁴⁹⁴ Rule 150 on Reparation of the ICRC Customary IHL database, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule150, accessed on 1 February 2016.

⁴⁹⁵ 'The inter-State consequences of violations are laid down in the rules on State responsibility. This article will try to show how those rules apply to violations of international humanitarian law'. M Sassòli, 'State responsibility for violations of international humanitarian law', Vol. 84, No. 846, *International Review of the Red Cross*, June (2002), p. 402

stated or not in IHL conventions. Part A of this Chapter already established that nothing in IHL prevents individual reparation. Part B will analyse whether individuals enjoy secondary rights under general international law for serious violations of IHL (as established in the Principles and Guidelines) or whether the nature of IHL excludes individual reparation.

A. State responsibility and individual reparation for IHL breaches

Van Boven argues that the construction of the concept of state responsibility to the inter-state context only, ignores the historic evolution of international law since World War II. He explains that human rights are now an integral and dynamic part of international law, as evidenced by numerous widely ratified international instruments.⁴⁹⁶ Indeed, the duty of affording remedies for governmental misconduct is so widely acknowledged that the right to an effective remedy for violations of human rights may be regarded as forming part of customary international law.⁴⁹⁷ Chapter 2 of this thesis also shows that the law of diplomatic protection (based on state responsibility) has been influenced by human rights law to the point where it has evolved in its treatment of denial of justice as a right belonging also to individuals, not only states.⁴⁹⁸

⁴⁹⁶ van Boven, 'Victims' Rights' (n 21) 26. See also M Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in M Kamminga and M Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009).

⁴⁹⁷ Shelton, *Remedies* (n 12) 28-29.

⁴⁹⁸ Chapter 2 discusses the evolution of the concept of diplomatic protection from the traditional *Mavrommatis* (n 279) conception to the contemporary understanding in *Diallo*, where the state, instead of exercising diplomatic protection in its own right, does so as an agent on behalf of the injured individual: 'the sum awarded to Guinea in the exercise of diplomatic protection of Mr Diallo is intended to provide reparation for the latter's injury' – *Diallo (Compensation)* (n 113) [57]. It also notes that the International Court of Justice, in the *LaGrand* (n 92) case and in *Avena* (n 123), has established that the breach of

Against this background, it is relevant to note once again that the Darfur Report states that the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on state responsibility. According to the Commission, these provisions may now be construed as obligations assumed by states not only towards other states, but also *vis-à-vis* the victims who suffered from war crimes and crimes against humanity.⁴⁹⁹

As mentioned, Article 33 of the ILC Reparation Articles confirms that reparation by the liable state may be owed both to other states and to injured individuals.⁵⁰⁰ In addition, the Commentary affirms that at the international level, individuals can invoke the responsibility of a state on their own account and without the intermediation of any state.⁵⁰¹ The ILC Commentary says that the primary rule will determine whether non-state entities can invoke responsibility on their own account. Clearly, it is a matter of interpretation of the primary norm, and in principle this could be done before an international body or in national courts. The ILC Commentary makes clear that ‘state responsibility for a breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as ultimate beneficiaries and in that sense as the holder of

international norms on treatment of aliens may produce both the violation of a right of the national State and the violation of a right of the individual. The same conclusion reached by the Inter-American Court of Human Rights, in its Advisory Opinion OC-16/99.

⁴⁹⁹ *Darfur Report* (n 100) [597].

⁵⁰⁰ ‘This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State’, Article 32(2). See also the Commentary on Article 32, Report of ILC Responsibility Articles (n 23) [3-4].

⁵⁰¹ See Article 33 (2) and Commentary [233], Report on ILC Responsibility Articles (n 23).

the relevant rights'.⁵⁰² The commentary cites the *Jurisdiction of the Courts of Danzig*, as well as *LaGrand*, to prove that individual rights under international law may also arise outside the framework of human rights. Notably, the PCIJ affirmed in *Danzig* the existence of a right for an individual under international law despite the lack of an international procedural mechanism. It stated that national courts could enforce such rights.⁵⁰³ Similarly, the ICJ reaffirmed in *LaGrand* that individuals can have international rights despite their lack of general international standing and that these rights should be enforced domestically.⁵⁰⁴

In this sense, it is fair to say that individuals can enjoy rights under contemporary IHL.⁵⁰⁵ It has been observed, in this context, that it would be 'preposterous to affirm that the position of the individual as a holder of rights dissolves when their need to be protected against abuses reaches its peak, i.e. in the situations of armed conflicts, when individuals are more vulnerable than ever'.⁵⁰⁶ In addition, it is well established that HR law applies in situations of armed conflict, and there is a set of HR that continues to apply even when

⁵⁰² Commentary, Report on the ILC Responsibility Articles (n 23) 234 et seq.

⁵⁰³ [...] it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adaptation by the parties of some definite rules creating individual rights and obligations **and enforceable by national courts**. [emphasis added]. *Danzig* (n 91) 17.

⁵⁰⁴ *LaGrand* (n 92) 77.

⁵⁰⁵ Lopes and Quenivet argue that the regime of 'protected persons' under IHL offer protection and assistance in the form of certain rights to individuals who do not play a role in the hostilities. They also contend that treaty law also holds special rights for individuals by virtue of the Geneva Conventions and their Additional Protocols. See Lopes and Quenivet, 'Individuals as subjects' (n 393) 214. Gaeta points out as an example that Article 12 of the Geneva Convention 1, provides that members of the armed forces who are wounded or sick 'shall be respected and protected in all circumstances' and they 'shall be treated humanely and cared for by the Party to the conflict in whose power they may be'. Gaeta 'Compensation' (n 28) 319.

⁵⁰⁶ Gaeta 'Compensation' (n 28) 319.

the state makes a declaration under the derogation clause contained in the human rights treaties.⁵⁰⁷

In principle, therefore, if a state breaches a norm containing an individual right, it is liable to afford reparation to the individual victim. The question of whether individuals can be holders of secondary rights, and whether the secondary right to reparation entails the right to access a procedural avenue to enforce it, has been addressed in Chapter 1. The chapter concludes that if individuals' rights are breached, individuals have an actionable secondary right to reparation. Claims can be pursued at the international level by the home state representing its national or, when possible, by the individual him/herself (e.g. before a HR court, monitoring body, claims commission or arbitral tribunal). When the claims involve fundamental breaches, individuals can pursue these claims at the domestic level before national courts or before foreign courts.⁵⁰⁸

However, since reparation in the context of war has traditionally been awarded to states, it has been argued that reparation for IHL can only be made between states. In addition, none of the IHL instruments contain monitoring mechanisms with individual standing as the human rights treaties do. This section will investigate whether there is a norm in CIL that provides for state-to-state reparation excluding individual remedies for victims of

⁵⁰⁷ The International Court of Justice stated that 'the protection of the International Covenant on Civil and Political Rights does not cease in times of war' – The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ Reports 226 [25] [hereinafter *Nuclear Weapons*]. There is ample literature on this subject. See, *inter alia*, L Doswald-Beck and S Vité, 'International Humanitarian Law and Human Rights Law' (1993) 293 IRRC 94; F Hampson and I Salama, 'The Relationship between Human Rights Law and International Humanitarian Law', UN Sub-Commission on the Promotion and Protection of Human Rights, Working Paper (June 21, 2005) UN Doc E/CN.4/Sub.2/2005/14; Droege, 'The Interplay' (n. 488).

⁵⁰⁸ As explained in previous chapters, personal and state immunities might prevent the exercise of jurisdiction by some domestic courts.

armed conflict or if the practice of interstate reparation responds to policy concerns rather than being established by a legal norm.

B. Human rights and the laws of armed conflict

Before looking at general international law practice in this regard, it is important to look at human rights law. It is widely recognised that human rights law applies during armed conflict; there is a set of fundamental rights during armed conflict that individuals enjoy and when these are breached, victims have a right to a remedy and reparation. The ICJ recognised this in the *Nuclear Weapons*⁵⁰⁹ and more recently in the *Wall* Advisory Opinion: '[...] the protection offered by human rights conventions does not cease in case of armed conflict'.⁵¹⁰ In *Hassan*, the ECtHR made clear that 'the protections offered by human rights conventions and that offered by international humanitarian law co-exist in situations of armed conflict'.⁵¹¹

In this sense, regardless of whether there is an individual right to reparation under principles of state responsibility for victims of armed conflict, it is clear that certain prohibited acts or omissions, whether committed in peace or wartime, give rise to an individual right to a remedy in international law by virtue of the right contained in human rights conventions. However, some insist that there is no individual right to a remedy for

⁵⁰⁹ *Nuclear Weapons* (n 507).

⁵¹⁰ *Wall Opinion* (n94) 136 [106].

⁵¹¹ *Hassan v United Kingdom* A no 29750/09 (16 September 2014) ECtHR 4 [102].

IHL violations because of the ‘particularities’ of this legal regime.⁵¹² This reasoning has led to positions like that of the U.S. before the Committee Against Torture (CAT) arguing that while the UNCAT applies in time of war, Article 14 is inapplicable since claims of IHL violations are to be resolved on a state– to–state level and war reparation under CIL are subject to government-to-government negotiations.⁵¹³ The CAT referred to its General Comment 3⁵¹⁴ on the applicability of Article 14 in its Concluding Observations.⁵¹⁵ Under the heading ‘Inquiries into allegations of torture overseas’, the Committee urged the State Party to: ‘(c) Provide effective remedies and redress to victims, including fair and adequate compensation, and as full rehabilitation as possible, in accordance with the Committee’s general comment No. 3 (2012) on the implementation of article 14 of the Convention by State parties’.⁵¹⁶

There has been much written on the relationship between HR and IHL, for example, how both regimes apply in practice; what ‘*lex specialis*’ or ‘complementarity’ mean; the extent of ‘conflict’ or the characteristics of ‘mutually reinforcing regimes’. While this is not the place to go into a detailed discussion of these topics, it is important to clarify how

⁵¹² The majority of the arguments are of a policy nature. For example, Tomuschat argues that ‘grave violations of humanitarian law, in particular, constitute essentially a mass phenomenon which cannot be successfully addressed by way of individual suits’. Tomuschat, *Between Idealism* (n 88) 414. Others argue that armed conflicts are harder to monitor than situations not amounting to war or that judicial review can hamper the achievement of peace at the end of a conflict.

⁵¹³ US Third Periodic Report to UN Committee Against Torture. Nov. 12-13, 2014. See the full unofficial transcript by JustSecurity at http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cat_complete_transcript_from_just_security.pdf accessed 2 February 2016. The official version of the opening statement by Amb. Keith Harper, U.S. Rep. to the Human Rights Council is available at: <https://geneva.usmission.gov/2014/11/12/ambassador-harper-opposition-to-torture-is-a-fundamental-american-value> accessed 2 February 2016.

⁵¹⁴ CAT, General Comment No. 3 of the Committee against Torture: Implementation of article 14 by States parties, 19 Nov 2012, CAT/C/GC/3.

⁵¹⁵ CAT, Concluding observations on the combined third to fifth periodic reports of the United States of America, 19 Dec 2014, CAT/C/USA/CO/3-5.

⁵¹⁶ *idem*.

does HR law applies during armed conflict and what the effect on the right to a remedy and reparation for victims of human rights violations is. The idea that IHL and international HR law are complementary, rather than alternative regimes, has largely replaced the former convention that maintained that the two regimes are mutually exclusive.⁵¹⁷ As explained by Ben-Naftali:

[t]he coupling of the consciousness of the changing face of war from inter-state to intra-state or mixed conflicts, with the experience that ‘the first line of defence against international humanitarian law is to deny that it applies at all,’⁵¹⁸ generated a new paradigm according to which IHL is not an alternative to IHRL but an exception to the full application of the latter.⁵¹⁹

Normative developments⁵²⁰ and international and domestic jurisprudence,⁵²¹ together with a wide scholarly support, seem to confirm that the confluence of the regimes is the new canon. Still some scholars maintain that both regimes do not and indeed should not meet,⁵²² while others are concerned that it may result in less rather than more protection

⁵¹⁷ See e.g. GIAD Draper, ‘Humanitarian Law and Human Rights’, *Acta Juridica* (1979)193-206.

⁵¹⁸ R R Baxter ‘Some existing Problems in Humanitarian Law’ in *The Concept of International Armed Conflict: Further Outlook* (Proceedings of the International Symposium on Humanitarian Law, Brussels, 1974)

⁵¹⁹ Orna Ben-Naftali ‘International Humanitarian Law and International Human Rights Law –Pas de Deux’ in Ben-Naftali (n 28) 4.

⁵²⁰ ‘Normative developments originating in the 1968 International Conference in Teheran, and including the 1977 Protocols Additional to the Geneva Conventions; the 1990 Declaration of Minimum Humanitarian Standards; and the Statute of the International Criminal Court, which proscribes crimes against humanity and genocide in both peace and wartimes situations, confirmed the validity of the new paradigm’. Ben-Naftali (n 28) 4-5.

⁵²¹ See e.g. *Nuclear Weapons* (n 507); *Wall Opinion* (n94); *Arrest Warrant Case* (n 345) 69-70 [216-217]. On the domestic level, the practice of the Israeli Supreme Court operating in its capacity as High Court of Justice and exercising judicial review over actions of the military in the occupied Palestinian Territory is noteworthy. See, for example, *Mara'abe v. The Prime Minister of Israel*, HCJ 7957/04, Israel: Supreme Court, 15 September 2005, available at: <<http://www.refworld.org/docid/4374aa674.html>> accessed 3 February 2016; *Public Committee Against Torture v. State of Israel (Targeted Killings)*, HCJ 769/02, Israel: Supreme Court, 13 December 2006, available at <http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf> accessed 3 February 2016.

⁵²² See, for example, Bowring, ‘Fragmentation, Lex Specialis and the Tensions in the Jurisprudence of the European Committee of Human Rights’ (2009) J.C. and S.L. 1-14.

to human rights.⁵²³ Modirzadeh for example, argues that the convergence approach avoids doing the hard work of actually transforming and re-envisioning IHL to establish real accountability mechanisms and remedies for IHL violations (as opposed to arguing complex jurisdictional legal points in order to apply HR law during armed conflict and provide the possibility of state accountability before HR bodies and domestic courts). Convergence of IHL and international HR law, according to Modirzadeh, ‘leaves unaddressed and untheorized the broader implications for how law functions in war’.⁵²⁴ Most scholars, though, hold that there is a large measure of convergence between IHL and international HR law, and as such, both legal regimes can be used for interpretative purposes to improve the law and advance its humanistic purpose. Opinions diverge, however, on the scope and methods of dealing with norm conflicts: some hold that existing interpretative mechanisms – most specifically the *lex specialis* principle – adequately resolve the relatively narrow scope of norm conflicts.⁵²⁵ Droege argues that two main concepts should govern the interaction between IHL and HR law: complementarity and mutual influence (in most cases), and precedence of the more specific norm (*lex specialis*) when there is contradiction between the two bodies of law (in some cases).⁵²⁶ Although, as she notes, ‘the question is: in which situation is either

⁵²³ See N Lubell, ‘Challenges in Applying Human rights Law to Armed Conflict’ (2005) International Review of the Red Cross 860, 737-754; W Shabas, ‘Lex specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus and Bellum’ (2007) 40 Is LR 592-613; Y Shany, ‘Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Against Terror’ in Ben-Naftali (n 28).

⁵²⁴ N K Modirzadeh, ‘The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict’ US Naval War College, International Law Studies (Blue Book Series 2010) 86, 390-393, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1543482> accessed 3 February 2016.

⁵²⁵ See: M Sassoli, ‘The Role of Human Rights and International Humanitarian Law in the New Types of Armed Conflicts’, in Ben-Naftali (n28).

⁵²⁶ C Droege, ‘Elective affinities? Human Rights and Humanitarian Law’ (2008) 90(871) IRRC 501.

body more specific?’⁵²⁷ For others, only political processes are capable of harmonizing these regimes.⁵²⁸ Some scholars believe that the convergence is as substantive as substantial, indicating a ‘movement towards a new merger’ of both bodies of law into one.⁵²⁹

The United States’ position that the UNCAT and IHL are ‘complementary’ and ‘mutually reinforcing’ in wartime settings except in case of ‘conflict’ seems to assume that IHL will always take precedence as the more ‘specific’ rule. But what is relevant for this discussion is that even if one takes this position as accurate, the claim of a ‘conflict’ between a norm of IHL and the individual right to enforceable compensation under Article 14 is still disputable. Is there really a ‘norm’ of IHL establishing that reparation for HR and IHL violations committed during armed conflicts have to be resolved on a state-to-state level? Is there a ‘norm’ under CIL establishing that war reparations are subject to government-to-government negotiations?

Prima facie, nothing precludes the application of the obligation to afford compensation under Article 14 to victims of torture occurring in armed conflict. This is a narrow obligation and the UNCAT was intended to strengthen the universal prohibition on torture. The competing rule of ‘state-to-state reparation only’ is questionable. Even if claimed that it does exist, it is clearly unwritten in non-international armed conflict, and certainly lacks the qualities of precision and specificity that characterised the Geneva

⁵²⁷ *Idem.* 502.

⁵²⁸ M Milanovic, ‘Norm Conflicts, International Humanitarian Law and Human Rights Law’ in Ben-Naftali (n 28).

⁵²⁹ Arnold and Quenivet (eds) (n 393).

Convention provisions applied in *Hassan* over Article 5 of the ECHR.⁵³⁰ There is no practice showing that HR bodies typically refrain from applying the remedies afforded by HR law in deference to IHL rules.⁵³¹ Finally, as explained in the previous section, nothing in IHL precludes states from expanding the remedies contemplated by that system through the creation of civil remedies enforceable by individuals, whether through their domestic legislation or through international agreements such as the UNCAT.⁵³²

After a detailed analysis of domestic and international jurisprudence, particularly that of HR bodies and courts, Dorege observes:

there is no conflict between human rights law and humanitarian law in respect of legal remedies. Humanitarian law is simply silent on the question of an individual right to a remedy; it does not preclude individual remedies where they exist under other international law or domestic law. Human rights law has reinforced the possibility of alleged victims of violations of human rights and humanitarian law bringing cases before courts and other human rights bodies. This is not in conflict with humanitarian law, but can indeed strengthen compliance with it, albeit through the lens of human rights law.⁵³³

While there is clearly an earlier practice of war reparations afforded at state level, the law and practice on reparation for HR and IHL violations has evolved greatly since WWII. It is important to differentiate between policy considerations and legal norms. The premise that a rule of international law exists excluding individual remedies in IHL is legally questionable. As shown in Part I, while the evidence of the compensation rules of IHL

⁵³⁰ *Hassan* (n 511).

⁵³¹ See n 489 and accompanying text

⁵³² Indeed, Article 75 of Additional Protocol I, which prohibits torture and humiliating and degrading treatment, expressly provides that '[n]o provision of this Article may be construed as limiting or infringing *any other more favourable provision granting greater protection, under any applicable rules of international law*'. Article 75(8). This savings clause suggests that IHL in this context would welcome the additional remedies afforded by the UNCAT (n. 9).

⁵³³ Droege, 'Elective Affinities' (n 526) 546.

applying to individuals is inconclusive, there is nothing in IHL that prevents reparation to individuals. Importantly, such a rule would clearly be at odds with non-international armed conflicts where non-state actors (as opposed to only states) are bound to comply with IHL provisions. Under CIL, such a norm would be directly in conflict with existing obligations in HR law to afford remedies to victims whether the violations are committed in times of peace or during armed conflicts.

C. Reparation for IHL violations outside HR mechanisms and with no reference to Article 3 of Hague IV and Article 91 of API

The International Law Association recognises the right of victims of armed conflict to reparation.⁵³⁴ The Committee on Reparation for Victims of Armed Conflict enacted a Declaration of International Law Principles on Reparation for Victims of Armed Conflict. It established that:

[t]he old provisions contained in the Hague Convention IV and restated in Protocol I Additional to the Geneva Conventions, according to which a Party to the conflict is responsible for the violations of the law of armed conflict and is liable to pay compensation, should be modernized and brought in conformity with the developments of International Humanitarian Law.⁵³⁵

This section examines these developments to assess if victims of armed conflict have a right to a remedy and reparation outside HR conventions and despite the ambiguities of the compensation provisions in IHL instruments.

⁵³⁴ The ILA Reparation for Victims of Armed Conflict Committee concluded the first part of its work with the adoption of the Declaration of International Law Principles for Victims of Armed Conflict at the 74th ILA Conference (Res 2/2010).

⁵³⁵ *ibid*, 1.

There are a number of examples in which a right for individuals to obtain compensation in case of a violation of IHL is clearly mentioned in a peace treaty or a Security Council Resolution without explicitly grounding the right on Article 3 of the Hague Convention IV or the respective provisions in the Geneva Conventions or in relation to HR obligations. Some of these examples are described below.

i. Eritrea-Ethiopia Claims Commission (EECC)

To a certain extent, the individual is the bearer of a right to compensation for violations of IHL before the EECC. Article 5, Para. 1 Sentence 2 of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea stipulates:

The mandate of the Commission is to decide through binding arbitration all claims for losses, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.⁵³⁶

According to this rule, individuals are entitled to obtain reparation for their loss suffered from a violation of international law in the context of the conflict between Eritrea and Ethiopia. Even though the individual has no standing before the EECC, the individual is the bearer of the material right to reparation under the Agreement. The wording of Article

⁵³⁶ Agreement of 12 December 2000 (2001) 40 ILM 260.

5 Para. 8, 9 of the Agreement, of the Rules of Procedure⁵³⁷ and of Decision No. 5⁵³⁸ indicate that the state, when claiming for a loss suffered by an individual, is not invoking its own right, but is acting on behalf of the individual. In its Partial Award on Eritrea's Claims 15, 16, 23 & 27-32, the EECC confirmed this classification by ruling that claims brought by Eritrea on its own behalf for non-nationals are outside the scope of jurisdiction of the Commission. These claims should have been made on behalf of the individuals themselves (under Article 5 paragraph 9), as 'the claim remains the property of the individual and that any eventual recovery of damages should accrue to that person'.⁵³⁹

The EECC observed in its Final Award Decision that the option to bring large claims on behalf of individual victims was not used by the parties to the Agreement. As noted by the Commission, this was probably due to lack of time and resources:

25. [...] For reasons that are readily understandable, given limits of time and resources, both Parties filed their claims as inter-State claims. Although Eritrea filed claims on behalf of six individuals, neither Party utilized the option, available under Article 5(8) of the Agreement and the Commission's Rules of Procedure, of presenting claims directly on behalf of large numbers of individuals. Nevertheless, some of both States' claims are made in the

⁵³⁷ Article 23 and 24(3)(b), available at:

< <http://www.pca-cpa.org/ENGLISH/RPC/EECC/Rules%20of%20Procedure.PDF>, (accessed 8 April 2016).

⁵³⁸ Available at <<http://www.pca-cpa.org/ENGLISH/RPC/EECC/Decision%205.pdf>> (accessed 8 April 2016).

⁵³⁹ Partial Award of 17 December 2004, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, [19], http://legal.un.org/riaa/cases/vol_XXVI/195-247.pdf accessed 10 April 16. Claims for injuries of Eritrean nationals were only brought on behalf of Eritrea and not explicitly on behalf of the individuals. However, they are within the jurisdiction of the Commission, as Article 5(8) of the Peace Agreement states that claims shall be submitted on behalf of the parties and the nationals themselves. The Commission seems to consider the formulation chosen by Eritrea to be sufficient to include claims of the individuals.

exercise of diplomatic protection, in that they are predicated upon injuries allegedly suffered by numbers of the Claimant State's nationals[...].⁵⁴⁰

As the Commission further explains, Article 5(9) of the Agreement allowed '[...]claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals'. According to the provision, '[s]uch claims shall be considered by the Commission on the same basis as claims submitted on behalf of that party's nationals'.⁵⁴¹ However, this innovative article was not used. While Eritrea sought to bring claims predicated upon injuries to Ethiopian nationals, it did so on behalf of the state of Eritrea, and not on behalf of the injured individuals. Albeit not used, it is clear that while the EECC is an inter-state agreement, it conferred an individual right to obtain reparation for a violation of the *jus in bello*.⁵⁴²

At this point, it is not clear what the practical results of the Commission's final awards will be. Unlike some other recent international claims processes (such as the Iran-US Claims Tribunal and the UNCC), there is no dedicated source of funding for EECC awards. Even if awards are promptly paid, they are predominantly state-to-state claims that are not directed to specific recipients. Outside of the six individual claims, the

⁵⁴⁰ Under Article 5(9) of the Agreement, '[i]n appropriate cases, each party may file claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals. Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of that party's nationals'. This unusual provision was not utilised. While Eritrea sought to bring claims predicated upon injuries to Ethiopian nationals, it did so on behalf of the State of Eritrea, and not on behalf of the injured individuals.

⁵⁴¹ *ibid.*

⁵⁴² The US Court of Appeals of the District of Columbia, however, ruled in 2003 that the remedy offered by the EECC was not effective: 'We conclude that the Commission's inability to make an award directly to Nemariam, and Eritrea's ability to set off Nemariam's claim, or an award to Eritrea based upon her claim, against claims made by or an award in favor of Ethiopia, render the Commission an inadequate forum; [...] In so saying, we recognize that the decision is a close one, particularly in the light of our limited standard of review and the district court's observation, with which we agree, that there is nothing in the record to suggest the plaintiffs' awards will be set off against debts owed by Eritrea to Ethiopia. Neither, however, is there any legal barrier to such a set off'. Hiwot Nemariam et al., *Appellants, v. The Federal Democratic Republic of Ethiopia and The Commercial Bank of Ethiopia, Appellees*. No. 01-7142. United States Court of Appeals, District of Columbia Circuit. 315 F.3d 390, January 24, 2003. Para 22.

payments would be received by the two governments, which technically would have discretion as to whether to keep the funds, provide them to the affected individuals, or use them for alternative forms of assistance or relief to the affected population groups. In this respect the process is also unlike those of the Iran US Claims Tribunal and the UN Compensation Commission, where specific awards were made for specific recipients.⁵⁴³

ii. United Nations Compensation Commission (UNCC)

Another example of reparation for IHL violations outside HR mechanisms and with no reference to Article 3 of Hague IV and Article 91 of API is the UNCC⁵⁴⁴. It was set up after the gulf war in 1980 and rules upon claims resulting from Iraq's unlawful invasion and occupation of Kuwait. In the framework of the UNCC, there is one situation in which a payment can be made for a violation of IHL (*jus in bello*) even though the UNCC usually grants compensation for damages resulting in the violation of the prohibition of the use of force by Iraq (*jus ad bellum*). These cases concern claims by the members of the Allied Coalition Armed Forces, who are usually excluded from submitting claims before the UNCC. They are entitled to obtain compensation from the commission only if they were prisoners of war and had suffered mistreatment contrary to the rules of IHL.⁵⁴⁵

The UNCC regime is special not only because it was imposed on Iraq by a resolution of the UN Security Council, but also because the resolution also provided for a source from

⁵⁴³ M.J. Matheson, "The Damage Awards of the Eritrea-Ethiopia Claims Commission," 9 *The L. & Practice of Int'l Courts & Tribunals* 1 (2010), 1–15.

⁵⁴⁴ Established by SC Res 692 (20 May 1991).

⁵⁴⁵ Decision No. 11 of the Governing Council, UN Doc S/AC.26/1992/11.

which reparation was to be paid. According to Resolution 687: 'Iraq ... is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of the unlawful invasion and occupation of Kuwait'.⁵⁴⁶

The wording of the resolution seems to suggest that individual victims are entitled to redress for Iraq's violation of the *jus ad bellum* under international law. However, the exact wording does not specify the owner of the right. It only enumerates the damages and persons who may have suffered such harm. Nonetheless, the procedural rules and the Commission's practice clearly demonstrate a concept endowing the individual who has suffered damages, as described in the resolution of the Security Council, with a right to reparation.⁵⁴⁷

According to the wording of Article 5, Para 1(a) of the Provisional Rules for Claims Procedure: 'a Government may submit claims on behalf of its nationals'.⁵⁴⁸ Consequently, whereas the individual has no standing before the UNCC, the state acts as representative for the individual before the Commission. It is not the same as diplomatic protection, since states are also representatives for individuals who are not their nationals,

⁵⁴⁶ SC Res 687 (3 April 1991).

⁵⁴⁷ C Alzamora, 'The UN Compensation Commission: An Overview' in RB Lillich (ed), *The United Nations Compensation Commission* (Transnational Publishers 1995) 3, 8-9; JR Crook, 'Is Iraq Entitled to Judicial Due Process?' in RB Lillich (ed), *The United Nations Compensation Commission* (Transnational Publishers 1995) 77, 80; N Wühler, 'The United Nations Compensation Commission' in Randelzhofer and Tomuschat (n 53) 213, 216.

⁵⁴⁸ UNCC Governing Council Decision 'Provisional Rules for Claims Procedure', UN Doc S/AC.26/Dec.10 (June 1992).

but who are residing within the states' territory.⁵⁴⁹ Further, claims filed by states on behalf of individuals are dependent on the consent of the individual, as they have to be accompanied by a signature of the individual whose claim is covered.⁵⁵⁰ The states have also to assure the individual claimant that any damage paid is distributed to that individual if successful.⁵⁵¹ The status of the state as representative for the individual is affirmed by Article 5, Para. 3 of the Provisional Rules for Claims Procedure, according to which a corporation or other private legal entity may itself make a claim to the Commission, independently from any assistance of a state, if the respective state fails to do so.⁵⁵² Persons, who were not in a position to have their claims submitted by their governments, will not be deprived of their claim, as according to Article 5, Para. 2 of the Rules, an appropriate person, authority or body shall be appointed to submit claims on their behalf.

The UNCC had to deal with more than 1.7 million claims resulting from the 1990-91 Iraqi invasion and occupation of Kuwait. The UNCC Governing Council gave first priority to the hundreds of thousands of individuals who were displaced or injured. They were offered modest fixed sums without the need to prove actual losses. This programme

⁵⁴⁹ Article 5 para.1 UNCC Provisional Rules for Claims Procedure; V Heiskanen, 'The United Nations Compensation Commission' (2002) 296 RdC 259, 328.

⁵⁵⁰ UNCC Governing Council Decision 'Criteria for Expedited Processing of Urgent Claims', UN Doc S/AC.26/Dec.1 (2 August 1991) [19].

⁵⁵¹ UNCC Governing Council Decision 'Distribution of Payments and Transparency', UN Doc S/AC.26/Dec.18 (24 March 1994).

⁵⁵² 'Provisional Rules for Claims Procedure' (n 548).

was very successful and resulted in relatively prompt awards and payments of fixed amounts, totalling more than \$ 3 billion USD, to more than 800,000 individuals.⁵⁵³

While the EECC dealt with both *jus ad bellum* liability of Eritrea and violations of *jus in bello* of both belligerent parties, the UNCC Security Council Resolution 687 establishes an individual right to obtain reparation for the loss suffered as a result of Iraq's unlawful invasion of Kuwait (*jus ad bellum*).⁵⁵⁴

iii. Security Council Resolutions and Peace Agreements

The Security Council made another explicit link between a violation of international humanitarian law and an individual right to compensation in the context of the Israeli-Palestinian conflict. In its Resolution 471, the Security Council stated that the violation of Article 27 of the Geneva Convention IV by Israel established the obligation 'to provide the victims with adequate compensation for the damages suffered as a result of these crimes'.⁵⁵⁵ The resolution does not contain any reference to Article 3 of the Hague Convention IV or the general principles of state responsibility, nor does it give other basis for the existence of such a right. It is not therefore clear whether the document

⁵⁵³ Matheson "The Damage Awards of the Eritrea-Ethiopia Claims Commission," (n 543) 6. Matheson directs to the 'Status of Claims Processing' on the UNCC website, <www.uncc.ch> accessed 8 April 2016.

⁵⁵⁴ The entire mandate of the UNCC is based on the violation of the *jus ad bellum* by Iraq. It has been argued that with a view to such violations the Security Council has created individual rights for compensation, as opposed to implying that the Governing Council of the UNCC only acted in recognition of rights existing independently of the Security Council Resolution establishing the entire framework. For the competence of the Security Council to do so see A Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations' (2002) 13 EJIL 161, 164 et seq. However, the example of the Security Council in its Resolution 471 concerning Israel could hardly be clearer in grounding the individual right to compensation in a violation of international humanitarian law.

⁵⁵⁵ UNSC Res 471 (5 June 1980) [2-3].

presupposes and confirms an existing individual right to compensation under international law or whether it intends to establish an individual right by treaty or by resolution.⁵⁵⁶

Similarly, the International Commission of Inquiry on Darfur proposed an Ad hoc Compensation Commission to the Security Council in 2004. In its report, the Commission pointed out that: ‘there has now emerged in international law a rights of victims of serious human rights abuses (in particular war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses’.⁵⁵⁷

There are some peace agreements that do not differentiate between losses resulting from an infringement of the *jus in bello* or other breaches. The Treaty of Versailles, concluded after the First World War, ordered in its Article 231 reparations to be paid by Germany and its allies for a war of aggression.⁵⁵⁸ In other words, reparation was due for a violation of the *jus ad bellum*.⁵⁵⁹ However, the US-German Mixed Claims Commission’s mandate

⁵⁵⁶ This is also true for those peace agreements which do not differentiate between losses resulting from an infringement of the *jus in bello* or others, such as the US-German Mixed Claims Commission or the Property Commission for Bosnia and Herzegovina established under the Dayton Peace Agreement. The Dayton Peace Agreement explicitly states the rights of persons deprived of their property to restoration or compensation (Annex VII, Article 1 Para 1): ‘Rights of Refugees and Displaced Persons: All refugees and displaced persons have the right to freely return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.’ The right also seems to cover compensation for property that was destroyed during the conflict; however, the right is not dependent on any violation of international humanitarian law.

⁵⁵⁷ *Darfur Report* (n 100).

⁵⁵⁸ Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) 13 AJIL Supp. 151, 385 (1919). See generally: C Brezina, *The Treaty of Versailles, 1919: A Primary Source Examination of the Treaty That Ended World War I* (Primary Sources of American Treaties 2006).

⁵⁵⁹ I Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 138; P d’Argent

was much broader than those of the Mixed Arbitral Tribunals under the Treaty of Versailles,⁵⁶⁰ covering also losses suffered by individuals as a consequence of ordinary measures of the war.⁵⁶¹ Individual claims of US nationals were represented by their government before the Commission⁵⁶² and no differentiation was made as to whether the loss was a consequence of a violation of international humanitarian law or not.

Another example is the Property Commission for Bosnia and Herzegovina established under the Dayton Peace Agreement (DPA). The DPA explicitly states the rights of persons deprived of their property to restitution or compensation:

Rights of Refugees and Displaced Persons: All refugees and displaced persons have the right to freely return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. (...).⁵⁶³

The right seems also to cover compensation for property destroyed during the conflict; however, the right to restitution is not dependent on any violation of international humanitarian law.

On the other hand, while the Treaty of Versailles reparation system was based on the breach of the *jus ad bellum* and consisted of inter-governmental payments, it also contained some individual rights. Especially interesting is Article 297 lit e) of the Treaty

Reparations de guerre (n 16) 50, 77.

⁵⁶⁰ The U.S. did not ratify the Treaty of Versailles but concluded a separate treaty with Germany on 25 August 1921, according to which the U.S. enjoyed all the rights resulting from the Treaty of Versailles. Treaty of Berlin, 16 AJIL Supp. 10, 13 (1922); Brezina (n 527).

⁵⁶¹ See Decision No 1 of the Commission of 1 November 1923, (n. 562) p. 174 et seq.

⁵⁶² The US-German Mixed Claims Commission was established by an agreement on 10 August 1922, RGBl. (1923), 113, 18.

⁵⁶³ Dayton Peace Agreement (Annex VII, Article 1 Para 1).

of Versailles, according to which nationals of Allied or Associated Powers could claim compensation for damage or injury suffered by the application of an ‘exceptional war measure’ or ‘measures of transfer’ before Mixed Arbitral Tribunals. The scope of these claims was restricted, as ‘exceptional war measures’ were defined as measures that were taken with regard to enemy property and which were lawful.⁵⁶⁴ Other losses of individuals resulting from the war could not be claimed by the individuals themselves, as they were part of the reparation owed to their national government.⁵⁶⁵

IV. The ICJ *Wall Opinion*

In the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,⁵⁶⁶ the ICJ seems to acknowledge that certain secondary individual rights exist under CIL when fundamental rights of individuals are breached, including violations of the laws of war. The Court stated in this case that Israel was obliged under international law to afford reparation to all natural and legal persons injured by the construction of the wall.⁵⁶⁷ The Court seems to derive this obligation from general international law. Firstly, it cites the *Chorzów* case to refer to the appropriate forms of reparation, applying, therefore, state responsibility principles to reparation to individuals.⁵⁶⁸ Secondly, the obligation to afford reparation to all natural and legal persons injured by the construction of the wall can only be derived from CIL since there is no treaty between Israel and

⁵⁶⁴ See Annex 1-3 to Section IV of the Treaty.

⁵⁶⁵ Article 232 Treaty of Versailles (n 558) 47 et seq.

⁵⁶⁶ *Wall Opinion* (n 94) 131.

⁵⁶⁷ *Wall Opinion* (n 94) 198 [152-153].

⁵⁶⁸ *Wall Opinion* (n 94)

Palestine that explicitly provides reparation to individuals for the breaches alleged (the Court does not derive this obligation from the treaties in force for Israel).⁵⁶⁹

The Court found violations of the Hague Regulations of 1907, Articles 46 and 52, as well as the Fourth Geneva Convention of 1949, Articles 49 and 53. These provisions do not contain any references to an obligation to make reparation to individuals. As explained earlier, some commentators argue that these provisions do not even contain individual rights.⁵⁷⁰ On the other hand, it has been argued that these norms do contain individual rights⁵⁷¹ or that today they must be interpreted as containing individual rights,⁵⁷² and that Article 3 of the Hague Regulations and Article 91 of the Additional Protocol I to the Geneva Conventions provide for an obligation to make reparation to individuals.⁵⁷³ The

⁵⁶⁹ Following the *Wall Opinion* (n 94), the ICJ has given reparations for HR and IHL violations in two subsequent occasions. In the *Armed Activities* case against Uganda, the Court considered that given the nature and gravity of the violations, ‘those acts resulted in injury to the DRC and to persons on its territory’ imposing upon Uganda an obligation to make reparations accordingly. In reaching that conclusion, the Court relied generally on its previous decisions, including the *Chorzów* case (n 22); *Armed Activities Case* (n 97) [259]. On the other hand, by acknowledging the responsibility of Uganda for injuries suffered by persons in the DRC, the Court implicitly seems to acknowledge the obligation to repair that harm accordingly. Therefore, arguably the DRC has the right to request individual reparations on behalf of its citizens who were wronged by Uganda’s conduct. In *Diallo*, a diplomatic protection case brought by Guineas against DRC, the Court recalled the fundamental character of the human rights obligations breached when affording reparation in accordance with the *Chorzów* principle. *Diallo, (Merits)* (n 97) [161].

⁵⁷⁰ Hofmann, ‘Victims of Violations of IHL’ (n 98) 341; Provost (n 98)27 et seq.

⁵⁷¹ Frits Kalshoven, ‘State Responsibility for Warlike Acts of the Armed Forces’ (1991) 40 ICLQ 827 et seq.; C Greenwood, ‘International Humanitarian Law (Law of War)’ in F Kalshoven (ed), *The Centennial of the First International Peace Conference* (Kluwer Law International 2000) 161, 250; Zegveld, ‘Remedies for victims of IHL’ (n 16).

⁵⁷² The report of the *International Commission of Inquiry on Darfur* states that even if Article 3 of the Hague Convention IV was not initially intended to provide compensation for individuals, it does so in the present day, as the emergence of human rights in international law has altered the concept of state responsibility. *Darfur Report* (n 100).

⁵⁷³ See for example, the Preamble of the Principles and Guidelines (n 2) and expert opinions by Kalshoven, David; and Greenwood (n 100).

Court, however, is silent in this regard. It only mentions that these IHL violations are fundamental and give rise to *erga omnes* obligations.⁵⁷⁴

The Court also determined that Israel had breached several HR treaty obligations by constructing the wall, including Article 12 of the International Covenant on Civil and Political Rights (ICCPR) and several other rights under the International Covenant on Economic, Social and Cultural Rights. Yet, the Court does not refer to these treaties as the source for a secondary right to reparation. It determines nonetheless that the manner in which Israel is breaching these obligations constitutes a violation to the right to self-determination, which is a fundamental right giving rise to *erga omnes* obligations.⁵⁷⁵ In other words, the ICJ seems to be implying that there is an obligation under international law to make reparation to individuals for violations of HR and IHL in breach of *erga omnes* obligations. Not even the Separate Opinion of Judge Higgins, which is highly critical of the Court's analysis of human rights and IHL, disagrees on this point.⁵⁷⁶

As explained by Gaeta, as well as d'Argent, the failure by the Court to clarify which violations entitled the obligation to repair damage to private individuals can only mean that for the Court, the matter was irrelevant.⁵⁷⁷ Clearly, the judgement implies that the obligation of Israel to repair the injury caused to individuals followed naturally from the

⁵⁷⁴ *Wall Opinion* (n94) [154-159].

⁵⁷⁵ *ibid* [122].

⁵⁷⁶ See generally: Separate Opinion of Judge Higgins (n. 104).

⁵⁷⁷ Gaeta 'Compensation' (n 28) 321. See also d'Argent, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion' in P-M Dupuy et al (eds) (n 570) 463-477.

illegality of the Israeli conduct under each of the aforementioned rules of international law, including those on military occupation.

Tomuschat on the other hand argues that the ICJ had indeed suggested an individualized reparation scheme but only because of the peculiar features of the Palestinian situation. He argues that there is no Palestinian government that could assert claims against Israel according to the model of diplomatic protection since the Palestinian National Authority does not have the full status of national government.⁵⁷⁸ However, Schwager points out that ‘It cannot be argued that in absence of a Palestinian State, the Court was forced to rule in favour of individuals, as it could have made a ruling in favour of the Palestinian National Authority as the representative for the Palestinian people’.⁵⁷⁹

V. National laws granting an individual right to seek compensation under international law (ATCA & TVPA)

In the United States, the Alien Tort Claims Act (ATCA)⁵⁸⁰ and the Torture Victim Protection Act (TVPA)⁵⁸¹ provide a basis in law for US federal courts to hear civil claims against persons allegedly responsible for serious human rights abuses. The ATCA, adopted in 1789, provides jurisdiction to federal district courts over cases brought by non-citizens for torts committed in violation of ‘the law of nations’. Beginning with the Second Circuit Court of Appeals’ landmark decision in *Filartiga v. Pena-Irala*,⁵⁸² US

⁵⁷⁸ Tomuschat ‘The Individual and National Courts’ (n 27) 825.

⁵⁷⁹ E Schwager, ‘Compensation for Victims of an Armed Conflict’ (2005) 4(2) Chinese J of Intl L 417.

⁵⁸⁰ 28 U.S.C. Section 1350.

⁵⁸¹ 28 U.S.C. ch 85 Section 1350

⁵⁸² 630 F.2d 876 (2d Cir. 1980).

courts have held that conduct which violates the ‘law of nations’ under the ATCA includes human rights abuses prohibited by norms of ‘customary international law’. In June 2004, the Supreme Court in *Sosa v. Alvarez-Machain*⁵⁸³ upheld the validity of the ATCA. In so doing, the court cited with approval *Filartiga* and other cases that have permitted claims for violations of ‘specific, universal and obligatory’ international norms. Which claims can go forward under the Supreme Court’s definition remains to be seen, but the list likely includes torture, extrajudicial killing, slave labour, war crimes, crimes against humanity, and genocide. The TVPA, passed by Congress in 1992, extended the ATCA by providing a cause of action to US citizens and non-citizens alike for extrajudicial killing and torture.

The ATCA of 1789 states: ‘[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’. It seems that the ATCA not only provided a rule establishing jurisdiction, but also constituted a cause of action. However, in its judgment in *Sosa v. Alvarez-Machain*, the US Supreme Court ruled that the ATCA is a strictly jurisdictional statute.⁵⁸⁴ It held that the ATCA was enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time.⁵⁸⁵ Nowadays, federal courts could recognise claims under federal common law for violations of a norm of international law if the norm has a definite content and acceptance among civilized nations, such as the

⁵⁸³ 542 U.S. 692, 124 S.Ct. 2739 (2004).

⁵⁸⁴ *Sosa v. Alvarez-Machain*, 124 S.Ct., p. 2739, 2754.

⁵⁸⁵ *ibid.* 2761.

18th-century paradigms in place when the ATCA was enacted.⁵⁸⁶ In allowing actions under the ATCA for violations of widely accepted international norms,⁵⁸⁷ the US legal system recognised a right of individuals to compensation resulting from a violation of an international norm having the required qualifications.

However, in *Kiobel v. Royal Dutch Petroleum*⁵⁸⁸, the US Supreme Court held that under the Alien Tort Statute, there is a presumption against extraterritorial application of U.S. law. The Court reasoned that such presumption, derived from a traditional canon of interpretation that serves to protect against clashes between U.S. law and the law of other nations. The Court established that nothing within the text, history, or purpose of the statute indicates that it was intended to apply extraterritorially. In order to rebut this presumption, the petitioners' claim would have to touch and concern the territory of the United States with 'sufficient force'.⁵⁸⁹

Compensation claims before US courts resulting from acts committed during armed conflicts have had very different outcomes. A considerable number of cases resulting from WWII have been settled.⁵⁹⁰ In these cases, the courts did not have to rule whether claims by victims of an armed conflict could succeed in court proceedings. Other claims

⁵⁸⁶ *ibid.*

⁵⁸⁷ C Ryngaert, 'The U.S. Supreme Court's Decision in *Sosa v. Alvarez-Machain*' (2004) 6 International Law Forum du droit international 116, 121.

⁵⁸⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

⁵⁸⁹ *ibid.* IV

⁵⁹⁰ For example, *Rosner v. US*, a case concerning claims against the US resulting from the confiscation of a train loaded with stolen Jewish property. *Rosner v US*, 231 F.Supp.2d 1202, (S.D.Fla.) Docket No. 01-1859-CIV-SEITZ, Settlement Agreement, approved in a written order dated 8 April 2005, available at: <http://www.state.gov/documents/organization/87320.pdf> [Accessed 15 April 2016].

have been dismissed on procedural grounds.⁵⁹¹ Relying on the political question doctrine, the court ruled in *Burger-Fischer et al. v. Degussa AG*, that ‘under international law claims for compensation by individuals harmed by war-related activities belong exclusively to the state of which the individual is a national’.⁵⁹² However, the Court of Appeal in *Alperin v. Vatican Bank* interpreted the decision of the Supreme Court in *Republic of Austria v. Altmann* concerning assets looted in the Second World War,⁵⁹³ to allow the case to proceed as an affirmation that courts have a place in deciding Holocaust-era claims.⁵⁹⁴ Importantly, the Supreme Court judgment and an earlier decision to grant certiorari on the same issue dealt only with the limited question of immunity.⁵⁹⁵ In its decision, the Court of Appeal differentiated between claims concerning conversion, unjust enrichment, restitution, a right to accounting with respect to lost and looted property and other claims including slave labour claims. As the latter would require a retroactive political judgment, such claims would concern a political question that is not justiciable.⁵⁹⁶

It is important to note that the practice of US Courts (the assumption of extraterritorial civil jurisdiction) under the ATCA and the TVPA has been controversial. A Joint Separate Opinion of three of the judges in ICJ *Arrest Warrant* case stated that: ‘While

⁵⁹¹ See overview given in *Alperin v. Vatican Bank*, 405 F.3d 727 (9th Cir. 2005) 740 et seq.

⁵⁹² 65 F.Supp.2d 248 (D.N.J. 1999), 273. See also *Tel-Oren et al v Libyan Arab Republic* (n. 399), 810; *Goldstar (Panama) SA v. United States* (n 399); *Princz v. Federal Republic of Germany* (n 399).

⁵⁹³ *Republic of Austria v Altmann*, 7 June 2004, 124 S.Ct., 2240.

⁵⁹⁴ *Alperin v. Vatican Bank* (n.591)

⁵⁹⁵ The Court held that the United States Foreign Sovereign Immunities Act (FSIA) applies retroactively to the claim.

⁵⁹⁶ *ibid.*

this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally'.⁵⁹⁷ The House of Lords in *Jones v Saudi Arabia* also referred to US practice as 'unilateral extension of jurisdiction ... which is not required and perhaps not permitted by customary international law'.⁵⁹⁸

D. Reparation for International Humanitarian Law violations in the context of individual responsibility under International Criminal Law

The need to make reparations to victims of international crimes, including war crimes, recently crystallised in the *Lubanga* decision before the ICC.⁵⁹⁹ The judgment establishes that individuals can be held responsible for reparations to victims of international crimes.⁶⁰⁰

A close look at the history of ICL shows that reparation for victims within the ICL context derives from the principle of state responsibility. In this sense, the redress system in ICL is relevant in two ways. First, it shows that the international community recognises a right to reparation for victims of international crimes and therefore victims of both HR and IHL. Second, it shows that while reparations under ICL are made at the

⁵⁹⁷ 'In civil matters we already see the beginnings of a very broad form of extraterritorial jurisdiction. Under the Alien Tort Claims Act, the United States, basing itself on a law of 1789, has asserted a jurisdiction both over human rights violations and over major violations of international law, perpetrated by non-nationals overseas. Such jurisdiction, with the possibility of ordering payment of damages, has been exercised with respect to torture committed in a variety of countries (Paraguay, Chile, Argentina, Guatemala), and with respect to other major human rights violations in yet other countries. While this unilateral exercise of the function of guardian of international values has been much commented on, it has not attracted the approbation of States generally'. *Arrest Warrant Case* (n 345) [48].

⁵⁹⁸ *Jones v Ministry of Interior of Kingdom of Saudi Arabia* [2006] 2 WLR 1424.

⁵⁹⁹ *Prosecutor v. Thomas Lubanga Dyilo (Appeals Judgments)* ICC Case No ICC-01/04-01/06 (February 28, 2015).

⁶⁰⁰ Decision establishing the principles and procedures to be applied to reparations, 07 August 2012, ICC-01/04-01/06-2904, <<http://www.icc-cpi.int/iccdocs/doc/doc1447971.pdf>> accessed 8 April 2016.

level of individual responsibility, the state on whose behalf the individuals acted is still responsible to afford reparation. Morris and Scharf affirm that ‘the prosecution and punishment of individuals responsible for war crimes does not relieve the State of its responsibility for the violations of international law and its obligation to provide compensation’.⁶⁰¹ As Gaeta explains, the contention can be made that if victims of international crimes have the right to reparation *vis-à-vis* the responsible individual, *a fortiori* they should possess the same right *vis-à-vis* the state on behalf of which the responsible individual has acted: ‘Once it is recognized that individuals who have acted *qua* state agents are liable to reparation under international law towards the victims of their crime, it is only logical to also recognize that the state on behalf of which they have acted shares this form of liability to the extent that the wrongful conduct can be attributed to it’.⁶⁰² The question that remains open however is whether the individual victim can bring an action directly against the liable state under international law and if so, in what forum. As will be described below, the drafting discussions during the ICC Preparatory Committees as well as the reparation provisions of the Rome Statute, considered the question of international liability of both the individual and the state. Nonetheless, at the end it was agreed that the ICC was not the adequate forum to address questions of state responsibility.

While it is widely known that the ICC establishes a reparation regime for victims, the following paragraphs will show that the International Criminal Tribunals for Former

⁶⁰¹ V Morris and M P Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (Transnational Juris Publications 1995) 288.

⁶⁰² Gaeta ‘Compensation’ (n 28) 321.

Yugoslavia (ICTY) and Rwanda (ICTR) had already addressed the question of reparation for victims of international crimes (therefore victims of both HR and IHL violations). Nonetheless, it is important to note that the recognition of victims rights were scarce in the Ad Hoc Tribunals. As pointed out by Evans, '[f]ollowing the standstill in international criminal law during nearly half a century following the International Military Tribunals after the Second World War, the creation of the Statutes of the International Criminal Tribunals for Former Yugoslavia in 1993 and Rwanda in 1994 failed to provide significant progress in the recognition of victims. Nevertheless, the experiences of victims in the ad hoc Tribunals have provided an impetus for advocacy towards recognition of victims' rights'.⁶⁰³

To understand the development of this right in ICL, this section will first describe the reparation provisions of the International Tribunals and the Special Court. It will then analyse the right to reparation for victims of international crimes under the ICC with the aim of clarifying how international law already recognises this right not only against individual perpetrators, but also *vis-à-vis* the responsible state.

i. The Ad Hoc International Criminal Tribunals and the Special Court

The question of individuals' duty to make reparations was addressed in the statutes of the ad hoc international criminal tribunals. Although the provisions of the Statute of the ICTY on penalties only refer to restitution, the Rules of Procedure address the question of reparations more generally. Thus, Article 24(3) the Statute provides that 'in addition to

⁶⁰³ C Evans *Reparation for Victims of Armed Conflict*, (n 11), 89.

imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners'. Rule 105 of the Tribunal's Rules of Procedure and Evidence established procedures for the restoration of property, according to which the ICTY and national courts will cooperate in locating the rightful owners of the property. To date, however, no such orders have been made and no fines have been imposed.⁶⁰⁴ Rule 106 deals with compensation to victims.⁶⁰⁵ Although the Statute is silent on the question of compensation, this rule establishes a system of cooperation between the tribunal and national authorities, under which a person found guilty by the tribunal of a crime that has caused injury to a victim can rely on the tribunal's judgment in proceedings under national law.⁶⁰⁶ The ICTY itself will not recommend the award of compensation and the existence of such a remedy is still entirely dependent on the provisions of the relevant national laws.⁶⁰⁷

⁶⁰⁴ J C Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Nijhoff 2013) 209.

⁶⁰⁵ Rule 106:

Compensation to Victims

(A) The Registrar shall transmit to the competent authorities of the States concerned the judgement finding the accused guilty of a crime which has caused injury to a victim.

(B) Pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation.

(C) For the purposes of a claim made under Sub-rule (B) the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury.

⁶⁰⁶ Rule 105B of the ICTY Rules of Procedure and Evidence provides that 'pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation'.

⁶⁰⁷ Article 23(3) of the Statute of the ICTR repeats verbatim the provisions of Article 24 of the Statute of the ICTY, and Rules 105 and 106 of its Rules and Procedure and Evidence.

The ICTR and the Special Court of Sierra Leone (SCSL) share the same rule of procedure providing compensation to victims, but as explained, the compensation provision contained in Rule 106 is rather vague and needs interpretation to apply it. Although it makes clear that victims have a right to obtain compensation, it does not clarify where they can claim such compensation. The ICTY (or the ICTR or the SCSL) do not have the power to award damages (except for restitution of property in some cases).⁶⁰⁸ While at some stage the ICTY envisioned the creation of a claims commission for victims⁶⁰⁹-reason why all the assets of Serbia and Bosnian Serbs were frozen pursuant

⁶⁰⁸ Rule 105:

Restitution of Property

(A) After a judgement of conviction containing a specific finding as provided in Sub-rule 98 *ter* (B), the Trial Chamber shall, at the request of the Prosecutor, or may, *proprio motu*, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof, and may in the meantime order such provisional measures for the preservation and protection of the property or proceeds as it considers appropriate.

(B) The determination may extend to such property or its proceeds, even in the hands of third parties not otherwise connected with the crime of which the convicted person has been found guilty.

(C) Such third parties shall be summoned before the Trial Chamber and be given an opportunity to justify their claim to the property or its proceeds.

(D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

(E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.

(F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

(G) The Registrar shall transmit to the competent national authorities any summonses, orders and requests issued by a Trial Chamber pursuant to Sub-rules (C), (D), (E) and (F).

⁶⁰⁹ The ICTY Statute was adopted unanimously along with SC Res 827. The Resolution addresses compensation: 'The work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of IHL'[7]. Michael Scharf co-drafted Res 827, and comments: 'What we had in mind was a procedure similar to that devised for the victims of the Iraqi invasion of Kuwait, in which frozen Iraqi assets and proceeds from Iraq oil sales would be dispersed to victims through a UN Compensation Commission'. M P Scharf, *Balkan Justice: The Story Behind the First International War Crimes Tribunal Since Nuremberg* (Carolina Academic Press 1997) 63.

to a Security Council Resolution – the assets were later unfrozen and no commission was ever created.⁶¹⁰

As a result, there is no forum to bring compensation claims other than domestic courts. It is necessary, therefore, to interpret the provisions in Rule 106 ‘pursuant to the relevant national legislation’ and ‘in a national court’ to identify the adequate forum to bring a civil claim for compensation. A brief mention of Rule 106 arose during the *Bagosora* trial at the ICTR.⁶¹¹ Belgium wanted to appear as *amicus curiae* before the ICTR in relation to Belgian nationals with an alleged civil claim against Bagasora; however, there was no discussion of how Rule 106 is to be applied. The ICTR rejected the request as a finding of guilt had not been made at that time.

Rule 106 explicitly states that the victims may bring a cause of action pursuant to the relevant national legislation, reflecting that the ICTY does not have the power to alter domestic law or jurisdictional grounds.⁶¹² On the other hand, the rule says a victim may bring an action in a national court meaning no specific national court is presumed as the

⁶¹⁰ The creation of a victim compensation fund from frozen assets was contemplated for the ICTY. Although the statute of the Tribunal does not give it the power to award victim compensation, a clause was included in SC Res 827 (which approved the Statute of the Tribunal), declaring that the creation of the Tribunal was without prejudice to the future establishment of a victim compensation program; UNSC Res 827 (1993), UN Doc. S/RES/827 UNSCOR, 48th Sess., 3217th. However, the Security Council later unfroze the assets of Serbia and the Bosnian Serbs ending any possibility of a compensation program for victims of IHL/HR violations in the Balkans; UNSC Res 1074 (1995) UN Doc. S/RES/1074, UNSCOR, 50th Sess., 3700th.

⁶¹¹ Case no ICTR-96-7-T (Decision on the Amicus Curiae Application by the Government of the Kingdom of Belgium) <<http://srch0.un.org/ictor.org/ENGLISH/decisions/Bagosora%20decisins.html>> accessed 8 April 2016.

⁶¹² At the time of adoption, several states emphasised this limitation on the tribunal, and its inability to alter domestic law, including the UK; China; Brazil; and Russia. The Morocco and Djibouti delegates noted the importance of providing compensation for victims though there was no mention of a mechanism for doing so. UN Doc S/RES/827 (1993) and Verbatim Record of the 3217th Meeting S/PV.3217, 25th May 1993.

adequate forum. The exercise of this right depends on whether the courts have jurisdiction to pursue the case.

There can be two broad interpretations of Rule 106 of the ICTY and ICTR (or Rule 105 of the Special Court for Sierra Leone).⁶¹³ The first one rests on the assumption of an existing possibility for victims to bring compensations claims before national courts. It establishes only the obligation of states to recognise the judgment of the Tribunal to be final and binding as to the criminal responsibility of the convicted person. The second one implies that this provision establishes a specific right for victims of crimes tried in the international criminal tribunals to bring a claim of compensation in a national court pursuant to the relevant legislation. Each of these interpretations will be discussed in turn.

a. There is no right to compensation under the Rules of Procedure and Evidence

One interpretation is that the Rule reflects the right of all victims to obtain compensation in national courts and establishes only an obligation on states to recognise the judgments of the Tribunal to be final and binding as to the criminal responsibility. Kirk McDonald and Swaak-Goldman seem to take the view that specific national legislation would be required to bring a claim of compensation in a national court: ‘A victim, or persons

⁶¹³ See: Rules of Procedure and Evidence of the Special Court for Sierra Leone, as amended 2 December 2015. The Rules have been amended several times since their adoption on 16 January 2002, but Rule 105 is still the same. See: <http://www.rscsl.org/Documents/RSCSL-Rules.pdf> accessed 15 April 2016.

claiming through her or him, may bring an action in a national tribunal under the applicable local law after the ICTY has found an accused person guilty'.⁶¹⁴

If this is the case, then the only forums in which to claim compensation would be a) the territorial states where the crimes were committed (Rwanda, Sierra Leone and the succeeding states of the former Yugoslavia pursuant to the rules of succession of states),⁶¹⁵ or b) the United States, which has legislation allowing extra-territorial civil jurisdiction for international human rights violations – for both, US citizens, and aliens.⁶¹⁶ Other national courts would only have jurisdiction in exceptional circumstances.⁶¹⁷

Following this line of interpretation would imply, for example, that a civil claim for compensation could be brought in the Former Yugoslavia (i.e. Bosnia and Herzegovina) and in the U.S. independently of the ICTY ruling. The only advantage of the Tribunal judgement would be that, pursuant to Rule 106, the criminal responsibility of the accused would have been proved.⁶¹⁸

⁶¹⁴ KM Gabrielle and S-G Olivia (eds), *The Experience of Internation: Commentary* (Kluwer Law Int. 2000) 478.

⁶¹⁵ See: the Vienna Convention on Succession of States in Respect to Treaties (1978) UN Doc A/CONF. 80/83.

⁶¹⁶ The Torture Victim Protection Act (TVPA) (n 581) and the Alien Tort Claims Act (ATCA) (n 580) in the US. There is no other domestic legislation in any other county that expressly grants courts jurisdiction with respect to these matters. See generally: J Terry. 'Taking Filartiga on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Action Involving Torture Committed Abroad' in Scott (ed), *Torture as Tort* (Hart Publishing 2001).

⁶¹⁷ For example, it would depend on whether the perpetrator or the victim had the nationality of another state (at the time the crimes were committed) or in certain circumstances, if the perpetrator or his/her assets are domiciled in another state.

⁶¹⁸ It would also help in case personal immunity is claimed in the case of high military commanders, former head of states, etc.

b. There is a right to compensation under the Rules of Procedure and Evidence

Another interpretation is that the Rule establishes a specific right for victims of crimes tried in the ICTY to claim compensation in national courts (pursuant to relevant domestic legislation). The question that arises here is whether the Rule creates an obligation for all states to afford a civil remedy for victims of crimes tried in the ICTY/ICTR to claim compensation – and therefore an obligation to implement legislation to this end or to interpret existing legislation in favour of this right?

Bassiouni suggests that ‘relevant legislation’ means enabling legislation: ‘Rule 106(B) appears to anticipate that states will enact enabling legislation pursuant to their obligations under Chapter VII of the UN Charter and Article 29 of the Statute’.⁶¹⁹ The implication is that where a State has implemented legislation incorporating the ICTY Statute and Rules, they are bound by the obligations therein, and Bassiouni’s thinking is that ‘106(C) appears to refer to a state’s obligations under Article 29’. Article 29(2)⁶²⁰ of

⁶¹⁹ M Cherif Bassiouni and P Manikan, *The Law of the International Criminal Tribunal for the former Yugoslavia* (Transnational Publishers Inc 1996) 704.

⁶²⁰ ICTY Statute

Article

29

Cooperation and judicial assistance.

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the International Tribunal.

the Statute is very broadly drafted: 'States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons...(e) the surrender or transfer of the accused to the International Tribunal'.⁶²¹

It is also important to keep in mind that Rule 106 expands the right of victims to bring actions for compensation to different forums: 'pursuant to relevant legislation... in a national court or other competent body'. Taking this into consideration makes it difficult to believe that the judges, when drafting these Rules, were limiting the right of victims to claim compensation only to the national courts where the conflict occurred,⁶²² or in a national court where existing extraterritorial legislation would allow such a claim (the only possibility being the US Federal Courts).⁶²³

Similarly, it would also be hard to imagine that the drafters were limiting the right to compensation to these forums when some civil law countries afford damages in criminal cases. If a criminal case based on universal jurisdiction is brought against an alleged perpetrator from the Former Yugoslavia, victims acting as *parte civile* can be awarded compensation for the injuries suffered. Giving a limited interpretation to Rule 106 would result in the absurd situation whereby victims of cases where the Tribunal has not

⁶²¹ Bassiouni and Manikan, *The law of the ICTY* (n 619) 704.

⁶²² Part of the reason for creating an international tribunal was the incapacity of the national courts where the atrocities were committed to afford impartial justice. See JE Alvarez, 'Rush To Closure: Lesson of the Tadic Judgment' (1998) 96(7) Michigan Law Review 2031.

⁶²³ See: n 616

interfered would have a better opportunity to obtain compensation than those were the ICTY has exercised its jurisdiction.

Finally, in order to comply with its obligations pursuant to Article 29 of the ICTY Statute, many states enacted implementing legislation,⁶²⁴ but others chose to interpret their existing laws in a manner consistent with their obligations towards the ICTY.⁶²⁵ This means that even if states have no specific legislation implementing some provision of the Statute and/or the Rules and Procedure and Evidence, existing laws should be interpreted in a consistent manner.

It is not clear the extent to which these provisions have arisen in the practice of the Ad hoc Tribunals and Special Court.⁶²⁶ However, as noted by Tomuschat, regardless of which interpretation is given to these provisions – whether the phrase ‘pursuant to the relevant national legislation’ suggest that the cause of action for compensation depends on domestic law or whether domestic law has no more to do than to set forth the

⁶²⁴ For example, the following states enacted legislation for the ICTY: Italy, Finland, Netherlands, Germany, Iceland, Spain, Norway, Sweden, Denmark, France, Republic of Bosnia and Herzegovina, Australia, Switzerland, New Zealand, United States, United Kingdom, Belgium, Republic of Croatia, Austria, Hungary, and Venezuela. See: A Cassese, ‘On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’, in A Cassese, *The Human Dimension of International Law: Selected Papers* (2008 OUP), 426

⁶²⁵ At the time of the establishment of the ICTY, ‘four countries have indicated that they do not need implementing legislation (Korea, Russia, Singapore and Venezuela). See Security Council Resolution establishing the ICTY (n. 612)

⁶²⁶ According to K Kress and G Slutier, ‘Fines and Forfeiture Orders’ in A Cassese, P Gaeta, and JRWD Jones (eds), *II The Rome Statue of the International Criminal Court: A Commentary* (OUP 2002) 1823, 1833, the issue has arisen in the practice of the ICTY ‘only to a very limited extent’. Ochoa (n 604) explains that the compensation provisions have not been applied citing: Zahar and Sluiter, *International Criminal Law: A Critical Introduction* (OUP 2007) 77; J RWD Jones and S Powels, *International Criminal Practice* (3rd edn, Transnational Publishers & OUP 2003) 804, [9.154]; and P Chifflet, ‘The Role and Status of the Victim’ in Boas, G and Schabas, W (eds), *International criminal law developments in the case law of the ICTY* (Martinus Nijhoff Publishers, 2003) 103.

modalities for the vindication of a right to reparation directly anchored, or codified, in the Rules of Procedure and Evidence – it would appear that no substantial legal consequences flow. He argues that domestic tribunals cannot decline jurisdiction to hear a case for reparation. Since Rule 106 of the ICTY implies that an accused convicted by the Tribunal cannot argue immunity, whoever is debarred from invoking immunity in criminal proceedings is also prevented from relying on that defence in subsequent civil proceedings design to obtain compensation for the damaged caused. On the other hand Tomuschat notes that such provision has no great potential since persons standing trial before the ICTY are unable to compensate by their assets or through the proceeds from their work all the damage they have caused.

Irrespective of practical hurdles, what is clear is that an individual right to reparation for international crimes (i.e. serious violations of human rights and IHL) is recognised. Whether a collective method of settlement would be more appropriate under certain circumstances, as argued by Tomuschat, or not, it is clear that it is not only the perpetrator who is made liable under international law but as he explains ‘the nation on whose behalf—or rather, in whose name—he committed his evil deeds’.⁶²⁷

ii. The International Criminal Court

The ICC is the first international criminal tribunal where victims can assert their right to reparation directly before the court itself. According to Article 75 of the Rome Statute,

⁶²⁷ Tomuschat, *Between Idealism* (n 88) 411.

the ICC may award reparations, including restitution, compensation and rehabilitation, either on request from the victims or, in exceptional circumstances, of its own volition (Article 75 (1)). Reparations can be awarded either on an individual or collective basis (or potentially both), depending on the ‘scope and extent of the damage, loss, or injury’.⁶²⁸ Furthermore, reparations orders can be made in the name of individual beneficiaries, or, where it is ‘impossible or impracticable to make individual awards directly to each victim’ or where ‘the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate’, the Court may order reparations to be awarded through the Trust Fund.⁶²⁹ Reparations so deposited may also be awarded through an international, inter-governmental or national organisation (Rule 98(4)). Finally, the ICC can also order protective measures following either arrest or conviction that involve tracing, identifying, freezing, and seizing of assets.

With respect to reparations awards, Article 75(5) of the Rome Statute indicates that the obligations of State Parties are the same as those set out in Article 109 relating to the enforcement of fines and forfeitures. Article 109 provides that State Parties must give effect to an ICC order in accordance with their national laws, and ‘without prejudice to the rights of bona fide third parties’ (Article 109(1)). In case of the inability to give effect to a forfeiture order, a State must ‘take measures’ to recover the equivalent value of the award (Article 109(2)). Finally, any funds recovered by the State in this respect must be transferred to the ICC (Article 109 (3)).

⁶²⁸ Rule 97(1) in ICC Rules of Procedure and Evidence (2000).UN Doc PCNICC/2000/1/Add.1

⁶²⁹ See: *ibid* Rule 98(2) and (3), and Article 79 of the Rome Statute (n 39).

The Trust Fund serves both as a repository of funds paid out by sentenced individuals (Article 75(2)) and as a potential supplementary source of funds where reparation awards cannot be enforced against insolvent perpetrators. Article 79 of the Rome Statute establishes the Trust Fund, providing *inter alia* that the Fund is to operate for the benefit of victims and their families, and that the ICC may order any assets obtained through fines and forfeitures to be deposited into the Fund. Rule 98 of the Rules of Procedure and Evidence further provides that, where it is ‘impossible or impracticable’ to make individual awards directly to the victim, the reparation amount may be deposited with the Trust Fund (Rule 98(2)). Furthermore, where a collective award is more appropriate in light of the number of victims and the scope of reparations, this can also be made through the Trust Fund (Rule 98(3)).

The inclusion of Article 75 in the ICC Statute shows that the international community recognises that victims of international crimes have a right to reparation vis-à-vis the perpetrators. International crimes as defined by the Rome Statute encompass the most serious breaches of both human rights and international humanitarian law. Article 75 does not differentiate between these two bodies of law.

As far as state responsibility is concerned, the drafting history of Article 75 clearly shows that the drafters considered the possibility of binding reparation orders or recommendations to states when state liability was engaged. The reparation provisions in Article 73 (now 75) of the 1998 Draft Statute read:

[...]

(b) [The Court may also [make an order] [recommend] that an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation, be made by a State]:

[- If the convicted person is unable to do so himself/herself; [and

- If the convicted person was, in committing the offence, acting on behalf of that State in an official capacity, and within the course and scope of his/her authority]]];

(c) [In any case other than those referred to in subparagraph (b), the Court may also recommend that States grant an appropriate form of reparations to, or in respect of, victims, including restitution, compensation and rehabilitation].⁶³⁰

However, these provisions were left out in the final version of the article. According to Muttukumaru, ‘the decision to abandon the principles of awards against States was not lightly taken by States’.⁶³¹ He explains that the rationale of abandoning the provisions relating to state responsibility was that the Court was intended to adjudicate individual criminal liability. It was argued that if awards of reparations could be made against states, the principle of individual responsibility would have become meaningless. In addition, the provisions on jurisdiction and admissibility in Part 2 of the Statute would have required substantial reconsideration. On the other hand, the possibility of enabling recommendations was seen as adding very little to the Court’s armoury. It formalised the notion of a recommendation, but in practice it remains open to the Court to make recommendations anyway. The negotiations on Article 75 of the Rome Statute were largely driven by the French and the United Kingdom delegations. As Muttukumaru observes, the fact that two states with very different legal traditions were able to attain a

⁶³⁰ See Article 73 of the Draft Statute for the International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court A/CONF.183/2

⁶³¹ C Muttukumaru, ‘Reparations to Victims’ in Roy S Lee (ed), *The International Criminal Court The Making of the Rome Statute: Issues, Negotiations, Results, Cooperation with the Project on International Courts and Tribunals* (Kluwer Law International 1999) 268.

consensus reflects the central importance of ensuring that victims' interests were given proper recognition in the Statute.

E. Is there a norm excluding individual reparation for violations committed in armed conflicts

Chapter I already demonstrates that if individuals are holders of international rights they also have an enforceable right to reparation by virtue of international law (although there might be circumstances where procedural bars like sovereign immunity might apply). The current chapter analysed whether individual reparation also applies to victims of armed conflict or if by virtue of its nature, individual reparation is inapplicable to IHL violations. Section B establishes that current evidence in the applicability of IHL provisions on compensation to individuals is still inconclusive, but that nothing in IHL prevents individual reparation. On the contrary, an analysis of the law and practice of reparation makes it clear that the intention of reparation has generally been to redress the victims (even when the vehicle to do it was at the inter-state level) and that there is a clear tendency since 1945 to afford reparation directly to individuals.

International law, particularly human rights law and international humanitarian law, has evolved greatly since the end of WWII. As described in this section, there is a set of fundamental rights that protect individuals in times of peace and war. When these substantive rights are breached, victims have a right to reparation by virtue of the applicable human rights conventions and CIL. There is no clear competing rule in IHL that excludes individual reparation. The state-to-state compensation schemes and the government-to-government negotiations for war reparations respond to policy

considerations rather than legal norms. Even the law on diplomatic protection today recognises that the right to a remedy belongs to both the state of nationality and the individual victim (see Chapter 2). There is clear evidence of state practice affording reparation directly to victims of armed conflict. The claimed ‘state-to-state only reparation’ rule is inapplicable in non-international armed conflicts (where states and non-states actors are equally bound by IHL rules) and contrary to the right to reparation for victims recognised in HR law and ICL. The claimed rule would leave victims of IHL violations by their state of nationality completely unprotected and other victims would depend on the political will and capability of states to bring claims on their behalf.⁶³² As established in the ICC *Lubanga* decision,⁶³³ an individual right to reparation for international crimes exists (i.e. serious violations of HR and IHL). It is clear that not only the perpetrator is liable under international law, but also the state on whose behalf he or she committed the crimes.

While claims of individuals were traditionally denied, the dominant view in contemporary literature is that an individual right to reparation exists for victims of international humanitarian law violations. The same shift is evident in state practice. Of course there are still many questions on how to implement this right in practice, particularly in cases of mass atrocities (whether these fall under human rights law or/and international humanitarian law). However, it is not viable to ignore the evolution of international law since the end of WWII. A better strategy is to recognise the changes and

⁶³² In some cases, even when diplomatic protection claims are brought before the ICJ, these are not enforced. For example, the *Avena* case (n 123). Or like *Diallo* (n 97) shows, diplomatic representation can be too costly for individual claims.

⁶³³ *Lubanga* (n. 599).

the reasons this transformation occurred in the first place to create effective mechanisms to enforce individual rights.⁶³⁴

⁶³⁴ See for example, S Furuya (Co-Rapporteur), 'Draft Procedural Principles for Reparation Mechanisms' (International Law Association; International Committee on Reparation for Victims of Armed Conflict, Conference, Washington 2014).

Chapter 4: The Principles and Guidelines

*The groans and cries to be heard...are never uttered by the most wretched victims. These, throughout the ages, have been mute. Wherever human rights are completely trampled underfoot, silence and immobility prevail, leaving no trace in history, for history records only the words and deeds of those who are capable, to however slight degree, of ruling their own lives, or at least trying to do so. There have been – there still are— multitudes of men, women and children who, as a result of poverty, terror or lies, have been made to forget their inherent dignity, or to give up the efforts to secure recognition of that dignity by others. They are silent. The lot of the victim who complains and is heard is already a better one.**

1. Drafting and adoption process of the Principles and Guidelines

A. Origins and background

The very nature of large-scale victimisation in the aftermath of World War II brought about a new social basis for redress.⁶³⁵ Attention was focused on the victims themselves,

* Preface by René Maheu in: J Hersch, *Birthright of man: a selection of texts prepared under the direction of Jeanne Hersch* (UNESCO 1969).

⁶³⁵ Bassiouni, 'International Recognition' (n 18) 210.

to their needs and rights, marking the birth of ‘victimology’ as a scientific study of victimisation and an international movement on victims’ rights.

The new discipline victimology focused its attention on the person of the victim – in counter position to criminology, which is centred on the person of the offender or criminal.⁶³⁶ As noted by Robert Elias, victimology started as an international pursuit stimulated by post-WWII humanitarianism⁶³⁷ and focused on all victims (of war, violence, ignorance, poverty, and disease), not solely on crime victims. However, the victimology movement lost its international drive during the Cold War. In the 1960s, national mechanisms concerned with criminal victimisation expanded in some countries.⁶³⁸ These procedures offered an incentive to governments by linking compensation to victims’ cooperation in the pursuit of criminal prosecutions.⁶³⁹ The focus of these mechanisms, however, was on victims of common crimes (not crimes of the state or international crimes).

With the introduction of domestic compensation schemes,⁶⁴⁰ the victims’ rights movement recovered some momentum, regaining full prominence in the 1980s.⁶⁴¹

⁶³⁶ A A Cançado Trindade, *The Access of Individuals to International Justice* (OUP 2011) 126 citing CF. E Neuman, *Victimología - El Rol de la Víctima en los Delitos Convencionales y No Convencionales* (Editorial Universidad 1994) 27-28.

⁶³⁷ R Elias, *The Politics of Victimization: Victims, Victimology and Human Rights* (OUP USA 1986).

⁶³⁸ According to Bassiouni, these were countries where political circumstances and economic affluence diminished concerns regarding compensation. Bassiouni, ‘International Recognition’ (n 18), 210.

⁶³⁹ Bassiouni cites as examples of these mechanisms Canada and several states within the United States or Canadian legislation. Bassiouni, ‘International Recognition’ (n 18), 210.

⁶⁴⁰ Bassiouni, ‘International Recognition’ (n 18), 210. Bassiouni cites in footnote 27 Canadian and U.S. legislation establishing this type of compensation programs.

⁶⁴¹ At the regional level, the European Convention on the Compensation of Victims of Violent Crimes was adopted in the framework of the Council of Europe in 1983. The Convention however dealt with minimum standards for national schemes for compensation of victims of crime based on social solidarity (European

Experts of victimology and other fields were seeking to extend monetary compensation to other forms of redress, including medical, psychiatric, and psychological treatment, and to expand the basis of such compensation and redress modalities to violations committed by state agencies and state officials.⁶⁴² In 1985, the UN adopted the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.⁶⁴³ The cause of victims' rights was furthered throughout the 1990s as a result of the establishment of the *ad hoc* criminal and hybrid tribunals and the ICC. In this period, the plight of victims became so central to any notion of justice that it served as one of the arguments – albeit secondary – in favour of the creation of the ICTY and ICTR, and of the ICC.⁶⁴⁴ The statutes for these courts address, though in different degrees and ways, procedural and substantive rights of victims.⁶⁴⁵ Specifically, the Rome Statute of the ICC provides for the right to participation and reparation of victims – rights that were confirmed by the Court's first decision.⁶⁴⁶

Convention on the Compensation of Victims of Violent Crimes [24 November 1983] European Treaty Series 116).

⁶⁴² See: PM Tobolowsky, 'Victims Participation in the Criminal Justice Processes: Fifteen Years After the President's Task Force on Victims of Crime' (1999) 25 New Eng J on Crim and Civil Confinement 21; and JR Anderson and PL Woodard, 'Victim and Witness Assistance: New State Laws and the System's Response' (1985) 68 Judicature 221, 222 3.

⁶⁴³ Annex to UNGA Res 40/34 (29 November 1985) UN Doc A/RES/40/34 [hereinafter Victims' Declaration].

⁶⁴⁴ P d'Argent, 'Wrongs of the Past, History of the Future?' (2006) 279, EJIL 4, 17. Zwanenburg on the other hand argues that international law attention to victims came later and less prominently since criminalisation was the only focus during this period. 'Since the 1990s the trend in human rights law and IHL has been criminalisation. In this process the attention has tended to focus on the perpetrator rather than the victim. This is illustrated by the statutes of the ICTY and ICTR. With the adoption of the Rome Statute of the ICC, the victim's role has become more prominent, however'. M Zwanenburg, 'The Van Boven/Bassiouni Principles: An Appraisal' (2006) 24 (4) Netherlands Quarterly of H Rights 647. The section on ICL in Chapter 3 on IHL describes the rights of victims in the statutes of these international criminal courts.

⁶⁴⁵ I Bottigliero, *Redress for Victims of Crimes under International Law* (Martinus Nijhoff 2004) 193. See also Chapter 3 on IHL and reparation. The section on ICL describes the rights of victims in these criminal courts.

⁶⁴⁶ On 7 August 2012, Trial Chamber I established principles for providing reparations to victims in *Prosecutor v. Thomas Lubanga Dyilo* (*Sentence*) [10 July 2012] ICC-01/04-01/06-2901, and *Prosecutor*

In general, the end of the Cold War opened up new potentials and new perspectives for victims' demands for reparative justice.⁶⁴⁷ Democratic structures were introduced or re-established in various continents—notably in Central and Eastern Europe and in Latin America. Truth and reconciliation commissions were set up in many countries.⁶⁴⁸ It was in this period that the struggle against impunity and the call for reparative justice took shape—the victim's perspective, often overlooked and ignored, 'was lifted up from the stalemate of the Cold War'.⁶⁴⁹

Following the major geopolitical changes of the late eighties and early nineties, claims relating to past wrongs that had not been given voice for many decades were brought back to life, or simply heard for the first time. It was in this climate that demands for criminal and reparative justice became visible and vocal, particularly in regards to WWII claims. Many individuals decided to challenge the settlements agreed by states in the aftermath of the war, which had been mostly partial compared to the damage suffered by the victims,⁶⁵⁰ and claim reparations. Civil society groups in East Asia, Australia, and Europe demanded reparations for comfort women (sex slaves of the Japanese Imperial

v. Thomas Lubanga Dyilo (Reparations) [7 August 2012] ICC-01/04-01/06. The Chamber considered that it is of paramount importance that the victims, together with their families and communities, participate in the reparations process, and be able to express their points of view, their priorities and the obstacles they have encountered in their attempts to secure reparations. It is important to note that the ICC can only decide on responsibility of individuals to afford reparation for crimes falling under its jurisdiction. It does not have jurisdiction to establish state responsibility. In the present case, Lubanga was declared indigent and therefore any reparations afforded would be funded by the ICC Trust fund resources.

⁶⁴⁷ van Boven, 'Victims' Rights' (n 21) 27.

⁶⁴⁸ See generally: P B Hayner, 'Fifteen Truth Commissions - 1974 to 1994: A Comparative Study'. (1994) 16 (4) Human Rights Quarterly.

⁶⁴⁹ van Boven, 'Victims' Rights' (n 21) 27.

⁶⁵⁰ Boisson de Chazourneds and Heathcote, 'Mise en oeuvre de la reparation des crimes de l'histoire: une possible [re]conciliation des temps passes, presents et futures?', in L Boisson de Chazourneds, J F Queguiner, and S Villalpando (eds), *Crimes de l'histoire* (Bruylant 2004).

Army) and for the victims of Japanese forced labour schemes, whose demands had been ignored for so long. Reparation claims for forced labour and for massacres of civilians against Germany and Austria were brought in the U.S., Italian, and Greek courts. Claims were also brought against Swiss banks for dormant accounts, and for the restitution of cultural property and looted works of art. In the same climate, the right to reparation for victims of brutal repression by Latin American dictatorships became a persistent claim.⁶⁵¹

It was against this background, stressing the importance of criminal and reparative justice as a condition for reconciliation and democracy, that in 1989 the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Theo van Boven as Special Rapporteur. His mandate was to study the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms, with a view to exploring the possibility of developing some basic principles and guidelines in this respect.⁶⁵² Two years later, the Sub-Commission also embarked on studies aimed at combating impunity.⁶⁵³ This was a time of political change on various continents, with prospects of a higher degree of human rights advancement. It was also a time of the creation of transitional justice mechanisms in several countries. In this

⁶⁵¹ See generally: I Bottiglieri, *Redress for Victims* (n 645), 193.

⁶⁵² The Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res 1989/13 (31 August 1989).

⁶⁵³ In 1991, the Sub-Commission on Prevention of Discrimination and Protection of Minorities requested Mr Louis Joinet to study the impunity of perpetrators of human rights violations (Decision 1991/110). In 1994, the Commission split the study in two, entrusting Mr Joinet with the aspect of civil and political rights and Mr El Hadji Guissé with that of economic, social and cultural rights (Decision 1994/34). In 1997, Mr Joinet submitted his final report entitled *The Administration Of Justice And The Human Rights Of Detainees, Question Of The Impunity Of Perpetrators Of Human Rights Violations (Civil And Political)* (pursuant to Sub Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1) which contained a set of principles for the protection and promotion of human rights through action to combat impunity. In 2004 Ms Diane Orentlicher was appointed as Independent Expert for the period of one year to update the principles. She submitted her report on 9 February 2005 (E/CN.4/2005/102/Add.1).

context, restoring justice implied an increased focus on the criminal responsibility of perpetrators of gross human rights abuses and their accomplices. It also opened up the exposure of many wrongs inflicted on the victims of these abuses, with a view to rendering retributive and reparative justice. This was a time marked by the triumph of the human rights discourse in world politics: human rights, it was demanded, would not only be proclaimed, but also effectively enjoyed—future violations would be repressed and victims would be redressed.⁶⁵⁴

B. Description and context of the process

The drafting and adoption process of the Principles and Guidelines stretched over fourteen years, with repeated requests for comments, but with little substantive discussion in the CHR itself.⁶⁵⁵ After all, the draft instrument was one more project in an overloaded UN human rights agenda. In addition, while the subject matter of redress and reparation enjoyed broad sympathy, as shown by the wide sponsorship that the procedural resolutions of the Commission received, the political interest among state members was not strong. As observed by van Boven, ‘this limited political interest may also reflect the reticence of many states to accept and implement domestically the consequences of victim-oriented policies of reparative justice’.⁶⁵⁶ As a result, the CHR and even its Sub-

⁶⁵⁴ Pierre d’Argent, ‘Wrongs of the Past’ (n 644) 17.

⁶⁵⁵ van Boven, ‘Victims’ Rights’ (n 21), 29.

⁶⁵⁶ Bassiouni makes a similar point when he argues that the movement of victims’ compensation started to loose momentum when stakeholders sought reparation from states for official acts. ‘States were willing to recognize victims’ rights when the harm arose from individual action, but not when the harm was a product of State policy or committed by State actors’—Bassiouni, ‘International Recognition’ (n 18) 211.

Commission provided little substantive guidance and feedback.⁶⁵⁷ The policy bodies were mainly involved in taking procedural decisions to advance the process, although with moderate speed.

The mandate of the Special Rapporteur established that the study had to take into account existing international human rights norms and relevant decisions of international human rights' bodies. According to van Boven, the study and the draft principles and guidelines as they evolved demonstrated that the gaps in human rights protection were less legal than political and that a new instrument was not supposed to entail new international or domestic legal obligations, but rather to identify mechanisms, modalities, procedures, and methods for making existing legal obligations operational.⁶⁵⁸

Van Boven's final report provided the basis for the first draft of the Principles and Guidelines.⁶⁵⁹ While working on the report, the Special Rapporteur received input from non-governmental experts from various continents, particularly from countries that had been enduring gross violations of human rights.⁶⁶⁰ Based on the comments received and taking into account the deliberations of a workshop co-organised by the International Commission of Jurists and the Maastricht Centre for Human Rights on this topic, van Boven made several revisions to the draft Principles and Guidelines. He prepared two

⁶⁵⁷ van Boven, 'Victims' Rights' (n 21) 29.

⁶⁵⁸ *Idem.* 28.

⁶⁵⁹ van Boven, 'Study concerning the right to restitution' (n 17).

⁶⁶⁰ *Idem.* Chapter IX.

revised versions between 1993 and 1997,⁶⁶¹ submitting the final version to the CHR in 1997.⁶⁶²

In 1998, the CHR requested its Chairman to appoint an expert to prepare a revised version of the Principles and Guidelines elaborated by Mr van Boven.⁶⁶³ The summary records are silent on the reasons behind this decision. In the same year, the CHR appointed M. Cherif Bassiouni as Independent Expert.⁶⁶⁴ The following year, Bassiouni submitted a comprehensive report comparing the Principles and Guidelines drafted by van Boven with the Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity⁶⁶⁵; with the Victims' Declaration; and with the provisions on reparations in the Rome Statute of the ICC.⁶⁶⁶ His 1999 report proposed a comprehensive round of study, discussion, conferences, and seminars to consider the issue. However, the Commission requested the Independent Expert to build on the work previously undertaken and submit a final report to the Commission's 2000 session.⁶⁶⁷ Following consultations with governmental and non-governmental experts and after reflecting on the recent developments in international criminal law, Bassiouni added new

⁶⁶¹ Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr Theo van Boven, UN Doc E/CN.4/Sub.2/1996/17 (May 24, 1996) and UN Doc E/CN.4/1997/104 (January 16, 1997).

⁶⁶² UN Doc E/CN.4/1997, Annex.

⁶⁶³ The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, CHR Res 1998/43, ESCOR Supp (no 3) 150, UN Doc E/CN.4/1998/43 (1998).

⁶⁶⁴ The 1985 Basic Principles of Justice for Victims of Crime and Abuse of Power (n 643) were drafted at a regional meeting held in Ottawa, Canada, chaired by Professor M Cherif Bassiouni. In addition to this relevant background, given Bassiouni's expertise in international criminal law (ICL), his appointment as Independent Expert perhaps reflected the recognition by the Commission on HR of the parallel developments of the right to reparation in human rights law and ICL, as well as the narrowing intersection between human rights law and the law of armed conflict.

⁶⁶⁵ See: (n. 653)

⁶⁶⁶ 'Bassiouni '2000 Report' (n. 668).

⁶⁶⁷ Commission on Human Rights, Res 1999/33 (26 April 99), E/CN.4/RES/1999/33

dimensions to the draft Principles and Guidelines, with particular reference to IHL.⁶⁶⁸

The report submitted to the 56th Session of the CHR in early 2000 annexed a third version of the draft Principles and Guidelines.

While the drafting process had regained some impetus after Bassiouni's appointment, it had a new setback after he submitted his report in 2000. The drafting and submission of his report coincided with the preparations of the 'World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance' that was being organised by the CHR, to be held in 2001 in Durban, South Africa.⁶⁶⁹ The idea of a duty to repair historical wrongs connected with practices of slavery and colonialism had been formally discussed during the political process leading to the conference. This was a highly politicised issue that deeply divided states and that was relevant to the substance of the Principles and Guidelines. Fortunately, the 'Durban debate' did not really permeate the standard setting process of the draft Principles and Guidelines.⁶⁷⁰ Still, and understandably so, the drafting process lingered in those years in order to avoid disruptive influences.

⁶⁶⁸ Mr Bassiouni submitted his final report, entitled '*Civil And Political Rights, Including The Questions Of: Independence Of The Judiciary, Administration Of Justice, Impunity, The Right To Restitution, Compensation And Rehabilitation For Victims Of Gross Violations Of Human Rights And Fundamental Freedoms*' in accordance with Commission Res 1999/33 (18 January 2000) UN Commission on Human Rights 56th session Item 11(d) of the provisional agenda, at E/CN.4/2000/62. [Hereinafter Bassiouni 2000 Report]

⁶⁶⁹ On 31 August-8 September 2001.

⁶⁷⁰ There was one mention during the first consultative meeting of reparation for past injustices by the representative of South Africa who asked the two Experts also to comment on violations committed under apartheid and colonialism, which had so ravaged South Africa. See Report of the consultative meeting on the draft 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.4/2003/63 [9]. (Hereinafter Report of the First Consultative Meeting).

In 2000, the CHR took note of the report by Bassiouni. It requested the UN Secretary-General to circulate the text of the draft Principles and Guidelines to all member states for comments. It also requested the High Commissioner for Human Rights to hold a consultative meeting in Geneva with a view to finalising the Principles and Guidelines on the basis of the comments submitted.⁶⁷¹ It made the same requests in 2001, deciding also to consider the matter at its fifty-eighth session under the agenda sub-item entitled ‘Independence of the judiciary, administration of justice, impunity’.⁶⁷² The CHR made the same requests again in 2002.⁶⁷³

This time around, a group of NGOs⁶⁷⁴ that had been closely following the process successfully lobbied stakeholders in highlighting the importance of organising the Consultative Meeting to discuss the future of the draft Principles and Guidelines. The Office of the UN High Commissioner for Human Rights (OHCHR) scheduled a formal consultation for states, and inter-governmental and non-governmental organisations to take place on 30 September and 1 October 2002. In order to encourage the process and lift the profile of the Principles and Guidelines in the human rights agenda of member states, the NGO coalition organised an informative meeting on 29 August 2002 hosted by the OHCHR. Both Bassiouni and van Boven were invited, although only the latter was

⁶⁷¹ For all interested governments, intergovernmental organisations and non-governmental organisations in consultative status with the Economic and Social Council (ECOSOC), UN Commission on Human Rights Res 2000/41 (20 April 2000) UN Doc E/CN.4/RES/2000/41.

⁶⁷² Commission on Human Rights, Res 2001/105 (23 April 2001) UN Doc. E/CN.4/RES/2001/105.

⁶⁷³ Commission on Human Rights, Res 2002/44 (23 April 2002) UN Doc E/CN.4/RES/2002/44. The Office of the High Commissioner requested comments several times, see: UN Doc E/CN/2001/61 (29 December 2001) and E/CN.4/2002/70 (23 January 2002).

⁶⁷⁴ The original group of NGOs was formed by The Redress Trust (REDRESS), ICJ, AI, Medical Foundation, APT, OMCT, IRCT and the International Society for Traumatic stress studies. By the first consultative meeting other NGOs joined: ICAR foundation, International Service for Human Rights, Human Rights Advocates, Asian Human Rights Commission. EAAF, Human Rights First, and CCJO.

able to attend. In addition to the NGOs, van Boven, and the representatives of the OHCHR, twenty-two state delegations attended the meeting.⁶⁷⁵ Participants agreed that it was time to move forward. Recognising that the project had started more than a decade ago, everyone present agreed that it was crucial to determine a procedural mechanism to finalise the draft instrument.

Pursuant to Commission Resolution 2002/44, the OHCHR convened a consultative meeting in the fall of 2002. Both experts, van Boven and Bassiouni, were present, as well as forty-nine member states, IGOs, other independent experts, and the NGO coalition.⁶⁷⁶ All attendees supported the initiative to adopt a universal instrument on the right to a remedy and reparation for victims of international human rights and humanitarian law violations. During the meeting, participants had the opportunity to request clarifications from the former Rapporteur and Independent Expert on the substance and drafting of the Principles and Guidelines. The main questions raised during the meeting were in reference to the scope and limits of the obligations implied within the right to a remedy and reparation. What types of violations were covered by the draft instrument (human rights and/or IHL violations; gross violations or all violations)? Committed by whom and in what context (state and/or non-state actors during peace and/or war time)? Who were the beneficiaries or recipients of such obligations (i.e. definition of victim)? The necessity to maintain the victims' perspective on the structure and substance of the instrument was considered of paramount importance. Similarly, it was agreed from the start that while

⁶⁷⁵ See: REDRESS Internal Minutes (on file with the author).

⁶⁷⁶ In addition, forty-nine member states were present as well as IGOs, NGOs, and other experts. For the detailed list see: Annex III of the Report of the First Consultative Meeting (n. 670).

the instrument should reflect existing norms of international law, since it was not a treaty, it should also reflect emerging concepts as well as allow progressive development on the subject.⁶⁷⁷

The Chilean chairman, Alejandro Salinas, proposed a recommendation to the Commission on Human Rights to establish a mechanism to finalise the draft instrument: ‘Taking into account the discussions held and the Chairperson-Rapporteur’s conclusions, [...], that mechanism should consult and cooperate with interested Governments, IGOs, NGOs and the two experts, Mr. Theo van Boven and Mr. M. Cherif Bassiouni, in its work’.⁶⁷⁸ Most of the states agreed with the proposal. Some, however, thought it was appropriate to establish in the recommendation a deadline to adopt the Principles and Guidelines. Others thought the ambiguity would facilitate the process of adoption. Only Cuba commented on the necessity of establishing an ‘inter-governmental’ mechanism for proper political debate, and the U.S. proposed to establish the Consultative Meeting as the appropriate method in the recommendation to the Commission.⁶⁷⁹ The Chair submitted the results of the meeting to the Commission in 2003, calling for the establishment of an effective mechanism to finalise the draft.⁶⁸⁰ The Commission

⁶⁷⁷ Chairperson-Rapporteur’s Conclusions, Report of the First Consultative Meeting (n. 670).

⁶⁷⁸ Report of the First Consultative Meeting (n. 670).

⁶⁷⁹ See REDRESS Internal Minutes (on file with the author).

⁶⁸⁰ E/CN.4/2003/63 (27 December 2002): Based on discussions during the meeting, the Chairperson-Rapporteur, as follow-up to the consultative meeting, recommended that the Commission on Human Rights:

(a) Establish, at its next session, an appropriate and effective mechanism with the objective of finalising the elaboration of the set of Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law, contained in the annex to document E/CN.4/2000/62;

(b) Taking into account the discussions held and the Chairperson-Rapporteur’s conclusions, contained in the report of the consultative meeting, that mechanism should consult and cooperate with

conferred on Salinas the mandate to prepare another revision of the draft Principles and Guidelines in cooperation with the Experts, taking into account the comments made by states, inter-governmental, and non-governmental organisations during the consultative meeting. The Commission's resolution also ordered the OHCHR to hold a second consultative meeting.

The fourth revised version was completed and circulated on 15 August 2003. The participants considered the revised version and commented on the text during the second consultative meeting (20, 21, and 23 October 2003). The most contentious issue that arose during the discussions was the scope of the instrument: whether it should cover violations of both human rights and international humanitarian law, and whether it should cover all breaches or just gross/serious violations. On 23 October 2003, a further revised version was circulated together with a proposal put forward by the Chairperson and the Experts that arose out of the informal consultations held the day before. The 'Chair/Experts' Proposal'⁶⁸¹ addressed the contentious issues related to the scope of the instrument and suggested two important modifications. The first was to delete all references to human rights or international humanitarian law violations and thus change the title to 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Law'. The second, following from the first, was a suggested definition of 'gross violations of international law'.⁶⁸²

interested Governments, IGOs, NGOs and the two experts, Mr Theo van Boven and Mr M Cherif Bassiouni, in its work.

⁶⁸¹ Annex II, E/CN.4/2004/57.

⁶⁸² *idem* [5]. See definition and analysis of this issue below: (n 710) and accompanying text.

It was clear that the participants required time to review the Chair/Experts' Proposal and the new revised text. Thus, at its 2004 session, the Commission again deferred action on the draft, calling for Mr Salinas to hold a third consultative meeting. The Commission's resolution also asked the Chair to prepare, together with the Experts, a revised version taking into account 'the opinions and commentaries of states and of intergovernmental and non-governmental organisations and the results of the previous consultative meetings'.⁶⁸³ Despite the heated discussions on the scope of the instrument, the adopted resolution requested the Chairperson-Rapporteur to prepare a revised version of the Principles and Guidelines for victims of all violations of international human rights and humanitarian law.⁶⁸⁴ With a view to facilitating the consultative process, the Mission of Chile invited all interested parties, and inter-governmental and non-governmental organisations to an informal exchange of views with the Chair on 2 August 2004 in Geneva. At this meeting, it became clear that the Chair/Experts' Proposal did not achieve the desired consensus and that the third meeting would have to concentrate on the further reviewed version mandated by the Commission's resolution. The Chairperson Rapporteur and the Experts finalised this version on 5 August 2004 after a two-day drafting meeting in Geneva.

The third consultative meeting took place on 29, 30, September and 1 October 2004. As expressed by many delegations during the previous informal gathering, this meeting was perceived as the last attempt to finalise the draft. It was crucial to achieve consensus over the text or there was a real risk that states, even those delegations that had been

⁶⁸³ Commission Res 2004/34. See: chap. XI, E/2004/23-E/CN.4/2004/127.

⁶⁸⁴ *ibid.*

promoting the text in the past, would oppose continuation of the process. The 5 August 2004 version introduced by the Chair and the Experts⁶⁸⁵ included violations of human rights and international humanitarian law, but limited the scope to ‘gross and serious violations’ only. After several proposals and debates over the scope, the language, and the applicable standards, on 1 October 2004 the Chairperson-Rapporteur presented a final version. With some modifications, this version only covered gross violations of international human rights law and serious violations of international humanitarian law.

On 23 February 2005, the Chair requested to hold an informal meeting to discuss the follow up to the process of finalising the draft Principles and Guidelines and to examine the procedural aspects that could facilitate the completion of the process, but without opening a discussion on any substantive or language proposals. During this meeting, it was clear that some delegations still had problems with certain provisions of the text (particularly on the scope of the instrument), but it was also clear that the majority of states agreed on the importance of adopting a UN instrument on the right to reparation.

The draft Principles and Guidelines were finally submitted to the CHR at its 61st session. The text was adopted on 19 April 2005 with no votes against, but with thirteen abstentions.⁶⁸⁶ Germany, one of the states that absented, gave an explanation of vote. It restated its view expressed during the consultation process that victims of HR violations do not have a right to reparation under CIL but only as part of state sponsored

⁶⁸⁵ Although this new version was made on consultation with both Experts, only Theo van Boven was present in Geneva during the drafting of the text and at the Third Consultative Meeting.

⁶⁸⁶ The countries abstaining were: Australia, Egypt, Eritrea, Ethiopia, Germany, India, Mauritania, Nepal, Qatar, Saudi Arabia, Sudan, Togo, and the United States. See: Commission on Human Rights, Resolution 2005/35 (19 April 2005) E/CN.4/RES/2005/35.

mechanisms and that victims of IHL do not have a right to claim reparation under IHL instruments.⁶⁸⁷ Three months later, on 25 July 2005, the Principles and Guidelines were adopted by ECOSOC by a vote of forty-three in favour and five abstentions (none against).⁶⁸⁸ On 16 December 2005, the General Assembly adopted the instruments without a vote.⁶⁸⁹ A small number of delegations had some observations but none call for a vote.⁶⁹⁰ Germany referred once again to the explanation of vote it had given at the CHR:

“18. Ms. Beinhoff (Germany) said that her Government continued to attach the highest political importance to the issue of reparation. However, **even if not breaking the consensus**, it wished to uphold the views it had expressed in its explanation of vote at the sixty-first session of the Commission on Human Rights” (emphasis added).⁶⁹¹

Technically, as described by the UN⁶⁹² as well as by van Boven,⁶⁹³ the General Assembly adopted the Principles and Guidelines without a vote and therefore “by consensus”. However, van Boven correctly notes elsewhere that “as transpired from the German

⁶⁸⁷ See: n 716 and accompanying text.

⁶⁸⁸ In favour: Albania, Armenia, Azerbaijan, Bangladesh, Belgium, Belize, Brazil, Canada, China, Congo, Costa Rica, Cuba, Denmark, Ecuador, France, Guinea, Iceland, Indonesia, Ireland, Italy, Jamaica, Japan, Kenya, Lithuania, Malaysia, Mauritius, Mexico, Namibia, Nicaragua, Panama, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Senegal, South Africa, Spain, Thailand, Tunisia, Turkey, United Arab Emirates, United Kingdom, United Republic of Tanzania./ Against: None. /Abstain: Australia, Germany, India, Nigeria, and the United States. Absent: Benin, Chad, Colombia, Democratic Republic of the Congo, Mozambique, Pakistan. See: Annex I, ECOSOC Res 2005/23 (25 July 2005) UN Doc E/2005/23.

⁶⁸⁹ See: n 2

⁶⁹⁰ Report of the Third Committee to the General Assembly (A/60/509/Add.1, 1 December 2005); General Assembly, Summary record of meeting No. 39 held in the Third Committee on 10 November 2005 (A/C.3/60/SR.39), p 2-3.

⁶⁹¹ See page 3 of the Summary records of the 39th meeting of General Assembly, held in the Third Committee on 10 November 2005 (A/C.3/60/SR.39).

⁶⁹² UN Press Release “Principles On Right To Reparations For Victims Of Gross Human Rights Violations Approved By Third Committee” General Assembly Third Committee, GA/SHC/3838 (10 NOVEMBER 2005)

⁶⁹³ T van Boven ‘Introductory note on 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’, available at http://legal.un.org/avl/ha/ga_60-147/ga_60-147.html [accessed 17 April 2016]

position [...], there appears not to be general consensus as to existence of customary international law governing individual reparation claims”.⁶⁹⁴

Van Boven described the drafting and adoption process of the Principles and Guidelines as somehow spontaneous, not following a preconceived plan: ‘It was made up of an evolving pattern, entailing non-governmental expertise and, progressively, inter-governmental participation and input’.⁶⁹⁵ As observed by the Special Rapporteur, the draft Principles and Guidelines underwent a series of revisions and clarifications with the aim of reaching consensus, without reducing the text to the lowest common denominator level. For him, the process under the Commission’s authority and how it stretched a number of years was important for political and psychological reasons: ‘It signified the indispensable element of inter-governmental ownership and interest in the process, without however losing close links with the quarters of civil society’.⁶⁹⁶

2. The victim’s perspective

Based on the discussions during the first consultative meeting, the Chairperson made the following conclusion:

Appropriately, the draft Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law were drafted to reflect a victim-based perspective, organising principles from all legal sources not according to instruments and sources, but according to the needs and rights of victims. The victim’s perspective, as reflected in the structure and content, should be retained.⁶⁹⁷

⁶⁹⁴ van Boven, ‘Victims’ Rights’ (n 21) 27.

⁶⁹⁵ van Boven, ‘Victims’ Rights’ (n 21) 25.

⁶⁹⁶ *ibid.* 29.

⁶⁹⁷ UN Doc E/CN.4/2003/63 [6].

Throughout the drafting process, the importance of the victims' perspective was not only highlighted by the former Special Rapporteur and former Independent Expert, but also by most delegations.⁶⁹⁸ Zwanenburg argues that without a doubt, 'the most important aspect of the Van Boven/Bassiouni Principles is that they take the victim as their point of departure'.⁶⁹⁹

The use of the 'victims' perspective' in the context of the Principles and Guidelines, however, seems to have more than one meaning. It often refers to the empowerment of victims (i.e. the capacity to reflect the needs and interests of the victims). But it also relates to the drafting methodology and structure employed in the instrument – focusing on the victims as the point of departure as opposed to the legal body classifying the violation. In order to analyse both aspects of the notion of 'victims' perspective', the first dimension will be referred to as 'victims' viewpoint'. The second will be referred to as 'victim-oriented framework'.

A. The victims' viewpoint: an empowering instrument?

A dimension of the victims' perspective often referred to is the capacity to reflect the needs and wishes of victims. This aspect of the victims' perspective requires two elements: an accurate reflection of human rights concepts as perceived by victims and the need to give voice to the victims in the human rights arena. The juxtaposition of these

⁶⁹⁸ See, for example, UN Doc E/CN.4/2003/63 [6] [12], [20], [21] and [66].

⁶⁹⁹ Zwanenburg, 'An Appraisal' (n. 644) 641.

two elements necessarily entails the possibility of a common narrative that reflects the views of a cohesive group: *the victims*. Referring thus to a victims' perspective in this context (the victims' viewpoint) would seem to presuppose three premises: first, victims are generally silent and/or silenced; second, if victims are in a position to speak, they will express themselves in similar terms; and third, the views of the victims have inherent authority in the human rights discourse.

For van Boven, all of these premises are accurate.⁷⁰⁰ He notes that victims regularly experience the gap between entitlements and realities. In his first study on the right to restitution, compensation, and rehabilitation, the Special Rapporteur describes how legal, political, social, and economic obstacles regularly affect victims.⁷⁰¹ He explains, for example, that laws are inadequate; that there are hurdles in getting access to justice; and that the courts have restrictive attitudes. There are also references to the political obstacles that victims suffer due to the unwillingness of the authorities and society to recognise that wrongs were committed, or of economic setbacks as a result of the shortage or unjust distribution of resources. Last but not least, van Boven refers to the disenfranchisement of victims as a consequence of their lack of knowledge and capacity to present and pursue their claims. Victims, and particularly those vulnerable groups generally victimised (like women, children, members of specific racial, ethnic or religious groups, the mentally and physically disabled and many more), are often silenced as a consequence of their actual victimisation, their vulnerability, and their personal circumstances.

⁷⁰⁰ See van Boven, 'Victims' Rights' (n 21) 19-20.

⁷⁰¹ van Boven, 'Study concerning the right to restitution' (n 17).

While arguing that victims are silent and silenced, the former Special Rapporteur also acknowledges that the victims' perspective cannot be seen in isolation from the perspective of other sectors of society. He recognises that the human rights discourse is complex and reflects the interests of different stakeholders. But he maintains that human rights notions are better translated from the perspective of victims than from the demands of the powerful:

Governments may be guided by claims of sovereignty; peoples pursue their aspirations in terms of self-determination and development; religions entertain value systems; political and social institutions look for normative basis in order to attain their objectives. The perspectives of these various actors may be human rights related but often differ depending on status and power positions. They have to a greater or lesser extent the means at their disposal to promote and defend their interests. However, victims often find themselves in vulnerable situations of neglect and abandonment and are in need of the care, the interest and active recognition of the human rights promotion and protection systems.⁷⁰²

For this reason, van Boven explains, one may learn more about the essence and the universality of human rights from the voices of victims than from the views of secular or religious leaders. After all, 'if victims are in a position to speak, they will express themselves in similar terms'.⁷⁰³

The viewpoint of the victims was clearly a central point of orientation in van Boven's work. When analysing the drafting and adoption history of the Principles and Guidelines, it becomes evident that the Special Rapporteur's goal was to reflect the views and empower the victims of gross human rights abuses. Throughout the process, efforts

⁷⁰² van Boven, 'Victims' Rights' (n 21) 1.

⁷⁰³ *ibid* 2.

concentrated on receiving input from civil society while providing at the same time ‘the indispensable element of inter-governmental ownership and interest’.⁷⁰⁴ The entire standard setting exercise aimed at obtaining inter-governmental support without losing close links with essential quarters of civil society.

However, while victims are clearly at the centre of the human rights thinking,⁷⁰⁵ it is not easy to speak on behalf of this group or category of persons. As will be described, ‘victim and victimhood’ are not only difficult concepts to define, but also experiencing different types and degrees of abuse will result in a myriad of demands that are difficult to fix and organise under one single instrument.⁷⁰⁶ The original study assigned in 1989 by the Sub-Commission of Human Rights concerning the rights of victims of ‘gross violations of human rights and fundamental freedoms’ had a more narrow focus than the final version (which includes serious HR and IHL violations). The scope of the 2000 version of the draft Principles and Guidelines prepared by Bassiouni and reviewed during the first Consultative Meeting was even broader. It included *all* HR and IHL violations. Throughout the drafting process, IHL violations were included and the gross/serious element was removed. Arguably, this made it more difficult to reflect a coherent set of

⁷⁰⁴ *ibid* 25.

⁷⁰⁵ F Klug, ‘Human Rights and Victims’, E Cape (ed), *Reconcilable Rights?: Analysing the Tension Between Victims and Defendants* (Legal Action Group 2004).

⁷⁰⁶ The Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence explains how important is ‘to keep in mind that “victimhood” is only one dimension of the complex identity of a victim and that while transitional justice measures are indeed meant to provide recognition to victims and acknowledge the harm and suffering that they endured, their main purpose is to provide recognition of their equal status as rights holders’. See UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence*, 27 December 2016, A/HRC/34/62, para 30

demands and their corollary rights. In the final version, the scope was once more reduced to gross/serious violations, but kept both HR and IHL breaches.

Since the very beginning of the Commission's project, it was debated whether the instrument should be conscribed to gross violations of human rights and fundamental freedoms only or whether it should include all types of violations regardless of their severity. Debates over the non-hierarchy of rights and the assertion that human rights are indivisible played a key role in keeping the word 'gross' and later on 'serious' (for IHL) in brackets throughout the drafting process. Bassiouni deleted the term 'gross'/'serious' in his 2000 version. This was the draft reviewed during the first Consultative Meeting. However, the wider the scope, the more difficult it became to determine the legal provisions applicable. Human rights and international humanitarian law involve many types of violations. Some of them constitute international crimes; some of them do not. For example, a breach of the right to freedom of expression by an unjustified censoring of a newspaper is a human rights violation, but it is not an international crime like genocide or slavery. Similarly, using the flags of a neutral state in an armed conflict is a breach of IHL, but does not constitute a war crime or crime against humanity. While these are all violations of human rights and/or IHL, it is difficult to put them into one single group to determine 'victims' demands' and to establish the legal consequences and applicable principles of international law on reparation and remedies. Still, the idea of limiting the instrument to certain types of violations only was questioned throughout the development of the instrument. It was argued that all violations of international law give rise to a duty to afford some form of reparation, regardless of their severity. As a general rule, all

violations of HR and IHL entail responsibility and corresponding legal consequences. Bassiouni's 2000 version included all violations of HR and IHL, albeit having a specific principle on the obligation to universally prosecute gross/serious violations constituting crimes under international law. Unfortunately, the draft still lacked clarity in terms of other international norms applicable and the legal consequences. During the first Consultative Meeting it became clear that participants were not satisfied with the manner the different principles and guidelines were organised in this version.

Some delegations also challenged the inclusion of IHL, stating that under IHL, remedies vary with respect to different categories of violations. Others argued that IHL norms do not contain an individual right to a remedy. The scope of the instrument became a heated debate during the second Consultative Meeting. Since the aim of the instrument was to reflect the victims' viewpoint, many of the participants, as well as the Chair and the Experts van Boven and Bassiouni, were concerned that proposals to remove IHL violations would defeat the purpose of creating a victim-oriented instrument. Many argued that a UN document on the right to reparation of victims would be crucial for the protection of victims of mass atrocities, particularly those committed during wartime. As mentioned earlier, out of this concern, the Chair and the Experts tabled a proposal on 23 October 2003 that arose out of informal consultations during the second Consultative Meeting. The 'Chair/Experts' Proposal' suggested the deletion of all references to human rights or international humanitarian law violations and change the title to 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross

Violations of International Law’. It defined ‘gross violations of international law’ as follows:

For the purposes of this document gross violations of international law means unlawful deprivation of the right to life, torture, or other cruel, inhuman treatment or punishment, enforced disappearance, slavery, slave trade and related practices, deprivation of the rights of persons before the law and similar serious violations of fundamental rights and freedoms and norms guaranteed under applicable international law.⁷⁰⁷

According to the proposal, its purpose was to achieve consensus to facilitate the adoption of the draft Principles and Guidelines. It attempted to avoid the specific debate of including/excluding IHL by relying on general principles of international responsibility under CIL, as opposed to specific norms of the law of armed conflict. In reality, however, the proposal created a wider group of victims – or a less clearly defined group – that states were not ready to accept.

In the end, the Principles and Guidelines were limited to ‘gross’ HR and ‘serious’ IHL violations. The legal consequences arising from serious violations of HR and IHL that constitute international crimes are different than those arising from other breaches (e.g. the right to access to a judicial remedy or the non-applicability of statutes of limitations).⁷⁰⁸ One could argue that this is because the demands of victims of less severe violations are different from victims of more severe violations or because states recognise that the second category requires special treatment (e.g. universal prosecution; *aut dedere aut judicare*), or probably due to a combination of both. Nonetheless, what is important is that both categories of serious violations (HR and IHL) share similar legal consequences.

⁷⁰⁷ See: (n 682).

⁷⁰⁸ See below: Section D: Content and structure of the Principles and Guidelines.

As will be explained in the next section, this amendment helped create consensus in adopting the instrument with violations from both bodies of law.

It seems valid to argue that an international instrument drafted by states and containing states' obligations is capable of reflecting victims' needs (thus being victim-oriented), despite the current limits of international law.⁷⁰⁹ Even when individual victims are not recognised as formal actors of international law, the drafting and adopting process of the Principles and Guidelines was very inclusive of victims' voices. It is evident that van Boven made a consistent effort to include the point of view of victims organisations around the world throughout the process and that the CHR allowed active participation of NGOs during the consultative meetings. Still, it is also clear that broadening the scope of the instrument to include less defined groups of victims made this task much more difficult.

The following section will look at the second aspect of the victims' perspective: whether the Principles and Guidelines were capable of modifying the traditional state centred legal structure to use a victim-oriented framework. This proposition implies a much more profound change than reflecting the needs and wishes of victims in an international instrument. It entails organising a legal instrument taking victims' needs as the point of departure, as opposed to the state's legal obligations, in regards to victims as recognised and categorised in existing treaty and customary law. As will be analysed, Bassiouni used this rationale when acting as Independent Expert to expand the scope of the Principles

⁷⁰⁹ See: (n712) and accompanying text.

and Guidelines to all types of HR and IHL violations and to include many new provisions, particularly in regards to IHL. The subsequent paragraphs will examine this proposition in more detail.

B. Victim-oriented framework: an attempt at harmonising standards from the victims' perspective

In regards to the drafting methodology and structure, Bassiouni explained that '[t]he Draft Guidelines intentionally adopted a victim-oriented perspective, organising principles from all legal sources not according to instruments and sources, but according to the needs and rights of victims'.⁷¹⁰ Accordingly, if a person is a victim of, for example, torture as defined in international law, he/she should have a right to a remedy and reparation regardless of the status of the perpetrator (state or non-state actor)⁷¹¹ or the context in which he/she was injured (international or non-international armed conflict or during peace time). The drafting methodology in this context is inductive rather than deductive (i.e. from the perspective of the victim rather than of the state).

While in principle this seems a valid and reasonable approach, it is important to analyse whether the Principles and Guidelines have a 'true' victim-oriented 'framework'. Is it really possible to achieve this through a drafting exercise in a state-controlled mechanism

⁷¹⁰ Report of the First Consultative Meeting, (n 670) [20].

⁷¹¹ Importantly, torture can only be committed if the act is linked to an official or de facto authority. Therefore torture can be committed by a non-state actor if the necessary link to the state or state-like authority is present. The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (n 39) defines torture as: 'Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions' (emphasis added).

within the current boundaries of international law?⁷¹² Clearly, the structure of the original study by van Boven and the subsequent set of Principles and Guidelines (i.e. the research and codification of applicable standards) were framed to determine states' obligations in regards to victims of gross abuses. The nature of the drafting exercise was always state-centric. It took place under the auspices of the CHR (a state-composed mechanism) and the methodology used was deductive (determining state obligations in order to establish rights of victims). Even if one argues that the scope of the study and draft instrument was subsequently widened with a view to reflect the needs of victims – when IHL violations were introduced in 1996 and when all types of violations were included (not only gross violations) in 2000 – the conceptual framework determining states' obligations was not altered.

During the drafting process, Bassiouni explained that if the point of departure is the victim, then the source of law could not guide the drafting and structure of the instrument. However, the entire drafting exercise had the aim of determining states' obligations in regards to potential rights of victims. These obligations are typically

⁷¹² It would seem valid to question the current State-focused framework governing the right to reparation since liability of non-State actors is now recognised under international law, however it is still uncertain whether alternative conceptual frameworks can help clarify and strengthen the status, content and scope of the victims' right to reparation or whether the state-focused frame is necessary to guarantee the maximum protection for victims. For a discussion of non-state actors and human rights law, see generally Clapham, *Non-State Actors* (n 82) and Philip Alston 'Non-State Actors and Human Rights', New York University *Center for Human Rights and Global Justice* (OUP Incorporated 2005). See also Nigel Rodley, who argues that the expansion of international human right law to non-state actors as proposed for example by Clapham is inappropriate. 'The alternative idea, claiming to be victim-oriented, that human rights should be understood in terms of the harm done, regardless of the character of the perpetrator, means that human rights as an idea will be indistinguishable from most kinds of serious crime or terrorism. The perceived advantages of this paradigm – use of a term that has acquired a positive resonance (it was not always the case) and jurisdiction of international human rights machinery – are evidently opportunistic and fail the test of value added, or practical applicability' – N Rodley, 'Non- state actors and human rights' in S Sheeran and N Rodley (eds), *Routledge Handbook of International Human Rights Law* (Routledge 2013), 523.

determined by the sources of law, using a state-perspective methodology. As a result, states recognised the existence of victims' rights during the standard setting process only where there were clear state obligations; rights were never inferred. In this context, the victim oriented 'framework' of the Principles and Guidelines is fairly limited. Notwithstanding, delegations kept a flexible attitude towards the framework of the Principles and Guidelines, in great part due to the shared conviction that this was a victims' instrument that was very much needed. However, as will be explained, the formulas agreed to keep some of its provisions watered down key standards on reparation, including access to justice; universal jurisdiction; the duty to afford reparation; and collective rights.

Several debates during the consultative meetings confirmed the discrepancy between the victim perspective (as in victim-oriented 'framework', not victims' needs) and the state-focussed framework. For example, one of the most controversial questions during the adoption process was the 'scope' of the Principles and Guidelines. There was vast disagreement in regards to the consequences of including IHL violations in a reparation instrument guided by principles of state responsibility – in particular because non-state actors can commit IHL violations during non-international armed conflicts.⁷¹³ It was unclear for many what the scope of states' obligations was in this regard. Equally, several delegations had reservations on what rights of victims arise in this type of scenario.

⁷¹³ None of the IHL instruments refer to responsibility for violations by non-state entities, but it is clear that if a non-state actor has international obligations it can be responsible for a breach thereof. See generally: L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002).

Others questioned whether an individual right to a remedy exists in the laws of armed conflict or if individual rights exist at all under this legal regime.

These were major questions that were difficult to settle in the forum in which they were being discussed. After all, as explained in Chapter 3, the precise relationship between HR and IHL has been subject to much debate.⁷¹⁴ During the consultation stage, the United States made the point that there are important differences between these two bodies of law, suggesting that the instrument should only address human rights. The U.S. delegation made three arguments. The first, that IHL already recognised: specific remedies binding on states with respect to criminal sanctions; the duty to search for offenders of certain violations; and compensation. Therefore, the United States suggested the Principles and Guidelines could create confusion when placed alongside binding IHL treaties. The U.S. delegation also argued that under IHL violations, remedies vary with respect to different categories of violations and that this distinction was not reflected in the draft instrument under review. Ultimately, the state argued that the UN CHR did not have the authority to deal with questions of IHL.⁷¹⁵ Germany similarly argued that there is no right to a remedy and reparation for individual victims under IHL. When Germany abstained before the 61st UN CHR on 19 April 2005, it gave the following ‘Explanation of Vote’:

⁷¹⁴ It is clear that the two bodies of law share the same philosophical underpinning and that HR has had an important influence on the development of IHL. See: T Meron, ‘The Humanization of Humanitarian Law’ (2000) 94(2) *American Journal of Intl Law* 239.

⁷¹⁵ General Comments of the United States on the Basic Principles and Guidelines on the Right to a Remedy for Victims of Violations of International Human Rights and Humanitarian Law, UN Doc (as revised August 15 2003; on file with the author).

[...] Germany very much regrets not to be able to subscribe to the ‘Basic Principles and Guidelines’ annexed to the resolution before us [f]or the following reasons:

Second, despite a claim to the contrary contained in the preamble, the ‘Basic Principles’ fail to adequately differentiate between human rights law on the one hand and international humanitarian law on the other. While it is true that under certain regimes such as the European Convention on Human Rights, violations of human rights may lead to an individual claim to reparation, this is certainly not true as far as violations of international humanitarian law are concerned. We firmly disagree with the proposition that such rights exist under the IV Hague Convention of 1907 or the First Additional Protocol to the Geneva Conventions of 1949.⁷¹⁶

On the other hand, several delegations argued that the instrument would be crucial for the protection of victims of mass atrocities, particularly those committed during wartime, as well as having a deterrent effect for future violations. It was also stressed that the mandate of the CHR given to the Consultative Meeting covered both types of violations and that it would be completely artificial to separate them in an instrument dealing with the legal consequences of such violations. As with the Rome Statute of the ICC, it was considered necessary to cover serious violations of both international HRL and IHL.⁷¹⁷

The substance of this debate is addressed in more detail in Chapter 3. It is important nonetheless to highlight here that these arguments reflected a tension between the desire to create a victim-oriented framework for the Principles and Guidelines and the state-focus methodology normally employed when drafting international instruments.⁷¹⁸ The

⁷¹⁶ 61st UN Commission on Human Rights, Explanation of Vote, Item 11-L.48, 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, Geneva (19 April 2005) Permanent Mission of Germany (on file with author).

⁷¹⁷ The Rome Statute, note 39, also provides for reparation to victims of the crimes covered by the Statute (Article 75).

⁷¹⁸ Even human rights treaties deal with primary obligations between states to ‘respect and implement human rights’. The unique nature of the UN Principles and Guidelines is that it deals with secondary rights,

reading of international law standards by the U.S. and Germany in this regard clearly establishes different remedial rights to victims of the same violations, and presumably of the same international crimes (e.g. torture, disappearance, slavery). The rights would vary, therefore, depending on whether the violations are committed during war, peace, international conflict, non-international conflict, and so on. Without discussing the merits of these arguments, it is clear that such reading organises principles based on specific instruments and isolated sources as opposed to according to the needs of the victims.

At the end, it was agreed by the majority of participants that by restricting the scope of the Principles and Guidelines to ‘gross’ HR violations and ‘serious’ IHL breaches, it was appropriate to retain IHL in the text. While according to the Preamble these are distinct but complementary regimes,⁷¹⁹ it is clear that the legal regime that applies to serious and gross violations is more similar to each other than the legal regime for other types of violations. The amendment therefore facilitated the finalisation of the instrument during the Third Consultative Meeting in 2004. After all, the legal consequences in regards to the rights of victims arising from gross and serious violations of human rights and IHL, which in principle also constitute crimes under international law, are the same: the right to a judicial remedy, universal jurisdiction, the non-applicability of statutes of limitations, and so on.

like the ILC Draft Articles on State Responsibility, but under the premise that these rights belong to individuals against states or other non-state actors directly under international law.

⁷¹⁹ Emphasising 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 which are complementary though different as to their norms** [emphasis added]. UN Principles and Guidelines (n.2) .

The decision to restrict the instrument to serious violations was nonetheless highly controversial. Those states that were not in favour of this limitation asserted two main arguments: firstly, the draft instrument had for many years covered *all* violations. It was argued that restricting its scope in the final stages could give the wrong impression that the right to reparation – particularly the forms of reparation described in the Principles and Guidelines – would only apply to the most severe violations. Secondly, it was argued that the Principles and Guidelines are a declarative instrument only, and that no other similar instrument dealing with victims of human rights abuses differentiates between the gravity of the violations.⁷²⁰ Principle 26 was included to address some of these concerns:

26. Nothing in these Basic Principles and Guidelines shall be construed as restricting or derogating from any rights or obligations arising under domestic and international law. In particular, it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law. It is further understood that these Basic Principles and Guidelines are without prejudice to special rules of international law.

Another heated debate took place in relation to the question of whether legal persons like corporations (or other non-state actors) can commit human rights violations.⁷²¹ As in the case of IHL violations committed by non-state actors, states questioned what would be the legal consequences of this assertion in an instrument establishing an obligation of states to afford remedies and reparation. Can states be liable to afford legal remedies under state responsibility principles (like access to justice) when non-state actors are

⁷²⁰ The second argument was mainly argued by the Group of Latin American and Caribbean Countries ('GRULAC') during the third consultative meeting in 2004, in particular by Ecuador and Peru. REDRESS, summary of the Third Consultative Meeting, (on file with the author).

⁷²¹ For example, there are many General Assembly Resolutions qualifying 'terrorism' as a violation of human rights. See: A/RES/48/122 (20 December 1993); A/RES/49/185 (23 December 1994); A/RES/54/164 (17 December 1999); A/RES/56/160 (February 2001).

ultimately liable? And more importantly, would such assertion bring more or less protection to victims (i.e. recognising non-liability of states for human rights violations)?

Principle 3 establishes that the obligation to respect, ensure respect for, and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, '[...], the duty to: (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, *irrespective of who may ultimately be the bearer of responsibility for the violation*'.⁷²² While in principle this seems like a valid solution to the question of non-state responsibility, in practice, there are many questions that remain open. For instance, are all states obliged to afford judicial remedies regardless of where the serious/gross violations are committed and the nationality of the alleged perpetrators or victims?⁷²³ What about concurrent liability between state(s) and non-state actor(s)? What is the relationship between this principle (access to justice) and jurisdictional barriers like immunities?

In general, the inconsistencies encountered during the process as a result of the tension between the 'victims' perspective' and the state-centric methodology were not thoroughly resolved. The issues were complex and extensive and there was a need to finalise the drafting process in order not to abandon the initiative. At the beginning of the

⁷²² Principle 3, UN Principles and Guidelines. See: Bassiouni, 'International Recognition' (n 18) 210. (emphasis added).

⁷²³ See, for example, *Kiobel v. Royal Dutch Petroleum Co.* (n 588), where the United States Supreme Court found that the Alien Tort Claims Act presumptively does not apply extraterritorially. See also *amicus curiae* submitted by the European Commission on Behalf of the European Union <http://www.cja.org/downloads/EuropeanCommissionEU.pdf>, accessed 8 April 2016.

consultation stage, the Chairperson had clarified the use of the terms ‘shall’ and ‘should’ in the draft. It explained that the term ‘shall’ was used for binding norms and the term ‘should’ was used for ‘less mandatory’ norms. However, it was unclear what ‘less mandatory norms’ means.⁷²⁴ Having this in mind, when a number of delegations were not prepared to accept some of the standards as reflected in the draft Principles and Guidelines, it was suggested during the Third Consultative Meeting that the Principles and Guidelines could be differentiated through the use of ‘shall’ in cases where international norms existed and otherwise with the use of ‘should’ for emerging/non-binding norms.

Many perceived this proposal as a slippery slope. From the very beginning it had been agreed that the Principles and Guidelines should reflect the progressive nature of international law, particularly in the area of victims’ rights. It was considered inappropriate to make such a stringent demarcation when it had not been possible to reach an agreement in some of the overall topics/discussions surrounding these rights. For example, after the first consultation, some delegations challenged the definition of ‘victims’ in the draft instrument. Said definition was almost identical to the definition of victims in the 1985 Victims’ Declaration.⁷²⁵ The definition stayed in the final version. It was argued that the UN CHR should not supersede a definition already adopted by the UN General Assembly. But it became clear that the drafters needed to be careful not to retreat from accepted standards. Eventually, since previous texts referred to ‘should’ in

⁷²⁴ The Chairperson’s report of the First Consultative Meeting tried to clarify the existing use of the terms. Report of the First Consultative Meeting (n. 670) 6 [9].

⁷²⁵ Victims’ Declaration (n 643).

certain provisions reflecting long-established principles of law (such as principle 19 on restitution), and since it became clear that no consensus could be reached in the use of ‘shall’ and ‘should’ for binding and non-binding norms, other drafting formulas were agreed during the third and last consultation to prevent diluting existing standards on reparation. For example, the principles on universal jurisdiction and on statutes of limitations used the formula ‘where so provided in an applicable treaty or contained in other international legal obligations’. ‘Where appropriate, and in accordance with domestic law’ was used in Principle 8 to include as victims’ immediate family or dependents, or other types of indirect victims. Similarly, the introductory paragraph to the forms of reparation (Principle 18) establishes that ‘in accordance with domestic and international law’, victims ‘should’ be provided with full and effective reparation, or Principle 12, where right to access to an effective judicial remedy is recognised ‘as provided for under international law’.

It is clear that these references defeat the intention to consolidate in one instrument the international rules on reparation for individual victims.⁷²⁶ It makes it necessary to look at other legal sources in order to clarify *what* are the international standards or *which* are the legal sources that bind states. Moreover, the Chairperson’s clarification of the use of the terms ‘shall’ and ‘should’ in the report of the First Consultative Meeting creates the impression that when the instrument uses ‘should’ it is understood to be a non-binding guideline. The concept of ‘less mandatory’ norms for those principles using ‘should’ is

⁷²⁶ As it becomes evident in the Chairperson’s conclusions of the First Consultative Meeting, the intention of the UN Principles and Guidelines was to reflect the existing rules of reparation in international law: ‘Comment 7. The Draft properly introduces no new legal principles of obligations, but only consolidates existing norms as they evolved’. Report of the First Consultative Meeting (n. 670).

simply not understood nor accepted. Shelton explains that, ‘the application of this criterion appears conservative in some parts of the draft’. She gives as examples the use of ‘should’ in the paragraph describing the forms of reparation, in the paragraph that contains the definition of restitution ‘that is by no means innovative’, and in the next paragraphs saying that ‘compensation should be provided for any economically assessable damage’. ⁷²⁷ The truth is that the principles in these paragraphs were seldom contested during the consultation stage. Thus the language originally used (before the start of the endless discussions on the meaning of the use of the terms ‘shall’ and ‘should’) was simply copied to the following drafts until the last one was adopted. Unfortunately, due to the discussions surrounding the use of these terms and the unclear ‘clarification’ in the Chair’s report of the first consultative meeting, it can now be interpreted as if the drafters considered these principles as non-binding and thus they used the word ‘should’.

The weaker or ambiguous result is in part a consequence of the back and forth of the terms ‘gross’/‘serious’ or similar wording in the drafting process and the debate on whether to include/remove IHL violations. During the negotiations, some delegations contended that many of the provisions in Bassiouni’s 2000 draft discussed during the First Consultative Meeting did not apply to *all* violations of HR and certainly not to some (or none) of the violations of IHL. This discussion continued during the next round of negotiations. As a result, the words ‘gross’ and ‘serious’ were put back in brackets after the second Consultative Meeting. At the end of the third and last consultation, the scope

⁷²⁷ Shelton, *Remedies* (n 12) 147.

of the instrument was finally reduced once more to the most severe violations. But at this point it was already too late to reopen the debate on the clear application of some of the provisions to gross and serious violations. It was the last opportunity to adopt the instrument and participants decided to reach a compromise to keep these provisions in the instrument, even if they were a weaker version. For example, Principle 5 on universal jurisdiction⁷²⁸ and Principle 6 on statutes of limitations⁷²⁹ use the formula ‘where so provided in an applicable treaty or under other international law obligations’, notwithstanding their applicability to severe violations that constitute international crimes. Similarly, Principle 12 on access to justice⁷³⁰ establishes equal access to an effective judicial remedy, but using the phrase ‘as provided for under international law’. Even Principle 18, establishing that victims should be provided with full and effective reparation, uses the formula ‘in accordance with domestic law’. This reference may imply that the obligation to provide reparation is subject to internal law. It can thus give the

⁷²⁸ Principle 5. To that end, where so provided in an applicable treaty or under other international law obligations, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction. Moreover, where it is so provided for in an applicable treaty or other international legal obligations, States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

⁷²⁹ Principle 6. Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

Principle 7. Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

The final wording of Principle 7 on the application of ‘non restrictive’ statute of limitation in case of civil procedures made it unclear whether it refers to civil and other (non-criminal) procedures of non-gross/non-serious violations only (which are not supposed to be included in the instrument) or whether it refers to all non-criminal procedures including violations that constitute crimes under international law.

⁷³⁰ Principle 12. 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

impression that reparation is more a matter of charity than a legal imperative under international law. Furthermore, and as mentioned earlier, the use of ‘should’ gives the impression that the drafters considered this a non-binding principle, despite clearly restating existing law.

It is difficult not to wonder whether the outcome of the Principles and Guidelines would have been clearer and stronger if the original scope had been maintained. After all, the IHL violations covered under the notion ‘serious violations of IHL’ as applied in the Principles and Guidelines would seem to be included in the notion of ‘gross human rights violations and fundamental freedoms’. It is not hard to imagine that states would have been less reluctant to apply these principles and guidelines to the most serious HR violations than to all violations of HR and IHL.

While no agreed definition exists of the term ‘gross human rights violations and fundamental freedoms’, the expression has a long history in the United Nations. The well-known ECOSOC resolutions 1235 and 1503, which were at the basis of defining the competence of the CHR to deal with violations of human rights, refer to ‘gross’ violations and ‘a consistent pattern of gross and reliably attested violations of human rights’. Clearly, the ‘consistent pattern’ related to the scale of the violations and the word ‘gross’ to the nature of the violations. From the *travaux préparatoires* of the 1503 procedure, it appears that the term ‘gross violations’ refer to violations of civil and political and economic, social and cultural rights, occurring in any part of the world and under any circumstances, including in situations of armed conflict, and breaches of IHL

or threat to peace.⁷³¹ The Vienna Declaration of 1993 also refers to gross violations of HR in the context of armed conflicts: ‘23. [...] The World Conference on Human Rights recognises that gross violations of human rights, including in armed conflicts, are among the multiple and complex factors leading to displacement of people’.⁷³²

On the request of Sub-Commission members, van Boven, then Special Rapporteur on the right to reparation, had to explain what was understood by the term ‘gross violations’. In his 1993 report, van Boven clarifies: ‘It appears that the word ‘gross’ qualifies the term ‘violations’ and indicates the serious character of the violations but that the word ‘gross’ is also related to the type of human right that is being violated’.⁷³³ He indicates as useful guidance the work of the ILC’s draft Code of Crimes Against the Peace and Security of Mankind, Common Article 3 of the Geneva Conventions of 12 August 1949, and the Third Statement of the Foreign Relations Law of the United States (section 702).

The relationship between HR law and IHL, as well as the use of ‘serious’ as a specific category of IHL violations, is explored in Chapter 3. It is clear nonetheless that the IHL violations covered under the notion ‘serious violations of IHL’ as applied in the Principles and Guidelines is included in the notion of ‘gross human rights violations and fundamental freedoms’ that are understood to apply in times of peace and during periods of armed conflict. Therefore, it is valid to ask whether the explicit use of IHL in the

⁷³¹ E/AC.7/SR.638, cited in Frequently Asked Questions, ‘How to submit communications to the Human Rights Council’, OHCHR <<http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx>> accessed 6 April 2014.

⁷³² Vienna Declaration and Programme of Action <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>, accessed 6 April 2014.

⁷³³ van Boven, ‘Study concerning the right to restitution’ (n 17).

instrument was really necessary and whether it brought more clarity or simply more confusion, especially when the scope of the draft instrument was expanded to include all types of violations (not only gross and serious). While nothing in IHL precludes the right to a remedy and reparation, it is less clear whether there is a direct source affording victims a right to a remedy and reparation under this legal regime (as opposed to under general principles of international/state responsibility principles or under HR law applicable to armed conflicts).⁷³⁴

Still, the final text of the Principles and Guidelines describes the adequate forms of reparation under international law and is the first international instrument to clarify the difference between the obligation to provide effective access to justice through judicial remedies and the obligation to afford substantive reparations. The UN General Assembly adopted it in 2005 without a vote, marking a milestone in the lengthy process towards the framing of victim-oriented policies and practices.

The drafting history and adoption process reflects the existing back and forth of the recognition of victims' rights within the realm of international law debates. It is clear that the instrument was initiated at a time when human rights and victims' demands were at the core of international politics (after the end of the Cold War), coinciding with an increasing awareness of the prevalence of victims' rights (a tendency illustrated by the

⁷³⁴ For a detailed discussion see Chapter 3 exploring whether there is a right to a remedy and reparation for IHL violations. Generally speaking, there is nothing in IHL that precludes this right [Hampson and Salama, 'The relationship' (n. 507)] and as Cordula Droege puts it, 'it is now clear that the simple statement that there is no right to reparation for violations of IHL is not adequate anymore in light of evolving law and practice'. C Droege 'The interplay' (n. 488) 2.

granting of standing to victims to participate directly in proceeding before the ICC). But as described earlier, this changed during the drafting and negotiation process (after 9/11 and Durban) and has continued to do so.⁷³⁵

C. Definition of victim

As one of the root concepts of reparation, the notion of ‘victim’ is a central question when exploring the right to a remedy and reparation for victims. After all, reparation occurs in response to victimhood. But despite being a core concept of reparation, defining the notion of ‘victim’ has proved a challenge.⁷³⁶ The drafting exercise of the Principles and Guidelines was no exception. The definition of victim was one of the most debated standards. The same was true during the debate of the definition of victim in the ICC negotiations.⁷³⁷ In both cases, the 1985 Victims’ Declaration⁷³⁸ was taken as the starting point:

A. Victims of crime

1. “Victims” means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.

2. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term “victim” also

⁷³⁵ The history of the drafting process up until its adoption is described at the beginning of this chapter. For recent developments in this area see discussion of *Germany v Italy* in Chapter 3.

⁷³⁶ See H Robouts and S Vandeginste ‘Reparations for Victims of Gross and Systematic Human Rights Violations: the Notion of Victim’ (2003) 16 World Legal Studies. Available at: <<http://scholar.valpo.edu/twls/vol16/iss1/5>> accessed 8 April 2016.

⁷³⁷ See: S Fernandez de Gurmendi, ‘Definition of Victim and General Principle’, in RS Lee (ed), *The International Criminal Court: Elements of Crime and Rules of Procedure and Evidence* (Transnational 2001) 427.

⁷³⁸ See: n. 643

includes, where appropriate, 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.

3. The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability.

Since no compromise was found for a definition of the term during the drafting and negotiation of the Rome Statute,⁷³⁹ it was placed in the Rules of Procedure and Evidence (RPE).⁷⁴⁰ Notably, the vast majority of delegations supported in principle a broad definition in the RPE based on the Victims' Declaration. This support lasted long into the process. However, various delegations had difficulties with some of the terms used in the Victims' Declaration's definition. In light of these difficulties, Japan proposed to have no definition at all or to have a very broad one that would give ample discretion to the Court itself.⁷⁴¹ As a result, Rule 85 simply defines 'victims' as 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the ICC'. Importantly, Rule 85 further provides that 'victims may include organisations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes'.⁷⁴² In other words, the definition also recognises legal persons as victims. An interesting development worth mentioning is that the ICC Pre-Trial Chamber took into account the definition of victim

⁷³⁹ S Fernandez de Gurmendi and H Friman, 'The Rules of Procedure and Evidence of the International Criminal Court' (2000) 3 Yearbook of International Humanitarian Law 157, 181.

⁷⁴⁰ International Criminal Court, Rules of Procedure and Evidence, UN Doc PCNICC/2000/1/Add.1 (2000).

⁷⁴¹ See n 737

⁷⁴² See n 740

in the Victims' Declaration and in the Principles and Guidelines when determining the category and scope of victim participation in ICC proceedings.⁷⁴³

The Principles and Guidelines reproduce almost word for word the definition of victim in the Victim's' Declaration. Despite the opposing outcomes, the debates during the drafting process were similar to those at the ICC. The first draft tabled at the consultation stage had, for the first time, a definition of victim.⁷⁴⁴ This definition was based on the 1985 Victims' Declaration, and generally all delegations agreed on the importance of having a definition of victims in the instrument and on the need of having one sufficiently broad and inclusive. However, during the third and last consultative meeting, some delegations started questioning some of the terms used in the definition, including the concept of legal persons and the inclusion of a member of the immediate family or a household of the direct victim as an indirect victim. As a result, the term household was removed as it did not appear in the definition of victims in the Victims' Declaration and the phrases 'where appropriate' and 'in accordance with domestic law' were added in Principle 8:

8. For purposes of this document, persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or

⁷⁴³ *Situation in the Democratic Republic of Congo*, Decision of the Pre-Trial Chamber I on the Application of Participation in the Proceedings, No: ICC-01/04 (17 January 2006).

⁷⁴⁴ The 2000 version drafted by Bassiouni contained a definition of victims in Principles 8 and 9 (n 668):
8. A person is "a victim" where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A "victim" may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm.

9. A person's status as "a victim" should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted.

While previous drafts did not have a definition of victim, van Boven does refer to the Victims' Declaration in his 1993 Report, see: van Boven, 'Study concerning the right to restitution' (n 17) [3].

*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. **Where appropriate, and in accordance with domestic law,** 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 victimisation [emphasis added].*⁷⁴⁵

9. A person’s status as “a victim” should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted.

The following elements are included in this concept of ‘victim’: the harm or loss which the person has suffered regardless of whether a perpetrator is identified or his/her relationship with the victim; the different types of harm or loss which can be inflicted through acts or omissions; direct and indirect victims of violations, and their respective entitlement to reparations; and whether the harm suffered is individual or collective.

The importance of recognising the victims’ right to redress regardless of the failure of authorities to link their harm or loss to a specific crime and/or a perpetrator is multi-layered. It is particularly relevant in cases of serious HR and IHL violations, as it is often difficult if not impossible to identify a perpetrator. In most cases, victims can only provide evidence on the harm endured (fiscal and psychological) and sometimes, circumstantial evidence, for example, showing that he/she were detained. In *Velásquez Rodríguez*, the IACtHR explained that circumstantial or presumptive evidence is especially important in allegations of serious HR violations, such as torture or disappearances, because this type of repression is characterised by an attempt to suppress

⁷⁴⁵ Emphasis added.

all evidence, leaving no traces of the torture or the identification of the torturer and/or hiding information about the kidnapping or the whereabouts and fate of the victim.⁷⁴⁶ Human rights jurisprudence establishes that the burden of proof in cases of torture – to provide a plausible explanation of the harm suffered during detention – switches to the state.⁷⁴⁷ The same rationale applies to cases of forced disappearances, where authorities have the burden of proving the whereabouts of persons who were detained or arrested.⁷⁴⁸ In these cases, the state is obliged to investigate and punish the perpetrators, and regardless of the success in this endeavour, the state is responsible to afford reparations.

Clearly, there are situations where individual perpetrators are identified and they can be held liable to provide reparation to victims. Principle 15 establishes that: '[...] In cases 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 or compensate the State if the State has already provided reparation to the victim'. But when violations are executed on a massive scale, it is virtually impossible even for willing authorities to match victims with

⁷⁴⁶ *Velásquez Rodríguez* (n 164) [134] et seq. Annual Report of the Inter-American Court of Human Rights.

⁷⁴⁷ The European Court recognised that because of the specific nature of torture, in cases where an individual is taken into police custody in good health but is found to be injured at the time of release, a clear presumption of responsibility arises under Article 3 of the Convention. See *Aksoy v. Turkey* (1996) ECHR 23 (18th December 1996) EHRR 553 [61]; *Tomasi v France* (9913) ECHR, (27 August 1992) 15 EHRR 1 [108-111]; and *Ribitsch v Austria*, (1996) ECHR 21 (4 December 1995) EHRR 573 [34]. In *Albert Womah Mukong v. Cameroon*, the UN Human Rights Committee explained that because of the nature of serious human rights violations like torture, 'the burden of proof cannot rest alone with the author of a communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to the relevant information [*Albert Womah Mukong v. Cameroon*, Views on Communication No. 458/1991 (21 July 1994)]'.

⁷⁴⁸ 'The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible.... **In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defence that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation [emphasis added]**'. *Velásquez Rodríguez* (n 164) [134] et seq.

perpetrators. In either case, there remains an obligation on the part of the state to provide reparation to victims for an act or omission that can be attributed to it. This is irrespective of whether a natural or legal person has been found liable (individuals and states can have concurrent liability for the same violations). In cases where states are not responsible for the violations (for example, in internal armed conflicts insurgents who are parties to the conflict might be liable for breaches of IHL),⁷⁴⁹ the Principles and Guidelines consider that ‘States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations’.⁷⁵⁰

The ICC Pre-Trial Chamber I decision in the *Situation in the Democratic Republic of Congo*⁷⁵¹ established that victims have a right to participate during the investigation phase, regardless of whether any ‘suspects’ have been identified or formally charged. As such, they are recognised as ‘victims’ even before defendants are identified and arrest warrants are issued.⁷⁵² Similarly, the Regulations of the Trust Fund of the ICC allow the Board of Trustees to use the voluntary contributions to benefit victims from the initial announcement of the opening of a formal investigation.⁷⁵³

⁷⁴⁹ In these cases, states will have the obligation to investigate and prosecute alleged non-state perpetrators when the violations occurred under their jurisdiction, and if the violations were committed by non-State actors who then become the new government of the state (for example in a revolution or a war of independence) or form a new state (war of cessation), then the new government will have the responsibility to afford full reparation.

⁷⁵⁰ Principle 16, Principles and Guidelines (n.22).

⁷⁵¹ *Situation in the Democratic Republic of Congo*, Decision of the Pre-Trial Chamber I on the Application of Participation in the Proceedings, No ICC-01/04 (17 January 2006).

⁷⁵² In these cases, potential massive applications to participate in proceedings might be problematic as well as the inevitable discrimination between victims that fall within the jurisdiction of the court and those that don’t (e.g. situations where formal investigations are opened and those where individuals are charged).

⁷⁵³ See Regulations of the ICC Victims Trust Fund. Available at: <<http://www.icc-cpi.int/linary/asp/PartIII - Resolutions.pdf>> accessed 8 April 2016.

The Principles and Guidelines also recognise that the term ‘victim’ may include 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 victimisation. There is no question of who is a direct victim – the person that is unlawfully killed, disappeared, and/or tortured. However, there are cases where the immediate family members and/or dependants might be considered indirect victims, as they are also affected by the violation. For example, a mother can suffer moral damage for the loss of a son, but can also suffer material damage if she was economically dependent on him. Furthermore, an indirect victim (such as the mother) whom the authorities have treated badly in regard to the disappearance of her son may herself be conceived of and claim reparation as a direct victim precisely because of her own, separate mistreatment by the official authorities. In such a case, the failure of the authorities to deal properly with the initial breach (that is, their failure to investigate and/or to reveal what they know or should know about the disappearance) causes additional harm to the mother, over and above what she has already suffered by her son’s disappearance.⁷⁵⁴

⁷⁵⁴ ‘The notion of victim, of relevance to reparation, has experienced a necessary *enlargement*, comprising close relatives (of fatal victims) in their own right, in the settled case-law of the international tribunals (European and Inter-American Courts) of human rights’ – AA Cancado Trindade, *Access to Justice* (n 636) 131. For a detailed analysis on the evolution of the concept of victim in the jurisprudence of the Inter-American HR System and its impact on reparations see C Sandoval-Villalba, ‘The Concepts of “Injured Party” and “Victim” of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations’ in C Ferstman, M Goetz and A Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity: systems in place and systems in the making* (Martinus Nijhoff 2009) pp. 243–82. See also R Rubio-Marín, C Sandoval, C Díaz ‘Repairing Family Members: Gross Human Rights Violations and Communities of Harm’ in R Rubio-Marín (ed) *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (CUP 2009) pp. 215-291.

The 2000 Bassiouni version tabled during the First Consultative Meeting also included members of the household and legal persons in the range of possible ‘victims’. However, these individuals were not included in the final version. There were various debates over the terminology and elements used in the definition during the last consultative meeting. While several amendments had been made to the original definition during the course of the consultations (e.g. from ‘persons who suffer collectively’ to a ‘collective group of persons’ to again ‘persons who suffer collectively’), during the last consultative meeting a number of delegations questioned some of the references and elements in the definition. There were several debates over: the use of the term ‘collectively’; the need to include persons intervening on behalf of the victim; the references to an unidentified perpetrator; the lack of clarity of the term ‘immediate family’; and the need to include again legal persons as potential victims. In order to overcome the various differences, several delegations suggested that the text should reflect more faithfully the agreed language contained in the 1985 Victims’ Declaration,⁷⁵⁵ a document that had already been approved by the General Assembly. In the end, this was considered the best course of action, and for this reason members of the household and legal persons were not included in the final version. However, this was not sufficient. In order to reach a compromise, the wording ‘where appropriate, and in accordance to domestic law’ (a formula used in many principles during the last hours of the Third Consultative Meeting) was added. There is no similar reference in the 1985 Victims’ Declaration. The final version of Principle 8 reads: *‘Where appropriate, and in accordance with domestic law, the term “victim” also*

⁷⁵⁵ See: (n 643).

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 victimisation’.

The reference to domestic law is problematic since, as noted by Sadoval-Villalba, it would seem that ‘These phrases imply States are given the possibility to consider in which situations the extension the concept of victim can take place, and confirms that in all situations, such decision to extend the concept of victim would have to conform with domestic law.’⁷⁵⁶ She gives the example of the reparations afforded in South Africa in the context of the Truth and Reconciliation Commission which did not consider appropriate to afford a ‘victim’ status to the next of kin of direct victims who were alive: ‘[...] as a result, for instance, the domestic reparations programme of South Africa cannot be considered to be acting against the Basic Principles, when only awarded reparations to relatives and dependents of the direct victim of gross human rights violation had died’⁷⁵⁷.⁷⁵⁸ Finally, as Sandoval-Villalba observes, “[...] the problem is also how domestic law defines ‘immediate family’ and ‘dependents’ for the purposes of reparations. A narrow definition of these terms would go against the basic idea that gross human rights violations produce a domino effect that goes beyond the nuclear family of a person.”⁷⁵⁹

⁷⁵⁶ C Sandoval-Villalba, ‘The Concepts of “Injured Party” and “Victim” of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations’ in C Ferstman, M Goetz and A Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity: systems in place and systems in the making* (Martinus Nijhoff 2009) p. 248. (hereafter ‘Injured Party’)

⁷⁵⁷ B. Goldblatt, ‘Evaluating the Gender Content of Reparations: Lessons from South Africa’ in R Rubio-Marin, *What Happened to the Women? Gender and Reparations for Human Violations* (New York, Social Science Research Council, 2006), 48-91.

⁷⁵⁸ C Sandoval-Villalba, ‘Injured Party’ pp 248–249.

⁷⁵⁹ Idem.

The fact that the final draft of the Principles and Guidelines does not specifically mention members of the household as possible victims does not mean that they cannot be indirect victims. Human rights jurisprudence shows that persons with a close connection to the direct victim can also suffer harm attributable to the same violation.⁷⁶⁰ Similarly, legal persons like organisations and institutions with legal personality can also be considered victims. For example, a museum could be considered to have been harmed by the theft or destruction of cultural property protected by the Second Protocol to the 1945 Hague Convention, which is a violation under its Article 15.⁷⁶¹ In the context of ICL, as mentioned earlier, Article 85(b) of the ICC RPE includes as victims ‘organisations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes’.⁷⁶²

The definition of victims also includes persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation. It is very common for human rights lawyers or doctors assisting victims of human rights abuses to be targeted. When

⁷⁶⁰ ‘While the original concept of indirect victim was restricted to persons who could suffer damage as a result of the violation or who could have a valid personal interest in securing the cessation of such violation, over the years the indirect victim concept has been transformed into a means of third party involvement. Indirect victims have been allowed to act on behalf of direct victims who were themselves unable to present their cases’. T Zwart, *The Admissibility of Human Rights Petitions: The Case Law of the European Commission of Human Rights and the Human Rights Committee* (Martinus Nijhoff Publishers 1994) 70. For discussion of the concept of indirect victim see generally AA Cancado Trindade, *Access to Justice* (n 636) and D Rodriguez Pinzon, ‘The “Victim” Requirement. The Fourth Instance Formula And The Notion Of ‘Person’ in the Individual Complaint Procedure of the Inter-American Human Rights System (2001) 7 ILSA J Int’l & Comp L 369.

⁷⁶¹ Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999 (26 March 1999) 2253 U.N.T.S. 212.

⁷⁶² See: n 740

considering the harm suffered, the context in which the violations took place needs be taken into account to define his/her victimisation and right to reparation. For example, a lawyer defending victims of gross abuses might be molested and intimidated through phone calls, written threats, random questionings, short detentions, and/or ‘mistaken’ arrests. In these cases, although the person is only a direct victim of non-serious violations, the distress, harm, and loss suffered need to be considered in the context of the overall pattern of serious violations of international human rights or humanitarian law.

Finally, although the final version of the Principles and Guidelines does not include some of the provisions relating to collective reparation in previous texts,⁷⁶³ Principle 8 recognises that persons can suffer collectively. The ninth paragraph of the Preamble goes further, noting that groups of persons can also be victims: ‘*Noting further that contemporary forms of victimisation, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively*’.

The question of collective rights and remedies and the definition of ‘victims’ sparked several debates during the consultative meetings. Some states contended that human rights are ‘individual’ rights, while other states argued for the recognition of ‘collective’ rights (and, accordingly, the definition of victims needed to reflect these positions). Conversely, those states (mainly Western countries) that argued that collective rights do not exist in international law considered it appropriate to retain a provision giving victims

⁷⁶³ For example, the 5 August 2004 draft of the Third Consultative Meeting suggested the deletion of a ‘collective group of persons’ from the definition of the previous draft that had the following definition of victim: ‘A person or a collective group of persons who individually or collectively suffer harm [...]’, (on file with the author).

the procedural right to claim collectively; those states that argued for the recognition of collective rights (including African and Latin-American states) did not agree that an international obligation to afford collective procedural remedies, like a class action, existed under international law. The definition of ‘victim’ in Principle 8 recognises that victims can be ‘persons who individually or collectively suffered harm’. On the other hand, the Preamble recognises ‘groups’ of victims.

The definition of ‘victims’ is crucial because reparation must be adequate and proportionate to the type and gravity of the violation and the needs of victims. If victims are targeted as a community and therefore suffer collectively, the appropriate form of reparation should also be collective. Still, the question of whether the reparations are due to a group of persons that has suffered collectively, as opposed to persons within that group, is still unclear. This debate goes to the heart of the discussion of whether ‘groups’ (in a ‘corporate’ sense, conceived as single integral entities) can be holders of human rights directly or whether only the ‘members’ belonging to a group who have been targeted because they belong to such an entity are the direct holders of these rights.⁷⁶⁴

⁷⁶⁴ Most human rights treaties reflect an individualistic concept of rights and rights-holders. But for many indigenous peoples their identity as an individual is inseparably connected to the community to which that individual belongs. Therefore the problem is that whilst human rights treaties and instruments guarantee individual rights, indigenous peoples ask for protection of their collective rights as a group. See P Jones, ‘Human Rights, Group Rights, and Peoples’ Rights’ (1999) 21(1) Human Rights Quarterly 80. See also D Sanders, ‘Collective Rights’ (1991) 13(3) Human Rights Quarterly 368; K Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights, and the Right to Self-Determination* (Martinus Nijhoff Publishers 2000).

Human rights mechanisms, notably the Inter-American System, have recognised the need for collective reparation.⁷⁶⁵ While the IACtHR did not initially acknowledge collective harm, it sometimes provided reparations that benefitted the community.⁷⁶⁶ Recent jurisprudence has granted reparations to communities and not only individuals.⁷⁶⁷ However, Zwanenburg argues that while human rights monitoring bodies have recognised a collective element of HR, this has not necessarily been in a ‘corporate’ sense. He refers to the *Mayagna (Sumo) Awas Tingni Community* case and notes the wording used by the IACtHR when referring to the violation of the right to property: ‘155. For all the above, the Court concludes that the State violated article 21 of the American Convention, to the detriment of **the members of** the Mayagna (Sumo) Awas Tingni Community, in connection with articles 1(1) and 2 of the Convention]’.⁷⁶⁸ In his view, the use of the phrase ‘the members of’ is not accidental.⁷⁶⁹

While there is a more explicit recognition of a collective victim by the IACtHR in the latter case *Saramaka v Suriname*, the Court uses the same language: “189. [...] the Court considers **the members** of the Saramaka people as the “injured party” in the present case

⁷⁶⁵ For an analysis of the different approaches to collective reparations by human rights bodies see: C Evans, *Reparation for Victims of Armed Conflict* (n 11) 82.

⁷⁶⁶ IACtHR, *Aloeboetoe et al. v. Suriname*, Reparations and Costs, Series C No. 15 (10/09/1993), para.96.

⁷⁶⁷ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, supra n. 8, paras. 155 and 164; *Plan de Sánchez Massacre v. Guatemala*, supra n. 18, para. 62; IACtHR, *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Series C No. 124 (15/06/2005), paras. 176 and 194; *Yakye Axa Indigenous Community v. Paraguay*, supra n. 8, paras. 188-189; IACtHR, *Sawhoyamaza Indigenous Community v. Paraguay*, supra n. 8, para. 204. For a more detailed analysis of collective reparations afforded by international bodies, see Aubry, Sylvain, Henao-Trip, Maria Isabel (2011) ‘Collective Reparations and International Criminal Court’, *Reparations Unit Briefing Paper No. 2*. <http://www.essex.ac.uk/tjn/documents/Paper_2_Collective_Reparations_Large.pdf> Accessed 16 April 2016.

⁷⁶⁸ The *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, (*Judgment*) [August 31, 2001] Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001). (emphasis added).

⁷⁶⁹ M Zwanenburg, ‘An Appraisal’ (n. 644) 662.

who, due to their status as victims [...], are the beneficiaries of the collective forms of reparations ordered by the Court [emphasis added].”⁷⁷⁰ It further explains that while it normally requires the Commission to individually name the beneficiaries of possible reparations, in this case, given the size and geographic diversity of the Saramaka people, and particularly the collective nature of reparations to be ordered, it does not find it necessary to individually name the members of the Saramaka people in order to recognize them as the injured party. Importantly, the Court observes that the members of the Saramaka people are “identifiable in accordance with Saramaka customary law, given that each Saramaka individual belongs to only one of the twelve matrilineal *lōs* in which the community is organized”.⁷⁷¹

This approach seems different from that of the IACHR in the case of the 1991 *Caloto Massacre* in Colombia. In this case –where members of an indigenous community were massacred with the participation of the police— the Commission recommended that: ‘the State adopt the measures necessary to carry out the commitments regarding social reparations on behalf of the Paez indigenous community of northern Cauca’.⁷⁷² It referred to the recommendations of a committee set up for the settlement of the case, which had concluded that the Caloto massacre affected the entirety of the Paez indigenous community of northern Cauca and that the state should attend to its obligation to protect the fundamental rights of the indigenous peoples, whose first right, the right to life, should be understood in collective terms, as well as the right to ethnic and cultural

⁷⁷⁰ IACHR, Case of the Saramaka People. v. Suriname. [L] Preliminary Objections, Merits, Reparations, and Costs. [SEP] Judgment of November 28, 2007 Series C No. 172. (emphasis added).

⁷⁷¹ *Idem* para 188

⁷⁷² IACHR, Rep No 36/00, Case 11.10, *Caloto Massacre* (Colombia), (Apr. 13, 2000) [75(3)].

reproduction, the right to territory, and the right to self-determination.⁷⁷³

It seems that, as Zwanenburg acknowledges, the ambiguity in the Principles and Guidelines on collective rights – i.e. Principle 8, which recognises that persons can suffer collectively, while paragraph 9 of the Preamble establishes that contemporary forms of victimisation can be directed against groups of persons – is reflective of a wider debate under international law.⁷⁷⁴

3. State responsibility as the legal basis of the right to a remedy and reparation

A. Relationship between the Principles and Guidelines and the Draft Articles on State Responsibility

The first draft of the Principles and Guidelines was the result of an extensive study of legal resources on reparation in conventional and CIL. Its intention was to reflect existing norms. However, as the Principles and Guidelines would not constitute a treaty, they were drafted with a view to the application of their provisions in the light of current and future developments. The first 1993 draft merged existing norms of international law, as well as emerging concepts.

The final version, adopted on April 2005 after three consultative meetings, differs significantly from the original, but retains the essence of that instrument: (i) what constitutes an effective remedy for victims of violations of international human rights and

⁷⁷³ Idem [23].

⁷⁷⁴ M Zwanenburg, 'An Appraisal' (n. 644) 662.

international humanitarian law; and (ii) the various forms of reparation that exist under international law and that are considered adequate for such violations.

But what is the legal basis of the Principles and Guidelines? According to van Boven,⁷⁷⁵ the essence of the right to a remedy and reparation is reflected in the general principle of law of wiping out the consequences of the wrong committed.⁷⁷⁶ For this reason, he argues that is appropriate for the Principles and Guidelines to rely on the doctrine of state responsibility codified in the ILC Responsibility Articles.⁷⁷⁷

In his 1993 Study concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, van Boven explains: ‘the issue of State responsibility comes into play when a State is in breach of the obligation to respect internationally recognised human rights. Such obligation has its legal basis in international agreements and/or in customary international law, in particular those norms of customary international law that have a peremptory character (*jus cogens*)’.⁷⁷⁸

The aim of the Principles and Guidelines is to define the scope of the right to a remedy and reparation, and allow for the future development of procedural remedies and substantive reparations. Like the ILC Responsibility Articles, the instrument does not

⁷⁷⁵ van Boven, ‘Victims’ Rights’ (n 21) 24.

⁷⁷⁶ ‘Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed’. *Chorzów*, (n 22) 47.

⁷⁷⁷ ILC Responsibility Articles (n 23).

⁷⁷⁸ See: van Boven, ‘Study concerning the right to restitution’ (n 17) [41].

define what constitutes a substantive violation (in this case of international human rights law or international humanitarian law), but only describes the legal consequences (the rights and duties) arising from these violations and establishes appropriate procedures and mechanisms to implement them.

Although there are many similarities with the reparation provisions of the ILC Responsibility Articles, there are also important divergences. The ILC Responsibility Articles were drawn up in the context of inter-state relations and are not focused on the relationship between states and individuals, though there are still important parallels to draw. For example, cessation of a breach is included in Principle 22(a) of the Principles and Guidelines as a form of *satisfaction*, while the ILC Responsibility Articles do not include cessation on the reparation section. According to the structure of the ILC Responsibility Articles, cessation is part of the general obligation to conform to the norms of international law, not a form of reparation.⁷⁷⁹ The ILC Responsibility Articles also treat assurances of non-repetition as a separate and distinct legal consequence of the international wrongful act. Equally, the updated principles to combat impunity⁷⁸⁰ treat separately guarantees of non-repetition from reparation. According to the impunity principles, assurances of non-repetition may include reform of state institutions, the repeal of laws that contribute to or authorise violations of human rights, and civilian control of military and security forces and intelligence services (Principles 35-38, and 31-34). The Human Rights Committee notes that where appropriate, reparation can involve

⁷⁷⁹ Dinah Shelton also argues that cessation is not a part of reparation but part of the general obligation to conform to the norms of international law. See: Shelton, *Remedies* (n 12) 149.

⁷⁸⁰ Impunity Principles (n. 653).

restitution, rehabilitation, and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition, and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.⁷⁸¹

On the other hand, the Principles and Guidelines add rehabilitation as a form of reparation, which is not a form of reparation recognised at the inter-state level. But rehabilitation is an important component of an individual's reparation and it is a right specifically recognised in international instruments.⁷⁸² Similarly, other forms of non-monetary remedies such as satisfaction and guarantees of non-repetition, which are not perceived as essential measures or forms of reparation at the inter-state level, are extremely important in human rights cases. This is reflected in the Principles and Guidelines where satisfaction includes measures such as truth telling or recovery/reburial of victims' remains, and guarantees of non-repetition, including measures to strengthen national institutions under the rule of law or even law reform.

While there are clear differences between both instruments, the most significant is that the ILC Responsibility Articles deal with inter-state relations while the Principles and Guidelines deal with state-individual relations and arguably inter-individual (non-state actors) relations. The question of whether state responsibility principles apply to relations between states and individuals is discussed at length in Chapter 1. This chapter

⁷⁸¹ Human Rights Committee, General Comment 31 (adopted 29 March 2004); (UN Doc HRI/GEN/1/Rev, 8 233-238). See in particular [17].

⁷⁸² See, for example the UN Convention on the Rights of the Child and its Optional Protocol (n 39); UN Convention against Torture (n 39); Declaration on Enforced Disappearances (n 39); and Declaration on the Elimination of Violence against Women (n 39).

investigates whether individuals can have primary and secondary rights under general international law, including the right to claim reparation directly under international law (tertiary rights). However, it is important to review this question again in the context of the Principles and Guidelines since this was one of the criticisms raised by Germany at the 61st session of the UNCHR: '[...] The "Basic Principles and Guidelines" seek to apply the principles of state responsibility to relationships between states and individuals. This approach fails to take into account that those principles – as developed by the International Law Commission – only apply to inter-State relations'.⁷⁸³

Does the fact that the ILC Responsibility Articles were drawn up with inter-state relations in mind mean that the law on state responsibility does not apply to states' breaches of human rights of individual victims? van Boven argues that the construction of the concept of state responsibility to the inter-state context only ignores the historic evolution since WWII of HR becoming an integral and dynamic part of international law, as evidenced by numerous widely ratified international instruments.⁷⁸⁴ Referencing the work of Shelton, he claims that it also ignores the fact that the duty of affording remedies for governmental misconduct is so widely acknowledged that the right to an effective remedy for violations of human rights may be regarded as forming part of customary international law.⁷⁸⁵ Chapter 2 of this thesis also shows that human rights law has influenced the law of diplomatic protection (based on state responsibility) to the point

⁷⁸³ See (n 716) and accompanying text.

⁷⁸⁴ Van Boven, 'Victims' Rights' (n 21) 26. See also M Kamminga, 'Final Report on the Impact of International Human Rights Law on General International Law' in M Kamminga and M Scheinin (eds), *The Impact of Human Rights Law on General International Law* (OUP 2009).

⁷⁸⁵ See Shelton, *Remedies* (n 12) 28-29.

where it has evolved in its treatment of denial of justice as a right also belonging to individuals, as well as states.⁷⁸⁶ In this context, van Boven cites the Report of the International Commission of Inquiry on Darfur, where it is argued that the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on state responsibility. According to the Commission, these provisions may now be construed as obligations assumed by states not only towards other states, but also *vis-à-vis* the victims who suffered from war crimes and crimes against humanity.⁷⁸⁷

Importantly, as mentioned already in Chapter 1, Article 33 of the ILC Responsibility Articles confirms that reparation by the liable state may be owed both to other states and to injured individuals.⁷⁸⁸ In addition, the Commentary affirms that individuals at the international level can invoke the responsibility of a state on their own account and without the intermediation of any state.⁷⁸⁹

⁷⁸⁶ Chapter 2 discusses the evolution of the concept of diplomatic protection from the traditional *Mavrommatis* (n 279) conception to the contemporary understanding in *Diallo*, where instead of exercising diplomatic protection in its own right, the state does so as an agent on behalf of the injured individual: ‘the sum awarded to Guinea in the exercise of diplomatic protection of Mr Diallo is intended to provide reparation for the latter’s injury’ – *Diallo (Compensation)* (n 113) [57]. It also notes that the International Court of Justice, in *LaGrand* (n 92) and in *Avena* (n 123), has established that the breach of international norms on treatment of aliens may produce both the violation of a right of the national state and the violation of a right of the individual. The same conclusion was reached by the Inter-American Court of Human Rights, in its Advisory Opinion OC-16/99.

⁷⁸⁷ Darfur Report (n 100).

⁷⁸⁸ ‘This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State’, Article 32 (2), ILC Responsibility Articles (n 23). See also Commentary to Article 32 [3-4] reproduced in the Report of the ILC Responsibility Articles (n 23).

⁷⁸⁹ Commentary to Article 32 reproduced in the Report of the ILC Responsibility Articles (n 23) 233.

Zwanenburg, however, argues that Article 33 only makes clear that the ILC Responsibility Articles do not deal with the possibility of the invocation of responsibility by persons or entities other than states. In his view, while individuals might be holders of rights in international law and therefore have a secondary right to reparation, this does not mean that there is a right under CIL for the individual to claim such reparation directly without the intermediation of a state (e.g. via diplomatic protection or by setting international courts or other redress mechanisms as procedural means to enforce their substantial rights). He notes that the ILC commentary makes clear that *‘It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account’*.⁷⁹⁰

Chapter 1 already analyses the argument that individuals can have primary (substantive) rights and secondary (reparation) rights but that the secondary right to reparation does not entail a procedural right to enforce it (‘tertiary’ rights). It concludes that if an individual’s rights are breached, he/she has an actionable secondary right to reparation. The right to reparation entails both the substance of the relief and the procedure to enforce it. Claims can be pursued at the international level by the home state representing its national or, when possible, by the individual him/herself (e.g. before a HR court, monitoring body, claims commission, or arbitral tribunal). When the claims involve fundamental breaches, individuals can pursue these claims at the domestic level before national courts or before foreign courts.⁷⁹¹ Still, it is important to clarify that the ILC Commentary does not say that primary rules need to establish ‘international

⁷⁹⁰ Commentary to Article 32 reproduced in the Report of the ILC Responsibility Articles (n 23) 234 et seq.

⁷⁹¹ Personal and state immunities might prevent the exercise of jurisdiction by some domestic courts.

procedural mechanisms’ for non-state entities to be able to claim reparation directly under international law. It simply says that the primary rule will determine whether non-state entities can invoke responsibility on their own account.

Clearly, it is a matter of interpretation of the primary norm, and in principle non-state entities could invoke responsibility on their own account before an international body or in national courts. In this sense, it can still be argued that certain HR and IHL norms afford individual rights under CIL (e.g. *jus cogens*) and thus responsibility to afford reparation for these specific types of violations can be invoked in international or domestic fora (an argument implicit in the Principles and Guidelines). The ILC Commentary makes clear that ‘state responsibility for a breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as ultimate beneficiaries and in that sense as the holder of the relevant rights’.⁷⁹² The commentary noted by Zwanenburg cites the *Jurisdiction of the Courts of Danzig*, as well as *LaGrand*, to prove that individual rights under international law may also arise outside of the framework of human rights. Notably, the PCIJ affirmed in *Danzig* the existence of a right for an individual under international law despite the lack of an international procedural mechanism. It stated that national courts could enforce such rights.⁷⁹³ Similarly, the ICJ

⁷⁹² Commentary on Article 32, Report on ILC Responsibility Articles, (n 23) 234 et seq.

⁷⁹³ ‘[...] it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adaptation by the parties of some definite rules creating individual rights and obligations **and enforceable by national courts.**’ (emphasis added). *Danzig* (n 91) [17].

reaffirmed in *LaGrand* that individuals can have international rights despite their lack of general international standing and that these rights should be enforced domestically.⁷⁹⁴

B. Non-state actors

It is relevant to point out that the final version of the Principles and Guidelines does not appear to exclude non-state actors' responsibility. Principle 3, setting out the obligation to respect, ensure respect for and implement the law, and Principle 18, concerning full and effective reparation, are not by their wording limited only to states. The 2000 draft version, on the other hand, did refer to 'a State's duty' in Principle 3. Furthermore, Principle 3 establishes that the obligations to respect, ensure respect for and implement the law include '[...], the duty to: (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, *irrespective of who may ultimately be the bearer of responsibility for the violation*'.⁷⁹⁵

As mentioned earlier, how to deal with non-state actors was an important question for the drafters of the Principles and Guidelines. Arguably, if the standpoint is that of the victim, it should not matter whether a state or non-state actor commits the violation. For this reason, there was vast disagreement in regards to the consequences of including IHL violations in a reparation instrument guided by principles of state responsibility. After all, it is indisputable that non-state actors can commit IHL violations during non-international

⁷⁹⁴ *LaGrand Case* (n 92) [77].

⁷⁹⁵ UN Basic Principles (emphasis added), (n 2).

armed conflicts.⁷⁹⁶ It was unclear for many what the scope of states' obligations was in this regard. Equally, several delegations had reservations on what rights of victims' arise in this type of scenario.

Another contested question was whether legal persons like corporations or other non-state actors can commit human rights violations. It is generally accepted that non-state actors exercising authority (i.e. *de facto* authorities) or individuals linked to a state can commit and be responsible for human rights violations. Clearly, insurgents, rebels, and other non-state actors (e.g. terrorists) can commit international crimes, and in certain circumstances such acts can be labelled human rights violations (for example, when the rebels are in control of a region and are acting as sole authorities over civilians or when they are acting under the orders or acquiescence of the State).⁷⁹⁷ In other cases, where non-state entities or individuals commit heinous crimes, the HR violations would not consist in the actions of the private individuals/groups (that are not connected to the state nor have effective control), but, for example, in the omission of the state in preventing their actions. The HR violations are not the acts committed by the private individuals, but the acts or omissions of the state.⁷⁹⁸

The question of non-state responsibility for HR violations is certainly not settled under international law. There is some state practice that refers to human rights violations by

⁷⁹⁶ While IHL instruments do not refer to responsibility for violations by non-state entities, it is clear that if a non-state actor has international obligations it can be responsible for a breach thereof. See generally: Zegveld, *Accountability of Armed Opposition Groups* (n 713).

⁷⁹⁷ See, for example: *Elmi v Australia* (122/1998), CAT/C/22/D/120/1998 (1999); 7 IHRR 603 (2000).

⁷⁹⁸ N Rodley, 'Can Armed Opposition Groups Violate Human Rights?' in K Mahoney and P Mahoney (eds), *Human Rights in the Twenty-first Century: A Global Challenge* (Nijhoff 1993).

non-state actors.⁷⁹⁹ However, it seems that this practice is not yet sufficient to challenge the notion that human rights law only binds states.⁸⁰⁰ For this reason, certain delegations opposed suggestions implicit in the Principles and Guidelines that non-state actors can violate HR law.⁸⁰¹ Likewise, states questioned what would be the legal consequences of non-state responsibility in an instrument establishing an obligation on states to afford remedies and reparation. Can states be liable to afford legal remedies under state responsibility principles (like access to justice) when non-state actors are ultimately liable? During the first consultative meeting, van Boven responded to these objections by reminding participants that: '[...] HR law was subject to evolution. [...] The question of non-State responsibility was also evolving. Such new developments must be taken into account in the Draft Guidelines. It may be that HR law had not yet developed far enough on non-State responsibility, but, as the draft was not a treaty, it could reflect those emerging concepts as well'.⁸⁰²

In practice, however, there are many questions that remain open. For instance, in cases on non-state responsibility, are all states obliged to afford judicial remedies regardless of

⁷⁹⁹ For example, there are many General Assembly Resolutions qualifying 'terrorism' as a violation of human rights, see A/RES/48/122 (20 December 1993); A/RES/49/185 (23 December 1994); A/RES/54/164 (17 December 1999); A/RES/56/160 (February 2001). Similarly, the Security Council declared that Sudanese rebel groups were responsible for human rights violations. See UN SC Res 1564 (18 September 2004), UN Doc S/RES/1564, and Res 1574 (19 Nov 2004), UN Doc. S/RES/1574. See Zegveld, *Accountability of Armed Opposition Groups* (n 713) 47-49.

⁸⁰⁰ Zegveld, *Accountability of Armed Opposition Groups* (n 713) 47-49. For further discussion on this subject see: P Alston (ed), *Non-State Actors and Human Rights* (OUP 2005), and Clapham, *HR Obligations of non-State Actors* (n 82).

⁸⁰¹ For example, during the first consultative meeting, 'the representative of the United Kingdom reiterated its concern about suggestions, implicit in the section, that non-State actors could violate HR law. The United Kingdom believed that only States could violate HR law, while others could violate IHL. That was the problem of lack of clarity that emerged when HR law and IHL were combined in a single document'. UN Doc E/CN/2003/63, 20 [33].

⁸⁰² See: n 667

where the serious/gross violations are committed and the nationality of the alleged perpetrators or victims?⁸⁰³ How does concurrent liability between state(s) and non-state actor(s) operate in these cases? What is the relationship between the principle of access to justice and jurisdictional barriers like immunities?

4. Content and structure of the Principles and Guidelines

The Principles and Guidelines have a preamble explaining their purpose and objective, and they are subsequently divided into eight sections containing a total of twenty-seven provisions. Broadly speaking, states have two obligations under international law: firstly, the duty to refrain from violating HR and IHL, and secondly, the duty to guarantee respect for such rights. The first is made up of a set of obligations that are directly related to the duty of the state to refrain –whether by acts or omissions – from violating fundamental rights and norms. This also implies that states shall take all necessary measures to guarantee the enjoyment of such rights. The second refers to the obligations of states to prevent violations, investigate them, bring to justice and punish perpetrators, and provide reparation for the damage they caused.

After recalling in Section I the general obligation to respect and implement international law, Section II of the Principles and Guidelines describes the obligations contained in this core duty:

3. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:

⁸⁰³ See: n 723.

(a) Take appropriate legislative and administrative and other appropriate measures to prevent violations;

(b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;

(c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and

(d) Provide effective remedies to victims, including reparation, as described below.

The subsequent sections of the Principles and Guidelines describe in detail the scope of this obligation, explaining how reparation, prevention, and prosecution are interlinked. Following the same structure, the next part of the chapter will give a brief description of the obligations to: a) prevent violations; b) investigate, prosecute and punish perpetrators; c) provide effective access to justice to all individuals alleging a violation (through impartial procedural remedies/avenues); and d) afford full reparations to victims.

A. Prevention

States have the responsibility under international law not only to abstain from inflicting, but also to protect individuals from HR and IHL violations. The nature of a state's obligation is therefore twofold: a duty to abstain and a duty to protect; the former being a negative obligation – to refrain from a certain action – and the latter a positive obligation – to ensure individuals are not subjected to a violation. The second refers to the obligation of states to prevent violations. The basis for this second duty – to guarantee

respect for such rights – is to be found both in CIL and international treaty-based law. Indeed, the bedrock of all HR and IHL instruments since the close of WW II has been the obligation to guarantee basic rights.⁸⁰⁴

It is not sufficient for states simply to pass laws prohibiting acts or omissions; they must also take all reasonable measures to ensure that such acts or omissions do not occur in practice. For example, to achieve the eradication of torture in practice, states are obliged to train law enforcement and other personnel coming into contact with those in custody, and are required to review interrogation rules regularly.⁸⁰⁵ The core idea behind the notion of prevention is that an effective system of procedural remedies/safeguards helps to deter violations and prevents the occurrence of future crimes. For example, if a detainee has a clear right to challenge his/her detention before an independent judiciary (through a *habeas corpus* or an *amparo* remedy), it is less likely that the police will arbitrarily detain a person and less likely that the police will mistreat him/her while in detention, as the person will be promptly brought before an impartial judge.

⁸⁰⁴ The duty to ensure basic rights is expressly provided for in several treaties. For example: Common Article 1 of the 1949 Geneva Conventions provides: ‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’; Article 2.1 of the ICCPR provides: ‘Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant [...]’; Article 2.1 of the UNCAT provides: ‘Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’; similar provisions are contained in regional human rights treaties, such as the African [Banjul] Charter on Human and Peoples’ Rights, the American Convention on Human Rights, and the European Convention on Human Rights, and in various declaratory texts. See n 39.

⁸⁰⁵ See for example, Article 11 of UNCAT (n 39)

There is a close link between the obligation to prevent violations and the obligation to afford guarantees of non-repetition.⁸⁰⁶ As mentioned earlier, the ILC Responsibility Articles on state responsibility treat assurances of non-repetition as a separate and distinct legal consequence of the IWA.⁸⁰⁷ The updated principles to combat impunity also treat guarantees of non-repetition separately from reparation.⁸⁰⁸ However, human rights jurisprudence often refers to guarantees of non-repetition as part of reparation. The Human Rights Committee has long established that states have an obligation to “take steps to ensure that similar violations... [do] not occur in the future”.⁸⁰⁹ In 2004, it held that the purpose of the ICCPR ‘would be defeated without an obligation integral to article 2 to take measure to prevent a recurrence of a violation of the Covenant.’⁸¹⁰ It specifically noted ‘that, where appropriate, reparation can involve restitution, rehabilitation, and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations’.⁸¹¹ As it will be explained below, more and more, reparation judgements include measures to adapt domestic remedies to international standards, including practice and law reform measures, as guarantees of non-repetition.⁸¹² The IACtHR has declared domestic laws or judgments to be in violation of the American

⁸⁰⁶ van Boven argued in his 1993 report that: “There exists a definite link between effective remedies to which the victim(s) is (are) entitled, remedies aimed at the prevention of the recurrence of similar violations and the issue of the follow-up given by the State party”. E/CN.4/Sub.2/1993/8, para. 55.

⁸⁰⁷ ILC Responsibility Articles (n. 23).

⁸⁰⁸ Updated Impunity Principles (n 653)

⁸⁰⁹ See communications No. 88/1981, *Larrosa v Uruguay*, Views adopted on 29 March 1983, para. 13; No. 124/1982, *Muteba v Zaire*, decision on admissibility dated 25 March 1983, para. 13; and No. 176/1984, *Penarriera et al. v Bolivia*, Views adopted on 2 November 1987, para. 18.

⁸¹⁰ See CCPR/C/21/Rev.1/Add.13, para. 17.

⁸¹¹ Human Rights Committee, General Comment 31 (adopted 29 March 2004); (UN Doc HRI/GEN/1/Rev, 8 233-238) [16].

⁸¹² See generally REDRESS, ‘Enforcement Report’ (n 40) and Echeverria, ‘Genealogy’ (n 7).

Convention and states have amended the laws,⁸¹³ or domestic courts have declared them to be unconstitutional⁸¹⁴ or have annulled judgments.⁸¹⁵ This is reflected in the Principles and Guidelines, where satisfaction includes measures such as truth-telling or recovery/reburial of victims' remains, and guarantees of non-repetition, including measures to strengthen national institutions under the rule of law or reviewing and reforming laws that contribute to or allow the violations to take place.⁸¹⁶

Another example of prevention is how states and those acting as official authorities (i.e. in internal armed conflicts) are specifically obliged to provide safeguards to those arrested, detained, or in custody to protect them from arbitrary detention, extrajudicial punishment, and torture. For this reason, several international instruments establish specific mechanisms to visit places of detention.⁸¹⁷ International law has also established other safeguards to protect persons who are taken into custody.⁸¹⁸ These measures are

⁸¹³ *Cantoral Benavides v. Peru (Reparations)* (Judgment) [3 December 2001] Inter-Am.Ct HR Ser.C No.88, [76].

⁸¹⁴ *Suarez Rosero v. Ecuador (Reparations)* (Judgment) [20 January 1999] Inter-Am Ct HR Ser.C. No.44 [81-83].

⁸¹⁵ *Cesti-Hurtado v. Peru (Reparations)* (Judgment) [31 May 2001] Inter-Am Ct HR Ser C, No.78 [15].

⁸¹⁶ Section 4.D of this chapter discusses the concept of guarantees of non-repetition as part of the obligation to afford reparation. It notes that while this is an effective means of practice and law reform as well as to implement victim-oriented policies, it is also problematic as it expands remedies beyond the specific victims of a case.

⁸¹⁷ For example, the Optional Protocol to the United Nations Convention against Torture implements a double system of prevention: national and international. Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 18 December 2002 at the 57th session of the General Assembly of the United Nations by Res A/RES/57/199. Similarly, the European Committee for the Prevention of Torture visits places of detention and examines the treatment of persons deprived of their liberty, with a view to strengthening their protection (n 819). The ICRC, although not a states' mechanism but an independent organisation, plays an important role in the prevention of mistreatment of detainees during armed conflicts or political unrests by acting as a neutral intermediary between detainees and the authorities.

⁸¹⁸ The Standard Minimum Rules for the Treatment of Prisoners (SMR), adopted in 1957, are the key standard for the treatment of prisoners globally. While these Rules still have value and are widely used today, there have been major developments in human rights and criminal justice since their adoption. The

commonly referred to as ‘custodial safeguards’ and include the right of access to lawyers, physicians, family members,⁸¹⁹ and, in the case of foreign nationals, diplomatic and consular representatives.⁸²⁰

IHL also has detailed rules on the treatment of persons in custody. The third Geneva Convention provides a wide range of protection for prisoners of war. It defines their rights and sets down detailed rules for their treatment and eventual release.⁸²¹ The rules protecting prisoners of war are specific and were first detailed in the 1929 Geneva Convention.⁸²² They were refined in the third 1949 Geneva Convention, following the lessons of WWII, as well as in the AP I of 1977.⁸²³ IHL also protects other persons deprived of liberty as a result of armed conflict. The fourth 1949 Geneva Convention and AP I also provide extensive protection for civilian internees during international armed

SMR are often regarded by states as the primary – if not only – source of standards relating to treatment in detention, and are the key framework used by monitoring and inspection mechanisms in assessing the treatment of prisoners. It is therefore particularly crucial that they are consistent with current standards of human rights and criminal justice. In December 2010, the UN General Assembly adopted resolution 65/230, requesting the Commission on Crime Prevention and Criminal Justice (CCPCJ) to establish an open-ended intergovernmental expert group to: ‘exchange information on best practices (...) and on the revision of existing United Nations Standard Minimum Rules for the Treatment of Prisoners so that they reflect recent advances in correctional science and best practices’. The process culminated in a new updated draft adopted without vote at the GA 80th plenary meeting. See: UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules): resolution / adopted by the General Assembly*, 8 January 2016, A/RES/70/175, available at: <http://www.refworld.org/docid/5698a3a44.html> [accessed 24 March 2017]

⁸¹⁹ *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)*, 12th General Report, The CPT Standards: Substantive sections of the CPT's General Reports, CPT/Inf/E (2002) - Rev. 2003 [40]: ‘As from the outset of its activities, the CPT has advocated a trinity of rights for persons detained by the police: the rights of access to a lawyer and to a doctor and the right to have the fact of one's detention notified to a relative or another third party of one's choice’. Principles 15-19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (adopted by UNGA Res 43/173 [9 December 1988]).

⁸²⁰ Principle 16(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; Rule 38 of the Standard Minimum Rules for the Treatment of Prisoners. The International Court of Justice has in the *LaGrand* (n 92) and *Avena* (n 123) recognised that Article 36(1) of the Vienna Convention on Consular Relations creates individual rights for the national concerned.

⁸²¹ Geneva Convention III (n 389)

⁸²² *Idem*.

⁸²³ 1949 Geneva Conventions and API (n 389).

conflicts. In non-international armed conflicts, Article 3 (common to both the 1949 Geneva Conventions and Additional Protocol II) provide that persons deprived of liberty for reasons related to the conflict must also be treated humanely in all circumstances. In particular, they are protected against murder and torture, as well as cruel, humiliating, or degrading treatment. Notably, those detained for participation in hostilities are not immune from criminal prosecution under the applicable domestic law for having done so.⁸²⁴

B. Investigations, prosecutions, and punishment

While states are obliged to prosecute international crimes as a separate and independent duty in international law, the Principles and Guidelines restate this obligation from the perspective of the victims. The corollary of the basic right to reparation is that those who perpetrate serious violations are not entitled to get away with them: impunity is incompatible with the victims' right to a remedy and reparation.⁸²⁵ The ECtHR held recently in *Shestopalov v. Russia* that:

56. [...] in cases of wilful ill-treatment by State agents in breach of Article 3, the Court has repeatedly found that, in addition to acknowledging of the violation, two measures are necessary to provide sufficient redress. Firstly, the State authorities must have conducted a thorough and effective investigation capable of leading to the

⁸²⁴ ICRC, 'Prisoners of war and detainees protected under international humanitarian law' <<https://www.icrc.org/eng/war-and-law/protected-persons/prisoners-war/overview-detainees-protected-persons.htm>> accessed 5 April 2016.

⁸²⁵ In her article 'Prosecution Is a Form of Reparation', Rosalina Tuyuc, a survivor of the Guatemalan Civil War, writes: 'I can attest to survivors' desire to see those responsible for these atrocities investigated and brought to justice. The current trial of Efraín Ríos Montt, the former military dictator who oversaw the genocide, is a critical step in the right direction. But it is also just the beginning: there are hundreds of other officials who must also face their day in court' - *New York Times* 4 March 2013. Available at <<http://www.nytimes.com/roomfordebate/2013/03/04/can-we-afford-to-forgive-atrocities/human-rights-prosecutions-are-a-form-of-reparation>> accessed 16 April 16

identification and punishment of those responsible. Secondly, an award of compensation is required where appropriate or, at least, the opportunity to apply for and obtain compensation for the damage sustained as a result of the ill-treatment (see *Gäfgen*, cited above, § 116).⁸²⁶

It further explained that is not enough to only provide compensation. Effective investigations and prosecution need to take place; otherwise it would allow state officials to commit torture with virtual impunity.⁸²⁷ Effective investigations and prosecutions as well as adequate punishments are an essential means of restoring the dignity of those who have suffered and in so doing have the social impact of reducing the risk of resort to personal revenge. On the other hand, an effectively functioning domestic system for providing redress is ‘one of the best safeguards against impunity’.⁸²⁸

⁸²⁶ ECtHR, *Shestopalov v. Russia*, 46248/07 (Judgment) [2017] ECHR 282 (28 March 2017) [56].

⁸²⁷ ‘56. [...] In cases of wilful ill-treatment by State agents, a breach of Article 3 cannot be remedied only by an award of compensation to the victim because, if the authorities could confine their reaction to incidents of wilful ill-treatment by State agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity. The general legal prohibition on torture and inhuman and degrading treatment, despite its fundamental importance, would thus be ineffective in practice (see *Vladimir Romanov v. Russia*, no. 41461/02, § 78, 24 July 2008, and *Gäfgen*, cited above, § 119). That is why awarding compensation to the applicant for the damage which he sustained as a result of the ill-treatment is only part of the overall action required (see *Cestaro v. Italy*, no. 6884/11, § 231, 7 April 2015). The fact that the domestic authorities did not carry out an effective investigation (see paragraph 54 above) is decisive for the purposes of the question of whether the applicant lost his victim status (*ibid.*, § 229).’ ECtHR, *Shestopalov v. Russia*, 46248/07 (Judgment) [2017] ECHR 282 (28 March 2017) [56].

⁸²⁸ ‘Comments of Françoise Hampson, The Administration of Justice and Human Rights, Report of the sessional working group on the administration of Justice’ (15 August 2000) E/CN.4/Sub.2/2000/44 [48]. The Impunity Principles also deal with the duty to prosecute under rubric of ‘the right to justice’ for victims, stressing that it is a general principle that states must take ‘appropriate measures...particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished’. The Impunity Principles also contain the following reference to the obligation to investigate and prosecute: ‘States should undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished.’ III.A. Principle 19 (n. 653).

A number of widely ratified HR and IHL treaties explicitly require states parties to ensure punishment of specific offences either by instituting criminal proceedings against suspected perpetrators in their own courts or by sending the suspects to another appropriate jurisdiction for prosecution.⁸²⁹ For this reason, it is generally accepted that an amnesty that foreclosed prosecution of an offence that is subject to this type of obligation would violate the treaty concerned.⁸³⁰ Amnesties for gross violations of HR and serious violations of IHL are generally considered incompatible with international law obligations to investigate, prosecute, and punish perpetrators of international crimes.⁸³¹

One of the latest efforts by the international community to ensure accountability for international crimes is the General Assembly resolution establishing the ‘International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011’.⁸³² According to the resolution, it will have two main tasks: (1) to collect, consolidate, preserve and analyse evidence of violations of IHL and HR violations and abuses; and (2) to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in accordance with international law

⁸²⁹ See, for example, Human Rights Committee, General Comment No. 31 (n. 30) para. 18; IACtHR, *Almonacid-Arellano et al. v. Chile*, Case 12.057, Report No. 44/02, (2002) para. 114. Shelton gives a thorough overview of the obligation to investigate, prosecute and punish in the context of the right to a remedy. She notes how amnesties are generally found inconsistent with these obligations. See: Shelton, *Remedies* (n 12) p 107-112.

⁸³⁰ See, for example, Special Court for Sierra Leone, *Prosecutor v. Morris Kallon*, case No. SCSL-2004-15-AR72(E), and *Prosecutor v. Brima Bazzy Kamara*, case No. SCSL-2004-16-AR72(E), Appeals Chamber, Decision on challenge to jurisdiction: Lomé Accord Amnesty (13 March 2004), para. 73; Antonio Cassese, *International Criminal Law* (Oxford University Press, 2003), p. 314.

⁸³¹ The ICTY suggested that an amnesty for torture (and, by implication, for other conduct whose prohibition in international law has the status of a peremptory norm) would be “internationally unlawful.” *Furundzija* (n.53) para. 155. See also *Prosecutor v. Morris Kallon* and *Prosecutor v. Brima Bazzy Kamara*, *Idem*. para. 82.

⁸³² UN GA Res (Syria) 71/248 (21 December 2016)

standards, in national, regional, or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law.⁸³³ When established, the mechanism will assist in the investigation and prosecution of those responsible for the most serious crimes under international law, in particular the crime of genocide, crimes against humanity, and war crimes as defined in relevant sources of international law.

Part III of the Principles and Guidelines describes the legal consequences that arise after the commission of serious violations that constitute crimes under international law. It is well recognised that international law requires that perpetrators of international crimes be brought to justice.⁸³⁴ It could be argued that the adoption in an increasing number of multilateral treaties of the *aut dedere aut judicare* principle reflects the customary status of this rule with respect to crimes under international law, with the consequence that the rule is applicable even apart from specific treaties in which it is embodied.⁸³⁵ Judge

⁸³³ UN GA Res (Syria) 71/248 (21 December 2016), para 4.

⁸³⁴ For example, the Genocide Convention establishes the obligation to *prevent and punish* acts of genocide (emphasis added). Article IV states: 'Persons committing genocide or any of the acts enumerated in Article III shall be punished...'. Article V calls on the state to 'provide effective penalties' for those found guilty of genocide. 'The principles underlying the Convention are recognised by civilised nations as binding on States even without any conventional obligation' – ICJ: Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (1950-1951). In 1970, the ICJ reconfirmed this principle in the *Barcelona Traction Case* (n 174). The Convention on the Suppression and Punishment of the Crime of Apartheid specifically requires states to adopt measures to prosecute, bring to trial, and punish those persons accused and found guilty of the crime of apartheid. International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted and opened for signature 30 November 1973 [UNGA Res 3068 (XXVIII)] (entered into force 18 July 1974) 1976, Article IV(b) and V. The Inter-American Convention on the Forced Disappearance of Persons also requires states to extradite or prosecute offenders. Inter-American Convention on Forced Disappearance of Persons, 33 I.L.M. 1429 (1994) (entered into force March 28, 1996) Article IV. A series of treaties on slavery and slave-like practices, including forced labour, also necessitate extradition or prosecution of those implicated. Bassiouni provides an exhaustive list of conventions prohibiting slavery and the slave trade; see M Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (M Nijhoff 1992) 767-783.

⁸³⁵ See, for example, Article 8 of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, (adopted 16 December 1970) 860 UNTS 105, (1971) 10 ILM 134; Article 8 of the Montréal

Weeramantry, in the *Lockerbie Case*, affirmed that the principle *aut dedere aut judicare* has become a rule of CIL.⁸³⁶ In other words, international crimes cannot go unpunished.

The Principles and Guidelines refer to the obligation to investigate, prosecute and punish as follows:

4. ‘...States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish him or her. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations’.

From the beginning of the consultation process, it was recognised that there exists a long-standing legal obligation to try perpetrators of international crimes. However, there was disagreement in regards to the exact legal implications that such obligation implies, particularly in regards to the duty to adapt national legal systems and the role of

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971) 10 ILM 1151; Article 10 of the International Convention Against the Taking of Hostages (adopted 17 December 1979) 1316 UNTS 205, (1979) 18 ILM 1456; Article 8 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, 1465 UNTS 85, (1984) 23 ILM 1027 and (1985) 24 ILM 535. Article 9 of the 1979 Convention on the Physical Protection of Nuclear Material; Articles 3(5) and 6 of the 1988 Convention for the Suppression of unlawful acts against Safety of Maritime Navigation; Article 7 of the 1997 International Convention for the Suppression of Terrorist Bombing; and Article 10 of the 1999 International Convention for the Suppression of Terrorist Financing.

⁸³⁶ ‘The principle *aut dedere aut judicare* is an important facet of a state's sovereignty over its nationals and the well-established nature of this principle in customary international law is evident from the following description: ‘The widespread use of the formula ‘prosecute or extradite’ either specifically stated, explicitly stated in a duty to extradite, or implicit in the duty to prosecute or criminalize, and the number of signatories to these numerous conventions, attests to the existing general *jus cogens* principle’. See: M Cherif Bassiouni, *International Extradition: United States Law and Practice* (OUP 2014) 22. As with its failure to consider the Montreal Convention, so also resolution 731 fails to consider this well-established principle of international law’. Dissenting opinion in the ICJ case ‘Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)’ (1992-2003). Although this was contained in Judge Weeramantry’s Dissenting Opinion, there was no dissension between the judges on this point.

international legal institutions in complementing national systems and their jurisdictions.⁸³⁷

In addition to the obligation to investigate, prosecute, and punish perpetrators of international crimes, Principle 4 also establishes the obligation of states to cooperate with other states and with international tribunals in the investigation and prosecution of international crimes.⁸³⁸ However, some states questioned the duty to prosecute outside the framework of the grave breaches system in the Geneva Conventions or other serious international crimes. It was argued that in many instances states' duties under international law go no further than prevention, suppression, or investigation. The obligation to cooperate, together with the obligation to prosecute through implementation of universal jurisdiction provisions in domestic law and the extradition or surrender to other states or international judicial bodies of alleged perpetrators, was highly controversial during the 2nd and 3rd consultations. For this reason, the formula '*in accordance with international law*' was used to reach a compromise in regards to the duty to cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.

Similarly, the text of Principle 5 on universal jurisdiction was modified during the last consultation to reach a compromise. The Principles and Guidelines call on states to

⁸³⁷ Report of the First Consultative Meeting, (n. 670) [23-24]

⁸³⁸ This standard is also recognised in Principle 3 of the 1973 UN Principles of International Co-operation in the Detection, Arrest, Extradition And Punishment Of Persons Guilty Of War Crimes And Crimes Against Humanity: '*States shall co-operate with each other on bilateral and multilateral basis with a view to halting and preventing war crimes against humanity, and shall take the domestic and international measures necessary for that purpose*'. UNGA Res 3074 (XXVIII) (3 December 1973).

implement appropriate provisions to exercise universal jurisdiction and to otherwise extradite suspects of international crimes to other states or international tribunals with a caveat: ‘5... *where so provided in an applicable treaty or under other international law obligations*, States shall incorporate or otherwise implement within their domestic law appropriate provisions for universal jurisdiction...’ (emphasis added).⁸³⁹

While states accepted treaty obligations in regards to universal jurisdiction, not all of them recognised the existence of a general obligation to investigate, prosecute, and punish international crimes under universal jurisdiction principles. Nonetheless, these delegations agreed that certain international crimes do give rise to universal jurisdiction under CIL, like grave breaches of IHL, genocide, and torture.⁸⁴⁰ While there was disagreement with this interpretation of the law, participants reached a compromise to keep the reference to universal jurisdiction in the instrument, which had actually been removed and was inserted back during the last meeting. Hence the reference to ‘where so provided in an applicable treaty or under other international law obligations’.

The principle of universal jurisdiction is classically defined as ‘a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim’.⁸⁴¹ The rationale behind universal jurisdiction is that there are certain acts that infringe the most

⁸³⁹ Principle 5, Principles and Guidelines (n.2)

⁸⁴⁰ Report of the Second Consultative Meeting, E/CN.4/2004/57 [23-26]

⁸⁴¹ See, for example, Kenneth C. Randall, ‘Universal jurisdiction under international law’ (1988) 66 Texas Law Review 785–8; International Law Association Committee on International Human Rights Law and Practice, ‘Final Report on the Exercise of universal jurisdiction in respect of gross human rights offences’, Report of the 69th Conference of the International Law Association, (2000) 2

basic values of humanity – intrinsic values that are protected directly under international law. Therefore, international law outlaws safe-havens for perpetrators, obliging states to prosecute or extradite (*aut dedere aut judicare*), and considers some domestic systems incapable of prosecuting these crimes for lack of independence and/or impartiality.⁸⁴² These acts are considered an affront against humanity and constitute international crimes. Since the international community has an interest in punishing the perpetrators (who are considered enemies of mankind), such crimes give rise to universal jurisdiction.⁸⁴³ Unlike most other ‘ordinary’ criminal-like conduct committed within a state, which is left to each state to prosecute, a person who, for example, is alleged to have committed torture can be prosecuted anywhere in the world where he or she is found.⁸⁴⁴ The Preamble of the ICC Statute affirms ‘that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international

⁸⁴² For an analysis of the principles of universal jurisdiction see for example, X Phillippe, ‘The principles of Universal Jurisdiction and Complementarity’ (June 2006) 88 IRRC 862. Amnesties are generally considered incompatible with the obligation to investigate, prosecute and punish perpetrators of international crimes. For a detailed analysis on amnesties, see Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties*, 2009, HR/PUB/09/1, available at: United Nations, *Rule of Law Tools for Post-Conflict States: Amnesties*, 2009, HR/PUB/09/1, available at: http://www.ohchr.org/Documents/Publications/Amnesties_en.pdf (accessed 16 April 2017).

⁸⁴³ These crimes are considered so harmful to international interests that states are entitled, and in some cases even obliged, to bring proceedings, regardless of the location of the crime and the nationality of the perpetrator or the victim: ‘Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law’. Institut de droit international (IDI), Resolution on universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes (adopted in Krakow, 2005), available at <http://www.idi-ii.org/idiF/resolutionsF/2005_kra_03_fr.pdf, para.1 (10 April 16) (hereinafter, ‘IDI Resolution’).

⁸⁴⁴ Article 5 of the Convention against Torture and other Cruel Inhuman and Degrading Treatment (UNGA Res 39/46 (10 December 1984).

cooperation'. It recalls 'that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.⁸⁴⁵

There have been a number of investigations, prosecutions, and convictions of international crimes on the basis of universal jurisdiction.⁸⁴⁶ However, there have also been several challenges to the use of this jurisdiction. In 2000, Belgium issued an arrest warrant against DRC's Minister of Foreign Affairs that was challenged before the ICJ.⁸⁴⁷ As a result, the Court ruled that there are some limits on the use of this principle. Acting heads of state or other acting officials representing the state, like foreign ministers, enjoy immunity from criminal prosecution in foreign courts. The ICJ concluded that immunity was not granted to state officials for their own benefit, but to ensure the effective performance of their functions on behalf of their respective states; and when abroad that they enjoy full immunity from arrest in another state on criminal charges, including charges of war crimes or crimes against humanity. However, the Court emphasised that '[w]hile jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a

⁸⁴⁵ Preamble, ICC Statute (n 39).

⁸⁴⁶ A well-known example is that of former Chilean dictator General Pinochet, arrested in Britain for torture; he faced extradition to Spain for prosecution for torture committed in Chile (see overview of the *Pinochet Cases* by Andrea Gattini at: <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e859>, accessed 15 April 16). Other examples include the case of Nikolai Jorgic, who was convicted in Germany for genocide committed in Bosnia (*Jorgic Case*, 2 BvR 1290/99, Federal Constitutional Court, 4th Chamber of the Second Senate, Germany); the case of Adolfo Scilingo, a former Navy Officer convicted in Spain for crimes committed in Argentina's 'Dirty War' (Sentencia Núm. 16/2005 Caso Adolfo Scilingo, Sección Tercera de la Sala de lo Penal de la Audiencia Nacional; 19 de abril de 2005, Audiencia Nacional de Madrid, Spain.); or in the UK, an Afghan warlord was convicted for carrying out torture and hostage-taking in his homeland. (*R v Zardad*, Case No: T2203 7676, UK Central Criminal Court, 07 April 2004).

⁸⁴⁷ *Arrest Warrant Case* (n 345).

certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility'.⁸⁴⁸

There have also been significant challenges to applying the principle of universal jurisdiction outside criminal proceeding (e.g. civil actions). The ICJ established in *Germany v Italy*⁸⁴⁹ that state immunity applies regardless of the *jus cogens* nature of the acts involved. As analysed in Chapter 3, the Court still left unanswered other relevant questions, for example, whether provisions of state immunity apply regardless of the right to access to a court where no alternative remedy exists or whether subject matter immunity in civil proceedings applies to foreign officials committing acts that give rise to international responsibility. The *Jones and Others v United Kingdom*⁸⁵⁰ decision of the ECtHR was more categorical. While the Court felt no need to examine national developments in detail as it considered the ICJ Judgment 'authoritative as regards the content of customary international law',⁸⁵¹ it did establish that there were other traditional means of redress for wrongs of this kind available under international law, namely diplomatic protection or an inter-state claim, and that therefore the immunity bar to universal civil jurisdiction did not affect the applicants' right to a fair trial.⁸⁵² Scholars and practitioners have criticised the Court's lack of analysis of whether these other means of redress were truly available,⁸⁵³ as well as the Court's upholding of the immunity of

⁸⁴⁸ *Idem* 60.

⁸⁴⁹ *Germany v Italy* (n 25).

⁸⁵⁰ *Jones and Others v UK* (n 378).

⁸⁵¹ *ibid* [198].

⁸⁵² See Mizushima Tomonori, 'Denying Foreign State Immunity on the Grounds of the Unavailability of Alternative Means' (Modern Law Review 2008) 71.

⁸⁵³ See, for example, Lorna McGregor, 'Jones v UK: A Disappointing End' (January 16, 2014) EJIL: Talk! <http://www.ejiltalk.org/jones-v-uk-a-disappointing-end/>, accessed 16 April 16

state officials. According to Philippa Webb, *Jones* stretched the meaning of the ICJ judgment, going against two emerging trends: the accountability of non-high ranking state officials for serious human rights violations and the diversification of various forms of immunity.⁸⁵⁴ Regardless of the validity of these criticisms, it is clear that there is a recent trend to limit the application of the principle of universal jurisdiction on the basis of sovereign immunity.

The second part of Principle 5 establishes: ‘5. *States should facilitate extradition or surrender offenders to other States and to appropriate international judicial bodies and provide judicial assistance and other forms of cooperation in the pursuit of international justice*’. Although it remains the rule that states have primary responsibility to exercise jurisdiction over serious crimes under international law, international crimes can be tried in international tribunals (or in third states exercising universal jurisdiction), and states need to cooperate fully with such procedures.⁸⁵⁵ The ICC, for example, has complementary jurisdiction and therefore can exercise jurisdiction over the crimes enlisted in its statute when national courts cannot offer satisfactory guarantees of independence and impartiality or are materially unable or unwilling to conduct an effective investigation. Other international tribunals have primary jurisdiction, like the UN International Criminal Tribunals for Rwanda and Yugoslavia, since they were established on the premise that the national courts of the countries where the conflicts

⁸⁵⁴ See Philippa Webb, ‘Jones v UK: the re-integration of State and official immunity?’ (January 14, 2014) EJIL: Talk! <http://www.ejiltalk.org/jones-v-uk-the-re-integration-of-state-and-official-immunity/>, accessed 16 April 16

⁸⁵⁵ See for example: Impunity Principles (n. 653), III.B; Principle 20

took place could not guarantee effective investigations and/or independent and impractical trials. In both cases, states should facilitate the extradition or surrender of offenders, as well as provide judicial assistance and other forms of cooperation to the international tribunals.

While the Principles and Guidelines reflect this standard, they use the term ‘should’, despite some delegations’ proposals to use ‘shall’ in order to accurately reflect the status of international law. Since some noted that there were instances in which certain states would not extradite their own national to international tribunals, it was agreed during the third consultation to keep the principle, but with the term ‘should’.⁸⁵⁶ Still, Principle 5, in connection with Principle 4, makes clear that if states are not extraditing or surrendering suspects, they have the duty to investigate, prosecute, and – if found guilty – punish perpetrators of international crimes.⁸⁵⁷

Finally, Principle 5 clarifies that the duty to cooperate in the pursuit of international justice includes the *‘assistance to, and protection of, victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment’*. Previous texts referred to ‘the right to a fair trial’, but this was contested by certain delegations as it was suggested that no international legal agreement specifically provided for the right to a fair trial as a condition or requirement for extradition. The phrase ‘subject to international legal

⁸⁵⁶ Report of the Third Consultative Meeting (n. 690) [27].

⁸⁵⁷ The Impunity Principles are equally clear in this regard. See: III.B. Principle 21 (n. 653).

requirements' was accepted with specific reference to Article 3 of the UNCAT, prohibiting extradition or any other type of transfers in cases where torture would likely be committed.⁸⁵⁸ Unfortunately, this formula leaves open the question of what those international legal requirements are. It is necessary, therefore, to look elsewhere for the precise content of this norm.⁸⁵⁹

Principles 6 and 7 address statutes of limitation in the context of reparation. As explained earlier, it is well recognised that international law requires that perpetrators of international crimes be brought to justice. Procedural or other barriers should not, therefore, hinder justice.⁸⁶⁰ In practice, however, disproportional statutes of limitation are a common bar to prosecutions of serious human rights and humanitarian law violations: victims face formidable legal hurdles when trying to bring criminal allegations or civil claims for grave abuses. Time barriers, in terms of which claims are blocked after a few years or less from the time when the breach occurred, often cause difficulty. For example, some countries have very short statutes of limitation for crimes such as torture.⁸⁶¹ It is common for this unlawful practice to occur in the context of police investigations and during detention. The period to bring claims for torture normally expires before the

⁸⁵⁸ Report of the Third Consultative Meeting (n. 690) [28].

⁸⁵⁹ Echeverria, 'Codifying (n. 8) p 292.

⁸⁶⁰ See for example: UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, preamble (cited in Vol. II, Ch. 44, § 763) and Article 1 (*ibid.*, § 764) (the UN Convention has been ratified by 48 States); European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, Article 1 (*ibid.*, § 765) and Article 2 (*ibid.*, § 766) (the European Convention has been ratified by 3 States).

⁸⁶¹ See for example: REDRESS, *Reparation for Torture: A Survey of Law and Practice in Thirty Selected Countries* (2003) at: <http://www.redress.org/downloads/publications/AuditReportText.pdf>. Accessed 12 March 2016. For a more recent example see: REDRESS, *Torture in Asia: The Law and Practice* (2013) at: <http://www.redress.org/downloads/publications/130729asia-report.pdf> Accessed 12 March 2016.

person is released from detention (logically most victims are afraid of bringing an allegation while they are still in custody).⁸⁶²

It is often difficult for victims of serious HR or IHL violations or his/her relatives to bring a claim because he or she is almost always traumatised, facing financial problems, coming from a marginalised community, and/or still suffering from on-going political persecution. It can be virtually impossible to bring a claim within the proscribed time limits, and thereafter it can be too late. In other cases, it may be impossible in practice to bring a claim until there is a change of regime and the violation could have occurred many years or sometimes decades previously, long past the normal periods laid down in statutes of limitation for ordinary crimes.

Reflecting this reality, the Principles and Guidelines had established that:

6. *Statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.*

7. *Domestic statutes of limitations for other types of violations that do not constitute crimes against international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive, procedurally or in other ways, so as to deprive the victim of pursuing a claim against the perpetrator or any other body or entity. Moreover, statutes of limitations shall not be applied to periods during which no effective remedies exist for gross violations of international human rights law and serious violations of international humanitarian law.*⁸⁶³

⁸⁶² There have been cases when domestic statutes of limitation have barred criminal investigations of torture allegations, for example: *Pantea v. Romania*, judgment of 3 June 2003, CM/Del/OJ/DH (2005) 922 Vol. I Public, p.24; *Kmetty v. Hungary*, judgment of 16 December 2003, CM/Del/OJ/DH(2005)928 Vol. I Public, p.13; *BatX and others v. Turkey*, judgment of 3 June 2004, p.26.

⁸⁶³ Revised version of the Principles and Guidelines (05 August 2004), Third Consultative Meeting.

Some delegations raised questions about the source of obligations contained in Principle 6. In response, it was noted that while the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity had not been universally ratified, it largely reflected existing international law on this issue.⁸⁶⁴ The UN Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, notes that ‘international jurisprudence has frequently reiterated that the Convention does not create new rights or obligations, but that it is declarative in nature, and that the principle of imprescriptibility of war crimes, crimes against humanity and genocide is a matter of *jus cogens*’.⁸⁶⁵

Not only do treaties and conventions proscribe statutes of limitation for the most serious crimes of international concern, but national legislation, judicial decisions, and policies also provide evidence of widespread state practice, and a belief that exempting these crimes from the relevant statutes of limitation is obligatory. Jean-Marie Henckaerts and Louise Doswald-Beck have noted that state practice and *opinio juris* establish this rule as a norm of CIL:

The recent trend to pursue war crimes more vigorously in national and international criminal courts and tribunals, as well as the growing body of legislation giving jurisdiction over war crimes without time-limits, has hardened the existing treaty rules prohibiting statutes of limitation for war crimes into customary law.⁸⁶⁶

⁸⁶⁴ Report of the Third Consultative Meeting (n. 690).

⁸⁶⁵ In terms of international jurisprudence, footnote 26 of the report reads: ‘See, for example, *The Prosecutor v. Klaus Barbie* (Supreme Court, France); *Kolk and Kislyiy v. Estonia* (European Court of Human Rights); *Priebke*, and *Arancibia Clavel* (Supreme Court, Argentina); *Molco* (Supreme Court, Chile); *Barrios Altos*, and *Gelman* (Inter-American Court of Human Rights)’. 2015 Report (n 875) 50.

⁸⁶⁶ ICRC Commentary on IHCL Henckaerts and Doswald-Bexk (n 441).

Such state practice reflects a widespread concern that providing limitation periods for the most heinous crimes would prevent their prosecution, which is necessary to deter the commission of such crimes, provide redress to victims, and ultimately protect fundamental human rights.⁸⁶⁷

The IACtHR in the *Barrios Altos Case* voiced one of the clearest rejections of prescription for gross human rights violations, in which it held:

This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognised by international human rights law.⁸⁶⁸

In *Furundzija*, the ICTY stated that one of the consequences of the peremptory nature of the prohibition of torture was ‘the fact that torture may not be covered by a statute of limitations’.⁸⁶⁹ It is also clear from observations by the UN Committee against Torture that it rejects the applicability of statutes of limitation to the crime of torture.⁸⁷⁰ Similarly, the Special Rapporteur on torture criticised statutes of limitation that lead to

⁸⁶⁷ Statutes of Limitation, ABA, Report to the House of Delegates, Section of International Law, 107A http://www.americanbar.org/content/dam/aba/uncategorized/international_law/2013_hod_annual_meeting_107A.authcheckdam.pdf accessed 16 April 16. See also Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Preamble, Nov. 11, 1970, 754 U.N.T.S. 73, available at: <http://www2.ohchr.org/english/law/warcrimes.htm> accessed 16 April 16 [hereinafter ‘Convention on Non-Applicability of Statutory Limitations’]. This discusses ‘that war crimes and crimes against humanity are among the gravest crimes in international law, ... [and] that the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, [and] the encouragement of confidence [...]’.

⁸⁶⁸ *Barrios Altos Case*, (Judgment) (14 March 2001) Series C No 75 [41].

⁸⁶⁹ *Furundzija* (n.53)157.

⁸⁷⁰ *Conclusions and recommendations on Turkey* (27 May 2003) CAT/C/CR/30/5, Recommendation [7(c)]; *Conclusions and recommendations on Slovenia* (27 May 2003) CAT/C/CR/30/4, Recommendation [6(b)]; *Conclusions and recommendations on Chile* (14 May 2004) CAT/C/CR/32/5 [7(f)].

the exemption of perpetrators from legal responsibility.⁸⁷¹ In cases of disappearances, which are continuing offences so long as the fate or whereabouts of the victim has not been determined, the international law norm is that any statutory limitation could not even begin to run while such a person has no effective remedy. Article 8(1) of the Enforced Disappearance Convention⁸⁷² imposes two strict requirements on any state party ‘which applies a statute of limitations in respect of enforced disappearance’. First, its duration must be ‘proportionate to the extreme seriousness of this offence’, and second, it may only commence ‘from the moment when the offence of enforced disappearance ceases’. That means that, taking into account the continuous nature of the crime, as recognised in the Inter-American Convention on Forced Disappearance of Persons,⁸⁷³ the statute of limitation period may not start until the fate or whereabouts of the victim has been determined.⁸⁷⁴ Finally, both the Statute of the ICC, and the Enforced Disappearance Convention state that, when committed as part of a widespread or systematic attack directed at any civilian population, a ‘forced disappearance’ qualifies as a crime against humanity and, thus, is not subject to a statute of limitations.

According to the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-repetition, the reason to make international crimes imperceptible are, first, that atrocity crimes raise particular investigatory and prosecutorial challenges that

⁸⁷¹ Report of visit to Spain, E/CN.4/2004/56/Add.2 [45]: ‘The length of the judicial process is reportedly often so great that by the time a trial opens, accused officers may not be tried because the statute of limitations for the offence has expired’.

⁸⁷² International Convention for the Protection of All Persons from Enforced Disappearance (n. 39).

⁸⁷³ Art. VII: ‘*Criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations*’ (n. 39)

⁸⁷⁴ International Convention for the Protection of All Persons from Enforced Disappearance (n. 39).

usually cannot be met on the same schedule as common crimes; and second, that imprescriptibility helps signal that such crimes constitute an affront to humanity, communicating that, in theory, neither space nor time will provide escape from responsibility.⁸⁷⁵

In practice, however, it is difficult to apply this principle to past violations when it contradicts criminal statutory law. It can be argued, for example, that it contravenes the principle of the non-retroactivity of the law. Nonetheless, courts have recognised that procedural rules should not precede the fight against impunity in democratic societies.⁸⁷⁶

Some countries have used crimes typified in their penal codes at the time the acts were committed but concluding that they constitute crimes against humanity (e.g. forced disappearances), and as such are not subject to statutory limitation, whatever the date of commission.⁸⁷⁷ Other courts have carried out judicial processes using crimes that may have not been typified in national codes at the time of the commission but have argued that international law already declared the acts in question to be illegal when they were committed.⁸⁷⁸ In general, jurisprudence shows that it is possible to guarantee

⁸⁷⁵ UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence*, 7 September 2015, A/HRC/30/42, para 48.

⁸⁷⁶ Vera Navarrete case, Constitutional Court of Peru, December 2004. Available at: <http://www.tc.gob.pe/jurisprudencia/2005/2798-2004-HC.html> accessed 16 March 16.

⁸⁷⁷ Federal Criminal and Correctional Court of Argentina, Case No 30514, *in the Process against Massera and others on Exceptions, (Judgment)* (9 September 1999); Supreme Court of Justice of Paraguay, Case No 585/96, *Capitan de Caballeria Modesto Napoleón Ortigoza, (Judgment)* (31 December 1996); Supreme Court, Argentina : *Chile v Arancibia Clavel* (Enrique Lautaro), Appeal Judgment, Case No 259, A 533 XXXVIII, 24th August 2004; and *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc.*, Case No 17.768, No 17.768, S. 1767. XXXVIII, 14 June 2005; and *Fujimori* Case, Supreme Court (Specialized Criminal Law Chamber) (Peru), No. 19-2001 AV, ILDC 1516, para. 711 (2009).

⁸⁷⁸ See Special Tribunal for Lebanon, Appeals Chamber, *STL-11-01/I*, paras.132 and 133; Supreme Court of Justice of Colombia, Criminal Cassation Chamber, Case No. 33.118, *Cesar Pérez García*, Decision of May 13, 2010, Case No. 33.118.

simultaneously respect to the principle of legality as well as due process and fair trial standards for the defendants, and to the rights of victims to see the perpetrators of violations brought to justice.⁸⁷⁹

Despite the evidence presented to the Third Consultative Meeting in regards to non-applicability of statutes of limitation for the most serious crimes, a few delegations (mainly Japan) still voiced concerns regarding Principles 6 and 7.⁸⁸⁰ For this reason, a last minute suggestion was made to reinstate the qualifying words ‘where so provided for in an applicable treaty or contained in other international legal obligations’, which was reflected in the final version of Principle 6. In Principle 7, an amendment within the final hour of negotiation was presented so that it would read ‘Domestic statutes of limitations or other types of violations that do not constitute crimes against international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive’, losing the part that established that statute of limitations shall not be applied during periods in which no effective remedies existed.

The Impunity Principles, which are an expert-mandated document, are more straightforward, requiring that in situations where states have statutes of limitation that

⁸⁷⁹ See *Scilingo and Pinochet* (National High Criminal Court, Spain) (n846); *Gelman v Uruguay*, Judgment, IACHR, 24 February 2011. Serie C No. 221; *Erdemovic*, ICTY, Case No. IT-96-22-A, Judgement (7 October 1997).

⁸⁸⁰ REDRESS Internal Minutes (n 675).

conflict with international criminal law norms, states should effectively bring their national laws and practice into conformity with international law.⁸⁸¹

C. Equal access to justice through effective remedies

A state's obligation towards victims has a dual dimension: to make it possible for them to seek relief for the harm suffered and to provide a final result where the harm is actually ameliorated. To put it differently, justice for victims demands genuine procedural mechanisms (procedural remedies), resulting in final positive relief (substantive reparations). It is generally accepted that international law requires states to provide effective procedural remedies under domestic law to guarantee adequate reparation to victims of HR violations. This right is firmly embodied in all major international HR treaties and declarative instruments.⁸⁸² The right to a remedy for a violation of a HR protected under any of the international instruments is itself a right expressly guaranteed by the same instruments and, in the case of fundamental HR, it has been recognised as non-derogable.⁸⁸³ Accordingly, there is an independent and continuing obligation under

⁸⁸¹ 'Prescription- of prosecution or penalty- in criminal cases shall not run for such period as no effective remedy is available. Prescription shall not apply to crimes under international law that are by their nature imprescriptible. When it does apply, prescription shall not be effective against civil or administrative actions brought by victims seeking reparation for the injuries'. Principle 23, Impunity Principles (n. 653).

⁸⁸² See for example: (n. 39)

⁸⁸³ See, for example: General Comment 29 on States of Emergency (Article 4) of the UN Human Rights Committee, CCPR/C/21/Rev.1/Add.11 (31 August 2001) [14]: 'Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective'. The Committee considered further that 'It is inherent in the protection of rights explicitly recognized as non-derogable ... that they must be secured by procedural guarantees...The provisions of the Covenant relating to procedural safeguards may never be made subject

HR law to provide effective domestic remedies to protect human rights, during peace or war, and irrespective of states of emergency. HR instruments guarantee both the procedural right to effective access to justice (through judicial and/or non-judicial remedies)⁸⁸⁴ and the substantive right to reparations (such as restitution, compensation, and rehabilitation).⁸⁸⁵ As explained by the ECtHR: ‘A remedy must be effective in practice as well as in law, particularly in the sense that its exercise must not be unjustifiably hindered by acts or omissions by national authorities’.⁸⁸⁶

The nature of the procedural remedies (judicial, administrative, or other) should be in accordance with the substantive rights violated and the effectiveness of the remedy in granting appropriate relief for such violations.⁸⁸⁷ In the case of grave abuses, remedies need to be judicial. As explained by the UN HRC, ‘administrative remedies cannot be

to measures that would circumvent the protection of non-derogable rights (...)’. Similarly the Inter-American Court of Human Rights explained that the judicial remedies to protect non-derogable rights are themselves non-derogable. (Advisory Opinion OC-9/87 of 6 October 1987. Judicial Guarantees in States of Emergency (Article 27(2), 25, and 25(8) American Convention on Human Rights. Series A no 9).

⁸⁸⁴ Some instruments explicitly call for the establishment of judicial remedies for the rights they guarantee: the African Charter on Human and Peoples’ Rights, for example, provides that all remedies should be judicial. See Article 7 of the African [Banjul] Charter on Human and Peoples’ Rights (adopted 27 June 1981) OAU Doc CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force 21 October 1986).

⁸⁸⁵ See J McBride, ‘Access to Justice and Human Rights Treaties’ (1998) 17 Civil Justice Q. 235.

⁸⁸⁶ See *Aksoy v. Turkey* (n 747).

⁸⁸⁷ Article 13 of the ECHR requires ‘the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief’ although states have some discretion as to how to comply, see: *D v. United Kingdom (Judgment)* (2 May 1997) App No 30240/96 [69] (referring to *Soering v. United Kingdom, (Judgment)* (7 July 1989) App. No. 14038/88, and *Vilvarajah v. United Kingdom, (Judgment)* (30 October 1991) App. No. 13163/87. The UN Human Rights Committee commented on Finland’s report (CCPR/C/95/Add.6) regarding the obligation under Article 2(b) of the ICCPR that ‘while noting that a recent reform of the Penal Code makes punishable the violation of several rights and freedoms, including those protected by articles 21 and 22 of the Covenant, the Committee is concerned that criminal law may not alone be appropriate to determine appropriate remedies for violations of certain rights and freedoms (Concluding Observations of the Human Rights Committee, Finland: 08/04/98 CCPR/C/79/Add.91).

deemed to constitute adequate and effective remedies [...], in the event of particular serious violations of human rights’.⁸⁸⁸

This is reflected in the Principles and Guidelines:

12. 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.

Accordingly, in cases of gross/serious violations, non-judicial remedies, such as administrative or other remedies, are not considered sufficient to fulfil states’ obligations under international law. Even if a victim can apply for compensation through an administrative procedure, he/she should also have the right in law and practice to bring a claim against the individual and state in a judicial court.⁸⁸⁹ In the same way, a person who has been detained has a right to challenge his/her detention before a judicial body and, if applicable, to bring a civil claim for his/her arbitrary detention. Nevertheless, the relevant procedures may take into account compensation already awarded to the victim in order to determine whether the claimant has received full and adequate reparation.⁸⁹⁰

⁸⁸⁸ *Nydia Bautista v Colombia* (No. 563/1993); *José Vicente and Amado Villafane Chaparro, Luis Napoleon Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres v Colombia* (No. 612/1995). Furthermore, the individual right of access to court for the determination of civil rights and obligations regarding serious human rights violations is a fundamental part of international human right law (See, for example, Article 27.2 of the American Convention on Human Rights; Article 6 of the European Convention on Human Rights; and Article 7 of the African Charter of the African Charter on Human Rights and People’s Rights).

⁸⁸⁹ See *Albert Wilson v. Philippines*, Communication No. 868/1999 (2003) UN Doc CCPR/C/79/D/868/1999.

⁸⁹⁰ For example, the benefit to those persons who were detained in Argentina before 10 December 1983 by virtue of the state of siege and who were in the custody of the Executive (under Decree No. 10/90 and Law 24.043) was extended to cover persons who had initiated legal action and won their cases, but who had

While the Principles and Guidelines have a legal and judicial approach to reparation, it is clear that in practice non-judicial schemes and programmes offering redress and reparations also contribute to reparative justice for the benefit of a large number of victims. Such schemes and programmes should operate in coordination with other justice measures,⁸⁹¹ but ultimately it should be possible to challenge these measures through effective judicial remedies (i.e. before an independent court).⁸⁹²

In sum, victims of serious HR and IHL violations have the right to access to justice, which includes being able to trigger effective judicial remedies of a sufficiently high standard of fairness and impartiality. States can also provide other remedies to complement reparation procedures, such as access to administrative bodies and mechanisms, modalities, and proceedings conducted in accordance with a state's domestic law. To this end, the Principles and Guidelines exhort states to publicise information about available remedies⁸⁹³ to protect victims, and their representatives,

received compensation lower than that awarded by the reparations laws. Decree Num. 131/94 of 1 August 1994. For a general overview of the reparation process in Argentina, see: P Guembre, 'Economic Reparations for Grave Human Rights Violations: the Argentine Experience' in de Greiff, *The Handbook of Reparations* (n 13).

⁸⁹¹ See in particular P de Greiff, 'Reparations Efforts in International Perspective: What Compensation Contributes to the Achievement of Imperfect Justice' in Charles Villa-Vicencio and Erik Doxtader (eds), *To Repair the Irreparable: Reparations and Reconstruction on South Africa* (David Phillip 2004).

⁸⁹² See, for example, the case of *García Lucero v Chile*, challenging the reparations measures in Chile. There were no effective remedies to challenge the lack of reparation for torture victims (due to lack of jurisdiction *ratione temporis*) or bring a claim before any other existing compensation scheme. Similarly, civil claim were also blocked in practice by the amnesty law in place. Inter-American Court of Human Rights *Case of García Lucero et al v Chile* (Judgment) [28 August 2013] (*Preliminary objection, merits and reparations*). See also *Albert Wilson v. Philippines* where the HRC considered that despite existing administrative compensation schemes there were no effective remedies since '[...] a civil action may not be advanced against the State without its consent, and [...] there are, under domestic law, extensive limitations on the ability to achieve an award against individual officers of the State' (n. 889) para 6.2.

⁸⁹³ UN Principles and Guidelines, (n 2)VIII. 12(a).

witnesses, and families from intimidation and retaliation;⁸⁹⁴ to provide proper assistance to victims seeking access to justice;⁸⁹⁵ to provide appropriate legal, diplomatic; and consular means to ensure that all victims can exercise their rights to a remedy;⁸⁹⁶ and so on.

As mentioned earlier, Germany disagreed with the overall proposition that victims of serious HR or IHL violations have an international right to an effective remedy outside of special HR procedures like the ECtHR. Thus, the inclusion of the qualifying wording ‘as provided for under international law’ in Principle 12 was suggested and adopted in the final version. Notwithstanding, Germany still gave an explanation of vote during the adoption of the instrument before the CHR. It stated its position that victims do not have a right to a remedy and reparation under CIL but only as part of state sponsored mechanisms.⁸⁹⁷

Finally, the Principles and Guidelines specify that: ‘13. *In addition to individual access to justice, States should endeavour to develop procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate*’. Several amendments were considered with regard to Principle 13 during the last consultation. The suggestion to reinstate references to ‘collective’ claims for reparation and to receive reparation ‘collectively’ was made. Collective and group claims are particularly important when victims are targeted as a community or a group, since the appropriate

⁸⁹⁴ UN Principles and Guidelines (n 2)VIII.12 (b).

⁸⁹⁵ UN Principles and Guidelines (n 2)VIII.12 (c).

⁸⁹⁶ UN Principles and Guidelines (n 2) VIII.12 (d).

⁸⁹⁷ See: (n 716) and accompanying text.

form of reparation needs to reflect the collective suffering. International crimes like genocide and apartheid are directed against groups/communities and in these cases authorities need to guarantee adequate reparation and effective access to justice for all the victims. However, several delegations opposed the suggestion to include claim procedures for groups of victims, and highlighted the lack of collective procedures in their domestic systems. The issue of collective forms of reparation was addressed in detail when analysing the definition of victims in Principle 8.⁸⁹⁸ Importantly though, it was noted again during the discussions surrounding Principle 13 that it might be difficult to find consensus on the issue of collective rights and that the language thus reflected a compromise.

D. Forms of reparation for harm suffered

The Principles and Guidelines emphasise that victims are entitled to ‘*adequate, effective and prompt reparation*’,⁸⁹⁹ which should be ‘*proportional to the gravity of the violations and the harm suffered*’.⁹⁰⁰ One of the key aspects of the instrument is that it re-iterates the five forms of full and effective reparation: restitution; compensation; rehabilitation; satisfaction; and guarantees of non-repetition. At the same time, it makes clear that account must always be taken of the individual circumstances of each case. Not every gross/serious violation will necessarily and automatically give rise to all of these aspects

⁸⁹⁸ See: (n 718-721) and accompanying text.

⁸⁹⁹ Principles and Guidelines, (n 2) IX.15.

⁹⁰⁰ *ibid.*

of reparation, but they should always be considered and, if appropriate, applied in proportion to the gravity of the violation suffered.⁹⁰¹

The ILC's Articles on state responsibility and the case law of HR monitoring bodies were important sources of guidance in the formulation of the Principles and Guidelines. Van Boven's original study identifying these forms of reparation was formulated with the then 'draft' ILC Responsibility Articles in mind (subject to the differences already described in the above section on state responsibility).⁹⁰² HR monitoring bodies have developed extensive case law on legal consequences of conventional HR obligations. The richest case law in this respect is probably that of the Inter-American system.⁹⁰³ The forms of reparation originally enlisted by van Boven were retained throughout the drafting and adoption process of the Principles and Guidelines, but were further elaborated, taking into account developing jurisprudence of HR mechanisms. This section will give a brief overview of the forms of reparation described in the Principles and Guidelines.

According to Section IX, the forms that reparation may take include:

Restitution (Principle 19): This form of reparation consists of re-establishing the *status quo ante*, i.e. the situation that existed prior to the occurrence of the wrongful act. Although it is generally not possible to 'undo' the pain and suffering caused by human rights violations, certain aspects of restitution might nonetheless be possible –

⁹⁰¹ Principles and Guidelines, (n 2) IX.18.

⁹⁰² van Boven, 'Victims' Rights' (n 21) 38.

⁹⁰³ See, for example, L Laplante, 'Bringing Effective Remedies Home: The Inter-American Human Rights System, Reparations, and the Duty of Prevention' (2004) 22(3) Netherlands Quarterly of Human Rights 347.

such as restoring an individual's liberty, legal rights, social status, family life, and citizenship; returning to one's place of residence; restoration of employment; and returning of property.⁹⁰⁴

Compensation (Principle 20): The role of compensation is to fill in any gaps so as to ensure full reparation for the damage suffered (as long as the damage is financially assessable).⁹⁰⁵ The IACtHR held in the *Velásquez Rodríguez* case that 'it is appropriate to fix the payment of 'fair compensation' in sufficiently broad terms [...]'.⁹⁰⁶ Awards of compensation encompass material losses (loss of earnings, pension, medical expenses, etc.) and non-material or moral damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life, and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment.

Rehabilitation (Principle 21): Rehabilitation is an important component of reparation and it is a right specifically recognised in international human rights instruments.⁹⁰⁷ The UN Victims' Declaration stipulates that: 'victims should receive the necessary material, medical, psychological and social assistance and support'.⁹⁰⁸ Reparation should include medical and psychological care and other services such as

⁹⁰⁴Principles and Guidelines (n2). See also, Principles 8-10 of the Victims' Declaration (n 643) .

⁹⁰⁵ Commentary, ICL Report on Responsibility Articles (n 23) [IV.E].

⁹⁰⁶ *Velásquez Rodríguez* (n 164) [27].

⁹⁰⁷ See, for example, the UN Convention on the Rights of the Child and its Optional Protocol; the UN Convention against Torture; the Convention on the Protection of All Persons from Enforced Disappearances (n 9).

⁹⁰⁸ Principle 14, Victims' Declaration (n 643)

legal and social services.⁹⁰⁹ Rehabilitation may be provided ‘in kind’ or the costs may form part of a monetary award. It is important to distinguish between indemnity paid by way of compensation (for material and/or moral damage) and money provided for rehabilitation purposes.

Satisfaction and Guarantees of Non-repetition (Principle 22): Satisfaction and guarantees of non-repetition refer to the range of measures that may contribute to the broader and longer-term restorative aims of reparation. A central component is the role of public acknowledgment of the violation, and the victims’ right to know the truth and to have the perpetrators held accountable.⁹¹⁰ The Principles and Guidelines list measures such as cessation of continuing violations; judicial sanctions against persons responsible for the violations; an apology, including public acknowledgement of the facts and acceptance of responsibility; commemorations and tributes to the victims; and implementing preventative measures, such as ensuring effective civilian control of military and security forces, protecting human rights defenders, and persons in the legal, media and other related professions.

As mentioned already, the forms and modalities are not mutually exclusive, nor worded exhaustively. The Principles and Guidelines are designed with a fair degree of flexibility in this regard and do not establish a hierarchy of forms of reparation. They leave room for forms of reparation that are not mentioned but that might be appropriate in a concrete

⁹⁰⁹ Principle 24, Bassiouni 2000 Report (n 668).

⁹¹⁰ Question of the impunity of perpetrators of human rights violations (civil and political); (2 October 1997) E/CN.4/Sub.2/1997/20/Rev.1 [17].

case. For example, the list in Principle 21 is not intended to be exhaustive of all of the various situations that can occur where restitution is appropriate, and what are given are examples of where it should be feasible to ‘return’ the victim to where he/she was prior to the occurrence of the wrongful act. However, it is often not possible to restore victims to their original situation before the violations occurred for example, pain, and suffering cannot be ‘undone’ though certain specific aspects of restitution are possible, as listed. Restitution is especially important where the obligation breached is of a continuing character: thus in a case of unlawful detention or disappearance, for example, the authorities must end the situation by producing the victim. However, other forms of reparation might be needed to redress the harm and suffering of the victim and his/her family.

The payment of compensation can be conceived of as covering all the damage that the victim has suffered, which can be financially assessed so as to ensure full reparation. There is a distinction between payment of money by way of compensation and payment of monies for other purposes (like a sum of money to pay for physical or physiological treatment which would be for rehabilitative purposes or a sum of money to repay the cost and expenses of the case). As its title indicates, payment under this head is purely compensatory, and corresponds to what can be calculated in monetary terms for the damage suffered by the injured party. It is not concerned with the punishment of the responsible state, nor does it include the concept of punitive or exemplary damages.

The IACtHR held in the *Velásquez Rodríguez* that ‘it is appropriate to fix the payment of “fair compensation” in sufficiently broad terms in order to compensate, to the extent possible, for the loss suffered’.⁹¹¹ Monetary compensation is intended to remedy the damage suffered by the injured party as a result of the breach, to the extent that money can do this. The appropriate heads of compensatory payments can vary according to the type of breach, the behaviour of the parties, and other factors. As explored in Chapter 2, compensation awards for individuals include material losses (loss of earnings, pension, medical and legal expenses) and non-material or moral suffering (pain and suffering, mental anguish, humiliation, loss of enjoyment of life, and loss of companionship or consortium), the latter calculated on the basis of what is fair in all the circumstances. Importantly, the right to compensation for the damage suffered by the victims up until the time of their death should be transmitted by succession to their heirs, and the awards of compensation need to consider also the course that the victim’s life would normally have taken and whether the violation caused a serious harm to his/her life plan.⁹¹²

In addition to compensation, rehabilitation is an important component of reparation. Victims are entitled to and should receive the necessary material, medical, psychological, and social assistance and support. State parties to the UNCAT, for example, have been specifically encouraged to support rehabilitation centres that may exist in their territory to ensure that torture victims get the means for as full rehabilitation as is possible.⁹¹³ Rehabilitation services should be provided in kind or the costs to have them provided

⁹¹¹ *Velásquez Rodríguez* (n 164) [27]

⁹¹² G Donoso, ‘Inter-American Court of Human Rights’ reparation judgments: Strengths and challenges for a comprehensive approach’ (2009) 49 *Revista IIDH*.

⁹¹³ Report on *Torture and other cruel, inhuman or degrading treatment or punishment*, submitted by Sir Nigel Rodley, Special Rapporteur of the Commission on Human Rights, in accordance with General Assembly resolution 53/139, Report A/54/426, 1 October 1999, Para 50.

may form part of a monetary award⁹¹⁴: in this latter situation it is important to distinguish between money paid by way of compensation and money provided for rehabilitation purposes. As van Boven explains, a sum of money might also be a way to produce rehabilitation when it aims to pay a) “reasonable medical and other expenses of rehabilitation;” b) “harm to reputation or dignity;” and c) “reasonable costs and fees of legal or expert assistance to obtain a remedy”.⁹¹⁵

There are a number of definitions of rehabilitation and of what is understood by services which aims at rehabilitation.⁹¹⁶ General Comment 3 to article 14 of CAT, for example, establishes that rehabilitation “should be holistic and include medical and psychological care as well as legal and social services”. Furthermore rehabilitation “refers to the restoration of function or the acquisition of new skills required as a result of the changed circumstances of a victim in the aftermath of torture or ill-treatment. It seeks to enable the maximum possible self-sufficiency and function for the individual concerned, and may involve adjustments to the person's physical and social environment. Rehabilitation for victims should aim to restore, as far as possible, their independence, physical, mental, social and vocational ability; and full inclusion and participation in society.”⁹¹⁷ The Committee has also point out that ‘the payment of compensation alone is not enough; it is equally necessary to ensure victims the means necessary for their rehabilitation’.⁹¹⁸

Satisfaction covers a wide and varied range of non-monetary measures that may contribute to the broader and longer-term restorative aims of reparation. Some will apply

⁹¹⁴ Christina Cerna discusses the challenges faced in the Inter-American region when affording rehabilitation services in kind as opposed to as part of a monetary award (e.g. through the states’ public health systems). See Christina M. Cerna, *Regional Human Rights Systems*, Vol. V of the Library of Essays on International Human Rights (Ashgate 2014).

⁹¹⁵ van Boven, ‘Study concerning the right to restitution’ (n 17), principles 3-4, and 9-10, p. 56-57.

⁹¹⁶ REDRESS, ‘Rehabilitation as a form of reparation under international law’ December 2009, p. 10 available at: <http://www.redress.org/downloads/publications/The%20right%20to%20rehabilitation.pdf> (accessed on 13 April 16)

⁹¹⁷ UN Committee Against Torture, *General comment no. 3, 2012: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: implementation of article 14 by States parties*, 13 December 2012, available at: <http://www.refworld.org/docid/5437cc274.html> [accessed 1 May 2016]

⁹¹⁸ UN Committee Against Torture, *Country Reports, Azerbaijan*, May 2010, CAT/C/SR.909. [35]

to all violations (e.g. verification of the facts) and in that sense are more general than specific measures for specific violations (e.g. searches in respect to disappearances). A central component of satisfaction is the role of public acknowledgment of the violation. Bringing events officially into the open – provided that this does not cause further harm to or danger for the victim and their families – can help to restore the individual's sense of identity and dignity, and can act as a deterrent. Equally significant is the victims' right to know the truth, and for the perpetrators to be made accountable. The obligation to verify the facts and make full and public disclosure of the facts is part of the primary obligation to respect HR and IHL.⁹¹⁹ This obligation as a form of reparation has been especially prominent in the case law of the IACtHR,⁹²⁰ first set out in the well-known *Velásquez Rodríguez* case.⁹²¹

Satisfaction may consist of an acknowledgement of the breach, an expression of regret, a formal apology, a declaratory judgment, or another appropriate modality. Again, the appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance. One of the commonest forms of satisfaction is a declaration of the wrongfulness of the act by a competent state body, be it a court, a tribunal, or some other official organ. Thus, any court or tribunal that has jurisdiction over a dispute has the authority to make a declaration of its findings, as a necessary part of the judicial process. A declaration may sometimes act as a precondition to other forms of reparation, or it may

⁹¹⁹ See, for example, Article 32 of Additional Protocol I to the Geneva Conventions (12 August 1949).

⁹²⁰ Sandoval, Clara and Duttwiler, Michael 'Redressing Non-Pecuniary Damages of Torture Survivors: The Practice of the Inter-American Court of Human Rights.' In: Gilbert, Geoff and Hampson, Françoise J and Sandoval, Clara, (eds.) *The Delivery of Human Rights: Essays in honour of Professor Sir Nigel Rodley*, (Routledge 2010) pp. 114-136.

⁹²¹ *Velásquez Rodríguez* (n 164) [134] et seq.

be the only remedy sought. In some instances, therefore, a finding of a violation could in itself be sufficient ‘satisfaction’. This is consistent with general international law practice as well as with human rights jurisprudence in particular.⁹²²

International courts and other remedial mechanisms have taken different approaches when affording redress. Sometimes their judgements and views focus narrowly on the needs of the particular individual who suffered a violation of a right in the past, without attempting to specify the more general implications of their conclusions for the laws, institutions, and practices of the responsible state. Others have expressly taken on the task of overseeing broader reform as a continuation of the adjudication of the case. Orders for broader reform are generally undertaken as "guarantees of non-repetition," ensuring that the past violation will not be repeated.

As mentioned earlier, although assurances or guarantees of non-repetition may amount to a form of redress, they also serve a preventive function.⁹²³ In this context, they may be described as a positive reinforcement of future performances, with cessation of violations being conceived of as the negative aspect of future performance, concerned with securing an end to the continuing wrongful conduct.

⁹²² Chapter 2 explores satisfaction as a form of reparation in diplomatic protection cases. As discussed in detail in Chapter 1, following the practice of international tribunals in general, human rights courts have recognised that declaratory judgements are a form of satisfaction. See nn. 122-125 and accompanying text.

⁹²³ ‘The core function of guarantees of non-recurrence is preventive in nature [...]’. UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence*, 7 September 2015, A/HRC/30/42, para 24.

International human rights instruments generally include positive obligations to prevent violations.⁹²⁴ At the same time, considerable emphasis is placed on institutional reforms and/or strengthening human rights norms within states, and especially amongst those who are often at the sharp end of committing violations: law enforcement, military, prison, and security services.⁹²⁵ Pablo de Greiff, Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, explains that:

25. [...] guarantees of non-recurrence relates to a combination of deliberate, diverse interventions that contribute to a reduction in the likelihood of recurring violations. The “object” is not the prevention of isolated violations, but of gross human rights violations and serious violations of international humanitarian law. Such violations presuppose systemic abuses of (State) power that have a specific pattern and rest on a degree of organizational set-up.

27. [...] there is no such thing as a general non-recurrence policy. An effective policy designed to prevent systemic violations will need to adjust form to function and choose the proper instruments.

While this concept of guarantees of non-repetition is an effective means to achieve practice and law reform as well as to implement victim-oriented policies, it can be problematic as it expands remedies beyond the specific victims of a case. Gerald Neuman recognises that ‘the goal of international human rights institutions is to induce action at the national level for the remediation of past injuries and the prevention of future injuries.’⁹²⁶ However, he argues that the understating of guarantees of non-repetition as a measure of redress with the potential to prevent future violations may cloud the distinction between ensuring that the same victim will not face a future repetition of the

⁹²⁴ For example, Article 2 of UNCAT. See note 9.

⁹²⁵ These organs and the personnel within them need to be properly and effectively controlled and trained (in law and in behaviour), and one important mechanism for this is the promotion and observance of codes of conduct and minimum standards that have been developed at the international level. See, among others, the *Code of Conduct for Law-Enforcement Officials* (17 December 1979) UNGA Res 34/169, and the *Mandela Rules* (n 818).

⁹²⁶ Gerald L. Neuman, ‘Bi-Level Remedies for Human Rights Violations’, Volume 55, Number 2 (Harvard International Law Journal 2014) p. 324

violation and ensuring that similar conduct will not result in violation of the rights of other individuals who are not parties to the case.⁹²⁷ He explains that this type of remedial measures might affect third parties and even larger groups of people who are not involved in the case. While it is clear that certain violations will require some form of systemic reform without which the particular victim will remain exposed to further violations (e.g. a law allowing arbitrary detentions), Neuman argues that these are exceptional cases. More frequently, narrower focused remedies fully redress and protect the victim. ‘The victim's own right to an effective remedy does not entail an additional right to a remedy solely for the benefit of unrelated future victims.’⁹²⁸

In this context, it has been argued that is best to formulate systemic policies in mechanisms where there is a greater opportunity of victim participation (as opposed to, for example, litigation before human rights courts). Victims’ participation can help create more adequate reparation measures and at the same time be part of the restorative process for victims.⁹²⁹ The UN Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence makes a distinction between the “epistemic”

⁹²⁷ Neuman, ‘Bi-Level Remedies’ (n. 926) fn36 at p. 330

⁹²⁸ Neuman, ‘Bi-Level Remedies’ (n. 926) p 333. He also notes that it has been argued that overly strong remedial doctrines may induce judges to avoid finding violations by narrowing substantive rights or by erecting procedural obstacles to their vindication. Ibid. 327

⁹²⁹ A well-organised participatory process has a potential healing effect on victims and communities. (REDRESS, ‘Collective Reparations: Concepts & Principles’ available at: <<http://www.redress.org/downloads/events/CollectiveReparationsMG.pdf>> accessed 6 July 2016, 1-3.). Being consulted and treated as right holders whose dignity is respected, helps victims to move forward and to be better integrated into society. (OHCHR, ‘Rule-of-Law Tools for Post-Conflict States. Reparations Programmes’ (2008) United Nations Publication, available at: <<http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf>> accessed 6 July 2016, 15-16). See Suchkova, Maria. ‘The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation’, Briefing Paper 5, Reparations Unit, (Essex Transitional Justice Network 2011)

and “legitimacy” arguments in favour of victim participation in transitional justice mechanisms. According to de Greiff, epistemic arguments refer to the kind of information and insight that can come about through participation, and the positive consequences of such a gain in knowledge. Epistemic arguments, therefore, posit that asking victims to participate in transitional justice measures can help: capture the sense of justice of victims and their judgments of what would constitute effective redress; ensure a close fit between the measures and the needs of victims, on the one hand, and important contextual factors such as cultural, historical and political realities, on the other; broaden the range of adequate alternatives as more ideas for effective redress are put on the table. He further explains that according to legitimacy arguments, victim participation is important not just because of specific contributions in terms of information or insight that victims may make, but rather because participation in itself provides a measure of recognition to, and empowerment of, victims. It also contributes to making victims visible, helping them achieve a place in the public sphere that may have been denied to them before; facilitates the identification of commonalities of experiences, values and principles among different types of victims as well as between victims and non-victims; the participation of victims puts a human face on discussions about transitional justice.⁹³⁰

Finally, the form of reparation, whether it is a monetary or a non-monetary award, plays an important role in its enforceability.⁹³¹ Monetary awards such as compensation can be implemented directly without affecting the structural system of the state, and in this

⁹³⁰ UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence*, 27 December 2016, A/HRC/34/62,

⁹³¹ Echeverria, ‘Genealogy’ (n 7) p 174.

respect may be easier to implement.⁹³² However, states are not always willing to afford monetary compensation, particularly in situations of massive and/or systematic violations or where the state has severe financial constraints. In contrast, non-monetary awards calling for legal or institutional reforms (e.g. cancelling an amnesty decree to make way for the prosecution of alleged criminals, affording victims with new opportunities to challenge the legality of detention, removal of the immunity of senior officials) will usually require a series of procedural steps within the legislative and/or judicial branches of the government, and for this reason it will invariably take more time and be more complicated for the state to implement such awards.⁹³³

Reparation may also necessitate changes to domestic laws within the liable state, including modifications to such laws that are in violation of a rule of HR and/or IHL. Sometimes legal reforms will be necessary to afford restitution: for example, for exiles to return to their countries and for the restoration of their rights, including property rights, legislative amendments within the state's national system might be required. Legal modifications are also required to stop violations (for example, an amnesty decree preventing victims from obtaining redress) or to prevent future violations (for example, if a law allows for indefinite and/or arbitrary detention). It is also important to recall that reparation should not only be secured through litigation and adjudication, but first and

⁹³² Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493, 525 (2011).

⁹³³ See generally REDRESS, 'Enforcement Report' (n 40). The report analyses the enforcement framework for material and non-materials awards, explores the enforcement of preliminary/provisional measures, the enforcement of restitution and compensation (monetary awards) and other non-monetary awards such as rehabilitation, satisfaction and guarantees of non-repetition, and considers whether certain forms of reparation are easier to enforce than others.

foremost through the design and implementation of reparation programmes.⁹³⁴ This is a valuable and realistic complement, which remains somewhat under-exposed in the Principles and Guidelines.⁹³⁵

5. Concluding remarks on the UN Principles and Guidelines

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Theo van Boven as Special Rapporteur in 1989. His mandate was to study the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms, with a view to exploring the possibility of developing some basic principles and guidelines in this respect. Two years later, the Sub-Commission also embarked on studies aimed at combating impunity. This was a time of political change on various continents with prospects of a higher degree of human rights advancement. It was also a time of the creation of transitional justice mechanisms in several countries. In this context, restoring justice implied an increased focus on the criminal responsibility of perpetrators of gross human rights abuses and their accomplices. It also opened up the exposure of many wrongs inflicted on the victims of these abuses, with a view to rendering retributive and reparative justice. This was a time marked by the triumph of the human rights discourse in world politics: human rights

⁹³⁴ See Article 32 of the Impunity Principles (n. 653).

⁹³⁵ van Boven, 'Victims' Rights' (n 21) 37.

would not only be proclaimed, but also effectively enjoyed – future violations would be repressed and victims would be redressed.⁹³⁶

The mandate of the Special Rapporteur established that the study had to take into account existing international human rights norms and relevant decisions of international human rights' bodies. According to van Boven, the study and the draft Principles and Guidelines as they evolved demonstrated that the gaps in human rights protection were less legal than political, and that a new instrument was not supposed to entail new international or domestic legal obligations, but rather to identify mechanisms, modalities, procedures, and methods for making existing legal obligations operational.⁹³⁷ This is reflected in the Preamble of the adopted Principles and Guidelines.

The drafting and adoption process of the Principles and Guidelines stretched over fourteen years. While the subject matter of redress and reparation enjoyed broad sympathy, as shown by the wide sponsorship that the procedural resolutions of the CHR received, the political interest among state members was weak. Even when the drafting process regained some impetus after Bassiouni's appointment as Independent Expert, it had new political setbacks once he submitted his report in 2000. The idea of a duty to repair historical wrongs connected with practices of slavery and colonialism had been formally discussed during the political process leading to the 2001 Durban Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance. This was a highly politicised issue that deeply divided states and that was relevant to the substance

⁹³⁶ d'Argent, 'Wrongs of the Past' (n 644).

⁹³⁷ van Boven, *Victims' Rights* (n 21) 28.

of the Basic Principles and Guidelines. In addition, the September 11 attacks in the US not only attracted most of the attention among international policymakers, focusing on immediate responses to the threat of ‘international terrorism’, but also brought about relevant questions on the relationship between HR and IHL and its treatment under international law. Contrary to recent developments, stimulated in particular by the establishment of international criminal tribunals, the US lobbied for a complete separation of these legal regimes. Such a stringent approach was in obvious conflict with the latest version of the Principles and Guidelines, which included both types of violations. Understandably, the drafting process stagnated in those years in order to avoid disruptive influences.

The changes to the scope of the instrument throughout the process – i.e. including *all* types of HR *and* IHL violations – also made the drafting, consultation, and adoption of the instrument more difficult. The most contentious issue that arose during the consultation stage was the scope of the instrument: whether it should cover violations of both human rights and international humanitarian law, and whether it should cover all breaches or just gross/serious violations.

Van Boven’s first draft covered gross violations of human rights and fundamental freedoms. However, after the workshop co-organised by the International Commission of Jurists and the Maastricht Centre for Human Rights on this topic, he included serious IHL violations and excluded fundamental freedoms. The scope of the instrument was further widened in Bassiouni’s 2000 draft. The new draft included *all* violations of HR and IHL

– the gross/serious qualification was removed and notions of ICL and IHL were developed to a greater extent. This was the draft reviewed during the first consultative meeting. Arguably, expanding the scope to all types of violations made it more difficult to reflect a coherent set of victims’ demands and their corollary rights. On the other hand, the legal consequences of violations of HR and IHL are similar only when dealing with the most severe violations (e.g. international crimes), which made the structuring of the instrument much more challenging. In the final version, the scope was once more reduced to gross/serious violations, but kept both HR and IHL breaches.

The rationale behind including both legal regimes and expanding the scope to all types of violations was the victim-oriented nature of the instrument. First, it was argued that from a victim’s perspective it doesn’t matter whether one is tortured, unlawfully killed, or disappeared during an armed conflict or during peace-time, by a policeman, a soldier, or a rebel. Second, that all violations of international law give rise to a right to reparation (not only serious or gross).

Despite the lack of recognition of non-states (i.e. victims) as formal actors in the drafting process of international instruments or generally under international law, it would seem possible in principle to create a victim-oriented document on the right to reparation. Clearly, the drafting and adoption process of the Principles and Guidelines was very inclusive of victims’ voices. Van Boven made a consistent effort to include the point of view of victims’ organisations around the world and the CHR allowed active participation of NGOs during the consultative meetings. However, broadening the scope

of the instrument to include a less defined groups of victims made this task much more difficult. There are still many outstanding legal questions that made the ‘new’ wider project very complex. For example, many still challenge whether a right to reparation exists under CIL for victims of human rights violations, and especially of IHL breaches, to claim reparations directly against states (an argument implicit in the instrument). At the same time, it is questionable whether such a right exists for all types of violations or only for those violations that are so severe as to constitute crimes under international law, breaches of CIL, *jus cogens* norms, or *erga omnes* obligations. On the other hand, while responsibility of non-state actors for IHL is widely recognised under international law, it is not the same under HR law.

In addition, many questions remain open when it comes to reparation for violations committed by non-state actors. For instance, in cases on non-state responsibility, are all states obliged to afford judicial remedies regardless of where the violations are committed and the nationality of the alleged perpetrators or victims? How does concurrent liability between state(s) and non-state actor(s) operates in these cases? What is the relationship between the principle of access to justice and jurisdictional barriers like immunities?

Looking at this legal landscape, it’s easy to conclude that broadening the scope of the instrument to include all violations of both HR and IHL was too ambitious. While van Boven seemed concerned to create an international instrument that could empower victims by reflecting their needs and wishes, Bassiouni went further by proposing a

victim-oriented drafting methodology and framework. He explained ‘[t]he Draft Guidelines intentionally adopted a victim-oriented perspective, organising principles from all legal sources not according to instruments and sources, but according to the needs and rights of victims’.⁹³⁸ The Independent Expert used this rationale to expand the scope of the Principles and Guidelines to all types of HR and IHL violations and to include many new provisions, particularly in regards to IHL. But during the negotiations, some delegations contended that many of the provisions in the 2000 draft did not apply to all violations of HR and certainly not to some (or none) of the violations of IHL. This discussion continued during the next consultation. The Chairperson and the Experts put forward a proposal addressing the contentious issues related to the scope of the instrument and suggested two important modifications. The first was to delete all references to human rights or international humanitarian law violations and thus change the title to ‘Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Law’. The second, following from the first, was a suggested definition of ‘gross violations of international law’. According to the proposal, its purpose was to achieve consensus to facilitate the adoption of the draft Principles and Guidelines. It attempted to limit the scope in terms of gravity and to avoid the specific debate of including/excluding IHL by relying on general principles of international responsibility under CIL, as opposed to specific norms of the law of armed conflict. In reality, however, the proposal created a broader group of victims – or an even less clearly defined group – that states were not ready to accept.

⁹³⁸ Report of First Consultative Meeting (n 670) [20].

As a result, the words ‘gross’ and ‘serious’ were put back in brackets. At the end of the third and last consultation, the scope of the instrument was finally reduced once more to the most severe violations, although it included a saving clause: ‘26. [...] it is understood that the present Basic Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law’. Unfortunately, at this point it was too late to reopen the debate on the clear application of some of the ‘contentious’ provisions to gross and serious violations. It was the last opportunity to adopt the instrument and participants decided to reach a compromise to keep these provisions in the instrument, even if they were a weaker/vaguer version (e.g. Principle 18 establishes that ‘in accordance with domestic and international law’ victims ‘should’ be provided with full and effective reparation when this principle is simply restating existing law and should not depend on internal law). On the other hand, it was clear that some delegations still had problems with certain provisions of the text, particularly on the inclusion of IHL, but it was also clear that the majority of states agreed on the importance of adopting a UN instrument on the right to reparation. The draft Principles and Guidelines were finally submitted to the Commission on Human Rights at its 61st session. The text was adopted on 19 April 2005 with no votes against, but with thirteen abstentions. Three months later, on 25 July 2005, the Principles and Guidelines were adopted by ECOSOC, by a vote of forty-three in favour and five abstentions (none against). The General Assembly adopted the instrument on 16 December 2005 without a vote..

One wonders whether the outcome of the Principles and Guidelines would have been clearer and stronger if the original scope had been maintained. After all, the IHL violations covered under the rubric of ‘serious violations of IHL’, as applied in the Principles and Guidelines, would seem to be included under the notion of ‘gross human rights violations and fundamental freedoms’. It is easy to imagine that states would have been less reluctant to apply these principles and guidelines to the most serious HR violations and fundamental freedoms than to all violations of HR and IHL. Regardless, the instrument successfully structures a broad corpus of law that exists on the right to a remedy and reparation. The Principles and Guidelines bring together the standards that have been developed in various quarters and structure them. They seek to rationalise through a consistent approach the means and methods by which victims’ rights can be addressed, so as to maximise positive outcomes and minimise the diversity of approaches that may cause uneven implementation. Their adoption marks a long and arduous effort seeking recognition of victim-oriented policies as part of international law.

Despite questions still raised on the legal status of the rights reflected in this instrument (e.g. whether principles of state responsibility can apply to individuals giving victims of the most serious violations of concern to the international community an enforceable right to reparation under CIL), after a lengthy process of consideration and review by non-governmental and governmental experts, the UN General Assembly adopted the Principles and Guidelines without a vote. Thus, there is some basis to consider the text as declaratory of legal standards in the area of victims’ rights, particularly in regards to the

provisions relating to the right to a remedy and reparation.⁹³⁹ Clearly, the instrument has been used as reference in international law by other international courts and tribunals as well as by governments implementing reparation policies. The Principles and Guidelines are without a doubt an invaluable reference, being the only international instrument that classifies the norms, rules, and standards on the right to a remedy and reparation for victims of grave abuses, and contains a detailed description of the mechanisms, procedures and forms of adequate redress.

⁹³⁹ See: van Boven, 'Victims' Rights' (n 21) 32, citing M Groenhuijsen and R Letschert, *Reflections on the Development and Legal Status of Victims' Rights Instruments*, in *Compilation of International Victims' Rights Instruments* (Tilburg/Nijmegen 2006) 1–18

Conclusion

In the area of state liability, there is a clear merging of HR law with IHL, ICL, and the law on diplomatic protection. It is well established that HR law applies during armed conflict; that serious violations of HR and IHL are international crimes that carry the same legal consequences; and that, nowadays, diplomatic protection is a mechanism used by foreign states to espouse HR claims on behalf of their nationals. While state responsibility principles have traditionally applied to these legal regimes, it has been at the inter-state level. However, HR law has transformed the law on state responsibility. Today, it is generally recognised that not only states, but also individuals can be holders of international rights. States have a customary obligation to afford domestic remedies and reparation for serious acts or omissions contrary to international HR law. If states fail to comply with this primary obligation under international law, they commit an IWA and, as such, are liable to afford reparation at the international level. HR violations that are systematic and/or massive are also IWAs and states become liable to afford reparation in the same way. The present study concludes that individual victims (as opposed to the state of nationality only or the international community as a whole) can also be the beneficiaries of this secondary obligation to afford reparation. In other words, since individuals enjoy customary rights, when these are breached, individuals have an actionable secondary right to reparation under general international law.

As shown in the present study, this conclusion becomes more forceful when examining the developments on the entitlement of individual primary and secondary rights and how they interconnect in HR law (Chapter 1), the law on diplomatic protection (Chapter 2),

and IHL and ICL (Chapter 3). The legal status of the Principles and Guidelines is premised precisely on the application of state responsibility principles to the relationship between individuals and states when gross violations of HR and serious violations IHL occur (Chapter 4). As demonstrated, the instrument accurately reflects current legal standards in this regard, and it is further evidence that the majority of states accept state responsibility for reparation in favour of individuals as part of contemporary international law.

Chapter 1. The Legal Position of the Individual in International Law

Chapter 1 analyses the different doctrinal positions on the individual right to reparation. The chapter shows that the individual can be a holder of international rights, including under CIL. It explains how certain fundamental obligations of states give rise to individual rights under general international law (e.g. the prohibition against torture; genocide; apartheid). It concludes that when individuals have customary rights, they have an enforceable right to reparation under CIL. If a state fails to respect a customary individual right (by failing to redress it domestically or because the breach is massive and/or systematic), it becomes liable to afford reparation under principles of state responsibility. Responsibility to afford reparation for these types of violations can be invoked by the individual victim in available international mechanisms or in domestic *fora*.

The doctrinal discussion on the notion of international legal subjectivity is not helpful when looking at the existence of an individual right to reparation. Whether one considers the individual a ‘subject’ or simply a ‘participant’ of international law, it is still necessary to determine which conditions have to be fulfilled to qualify a rule under international law as a norm containing an individual right. In addition, it is necessary to examine whether any general regime of reparations has developed to cover individuals. The Commentary on Article 33(2) of the ILC Responsibility Articles on state responsibility makes this clear: *‘It will be a matter for the particular primary rule to determine whether and to what extent persons or entities other than States are entitled to invoke responsibility on their own account’*.⁹⁴⁰

Recent ICJ jurisprudence confirms that there are international individual rights, including under CIL.⁹⁴¹ At the same time, the legal basis for a right to reparation for individual victims has become firmly enshrined in the elaborate corpus of international HR instruments. It has also been further refined by the extensive HR jurisprudence. The duty to remedy official misconduct is so widely acknowledged that it may be regarded as forming part of CIL.

While HR protection has been confined under specific treaty regimes, it does not mean that state responsibility is inapplicable to HR breaches. The powers of international HR

⁹⁴⁰ Commentary on Article 33, Report of the ILC Responsibility Articles (n 23) 234 *et seq.*

⁹⁴¹ See, for example, *LaGrand* (n 92), *Avena* (n 123), *Diallo* (n 97) the *Wall Opinion* (n94), and *Armed Activities Case* (n 97).

bodies and tribunals to afford reparation, and the actual reparations afforded, reflect principles of state responsibility for injury to aliens.

The PICJ applied in the *Chorzów* case the general principle of international law that every violation entails the duty to afford reparation in adequate form. The Court indicated that this was not only an international principle, but a general conception of law applicable to any breach.⁹⁴² While the *Chorzów* principle was first applied in an inter-state case, the ICJ already recognised that it equally applies to reparation for injury to individuals.⁹⁴³ Importantly, it recently confirmed that the *Chorzów* judgment, as well as the principles of state responsibility clarified in it, applies in the relationship between individuals and states.⁹⁴⁴

Based on the legal maxim that the capacity to bring claims is inherent in the substance of a right (*ubi jus ibi remedium*), the PCIJ affirmed in *Danzig* that national courts could enforce international rights of individuals.⁹⁴⁵ Similarly, the ICJ reiterated in *LaGrand* that international individual rights should be enforced domestically.⁹⁴⁶ The ILC refers to these two cases when exploring the individuals' capacity to invoke state responsibility in its commentary to the ILC Responsibility Articles.⁹⁴⁷ In this sense, since individuals have fundamental rights under general international law, when such rights are breached,

⁹⁴² *Chorzów* (n 22) [102].

⁹⁴³ *Application for Review* (n 131) 197-198.

⁹⁴⁴ *Wall Opinion* (n94) [52 et seq].

⁹⁴⁵ *Danzig* (n 91)

⁹⁴⁶ *LaGrand* (n 92) [77].

⁹⁴⁷ Commentary, Report of the ILC Responsibility Articles (n. 23) 234 et seq.

individuals have a customary right to reparation. In principle, this right can be enforced through domestic courts.

While procedural bars, like immunities, might apply in foreign or third state courts, these may be waived and may not be permanent. The ICJ clarified that:

[...] the fact that immunity may bar the exercise of jurisdiction in a particular case does not alter the applicability of the substantive rules of international law [...] whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation.⁹⁴⁸

Chapter 2: State Responsibility, Diplomatic Protection, and the obligation to afford reparation to individuals

Diplomatic protection, as the mechanism to enforce the law on state responsibility for injury to aliens, is the predecessor of the right to a remedy and reparation under HR law. It is also a contemporary mechanism that can be used to enforce HR of aliens. Both legal regimes coexist and are closely related. Evidence shows that there has been ample cross-fertilization between them (e.g. in addition to exhaustion of domestic remedies, HR rights law also allows inter-state claims). It is also clear that HR has greatly influenced the law of diplomatic protection. First, it has altered its traditional scope to include HR as part of denial of justice claims. Secondly, it is now recognised that the reparation due at the international level in diplomatic protection cases is to redress the actual injury of the individual victim. The concept that the injury claimed at the international level is an

⁹⁴⁸ *Germany v Italy* (n 25), especially [100].

injury of the state, as opposed to an injury of an individual (the so called Vattel's legal fiction⁹⁴⁹), has departed from its traditional understanding. Article 1 of the ILC Draft Articles on Diplomatic Protection was modified when defining diplomatic protection. It left out the part stipulating that a state was 'adopting in its own right' the claim of its national. The reference to this provision by the ICJ in the *Diallo* case seems to confirm that it is the up-to-date understating of diplomatic protection. The Court emphasised the point when it stated 'that the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter's injury'.⁹⁵⁰

The notion that an international (HR) standard of justice applies to individuals at home and foreigners abroad led some to argue that diplomatic protection would be superseded by HR law. After the adoption of the Universal Declaration on HR, the ILC rapporteur on State Responsibility, Garcia Amador, argued that the new rules of HR and fundamental freedoms would resolve the debate on whether states had an obligation to apply a national or an international standard of treatment to aliens. According to him, HR would help clarify the content of the international standard of justice that would be applicable to anyone regardless of his or her nationality.⁹⁵¹ However, due to the lack of individual procedural rights at the international level, there has been a 'renaissance' of diplomatic protection procedures. Victims have resorted to this institution as means to enforce HR. But the exercise of this remedy by states continues to be completely discretionary. The severity of the violations plays no role in the decision of states to exercise it. As such,

⁹⁴⁹ (n 59)

⁹⁵⁰ *Diallo (Compensation)* (n 113) [57].

⁹⁵¹ FV Garcia Amador, 'First Report on State Responsibility' (1956) 2 YBILC 202, [156].

diplomatic protection cannot be considered a HR remedy, but only a subsidiary machinery to enforce (some) HR.

The history and coexistence of diplomatic protection and HR, confirms the understanding that state responsibility principles apply to HR. Clearly, the recent recognition that the injury is to the individual and not to the state is consistent with the development of HR law and the acknowledgment of the role that individuals have in international law. Paradoxically, however, the rationale behind Vattel's legal fiction is ultimately coherent. If the injury is to the state (because the other state failed to afford the minimum treatment required by international law to its national) and not to the individual, then the state should be the one to have a remedy for such a breach. But if the law of state responsibility for injury to aliens now recognises that the legal or natural person is the injured individual, should not the individual have access to remedy directly under international law (regardless of the capacity of states to 'represent' them in diplomatic procedures)?

Importantly, Chapter 2 concludes that the 'minimum standard of treatment to aliens' is inseparable from the right to access to justice. The rule requiring prior exhaustion of local remedies as a precondition for diplomatic protection proves this symbiotic relation. The chapter explains that states have an obligation to afford foreigners access to a system of justice that guarantees due process in accordance with the international minimum standard. The rule of exhaustion of domestic remedies, therefore, is not a procedural precondition that can be waived in diplomatic protection claims. It is an inherent part of

the international wrong of denial of justice. In a similar way and obviously influenced by the law on protection of aliens, international HR law also requires the exhaustion of effective domestic remedies prior to bringing individual claims before international HR bodies. The local remedies rule presupposes access to justice for everyone under the jurisdiction of any state. So in the same way that denial of justice is understood as a system failure, where exhaustion of domestic remedies is an inherent material element of the IWA of denial of justice, international HR violations also materialise as IWAs after states fail to redress the breaches in accordance with international standards (i.e. effective remedies and adequate reparation). States, therefore, have nowadays an obligation to protect aliens and nationals alike from acts or omissions that breach general international law (like torture, slavery, arbitrary detentions, undue process, unfair trials, enforced disappearances, and so on). If states are unable to protect individuals and then fail to redress these violations in accordance with international standards, they commit and international wrong (a denial of justice/international HR violation) and are responsible under international law to afford reparation.

This understanding of exhaustion of domestic remedies as an inherent part the IWA would seem to limit the application of secondary obligations to afford reparation only to states. As it will be discussed further below, there have been recent attempts to transport the regime of state responsibility to non-state entities committing atrocities in armed conflicts or other situations of violence where IHL/HR apply. Clearly, if state responsibility for HR violations exhaust itself in the concept of lack of access to justice/effective remedies, it is hard to apply this standard to non-state actors. But can

states commit an IWA (and thus be liable to afford reparation) independent of domestic remedies? In terms of state responsibility for international crimes, there is a difference between ‘state crimes’ and an isolated international crime committed by a state official or another person connected to the state. The first case entails state responsibility when a pattern of ‘system criminality’⁹⁵² is proven. The second requires exhaustion of effective domestic remedies if available (the state commits an IWA engaging its international responsibility when it fails to redress the criminal act or omission). One can take the view that in the case of so-called state crimes the rule of exhaustion of domestic remedies is not applicable because the direct intent of the state can be proven (the violations are massive and/or systematic). The state is breaching the international legal order directly. The IWA materialises irrespective of domestic remedies. It is also possible to argue that the rule of exhaustion of domestic remedies is not applicable because it is assumed that there are no effective remedies available (the state is unable or unwilling to prevent/redress the violations). This nuanced difference can have an impact on the debate over non-state responsibility.

Finally, as clearly shown by the history of diplomatic protection, the strengthening of the exhaustion of the local remedies rule as a way to protect state sovereignty was born in response to the practice of abusive inter-state commercial activities. It was in this context that the principle of equality and state sovereignty was vigorously upheld and reinforced (e.g. the Calvo Doctrine). Paradoxically, it is more common nowadays to apply a restrictive reading of the exhaustion of domestic remedies rule and the protection of

⁹⁵² [Röling, ‘The Significance of the Laws of War’, in A. Cassese (ed.), *Current Problems of International Law* (1975), at 137–139]

sovereign equality in HR cases than in cases involving transnational commercial activities. Modern commercial arbitration allows direct claims by legal persons (without exhaustion of local remedies) and binds third states to enforce their judgements. Commercial activity is an exception to the principle of sovereign and diplomatic immunity when governments or state officials are sued in foreign courts. None of this is possible under HR law, not even when violations involve *jus cogens* norms.

Chapter 3. Is there an individual right to reparation for violations of IHL against states?

The obligation to afford reparation for IWAs of States applies equally to violations committed in armed conflict (e.g. for a serious breach of a right protected by a *jus cogens* norm). Nothing in IHL instruments or CIL prevents individual reparation for violations of the laws of war. Therefore, if individuals are the primary right-holders, they have a secondary right to reparation under principles of state responsibility.

As this chapter shows, war crimes and crimes against humanity give rise to international liability under general principles of state responsibility. Additionally, HR law continues to apply during armed conflict, including the obligation to afford a remedy and reparation for an infringement of a non-derogable right. If states fail to comply with this primary obligation, they become liable under international law. The ICC recently recognised that victims of international crimes have a right to reparation.⁹⁵³ Indeed, when serious HR

⁹⁵³ *Lubanga* (n 599).

and IHL violations are committed, not only the perpetrator is liable under international law to afford reparation, but also the state on whose behalf or acquiescence he or she committed the crimes.

While traditionally reparation for IHL breaches has been awarded at the inter-state level, Chapter 3 proves that no *legal norm* exists that excludes redressing victims directly. There is no consistent case law or state practice showing that compensation for IHL violations belongs only to states as opposed to the individual victim. On the contrary, HR law has influenced the understating of IHL precisely in the context of individual entitlements. As shown by the ICRC study on CIL, the clear tendency to recognise the exercise of rights by individuals that started in 1945⁹⁵⁴ has continued to consolidate in contemporary IHL.⁹⁵⁵ The chapter shows that the notion of individual remedies was already present during the drafting discussions of Article 3 of Hague IV (establishing liability to pay compensation for IHL violations). Likewise, that the intention and sometimes the practice of post-WWII settlements was to compensate individual war victims (and therefore the state-to-state practice of these compensation funds is evidence of a policy concern rather than the aim and intention of a legal norm). There are also many compensation programs specifically for victims of IHL violations committed during WWII. The chapter shows that while states have claimed that these funds are a result of moral as opposed to legal obligations, and therefore do not show *opinio juris* on an obligation to redress victims of IHL breaches directly, they were created to settle or avoid pending litigation. Their claimed *ex-gratia* nature is therefore questionable and is

⁹⁵⁴ ICRC Commentary on the APs by Sandoz (n 441)1067.

⁹⁵⁵ ICRC Commentary on IHCL by Henckaerts and Doswald-Bexk (n 441) 549.

important to reconsider the legal source of this practice and its impact on the formation of CIL. Finally, the chapter also describes how the European and Inter-American HR systems have applied individual remedies to violations arising in armed conflict settings. In sum, while there is lack of evidence to establish that an obligation to afford reparation to victims exist under the rules of IHL (i.e. that the compensation provision in Article 3 of Hague IV or Article 91 of AP I apply to individuals), there is certainly no legal norm preventing direct reparation to victims. If a state commits an IWA by breaching an individual right under IHL, it becomes liable to afford effective remedies and adequate reparations directly to the victim.

Not only is there lack of evidence to prove the existence of a ‘state-to-state only reparation norm,’ but such a rule would also be contrary to the right to reparation for victims recognised in HR law and ICL (both applicable during armed conflicts) and would be unsuitable in non-international armed conflicts – where states and non-states actors are equally bound by IHL rules. The claimed rule would leave victims of IHL violations by their state of nationality completely unprotected and other victims would depend on the political will and capability of states to bring claims on their behalf.

Chapter 3 shows that the dominant view in contemporary literature is that an individual right to reparation exists for victims of IHL violations and that the traditional inter-state practice responds to policy considerations rather than legal norms. There are still many questions as to how to implement this right in practice, particularly in cases of mass atrocities. However, there are also important policy considerations against government-

to-government negotiations. Political processes such as compensation treaties are generally imposed by the victorious states. In the past, these settlements have disregarded injuries suffered as a consequence of IHL violations in the vanquished countries. Individual claims, on the other hand, can help bring accountability and enforcement of international standards.

Ignoring the evolution of international law since the end of WWII, particularly in the area of HR and IHL, seems a rather short-sighted approach. Victims of IHL violations will continue to look for remedies in international law. There is already practice of IHL reparation claims before HR mechanisms, before the ICC, and even before domestic courts to force representation by the state of nationality in diplomatic protection claims. A better strategy is to recognise the changes and the reasons why the transformation of international law occurred in the first place. Efforts should be focused on creating effective mechanisms to enforce individual rights that respond to the specific nature of IHL.

Chapter 4: The Principles on Reparation

In the same way as ILC Responsibility Articles, the Principles and Guidelines organise secondary rules of state responsibility aimed at the generalisation of international standards, albeit in regards to victims' rights.

The origins of the Principles and Guidelines date back to the end of the Cold War. Following the major geopolitical changes of the time, demands for criminal and

reparative justice became visible and vocal. It was against this background that Theo van Boven was appointed Special Rapporteur to study the right to restitution, compensation, and rehabilitation for victims of gross violations of HR and fundamental freedoms, with a view to exploring the possibility of developing some basic principles and guidelines in this respect.⁹⁵⁶

The study and the draft principles and guidelines as they evolved indicated that a new instrument was supposed to identify mechanisms, modalities, procedures, and methods for making *existing* legal obligations operational.⁹⁵⁷ Still, the drafting and adoption process stretched over fourteen years. In addition to a lack of strong political support on behalf of states, there was a shift of focus on the relevance of victim-related issues after the new Rapporteur, Cherif Bassiouni, submitted his report in 2000. The idea of a duty to repair historical wrongs tabled at the 2001 Durban Conference was a highly politicised issue that deeply divided states and that was relevant to the substance of the instrument. In addition, after September 11, the US lobbied for a complete separation of HR and IHL. Such a stringent approach was in obvious conflict with the latest version of the Principles and Guidelines, which included both types of violations. The idea of convergence between IHL and HRL, which was once popular, had become deeply problematic. The drafting process lingered in those years in order to avoid disruptive influences.

⁹⁵⁶ The Sub-Commission on Prevention of Discrimination and Protection of Minorities, Resolution 1989/13 (31 August 1989).

⁹⁵⁷ See: the Preamble of the Principles and Guidelines (n 2).

Two elements were considered essential during the drafting of the instrument. First, the necessity to maintain the victims' perspective on the structure and substance; and second, the capacity to reflect emerging concepts, as well as allow for progressive development. Based on these premises, it was deemed necessary to expand the scope of the draft to include *all* violations of HR *and* IHL. However, the modifications to the scope made the drafting, consultation, and adoption of the instrument more challenging.

While the process was very inclusive of victims' voices, broadening the scope of the instrument to include a less defined group of victims made the task more difficult. Van Boven seemed intent on creating an international instrument that could empower victims by reflecting their needs and wishes. Bassiouni went further. He proposed a victim-oriented drafting methodology and framework: '[t]he Draft Guidelines intentionally adopted a victim-oriented perspective, organising principles from all legal sources not according to instruments and sources, but according to the needs and rights of victims'.⁹⁵⁸ He used this rationale to expand the scope to all types of violations (not only gross/serious) and to include many new provisions, particularly in regards to IHL.

During the negotiations, however, some delegations contended that many of the provisions in the Bassiouni draft (e.g. universal jurisdiction, the obligation to afford judicial remedies, and so on) did not apply to all violations of HR and certainly not to some (or none) of the violations of IHL. As a result, open-ended formulations were employed to keep these provisions in the text. For example, the drafting formula 'where

⁹⁵⁸ Report of First Consultative Meeting (n 670) [20].

so provided in an applicable treaty or contained in other international legal obligations’ was used for the principle on universal jurisdiction and the principle on statutes of limitations.

During the last consultation, the scope was reduced once more to the most severe violations in order to keep IHL in the text. After all, this was an instrument dealing with the consequences of breach, and serious violations of IHL and HR both constitute international crimes and share the same legal consequences in regards to remedies and reparation. Unfortunately, at this point it was too late to reopen the debate on the clear application of some of the ‘contentious’ provisions to gross and serious violations. It was the last opportunity to adopt the instrument and participants decided to reach a compromise to keep these provisions in the instrument, even if they were a weaker/vaguer version (e.g. Principle 18 establishes that ‘in accordance with domestic and international law’ victims ‘should’ be provided with full and effective reparation when this principle is simply restating existing law and should not depend on internal law).

One wonders whether the outcome of the Principles and Guidelines would have been clearer and stronger if the original scope had been maintained. As explained in the chapter, the IHL violations covered under the notion ‘serious violations of IHL’ as applied in the instrument would seem to be included in the notion of ‘gross human rights violations and fundamental freedoms’ that was the scope of the original project. It is easy to imagine that states would have been less reluctant to apply these principles and

guidelines to the most serious HR violations and fundamental freedoms than to all violations of HR and IHL. Regardless, its adoption marked a long and arduous effort seeking recognition of victim-oriented policies as part of international law.

Notably, the UN General Assembly adopted the Principles and Guidelines without a vote. Thus, there is some basis to consider the text as declaratory of legal standards in the area of victims' rights, particularly in regards to the provisions relating to the right to a remedy and reparation. Despite the questions raised on its legal status (e.g. Germany's contention that the principles of state responsibility only apply to inter-state relations), the instrument reflects recent developments in this area of international law. Its underlying premise of applying principles of state responsibility to the relationship between individuals and states is consistent with current international law as confirmed by jurisprudence from the ICJ, the history and evolution of diplomatic protection, the ILC Responsibility Articles, IHL and HR conventions, and soft law instruments, as well as HR and ICL jurisprudence. All of these elements support the argument that state responsibility for reparation in favour of individuals has crystallised in international law.

In addition the Principles and Guidelines have already been used as reference by international courts and tribunals, as well as by governments implementing reparation policies. The text is without a doubt an invaluable reference, being the only international instrument that classifies the norms, rules, and standards on the right to a remedy and reparation for victims of grave abuses and contains a detailed description of mechanisms, procedures and forms of adequate redress.

Unfortunately, despite the adoption of the Principles and Guidelines, there is still a long road ahead in terms of achieving victims' full access to justice and other forms of reparation. Unsettled questions on the legal basis of an international right to a procedural remedy and its scope, continues to affect the implementation of the right to reparation in practice. The notion that state responsibility principles only apply to inter-state relations, or the notion that individuals might have a secondary right to reparation under international law but cannot exercise it without the intervention/mediation of states, are still influential. These arguments are sometimes reflected in domestic and international judicial decisions on reparations. They also inform political and judicial forums on related topics like enforcement of awards; the application of sovereign immunities; and liability of non-state actors.

Even within the well-established system of HR tribunals and bodies, the lack of certainty surrounding the legal basis of the right to a remedy and reparation affects the implementation and enforcement of remedial judgments.⁹⁵⁹ Outside HR mechanisms (or other established international bodies awarding reparations like the ICC), victims of serious violations of HR and IHL have very limited opportunities to obtain access to justice and other forms of reparation. Although not explored in the present work, the lack of clarity regulating this right and its procedural scope undermines victims' efforts at obtaining remedies in foreign or third state courts. Prospects of successful civil universal jurisdiction claims have been overshadowed by the application of immunities. The recent ICJ decision in *Germany v Italy* established that states are obliged under current CIL to

⁹⁵⁹ See generally: Enforcement Report (n 40).

afford sovereign immunity to other states in their domestic courts (regardless of the gravity of the acts or the lack of alternative remedial avenues). The Court argued that it did not have to rule on the question of victims right to reparation⁹⁶⁰: ‘whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation.’⁹⁶¹ It restated that immunities are merely a procedural bar that may be waived and may not be permanent.⁹⁶² But in practice, the possibility of states waiving their immunity is pretty unlikely given the inherently political nature of serious HR and IHL violations. A change in state practice (denying immunities when heinous crimes are committed) is also improbable given how Italy’s “practice” was characterised as unlawful by the ICJ.⁹⁶³ For the time being, it seems that sovereign and diplomatic immunity will generally bar HR claims before third state courts, as well as before the courts of the state where the violations occurred (forum state) when the perpetrators are officials of another state or the state itself is being sued.⁹⁶⁴

The ICJ ruling separating the question of victims’ right to access to justice from the states’ right (or obligation) to afford sovereign immunity seems artificial. There is a clear

⁹⁶⁰ ‘[b]ecause immunity is upheld, no need to examine questions whether individuals are directly entitled to compensation for violation of IHL and whether states may validly waive the claims of their nationals in such cases’. *Germany v Italy* (n 25), [108].

⁹⁶¹ *Germany v Italy* (n 25), [100].

⁹⁶² *Germany v Italy* (n 25) [100].

⁹⁶³ ‘The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress’. *Germany v Italy* (n 25), [101].

⁹⁶⁴ See, for example, *Al-Adsani v United Kingdom*, Merits, App No 35763/97, ECHR 2001-XI; *Jones and Others v The United Kingdom* App nos. 34356/06 and 40528/06 (ECtHR, 14 January 2014). The ICJ established that even in criminal cases, diplomatic immunity would bar the jurisdiction against acting heads of governments and other officials such as the minister for foreign affairs. See: *Arrest Warrant* case (n 345)

interconnection between the two. As long as there is ambiguity on the legal basis and status of the accountability of states to redress individuals and the procedural dimensions of such obligation, it will be hard to clarify the relationship between remedies and immunities. It is crucial therefore to continue exploring this relationship. There are many questions unanswered and is important to address them.

Another key challenge in this area of law, not specifically addressed in this thesis, is the relationship between the right to reparation and the accountability of non-state actors. While non-state actors have been involved in violence throughout history, the influence of armed groups has been rising exponentially in recent times.⁹⁶⁵ 'By definition, at least half the belligerents in the most widespread and most victimizing of armed conflicts around the world, i.e. non-international armed conflicts, are non-state armed groups'.⁹⁶⁶ As a result, there seems to be a growing consensus that non-state entities should be responsible to afford reparation to victims. But while it is evident that more and more victims suffer from non-state violence, it is unclear how victims could claim reparation from non-state groups without the intervention of states. It may be tempting to apply the regime of secondary rules codified in the ILC Articles on State Responsibility to non-state entities, but it is difficult to conceive an autonomous non-state actors' obligation to afford remedies and reparations (a separate question all together is whether non-state responsibility for HR violations enhances the protection of HR in general).⁹⁶⁷

⁹⁶⁵ R. Duda 'Closing the gap: symbolic reparations and armed groups' (2011) 93 *International Review of the Red Cross* 783, 1

⁹⁶⁶ M. Sassòli 'Taking armed groups seriously: ways to improve their compliance with international humanitarian law' (n. 487) p.6

⁹⁶⁷ For a brief discussion of this topic, see: (n 711 and accompanying text

It is true that individual responsibility of perpetrators of international crimes to afford reparation has been established and recognised in the context of the ICC. However, this obligation directed to individuals (as opposed to states) under ICL is confined within the existing state-controlled legal framework. The ICC is a complementary mechanism that supplements states' primary obligation to investigate and prosecute international crimes and to make perpetrators accountable for reparations to victims. Perpetrators have an obligation to afford reparations to victims under ICL. States have a duty to require that perpetrators afford these reparations. Secondary rules of state responsibility are not applicable in this scenario.⁹⁶⁸

A separate question is that of non-state entities and the proposition to hold them accountable to afford reparations for HR and IHL violations. The UN has called upon armed organisations to respect HR law, and where violations or crimes occur, it has recognised that such groups have an obligation to provide reparations.⁹⁶⁹ However, it is questionable whether armed groups have the resources or capacity to fulfil HR obligations (and what are the type of HR obligations non-state entities can have). In practice, only states can hold these groups accountable to afford reparations. This duty therefore seems similar to the obligation of individuals charged with international crimes to afford reparations.

⁹⁶⁸ Nonetheless, states might be responsible under the rules of attribution. See Chapter 3, section 3.D.

⁹⁶⁹ See Darfur Report (n. 100) [600] [603]; UN Secretary - General, Report of the Secretary – General's Panel of Experts on Accountability in Sri Lanka, 31 March 2011 paras.188 and 419; and Human Rights Council, Report of the independent international commission of inquiry on the Syrian Arab Republic, A/HRC/21/50, 16 August 2012 p21 and 47. Cf Report of the United Nations Fact-Finding Mission on the Gaza Conflict, 25 September 2009, A/HRC/12/48, p401-403.

However, while it is clear that under ICL states need to investigate and prosecute international crimes and if applicable punish perpetrators and make them liable to afford reparations to the victims, it is unclear if a duty to make collective entities award reparations exists in international law (or how can this duty be implemented in practice). On the other hand, there are sometimes claims for legitimacy/self-determination from these groups and the idea of confining the notion of reparations to a criminal/civil context is perceived as inadequate. This explains the desire to move the obligation to afford reparation to the “international” (state) level. Nevertheless, it is hard to conceive a right to access to justice against non-state entities. While (some) armed groups might share some of the same characteristics as states (e.g. collective entities, perhaps organised to a certain extent, and possibly exercising control over a territory), they are not legal entities and do not have the permanency of a state. Unless the non-state entity becomes the new government of a state, it seems rather difficult to apply secondary rules of reparation directly to these groups.

The Principles and Guidelines recognise that non-state actors can be responsible to afford reparation to victims. Principle 15 establishes that where ‘a person, a legal person, or other entity is found liable for reparation for a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.’⁹⁷⁰ This does not imply that the instrument acknowledges state responsibility as the legal basis for non-state liability to afford reparations. As van Boven

⁹⁷⁰ Principles and Guidelines (n. 2)

explained during the consultations: ‘It may be that HR law [has] not yet developed far enough on non-State responsibility, but, as the draft [is] not a treaty, it could reflect those emerging concepts as well.’⁹⁷¹ Chapter 4 already explains that the Principles and Guidelines leave open the question of implementation of such duty. Are states obliged to afford a procedural remedy to implement such obligation? If such duty exists, is it based on rules of attribution or is there a universal (primary) obligation to afford procedural remedies (i.e. access to courts) to victims regardless of where the violations are committed and the nationality of the alleged perpetrator or victims?

The conceptual and practical difficulties of this debate are vast. While this topic did not form part of the research conducted for the present study there are a series of questions asked throughout this thesis that have to do with the close relationship between non-state liability and state responsibility towards victims. After all, impugned actions by non-state actors rarely fall short of state involvement. What is the exact relationship between non-state liability and states’ secondary obligations to afford remedies and reparation? There is no doubt that the question of non-state liability to afford reparations needs to be study further. However, there are legitimate concerns that undoing the HR notion based on state protection might have negative consequences for victims:

“The alternative idea, claiming to be victim-oriented, that human rights should be understood in terms of the harm done, regardless of the character of the perpetrator, means that human rights as an idea will be indistinguishable from most kinds of serious crime or terrorism.”⁹⁷²

There are many reasons why international law treats ‘private’ crimes differently from HR

⁹⁷¹ See n. 802 and accompanying text.

⁹⁷² Rodley, ‘Non- state actors and human rights’ (n 712) p 523

violations. While there is no space here to expand on this topic, there is one example mentioned earlier that shows how applying states 'standards' to non-state actors could result in less protection to victims. As advanced in Chapter 2, in cases of individual claims, domestic remedies need to be exhausted before the states' international responsibility can be called into question. There is a primary obligation to afford remedies and reparation to individuals under HR law and there is a secondary obligation under international law when states fail to redress the violations in accordance with international standards. This notion is inherited from the law on state responsibility for injury to aliens, which is state centric. Can this be the case also for reparation claims against non-state entities? What are the non-states entities primary obligations (if any) and when are these primary obligations breached? In this scenario, only quasi-states groups/organised entities with a capacity to afford a system of 'justice' affording 'domestic' remedies could be responsible under international law. Of course this scenario opens a whole set of new questions (e.g. would the same standard of effectiveness and adequate remedies under HR law apply?).

One might argue however that states and therefore non-state actors can breach the international legal order directly (regardless of their capacity to afford domestic remedies). For example, in cases of massive and/or systematic violations is common to reason that the rule of exhaustion of domestic remedies is not applicable because it is assumed that there are no effective remedies available (the state is unable or unwilling to prevent/redress the violations). It is therefore not necessary to exhaust them. But one can take the view that a state infringes international law directly when its intention is to

commit the violations (so-called ‘state crimes’). So when violations are massive and/or systematic the IWA materialises irrespective of domestic remedies. But even if arguing that states and therefore non-state actors can breach the international legal order directly, this scenario has several shortcomings. First, unless non-state groups have a system of ‘domestic remedies’ in place, non-state entities would only be liable for reparations when committing massive and/or systematic violations. What would happen for example in isolated cases of torture committed by members of armed opposition groups? Second, without concurrent liability of a state(s), how can victims access procedural remedies to hold these non-state entities accountable? Finally, separating the procedural dimension of the right to reparation (effective remedies) from its substantive component (adequate reparations) does not seem to enhance HR protection.

At first sight, it seems that moving beyond the regime of attribution is problematic. It is clearly necessary to explore this topic further. Perhaps states primary obligations to hold non-state actors responsible needs to be reinforced, or perhaps some form of a shared model of international responsibility between states and non-state-actors can be implemented. What seems clear is that transporting the regime of secondary obligations under state responsibility principles to non-state actors accountability is inadequate.

There are innumerable questions on non-state liability that need further study, but it is important to remember that:

Despite the claim that non-state actors play today a major role in present-day armed conflicts, in the harsh reality of many conflicts states continue to play a major direct or indirect role, particularly if they are not allowed to hide behind the smokescreen

labels of “globalization”, “failed States” or “uncontrolled elements”. They are responsible, under the general rules on attribution of unlawful acts, much more often than they would wish.⁹⁷³

Similarly, notwithstanding the recent progress of ICL, where individual criminal liability has been recognised for serious violations of HR and IHL as well as an obligation to afford reparation to the victims, the applicability of state responsibility principles to the relationship between states and individuals for states breaches of HR and IHL remains crucial for ensuring reparation for victims. As long as the international community continues to consist of sovereign states, it is of paramount importance to clarify the scope of the wrongful states’ secondary obligation towards individual victims.

The present work confined its research to answer the question whether the Principles and Guidelines were correct in assuming that state responsibility is the basis of a CIL right to a remedy and reparation for individuals victims in cases of gross violations of HR and serious violations of IHL committed by states. It answered this query affirmatively. Despite some of the questions that have been raised on the legal status of the Principles and Guidelines, its underlying premise of applying principles of state responsibility to the relationship between individuals and states is consistent with current developments in international law. Injured individuals can invoke state responsibility directly under general international law for serious violations of HR and IHL that constitute IWAs. In principle, this can be done before established international mechanisms or before domestic courts.

⁹⁷³ Sassòli, 'State responsibility for violations of international humanitarian law' (n. 495), p. 433.

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