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Introduction

“Conflict is bloody, ruins lives. Conflict is the very act of dehumanization, destroying of another by force.”¹

This quote by the President of the ICRC, Mirjana Spoljaric, at the Graduate Institute is a fitting start to a thesis where the question of humanization plays a central role. In her speech, she talked about the consequences of armed conflict, specifically the consequences suffered by civilians, those who traditionally should be protected from armed conflict against whom acts of violence with a primary purpose of spreading terror are strictly prohibited.²

One does not have to read the entire speech to realize that this principle is violated (whether intentionally or unintentionally) in every armed conflict in modern history. In a time where most conflicts play out in urban areas, civilians have become targets and victims and suffer the consequences of regimes and rebels more than the fighting parties do themselves. The notion of active conflict and more specifically, civilian victims of said conflict, has been on the forefront of the news since my generation can remember. The Geneva Academy states it is monitoring more than 110 armed conflicts as of 2024³, with most currently taking place in the

¹ ICRC, “It’s time to elevate the laws of war to a political priority” - Speech given by President Mirjana Spoljaric at the Graduate Institute (28 November 2022, Geneva) <<https://www.icrc.org/en/document/international-humanitarian-law-in-divided-world>> (Accessed 4 August 2024).

² Art. 51(2) Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (1977): “The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

³ Geneva Academy of International Humanitarian Law and Human Rights, ‘Today’s Armed Conflicts’ (Last Updated 2024) <<https://geneva-academy.ch/galleries/today-s-armed-conflicts>> (Accessed 4 August 2024).

Middle East and Africa, with the identifying factor being non-international armed conflicts. Armed conflict is no longer an exceptional occurrence, which would make laymen assume the rules of armed conflict, specifically when it comes to victims, would be updated to reflect the trends. This however, especially when it comes to the treatment of civilian victims, could not be further from the case. Victims of armed conflict have no individual right to reparation for violations of international humanitarian law by States, no access to tribunals designed to deal with these situations and frequently get denied forms of compensation by domestic courts, who follow the traditional interpretation that international humanitarian law is inter-State law. What this results in is victims who get ignored and whose needs neglected, although they are mostly the main group suffering the consequences of armed conflict today.

This thesis intends to set out the framework and possibility of the right to individual reparation for victims of armed conflict through researching whether human rights mechanisms may have a positive influence on the ability of victims of armed conflict to claim reparation. The research question this thesis intends to answer is: ***“Is there a right to individual reparation for victims of armed conflict and how can this right be used?”*** The answer to this question will be divided into three chapters.

Chapter 1 intends to set out the rules for reparation as currently in force under the framework of international humanitarian law. The discussion starting with the definition and concept of reparations, which includes an introduction to the field of state responsibility, including the Articles on Responsibility of States for Internationally Wrongful Acts (hereafter: ARSIWA), which is (whilst not the primary focus) an important aspect of the right to reparation. It will then set out the issues and concept of an individual right to reparation, which leads into a discussion of the history and evolution of the key provisions regarding the right to reparation and their history and evolution starting from the drafting phase of the Hague Conventions of 1899 and 1907 (specifically Convention IV respecting the Laws and Customs of War on Land with its Article 3), the implementation of the Geneva Conventions and its protocols and their answer to the protection of civilians. Afterwards, an analysis of the interpretation and application of the legal provisions by the domestic courts will demonstrate the unwillingness of states to accept an individual right to reparation in this field. Finally, it will be demonstrated how the compensation mechanisms established towards the turn of the century show a positive progression in this field.

Chapter 2 sets out the right to reparation under international human rights law, a field where this right has been thoroughly developed post-World War II. It discusses the standing of the individual in international human rights law and how the field has developed a right to remedy that which has been codified in both universal and regional human rights treaties, including the forms of reparation used in human rights law aims to use most frequently. The codification of the right will be discussed, with a focus on Article 2 of the International Covenant of Civil and Political Rights and the codification of the right in Article 13 of the European Convention on Human Rights and Article 25 of the American Convention on Human Rights. Afterwards, a discussion will follow regarding the different human rights mechanisms that accept individual applications, both in the United Nations and regional systems, where nuance must be made regarding the effectiveness of the former. The chapter will finish with an analysis of the work of the regional human rights courts (ECtHR and IACtHR) and concluding remarks.

Chapter 3 intends to compare and analyse the effectiveness of the access to mechanisms of international human rights law for victims of violations of international humanitarian law. It will set out the interrelationship between the two fields, following the lines of jurisprudence set out by the International Court of Justice of international humanitarian law being *lex specialis* in situations where both fields of law apply. It will follow the application of this line of jurisprudence by the regional courts and set out how victims of international humanitarian law have made attempts to claim reparation through the regional human rights systems (with a specific focus towards the European and American Courts). The chapter closes with the discussion of recent developments in alternative mechanisms, including the reparation provisions of the International Criminal Court, victim assistance mechanisms in recent treaties like the Convention on Cluster Munitions and the usage of Truth Commissions. An analysis of what needs to be done and concluding remarks will close out the chapter.

Whilst the conclusion of this thesis is relatively clear, given no concrete right to reparation for individual victims of international humanitarian law currently exists, what this thesis hopes to set out is an overview of the frameworks in both international humanitarian and human rights law and set out the options, potential benefits and difficulties of this field. What the author hopes to show is the lack of willingness of States to accept that this right is (even more urgently in recent years) necessary to ensure victims of international humanitarian law violations get the reparation they deserve, especially given their vulnerable position in domestic law.

Chapter 1: The Right to Reparation in the International Humanitarian Law Framework

Introduction

The concept of reparations in international law has been elaborated upon at length in modern international law. As a consequence of an internationally wrongful act, it has become a fundamental aspect of inter-state relations in international law.⁴ This chapter will elaborate on the general concept of reparation, go into how reparation between States functions, the framework of reparation in international humanitarian law and introduce the concept of reparation for victims who have been the victim of an internationally wrongful act by a State within the framework of international humanitarian law. Afterwards it will be elaborated why it is a controversial concept, whilst also discussing mechanisms that have been introduced to review claims also made by natural individuals after an armed conflict.

Definition and concept of reparation

The concept of reparation hangs closely together with the principle of state responsibility; reparation is seen as one of the consequences for a state after committing an internationally wrongful act. This was codified by the International Law Commission in the Articles on Responsibility of States for Internationally Wrongful Acts (hereafter: ARSIWA) in Article 31.⁵ According to Shelton, reparation means the recompense given to one who has suffered legal injury at the hands of another, either through providing restitution, giving satisfaction or compensation for a wrong inflicted.⁶ It also refers to the action done or given to the injured party by the responsible party. Shelton gives two basic principles that govern reparation: firstly, an international wrongful act generates an obligation of reparation; secondly, reparation must insofar as possible eradicate the consequences of the illegal act.⁷ These two principles were elaborated upon by the Permanent Court of International Justice (PCIJ) in the landmark ‘*Factory at Chorzów* (Germany v Poland)’ case, who stated that ‘*the Court observes that it is*

⁴ This can be seen as well in the ARSIWA.

⁵ Article 31(1) ARSIWA: ‘1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.’

⁶ D. Shelton, "Reparations" (Last Updated: August 2015) in Peters, A. and Wolfrum, R. (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2008-)<<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law:epil/9780199231690/law-9780199231690-e392?rskey=dbb7SB&result=3&prd=MPIL>> (Accessed 21 February 2024)

⁷ *ibid*, para. 2.

*a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.*⁸ The Court further elaborated that *“The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure.”*⁹ The Court went on to state that when it comes to reparations, international law is the law that applies in a situation of a breach between two states, not the domestic law governing international relations between the two States where the wrongful act occurred. The Court also stated for the first time on reparations in a major case that *“Rights or interest of an individual the violation of which rights causes damage are always in a different plane of rights belonging to a State, therefore may be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State; it can only afford a convenient scale for the calculation of the reparation due to the State.”*¹⁰

This was the first time that there is a definite separation between the rights of the individual and the rights of the State. One can argue that the Court here stated that individuals do have certain rights under international law. While *Factory at Chorzów* may not have been a case regarding international humanitarian law, it is a landmark case for the principle of reparations, nonetheless. Its principles are followed in various other areas of international law as well, making the case of high relevance in understanding the law of reparations.

Introduction to state responsibility

This section will be a brief overview of some of the main principles of state responsibility. The focus will lie on the connection between state responsibility and reparations, meaning some articles of the Articles on the Responsibility of States for Internationally Wrongful Acts will remain undiscussed.

The right to reparation entails a party's obligation to make a full reparation. This was stated in the *Factory at Chorzow* case as spoken by the PCIJ in 1928: *“Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation, which*

⁸ *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep Series A No 17, 29

⁹ *ibid*, 28.

¹⁰ *ibid*, 28.

would, in all probability, have existed if that act had not been committed.”¹¹ A codification of this principle can be found in the First Protocol to the Geneva Convention in Art. 91: “*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.*”¹² However, the most widely accepted codification of the principle of reparation in contemporary international law can be found in the ARSIWA. The text of these articles was adopted by the International Law Commission (hereafter: ILC) in 2001.

The reason it is important to discuss the ARSIWA before getting into the concept of individual reparations is because the leading line of interpretation in general international law has been that States are the “actors” in international law. This means that States are the subjects and actors of this field that can have rights, obligations, principles and agreements between them. Individuals (juridical or natural), at least in international humanitarian law (This differs in international human rights law, as discussed in Chapter 2), are seen as “objects for protection”. Individuals typically do not have rights or obligations under international law. This makes international law an atypical field of law, as juridical or natural persons, in contrast to domestic law, are not the main actors. The ARSIWA, as will be explained below, reflect this as well, as States are the primary actors holding responsibility mentioned in the Articles.

Articles On Responsibility of States for Internationally Wrongful Acts (ARSIWA)

State responsibility was codified by the ILC in the ARSIWA articles in 2001 and can be seen as rules of a secondary nature, meaning that whilst primary rules define the substantial obligations a state must follow to comply with the law, secondary rules determine the consequences of violating said primary rules.¹³ The starting point of any discussion regarding state responsibility has to start with the question whether or not there is an international obligation. This principle is laid down in Article 1 ARSIWA, which states that “*Each internationally wrongful act of a State entails the international responsibility of a State.*”

¹¹ *ibid*, 47.

¹² Article 91 Additional Protocol I to the Geneva Conventions of 1949 (1977).

¹³ A. Henriksen, *International Law*, (3rd edn, OUP 2021) 116. See also J. Crawford, “Articles on Responsibility of States for Internationally Wrongful Acts”, in United Nations Audiovisual Library of International Law (August 2012) <<https://legal.un.org/avl/ha/rsiwa/rsiwa.html>> (Accessed 7 March 2024). An important side note is that the question of responsibility is distinct from the treaty law question of whether a treaty obligation is binding upon a state or not.

The next question then would be what constitutes an internationally wrongful act, which is explained in art. 2 ARSIWA stating:

“There is an internationally wrongful act of a State when conduct consisting of an act or omission:

- a) Is attributable to the State under international law; and*
- b) Constitutes a breach of an international obligation of the State.”*

This means that both an act and an omission can be seen as an internationally wrongful act under ARSIWA.¹⁴ This was confirmed by the International Court of Justice in the *Tehran Hostages Case*, where it had to determine, firstly, how far, legally, the acts in question may be regarded as imputable to the Iranian State and, secondly, their compatibility or incompatibility with the obligations of Iran.¹⁵ This case illustrates quite well how wrongful conduct can be both acts and omissions. As Henriksen describes the case, *Tehran Hostages* demonstrates that a state can breach its international obligations in relation to acts of private individuals if the state under a (primary) legal obligation omits to offer protection from such acts.¹⁶ State responsibility furthermore does not always require damage in the form of material damage - it fully depends on the primary rules deemed as necessary. However, the characterization of an act of a State as wrongful will be governed by international, not internal, law, as stated in Article 3 ARSIWA.¹⁷ Henriksen explains that a State cannot thus justify a breach of international legal obligations by invoking its national laws and a State must also comply with international obligations, even if it requires breaching its national law.¹⁸

According to Article 4 ARSIWA, all conduct of state organs is considered an act of state responsibility whether the organ in questions exercises legislative, executive, judicial or any other functions; meaning that a state also cannot avoid responsibility for acts or omissions of

¹⁴ *Case Concerning United States Diplomatic and Consular Staff in Tehran* (United States of America v. Iran) (Judgment) (24 May 1980), I.C.J. Reports 1980.

¹⁵ Ibid, para. 56 and 67. In the case ICJ found that Iran had breached its international obligations under VCDR (the primary rules in this case) by failing to protect the US premises from Iranian protests (para 67).

¹⁶ A. Henriksen, *International Law*, (3rd edn, OUP 2021) 119.

¹⁷ Ibid, 117. See also Article 3 ARSIWA (*Characterization of an act of a State as internationally wrongful*): ‘*The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.*’

¹⁸ A. Henriksen, *International Law*, (3rd edn, OUP 2021) 118.

an entity that in practice functions as a state organ by denying it an official status in domestic laws.¹⁹ This hangs together with Article 5 (*Conduct of persons or entities exercising elements of governmental authority*), which is relevant to certain military units that may not directly be organs of the state but are empowered by laws of said State to exercise elements of governmental authority, their acts shall also be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.²⁰ This article has proven to be important since the drafting days of the ARSIWA, as there have been multiple occurrences of groups whose status could be considered questionable where it had to be determined whether or not their actions could be attributable to a state. It may be quite difficult to determine when an activity is an exercise of “governmental authority” and the determination as such may differ per State.

The obligation to make reparations under the ILC Articles is laid down in Articles 30 and 31, and Chapter II “Reparation for injury” provides the methods of reparation available to injured States. Under Art. 30 (*Cessation and non-repetition*), the State responsible for the internationally wrongful act is under an obligation to a) cease that act, if it is continuing; b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Article 31 (*Reparation*) states in paragraph 1 that ‘*The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.*’ Article 31 ARSIWA reflects that the right (or obligation, depending on which side of the internationally wrongful act the situation is assessed) to reparation flows from State responsibility, seeing as the state has to make full reparation for an internationally wrongful act. An injury does not have to be material, it can also be moral damage, and it is not a general requirement that a State has suffered material harm or damage before it can seek reparation.²¹

¹⁹ Article 4 ARSIWA (*Conduct of organs of a State*): ‘1. *The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.*’
‘2. *An organ includes any person or entity which has that status in accordance with the internal law of the State.*’

²⁰ Article 5 ARSIWA (*Conduct of persons or entities exercising elements of governmental authority*): ‘*The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.*’

²¹ A. Henriksen, *International Law*, (3rd edn, OUP 2021) 121.

Methods of reparation

The different forms of reparations are laid down in Chapter II: “Reparation for injury” and briefly listed in Article 34, whilst discussed more in detail in the provisions that follow. They include:

- Article 35: Restitution. Restitution can be described as ‘The obligation to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:
 - a) is not materially impossible;
 - b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation)’.
- Article 36: Compensation. The state responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution (art.36(1)).
- Article 37: Satisfaction. The state responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation/may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality/may not be out of proportion to the injury and may not take a form humiliating to the responsible State; and
- Article 38: Interest. The interest on any principal sum due under this chapter shall be payable when necessary, in order to ensure full reparation. The interest and mode of calculation shall be set to achieve that result/interest runs from the date when the principal should have been paid until the date the obligation to pay is fulfilled.

In practice the most used form of reparation is some form of compensation.²² One can think of various reasons for this, but a starting point is that whilst compensation may not be able to fix all harm done, it is a way of at least monetarily compensating for any material damage that was done to the claimant. In the chapter on Human Rights Law it will elaborate further what issues can arise, following the jurisdiction of the Inter-American Court of Human Rights, which has a progressive, victim-centered approach when it comes to reparations that can be beneficial. The court is aware that monetary sums will not ever repair gross violations of human rights,

²² D.O. Contreras-Garduno, ‘Collective Reparations at the Inter-American Court of Human Rights’, in *Collective Reparations: Tensions and Dilemmas between Collective Reparations with the Individual Right to Receive Reparations*. Intersentia (Human Rights Research Series) (2018).

torture or murder.²³ It is thus mainly a symbolic gesture, but out of the forms for reparation listed in the ARSIWA, it is the easiest for States to achieve.

Issue with reparations for individual victims

Something to keep in mind regarding reparations is, especially in international humanitarian law, that there is no permanent court in the international legal system that accepts claims from individual persons, whether juridical or natural. This is, for example, reflected in Article 34(1) of the Statute of the International Court of Justice, which makes clear only states may be parties in cases before the Court.²⁴ It is a major flaw in the system, as it limits those affected by internationally wrongful acts to seeking reparations (almost) exclusively before national courts, whether it be in the country that committed the internationally wrongful act, in their home country, or somewhere where the judicial system can make a possible claim to jurisdiction. There are multiple issues with this:

1. In situations during or post armed conflict, whether it be an international armed conflict or a non-international armed conflict, there is a tendency that the judicial system needs time and improvement to be able to function on its own again. This does not provide an environment in which the victims of armed conflict are able to go to their judiciary to demand reparations. It might thus be that claims only start coming in later, which brings the risk that the statute of limitations on a crime may have expired.
2. The laws regarding crimes or what are considered as internationally wrongful acts may have changed over time. A cruel but rightful example of this is the Nuremberg Laws of Nazi Germany, which authorized arrests of and violence against Jewish people.²⁵ What the Nuremberg Laws show, even though they were considered null and void directly after World War II ended, is that law changes quickly and is not always justifiable after violations have taken place. It is, however, what governments, its organs and groups that operate under the control of a State, base their actions upon to be able to work in accordance with the law, regardless of what that law may be.
3. Even when a Court looks at a case for reparations due to armed conflict, there is a high chance that only compensation will be awarded, as it is very difficult to award any of the other methods of reparations. The problem with this has been explained earlier;

²³ *ibid*, 132.

²⁴ Art. 34(1) Statute of the International Court of Justice: 'Only states may be parties in cases before the Court.'.

²⁵ Berenbaum, M., *Nuremberg Laws* in Britannica <<https://www.britannica.com/topic/Nurnberg-Laws>> (Accessed 7 March 2024).

compensation is usually a symbolic payment, because money cannot bring back a victim that was murdered or reverse torture done by the State to them. The only thing it can really be good for is material damage.

The concept of individual reparations

Introduction

The concept of individual reparation will now be introduced including how it historically came to be and the current framework in international humanitarian law. It will discuss the gradual but not complete shift from interstate resolution of reparation claims (the most prevalent example being lump sum claims) towards more individualized mechanisms entitling victims to claim reparation. The usage of lump sum claims was standard practice from World War II until the 1980s. Historically, the only way to achieve reparation for individuals was through domestic courts.²⁶ Victim-oriented reparation has, however, been developing over the thirty years in tandem with the establishment of ad hoc reparation mechanisms like the UNCC and the Ethiopia-Eritrea Claims Commission, both will be discussed further below. These bodies manifest the intentions of policy-makers involved in the creation of reparation mechanisms and in drafting of the respective constituent instruments. These intentions can be various.²⁷ This section will also discuss the shortcomings of these compensation mechanisms, which includes the almost exclusive use of national courts for the awarding of reparations to individual victims. National courts are supposed to serve as a gateway for victims seeking reparations in international humanitarian law.²⁸ As stated by Watkins, they should ideally be working together with international courts and criminal tribunals as part of a “flexible strategy” to enforce an “international consensus” against impunity for those who commit international crimes, whether it be states or individuals.²⁹ However, and this is a valid point made by Watkins, experience has proven the ineffectiveness of relying on national courts for such a purpose because the courts are “*almost always... inoperative*” during the conflict periods in

²⁶ C. Marxsen, *et al.* (2020) ‘Introduction: The Emergence of an Individual Right to Reparation for Victims of Armed Conflict’, in *Reparation for Victims of Armed Conflict*. Cambridge: Cambridge University Press (Max Planck Trialogues), pp. 1–15.

²⁷ S. Furuya. “The Right to Reparation for Victims of Armed Conflict: The Intertwined Development of Substantive and Procedural Aspects,” *Reparation for Victims of Armed Conflict* (Cambridge University Press 2020).

²⁸ J.L. Watkins, *The Right to Reparations in International Human Rights law and the Case of Bahrain*, 34 Brook. J. Int'l L. (2009).

²⁹ *ibid.*

which massive and systematic human rights violations usually occur and because “it takes quite some time for courts to assume an independent stance capable of finding powerful forces (usually the government itself) liable for violations.”³⁰ In many cases, relevant statutes of limitations and procedural mechanisms block victims from pursuing civil claims or prohibit criminal prosecution.³¹ This is why many victims of grave human rights violations choose to pursue justice abroad. This is particularly seen when it comes to reparations for violations of international humanitarian law during World War II; good examples being the Korean Comfort Women and the Distomo Case before the Greek Courts. For cases during this period the universality principle of jurisdiction applies, meaning that some crimes are so reprehensible that they harm all people, and therefore any nation may act on behalf of the international community to prosecute and punish those responsible, regardless of where the crimes were committed.³² This may only be done for crimes that are grave violations of international law, including war crimes, genocide, hostage taking and torture.³³

Historical context of reparations

When looking at the reasons as to why it is difficult to get compensated for internationally wrongful acts as individuals, one has to look towards history. Reparations historically came in the form of war reparations, meaning the victorious State would seek war reparations after a conflict, which were intended to recompense the costs of the conflict.³⁴ Furuya called it ‘the victor State plundering’ and reparations were not seen as a method for compensation for States harmed by international law until World War I.³⁵ This war changed the perspective, given its much more all encompassing scale, involving more casualties and violence than the world had seen until that moment. It raised the stakes for reparation for the victors of the war, inviting the

³⁰ *ibid.*

³¹ *ibid.*, page 16.

³² A good example of this is Belgium, which brought before the ICJ the Arrest Warrant case, based on the fact that they had a law (repealed in 2003) which allowed Belgium to judge people accused of war crimes, crimes against humanity or genocide. This law was very controversial, also being called *Belgiums Genocide Law*, as it allowed for Belgium to bring cases against Rwandese high officials before the ICJ.

³³ Coincidentally also the crimes that fall under the subject-matter jurisdiction of the International Court of Justice.

³⁴ D. Shelton, “Reparations” (Last Updated: August 2015) in Peters, A. and Wolfrum, R. (ed), *Max Planck Encyclopedia of Public International Law* <<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law:epil/9780199231690/law-9780199231690-e392?rskey=dbb7SB&result=3&prd=MPIL>>. Also S. Furuya, “The Right to Reparation for Victims of Armed Conflict: The Intertwined Development of Substantive and Procedural Aspects,” *Reparation for Victims of Armed Conflict* (Cambridge University Press 2020) 5.

³⁵ S. Furuya, “The Right to Reparation for Victims of Armed Conflict: The Intertwined Development of Substantive and Procedural Aspects,” *Reparation for Victims of Armed Conflict* (Cambridge University Press 2020).

possibility that those higher stakes and larger amounts of damages could be justified by holding Germany responsible for the war.³⁶ This resulted in the Treaty of Versailles, which changed the meaning of reparations from just victors' spoils to it being meant as remedies for violations of international law and moral duties, which were laid down in art. 231 of the Treaty of Versailles.³⁷ This meant that after the Treaty of Versailles, it was easier for States to claim compensation for wrongful acts that other States were responsible for, as claims could be based on Article 3 of the Convention (IV) respecting the Laws and Customs of War on Land of 1907 (hereafter: Hague Convention (IV) 1907).

This state-centered perspective is what defined the practice regarding reparations for the next decades and was not changed much during the judicial trials following World War II. Whilst both the Nuremberg and Tokyo Tribunals were based on individual criminal responsibility, meaning a shift of accountability from States to individuals involved in the crimes of States and the clear development of international criminal justice (with both tribunals serving as predecessors to international tribunals and the ICC to come), there was no regard for the other victims of the war.³⁸ The Nuremberg Tribunal had the mandate to seize property of convicted persons if that property was stolen and order its delivery to the Control Council for Germany, however, no orders were ever made.³⁹ Neither Tribunal had the competence nor procedure to receive reparation claims from victims, once more showing that these Tribunals were created by States making sure the perpetrators were being held accountable but not working on reparations, making them, even though they are both landmark tribunals, irrelevant for the rest of this thesis (seeing as they would be more suited to be looked at in an international criminal law aspect). According to Hofmann, there have been approximately 95 claims post WW2 for reparations which were regulated by lump-sum agreements, whereby the responsible State must pay a fixed amount of money or provide reparations in kind to the home State of individual victims.⁴⁰

³⁶ *ibid*, 20.

³⁷ *ibid*, 20. Art. 232 of Treaty of Versailles held the conditions for compensation.

³⁸ *ibid*, 22.

³⁹ S. Furuya, "The Right to Reparation for Victims of Armed Conflict: The Intertwined Development of Substantive and Procedural Aspects," *Reparation for Victims of Armed Conflict* (Cambridge University Press 2020); see also Art. 28 of the Charter of the International Military Tribunal of Nuremberg. Important to note is that the Tokyo Tribunal did not have the mandate to perform the same activity.

⁴⁰ R. Hofmann, "Compensation for Personal Damages Suffered during World War II" (last updated: February 2013) in A. Peters and R. Wolfrum (eds) *Max Planck Encyclopedia of Public International Law* <<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law:epil/9780199231690/law-9780199231690-e274>> (Last Accessed 4 March 2024).

After this, most reparation claims only happened between States and, if individual victims were compensated, this happened in lump-sum agreements between states, where the responsible State has to pay a fixed amount of money or provide reparations in kind to the home State of the individual victims. This practice stayed until the creation of various *ad hoc* tribunals and claims mechanisms started to gradually change it, which will be discussed further below.

Individual right to reparation

A good starting point when discussing the individual rights to reparations is to assess whether there is an individual right to reparation that needs to be protected. For this thesis, the method that will be used is the “three-step approach”, as described by Veronika Bílková in her article “Victims of War and Their Right to Reparation for Violations of International Humanitarian Law”.⁴¹

Bílková has developed a clear method which will be elaborated on and used as a guideline throughout this thesis to assess individual right to reparation. As stated in her article, the right to reparation is usually considered a secondary right “*deriving from a primary substantive right that has been breached.*”⁴² This means that the first step to concluding whether there is a right to reparation is that there must be a primary rule in international law (either in international humanitarian law or elsewhere) that grants individual rights. The primary rule is a necessary precondition because individual reparation can only accrue out of the violation of a legal position that is granted to the individual. This corresponds with the general practice of state responsibility, as elaborated on before, that the rules of state responsibility are secondary rules that need a primary rule to be breached before they come into play. An example of primary rules in IHL would be the Geneva Convention or the Hague Convention 1907. However, usually this is where IHRL can be quite helpful, seeing as a lot of rights in IHRL are meant directly for individuals to claim and get compensation through.

⁴¹ V. Bílková ‘Victims of War and Their Right to Reparation for Violations of International Humanitarian Law’, *Miskolc Journal of International Law* 4 (2007) 7.

⁴² *ibid*, 1. See also L. Zegveld, “Remedies for Victims of Violations of International Humanitarian Law” (2003) 85 *International Review of the Red Cross* 497, 503.

The second step is to determine whether international law also grants individuals the right to claim reparation for a violation of a primary rule of international law.⁴³ This condition is not always as obvious, but a secondary right to claim reparation is not sufficient to give reparation claims effect in practice.⁴⁴ Lastly, Bílková states that it is necessary to look into whether they have corresponding procedural (tertiary) rights, i.e. whether they can seek the protection of the substantive rights before the competent instances.⁴⁵ The last step of Bílková's approach corresponds with points made by Furuya in his chapter in "Reparations for Victims of Armed Conflict", in which he describes the importance of keeping a separation and clear understanding of the difference between procedural and substantive rights. Whilst these two sets of rights are usually intertwined and used together in practice, as Furuya explains, one cannot just have an abstract, theoretical discussion about a substantive right when this right does not have a clear procedure as laid down by policymakers.⁴⁶

Furuya describes the substantive right to reparation as "*an expansion from, traditionally, a right of the State to become an individual right*" and the procedural right to reparation as "*the shift from inter-State resolution of reparation claims, such as the conclusion of lump-sum agreements, towards victim-oriented mechanisms entitling individuals to claim reparation for harms they have suffered.*".⁴⁷ Given the fact that these rights have become intertwined over time, an excessive separation of the two would not make sense, also given the fact that, practically speaking, the more abstract substantive rights would only exist as abstract rights if it was not for the more concrete procedural rights, which provide individuals with the possibility to actually pursue their right to individual reparation. As Furuya states, we can only identify the substance of a right once we have a procedure establishing it, the concrete substance of the right must be identified in the respective historical circumstances in which policymakers found it necessary to establish a procedure.⁴⁸

⁴³ V. Bílková, 'Victims of War and Their Right to Reparation for Violations of International Humanitarian Law', *Miskolc Journal of International Law* 4 (2007), 1.

⁴⁴ C. Marxsen, "Introduction: The Emergence of an Individual Right to Reparation for Victims of Armed Conflict," *Reparation for Victims of Armed Conflict* (Cambridge University Press 2020) 4.

⁴⁵ V. Bílková, 'Victims of War and Their Right to Reparation for Violations of International Humanitarian Law', *Miskolc Journal of International Law* 4 (2007), 1.

⁴⁶ S. Furuya, "The Right to Reparation for Victims of Armed Conflict: The Intertwined Development of Substantive and Procedural Aspects," *Reparation for Victims of Armed Conflict* (Cambridge University Press 2020), 18.

⁴⁷ *ibid*, 16.

⁴⁸ *ibid* 18.

Analysis

When reflecting on the work done by both authors, there are several questions that arise. Firstly, is the reference that the right to reparation is a secondary right, meaning that there must be a primary right in international law that, if breached, provides the right to reparation as a secondary right. As Zegveld states, if there is no primary right, there can be no secondary right.⁴⁹ What complicates this relatively clear statement is that it is relatively unclear what the rights of individuals under international humanitarian law are, if any exist. The primary actors in international humanitarian law are States, meaning that this field of law was created with States as actors in mind, not necessarily individuals. This is made even more clear when referring to some of the primary legal instruments that exist for this field, like the general IHL Conventions.⁵⁰

Whilst individuals have a possibility to derive certain rights from the Conventions, the Conventions (as correctly stated by Bílková, among others) are not completely clear on whether individuals can be bearers of primary IHL rights.⁵¹ This can be seen in the wording of the Conventions, as they address only “States” or “Parties to the conflict”. Although the latter could be considered ambiguous and thus interpreted both in the direction of only states or states and others, it is the leading interpretation that only States (and in contemporary international law non-state actors/parties) can be the bearers of primary IHL rights. However, as Bílková describes, there are several provisions that treat or seem to treat civilians as more than just “objects of protection”. Examples of this include common Articles 6/7 of the Geneva Conventions, which identify that there are various groups that can have rights conferred upon them.⁵²

A similar problem of clearness can be found in the realm of secondary rights. One of the primary provisions regulating secondary rights of reparation, Article 3 of the 1907 Hague Convention IV on Respecting the Laws and Customs of War on Land (and its Annexes), does

⁴⁹ L. Zegveld, “Remedies for Victims of Violations of International Humanitarian Law” (2003) 85 *International Review of the Red Cross* 497, 503.

⁵⁰ Note: When there is a reference to the term “General IHL Conventions” the author means, including but not limited to, the following conventions: The Hague Conventions of 1899 and 1907 and its Regulations, the Geneva Conventions 1949 and Additional Protocols to the Geneva Conventions (1977) and other multilateral treaties on various aspects of the Hague and Geneva Conventions.

⁵¹ V. Bílková, ‘Victims of War and Their Right to Reparation for Violations of International Humanitarian Law’, *Miskolc Journal of International Law* 4 (2007), 3.

⁵² *ibid*, 3.

not specify who are the beneficiaries of the provision. Whilst it is ratified by all major powers, it is not clear who benefits from the right to reparation as stated in Article 3. Article 3 states that: “*A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.*”. As seen here, the belligerent party shall be liable to pay compensation if the case demands. This is one of the few provisions in international humanitarian law where it is not explicitly stated that it applies to either Contracting Parties; States or parties to the dispute.

There has been discourse and discussion on the analysis of this article, as there are two ways of interpreting the text. Both will now be elaborated upon, as it will provide the clear line of argument that has been used by states to limit the paying of reparations to individuals and if so, only through lump-sum agreements (which will be discussed later in this chapter) and the line of interpretation that this does provide basis of a right to reparation for individuals. The latter line of argument has been considered as highly controversial, especially given the timeframe the Conventions were written in. The reason one could argue that Article 3 has direct rights for individuals to base their claims upon as, like stated previously, Article 3 does not, unlike most provisions in the Convention and broader IHL, say that it is only applicable to states or *parties to the conflict*.⁵³ Article 3 does not have this and only says that *A state should be responsible for all acts committed by persons forming part of its armed forces and a party which violates the provisions of said Regulation shall, if the case demands, be liable to pay for compensation.*

Leading interpretation of Article 3 of Hague Convention IV 1907

The leading interpretation of Article 3 Hague Convention IV 1907 is that even though it might not be stated explicitly that this article only provides the right to reparation to the Contracting Powers to the convention, it still means only states are able to file for compensation for acts performed by a belligerent party. This interpretation is in line with the more traditional views and interpretations of the status of civilians/individuals in international humanitarian law, where they are seen as an “object of protection”.⁵⁴ Below will follow a brief overview of case law, where plaintiffs based their claim for compensation and right to reparation on Article 3 before domestic courts.

⁵³ see Hague Regulations and V. Bílková, ‘Victims of War and Their Right to Reparation for Violations of International Humanitarian Law’, *Miskolc Journal of International Law* 4 (2007), 1–11 (7)

⁵⁴ *ibid*

Court cases relating to the individual right to reparation

There have been various cases before national courts where individual victims (or groups of individual victims) have tried to claim reparation for internationally wrongful acts by States in the field of international humanitarian law. There will now follow a brief overview of a couple of the landmark cases, and why they were rejected or admitted. These cases interpret the leading line of jurisprudence regarding the reparations for individuals.

Prefecture of Voiotia v. Federal Republic of Germany (the Distomo case)

As elaborated by the Greek Court in the Distomo case, the traditional view of international law was that reparations were a concept that was purely inter-state. Individuals only could make a claim regarding direct rights in international humanitarian law, which is similar to the regime under international human rights law. This means that if an individual was treated by a foreign state in a way that violated international law, only the State to which the individual belongs has a cause of action.⁵⁵ This interpretation has been followed by various domestic courts, especially in cases regarding the atrocities that happened in the Second World War.

Italian Military Internees

Examples of this interpretation can be found in cases like Italian Military Internees: where the court stated that art. 3 Hague Convention IV 1907 was established as a general claim to compensation between the states' parties to the Convention in cases of breach of obligations in the Convention that only exists at the level of the State Parties to the Convention and had to be distinguished from claims of individual human beings against the occupier of an occupied territory to comply with the norms of international humanitarian law.⁵⁶ It elaborates further that the principle of diplomatic protection did not foreclose the possibility that the state that caused damage may allow individual injured persons to bring claims for reparation. Such claims may exist side by side with the claims of the national state against the damaging state under international law. However, this does not mean that international law requires the damaging state to provide such reparation. There is no rule in international law that requires recognition

⁵⁵ Prefecture of Voiotia v. Federal Republic of Germany, Supreme Court of Greece, Judgment, 4 May 2000.

⁵⁶ Italian Military Internees Case, A (an Italian citizen) and 942 other claimants, Joint constitutional complaint, 2 BvR 1379/01, NJW 2004, 2357, ILDC 438 (DE 2004), 28th June 2004, Germany; Constitutional Court [BVerfG]. Analysis from the Max Planck Institute <<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law:ildc/438de04.case.1/law-ildc-438de04?rskey=Th2rl7&result=1&prd=OP>> (Accessed 4 March 2024).

of such claims under a state's national law. Article 3 establishes a particular liability and compensation regime concerning violations of the Convention and its Annexes. It may thus be justified as a regulation as contained in Section 11(3) German Foundation Act, which provided that war captivity alone would not give rise to a claim for damages.⁵⁷ In the Analysis of the Max Planck institute, the following is stated: “As the Court explained, there was also no rule under international law granting individuals a right to claim compensation directly from the State that violated their human rights or rights guaranteed under international humanitarian law. Compensation could only be obtained by a claim of a State against another State for breach of an international obligation under international law.”⁵⁸

X. et al v. State of Japan

A case where the plaintiffs also tried to base their right to reparation on Art. 3 Hague Convention IV 1907 is the case X et al v. State of Japan.⁵⁹ The plaintiffs were Dutch nationals residing in the Dutch East Indies (now: Indonesia) who were interned in POW camps or private detainee camps amid the occupation of the Dutch East Indies by the Japanese military forces during World War II. According to the plaintiffs, they were subjected to severe forced labour and cruel treatment, or made to serve as comfort women, making them provide sexual services to the occupying forces. As a result of this treatment, they all suffered damages that they assert could be considered as breaches of both the Hague Regulations and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War by the Japanese Military Forces. The issue that the Tokyo District Court deliberated on was that the admissibility of the claims made by the plaintiffs depends on whether individuals who suffered damages from those acts of a member of the Japanese military in contravention of international humanitarian law can bring a claim for compensatory damages against the state to whose armed forces the individual belonged, based on Art. 3 of the Hague Convention and the rules of customary international law in the same context.⁶⁰ When it came to the decision on the issue, the following points were raised by the Tokyo District court: whilst it is made clear in Art. 3 Hague Convention that the State bears responsibility and duty for compensation caused by unlawful acts, it is in fact unclear “*whose damage is to become subject to the compensation or to whom and how the*

⁵⁷ *ibid*, para H3.

⁵⁸ *ibid*, para A3.

⁵⁹ X et al. v. State of Japan, Tokyo District Court, Judgment, November 30, 1998; H.T. (991) 262 (1999) 42 Japanese Ann Int'l L 129, 143-151.

⁶⁰ *ibid*, 144.

compensation should be paid.”.⁶¹ Furthermore, the district Court goes on to state that as a principle, a State bears an international responsibility for its conduct in breach of its international obligations towards another State whose legal interest was thereby injured. They elaborate on this by saying that generally, individuals who make claims, even if they directly suffered, their damage will belong to the State and thus make the State the only party that can raise a claim. Individuals can thus only seek redress indirectly through diplomatic protection. Exceptions to this, according to the Court, can be found in human rights law treaties.⁶² The general rule in Japan is that international treaties bear domestic legal force by way of promulgation.⁶³ This means that there are certain conditions for a treaty to have direct applicability in domestic courts. Firstly, the content of individual rights and duties must be clearly defined in the treaty. Secondly, it must be ascertained that States party to the treaty intended to establish such individual rights and duties. These two conditions mean that there has to be objective treaty interpretation, or even (supplementary) looking at the drafting process.⁶⁴ The Japanese Court came to the conclusion that Art. 3 only stipulates international responsibility of a State for violations of the Annexed regulations towards another State. It must be stated that in the courts of Japan, individuals who suffered damages by those acts of armed forces’ members in violation of international humanitarian law cannot claim compensation against the State to which the offenders belonged.⁶⁵ The claims were ultimately dismissed on the basis of the plaintiffs having no grounds, even though they still tried to argue that at the time of the violations, Art. 3 Hague Convention had been established as a rule of customary international law that obligated a violating State to pay compensation to individuals who suffered damages under IHL in general.⁶⁶ This was still rejected by the Court as a rule of customary international law cannot serve as a basis for a claim and there is no such rule existing at the time of the judgment in customary international law.

When analysing these cases, it becomes clear that the leading interpretation of art. 3 (being that States are the only ones that have the right to reparation) is followed dutifully by courts around the world. The only thing they differ on is the way of argumentation to justify the use of the interpretation. One of the things shared by the three judgments described here is that all of them

⁶¹ *ibid*, 145.

⁶² *ibid*, 145.

⁶³ *ibid*, 145.

⁶⁴ *ibid*, 145.

⁶⁵ *ibid*, 150.

⁶⁶ *ibid*, 150

found that there are no explicit rules under international law granting individuals a right to claim compensation directly from the State that violated their human rights or rights guaranteed under international humanitarian law. This also is an explanation for the trend that most reparation claims happen as lump-sum agreements. As a state does not usually have the time nor resources to provide diplomatic protection in individual cases before foreign domestic courts, a solution will be found in that there will be lump-sum agreements that might be divided between the different individual victims.

International mechanisms that include reparations for individuals

The final section in this chapter will discuss international mechanisms that do include a form of reparations available for individual victims. As stated by Furuya, the victim-oriented right to reparation has been developing gradually over the last thirty years through the establishment of various ad hoc claims mechanisms.⁶⁷ The two bodies that were focussed on by Furuya and will be discussed now are the United Nations Compensation Commission (UNCC) and the Eritrea-Ethiopia Claims Commission (EECC), as they show the various intents of policy-makers starting from the 1980s to move slightly away from lump-sum settlement and more towards a combination of state and individual (whether juridical or natural) claims.

United Nations Compensation Commission

The United Nations Compensation Commission was created by the United Nations Security Council as one of its subsidiary organs in 1991 following the 1990-1991 Iraqi occupation of Kuwait and the losses and damages suffered by Kuwait following these events. Security Council Resolution 687 called for the establishment of both a compensation fund and commission to assess the claims for damages and losses by Kuwaiti nationals, corporations and governmental (and international) agencies.⁶⁸ Both the Compensation Fund and the Compensation Commission were established through Resolution 692⁶⁹, to be located at the United Nations Office in Geneva and, with the Governing Council of the Commission, responsible for the handling of the claims together with a panel of Commissioners and a

⁶⁷ S. Furuya, "The Right to Reparation for Victims of Armed Conflict: The Intertwined Development of Substantive and Procedural Aspects," *Reparation for Victims of Armed Conflict* (Cambridge University Press 2020) 17.

⁶⁸ UNSC Res 687 (3 April 1991) UN Doc S/RES/687, para. 18

⁶⁹ UNSC Res 692 (20 May 1991) UN Doc S/RES/692, para. 3.

Secretariat in accordance with section E of Resolution 687.⁷⁰ The Security Council concluded the work was finalized⁷¹ and closed the Commission in 2022.⁷² Resolutions 686 and 687 establish both Iraq's responsibility and liability under international law for the losses resulting from the invasion and occupation of Kuwait,⁷³ towards Kuwait, third states **and** their nationals and corporations,⁷⁴ which came with the extra risk that the formal ceasefire between the two nations was dependent on the Iraqi acceptance of these provisions.⁷⁵ The primary function of the Commission was to process claims for compensation of losses and damages suffered by individuals, corporations, governments and international organizations as a result of the illegal invasion and occupation of Kuwait by Iraq.

Whilst the Governing Council (made up of the members of the Security Council) was tasked with decisions on policy-making and guidelines as to the administration of the Compensation Fund⁷⁶, the Panel of Commissioners was the designated authority to review and verify the claims that were brought forward, as laid down in the Provisional Rules on Claims ('UNCC Rules').⁷⁷ The UNCC Rules also contained the conditions for application to the Commission, including who may submit claims. Article 5 of the UNCC rules states that those entitled to make claims are governments and international organizations (paragraph 1). A government can also make claims on behalf of its nationals or other persons residing in its territory (Article 5(1)(a)) and on behalf of corporations or other entities residing in its territory (Article 5(1)(b)). International organizations may submit claims only on their own behalf (Article 5(1)(d)). An

⁷⁰ UNSC Res 692 (20 May 1991) UN Doc S/RES/692, para. 3. See also UNSC Res 687 (3 April 1991) UN Doc S/RES/687, para. 16 and further.

⁷¹ UNSC Res 2621 (22 February 2022) UN Doc S/RES/2621 para. 1.

⁷² *ibid.*, para. 8.

⁷³ UNSC Res 686 (2 March 1991) UN Doc S/RES/686, para 2(b): '*Demands that Iraq implement its acceptance of all twelve resolutions noted above and in particular that Iraq: (b) Accept in principle its liability under international law for any loss, damage or injury in regard to Kuwait and third States and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq;*'

⁷⁴ UNSC Res 687 (3 April 1991), UN Doc S/RES/687, para 16: '*Reaffirming that Iraq, without prejudice to its debts and obligations arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage - including environmental damage and depletion of natural resources - or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait;*'

⁷⁵ Mensah, T.A., 'United Nations Claims Commission' (last updated: April 2011) in A. Peters and R. Wolfrum *Max Planck Encyclopedias of International Law* (OUP 2008-) <<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law:epil/9780199231690/law-9780199231690-e424?rskey=d69RVQ&result=1&prd=MPIL>> (Accessed 26 June 2024), para. 4.

⁷⁶ *ibid.*, para. 9 to 12.

⁷⁷ United Nations Compensation Commission, 'Provisional Rules on Claims Procedure' (1992) S/AC.26/1992/10, Art. 2: These Rules apply to processing of claims submitted to the Commission under the Criteria adopted by the Governing Council.

important note is that both corporations and natural persons had to request the government to submit their claims to the Commission, and claims may only be submitted for a person by one government.⁷⁸ An exception was made for claims from stateless persons or refugees, as for these claims an appropriate person, State or international organization appointed by the Governing Council could forward claims on their behalf.⁷⁹ This can be called a consolidated claims system.

The claims were divided into six categories:

- Category A: claims submitted by individuals who had to depart from Kuwait or Iraq between the date of the invasion of Kuwait (2 August 1990) and the date of the cease-fire (2 March 1991);
- Category B: claims submitted by individuals who suffered serious personal injury or whose spouse, child or parent died as a result of the invasion by Iraq and occupation of Kuwait;
- Category C: individual claims for damages up to \$100,000 USD each, including 21 different types of losses (including but not limited to property damage, personal injury, mental pain and anguish, loss of financial means);
- Category D: individuals claims for damages above \$100,000 USD each (type of losses similar to Category C, but majority loss of real property, personal property, income or business-related incomes);
- Category E: claims submitted by corporations, other private entities, and public sector enterprises (four subcategories: E1 to E4);
- Category F: claims filed by governments and international organizations for losses incurred in evacuating citizens or damage to property (respectively F1 and F2 claims, four subcategories).

The UNCC was regulated by the rules established by the Governing Council, primarily being to follow the application of Security Council Resolution 687, and, where necessary, the application of other international law.⁸⁰

⁷⁸ *ibid*, Article 5(1)(c): Claims may be submitted on behalf of an individual, corporation, or other entity by only one Government.

⁷⁹ *ibid*, Article 5(2): An appropriate person, authority, or body appointed by the Governing Council may submit claims on behalf of persons who are not in a position to have their claims submitted by a Government.

⁸⁰ *ibid*, Article 31: *'In considering the claims, Commissioners will apply Security Council 687 (1991) and other relevant Security Council resolutions, the criteria established by the Governing Council for particular categories*

The UNCC is different from traditional claims mechanisms through the fact that it was established to process a large number of claims in a relatively short amount of time, and used mostly administrative and fact-finding procedures⁸¹, whereas traditional claims mechanisms would have a more litigious nature. In total, there have been more than 1.5 million successful claimants who were paid out more than \$52 Billion.⁸² There were claims from more than 100 governments, various international organizations and big corporations. Overall, the UNCC was successful and provided a structure where individuals were able (although being through application within their Member State) able to get compensation and partial reparations from the State who violated the rules of international law. The UNCC had a clear definition of what it considered to be victims and made it broader to also include immediate family.⁸³ Reparation was primarily paid out in monetary compensation.

There are, however, criticisms possible when discussing the work of the Commission as it did face some problems. One of the major problems the Commission faced is that it used the violation of *ius ad bellum* as a criterion for victimhood, leaving the nationals of the State that violated *ius ad bellum* unprotected.⁸⁴ This means that Iraqi nationals who had suffered injuries or losses due to the conflict were not able to get any form of compensation before the Commission. This is very problematic, given the fact that there was collateral damage also for those living in Iraq and makes it that there is a reliance on specific rules of international humanitarian law for each isolated case of damage. It immediately raises the second problem of the Commission, which was that its competence was limited only to cases of *direct* loss, damage, or injury as a result of the invasion.⁸⁵ Whilst a good foundation, especially as it provides an appropriate basis and scope, this still means that those affected living in Iraq were

of claims, and any pertinent decisions of the Governing Council. In addition, where necessary, Commissioners shall apply other relevant rules of international law.'

⁸¹ Mensah, T.A., 'United Nations Claims Commission' (last updated: April 2011) in A. Peters and R. Wolfrum *Max Planck Encyclopedias of International Law* (OUP 2008-) <<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law:epil/9780199231690/law-9780199231690-e424?rskey=d69RVQ&result=1&prd=MPIL>> (Accessed 26 June 2024), para 21.

⁸² United Nations Office at Geneva, 'United Nations Compensation Commission pays out final compensation award' (13 January 2022), <<https://www.ungeneva.org/en/news-media/press-release/2022/01/united-nations-compensation-commission-pays-out-final-compensation>> (Accessed 26 June 2024).

⁸³ Decision taken by the Governing Council of the UN Compensation Commission during its Second Session, at the 15th Meeting, 18 October 1992, Personal Injury and Mental Pain and Anguish, UN Doc. S/AC.26/1991/3, 2.

⁸⁴ S. Furuya, "The Right to Reparation for Victims of Armed Conflict: The Intertwined Development of Substantive and Procedural Aspects," *Reparation for Victims of Armed Conflict* (Cambridge University Press 2020), p. 43.

⁸⁵ UNSC Res 687 (3 April 1991) UN Doc S/RES/687, para. 16.

not able to make claims, which makes the question regarding causality between violation and harm easier to answer, but more problematic for those living in the offending State. Overall, the success of the Commission overshadows (to a certain degree) its problems.

Eritrea-Ethiopia Claims Commission

The Eritrea-Ethiopia Claims Commission (hereafter: EECC) was established following the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea signed on 12 December 2000 (hereafter: Algiers Agreement). This Agreement was created to formally conclude a two-year armed conflict (1998-2000) about a land boundary in place when Eritrea gained independence from Ethiopia in 1993.⁸⁶ The Algiers Agreement Article 1 provided that both parties permanently terminated military hostilities between them and would both refrain from the threat or use of force against the other.⁸⁷ The Agreement furthermore set up three bodies to work on the follow-up of the conflict: An independent, impartial investigative body (appointed by the SG of the OAU) to investigate incidents that could have contributed to misunderstandings between the parties (Art. 3); A Boundary Commission (Art. 4) and the Claims Commission (Art. 5).

The Claims Commission was located at the Permanent Court of Arbitration in The Hague, which acted as its Registry.⁸⁸ The mandate of the Claims Commission (laid down in Article 5(1)) was to '[...] decide through binding arbitration on all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned and 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 Convention, or other violations of international law.' Excluded were claims regarding the costs of military operations or the use of force, except to the extent that such claims involve

⁸⁶ Klein, N. 'Eritrea-Ethiopia Claims Commission' (last updated: March 2013) in A. Peters and R. Wolfrum (eds.) *Max Planck Encyclopedias of International Law* (OUP 2008-) <<https://opil-oup.com.uaccess.univie.ac.at/display/10.1093/law:epil/9780199231690/law-9780199231690-e1774?rskey=c4gZgL&result=2&prd=MPIL>> (Accessed 26 June 2024) para. 1.

⁸⁷ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (2000), Article 1(1).

⁸⁸ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (2000), Article 5(5). See also Permanent Court of Arbitration, 'Eritrea-Ethiopia Claims Commission' <<https://pca-cpa.org/en/cases/71/>> (Accessed 26 June 2024).

violations of international humanitarian law.⁸⁹ Submission of claims was done by the governments, either on their own behalf or on the behalf of its nationals (both juridical and national)⁹⁰, and in special cases, for those residing in either country that were not nationals.⁹¹ The decisions and awards of the commission were final and binding and monetary awards were rendered as a compensation method.⁹² In total, the Commission delivered 15 partial and final awards on liability and concluded its work on 17 August 2009.⁹³

The EECC is especially interesting for this thesis as it explicitly has the mandate to review compensation claims regarding violations of international humanitarian law and gives civilians the opportunity (through their governments) to submit claims. An example of an award that was rendered regarding Civilians was Ethiopia's claim 5.⁹⁴ This claim (in combination with its companion Partial Award Eritrea Claims 15, 16, 23 and 27-32 (*Eritrea's Civilians Claims*)) provides a detailed analysis of international humanitarian law and its application to civilians. The Commission stated that the conflict was an international armed conflict regulated by international humanitarian law.⁹⁵ Whilst there was a general understanding on the substantive content of the applicable rules between parties, on some aspects there was disagreement. The applicable laws were the Geneva Conventions, which the Commission stated largely reflect custom.⁹⁶ Ethiopia alleged that Eritrea had committed various violations of international law against Ethiopian citizens, including but not limited to: Physical and Mental Abuse In And Out of Detention; Unlawful Conditions of Detention; Unlawful Arrest, Detention and Internment; Confiscation and Discriminatory Levies. Especially relevant for the proceedings was Convention (IV) relative to the Protection of Civilian Persons in Time of War, of which Article 27 provides for the general treatment of protected persons in the territories of the parties to the conflict, which includes that protected persons shall at all times be humanely treated. The Commission also referenced Article 33, which prohibits protected persons from being punished for offenses they did not commit, as well as collective punishments and measures of

⁸⁹ Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (2000), Article 5(1).

⁹⁰ *ibid*, Article 5(8).

⁹¹ *ibid*, Article 5(9).

⁹² *ibid*, Article 5(17).

⁹³ Permanent Court of Arbitration, 'Eritrea-Ethiopia Claims Commission' <<https://pca-cpa.org/en/cases/71/>> (Accessed 26 June 2024).

⁹⁴ Eritrea-Ethiopia Claims Commission, *Partial Award Civilians Claims Ethiopia Claim 5*, 17 December 2004.

⁹⁵ *ibid*, para. 23.

⁹⁶ *ibid.*, para 24.

intimidation.⁹⁷ The Commission reviewed all claims brought forward extensively, and heavily assessed the specific provisions of international humanitarian law regarding the protection of civilians, which is something that is not often done. The Commission did find both Eritrea and Ethiopia liable for violations of international law involving civilians, military personnel or others for whose conduct it is responsible. It reviewed provisions specifically from Geneva Convention IV on medical treatment, detention rules, prohibition on physical and mental abuse, violations of inhumane treatment, expulsion and failing to provide safe repatriation from detention camps.⁹⁸

The EECC has played a fundamentally important role when it comes to the protection of civilians in contemporary armed conflict and reparations to civilians. However, when it came to the award of compensation and relief to war victims, the Commission in its Decision Number 8 considered it impossible and expensive to identify the specific individuals who have suffered injuries as a result of the various illegal acts committed towards them.⁹⁹ It asked both States to consider within their exercise of discretion how to use and dispose of the damages that may be awarded to them for the humanitarian objectives listed in the Algiers Agreement. In the Final Awards on Damages for both States (spoken in 2009), it is made clear that the monetary compensation both States receive will be used to provide relief to their civilian populations injured in the war.¹⁰⁰ Whilst this is not the idealistic approach of finding every victim of the conflict and compensating them, it is a more realistic option for events where mass loss and/or casualty has taken place.

Analysis and conclusion

These two claims commissions are an example of how, after international armed conflicts, attempts are made to compensate those that fell victim of the conflict. These two were especially picked as they tried to steer away from the lump-sum claims, by giving individual victims (whether juridical or natural) the opportunity to submit claims of damages. Where the UNCC primarily focused on the Security Council resolutions and the guidelines provided by the Governing Council, the EECC truly assessed whether violations of international

⁹⁷ *ibid.*, para. 42.

⁹⁸ *ibid.*, D. Findings of Liability for Violation of International Law.

⁹⁹ Eritrea-Ethiopia Claims Commission, 'Decision Number 8: Relief to War Victims' (27 July 2007) <<https://pcacases.com/web/sendAttach/750>> (Accessed 26 June 2024).

¹⁰⁰ Eritrea-Ethiopia Claims Commission, *Final Award on Ethiopia's Damage Claims*, 17 August 2009, p. 106.

humanitarian law had taken place, which is very progressive. The problem that arises, especially when focusing on claims of individual victims, is the sheer number of claims that have to be processed by these organs. Both took a very different approach, with the UNCC allowing every individual claim to be submitted by a State, and the EECC allowing for mass civilian claims made by the Parties and thus awarding compensation not to the individuals in particular, but the State to use for relief programmes. Both organs have aspects which could be incredibly useful to remember when establishing a claims panel in a future conflict, and both come with a learning curve. If one were to be idealistic to take the best of both organs, one would stick (partially) with structure set up by the UNCC, providing the organ with a full Secretariat and Panels of Commissioners, whilst taking the jurisdictional scope or applicable law of the EECC and looking purely at violations of international humanitarian law as the primary source of law, rather than Security Council Resolutions or Guiding Principles established by a Governing Council. There is thus room for improvement in both systems, however they can be seen as a step in the right direction when it comes to compensation mechanisms where individual victims can apply.

Conclusion of Chapter 1

Chapter 1 intended to focus on the evolution of the possibility for individual victims of international humanitarian law to claim compensation for the internationally wrongful acts of States. Whilst history shows us that the individual victim has not always been the main focus point (especially in the bigger armed conflicts) and the lump-sum method of reparations has been the preferred method of payment, there is a gradual shift towards victim-oriented reparations by policymakers. Individuals are no longer only a point of discussion when it comes to their individual criminal responsibility, like at the ad hoc tribunals and the ICC; they can now also (alongside with States) be seen as victims of armed conflict.

Whilst the main avenue for reparation will remain within the domestic courts, which come with the usual risks of ineffectiveness and risk of no admission, Claims Commissions do provide a form of opportunity for individuals to receive a form of reparation. The primary form of reparation will remain monetary compensation, but having a possibility to receive said compensation is already a step in the right direction. The question does remain whether the compensation received through these organs arrives at the people who need it the most, or whether there are risks of corruption. Whilst there still is a long way to go for individuals to more easily and effectively be able to receive reparations for internationally wrongful acts by

States, steps are at least taken in the right direction to ensure victims are assigned a more prevalent role in the post-conflict proceedings. The next chapter will explore how it is a lot easier for individuals to claim a violation of their human rights has taken place and how they are able to claim compensation through already established treaty-bodies like for example the CEDAW Commission.

Chapter 2: The Right to Reparation in the framework of International Human Rights Law

Introduction

The second chapter of the thesis will focus on the concept of reparations or remedies for individual victims of violations of international human rights law. The reason this field was chosen to make a comparison with international humanitarian law is because of its unique classification of individuals (natural persons) within international law, a field where, traditionally, the individual is seen as an object for protection. Furthermore, human rights law is especially important in situations of armed conflict, given that the International Court of Justice in its Advisory Opinion *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* set out that human rights law continues to apply during armed conflict, although international humanitarian law is the *lex specialis*.¹⁰¹ This chapter intends to set out the standing of the individual in international human rights law, the principles governing remedies and reparations in human rights law, the available avenues for redress for individuals and to analyze whether or not these methods are effective and what the challenges may be.

The Individual in International Human Rights Law

The first section will analyze the unique standing of the individual under international human rights law and elaborate on the differences between international human rights law and other fields of international law. One of the main aims of international human rights law is the protection of human rights of individuals.¹⁰² Through the decades post-World War II, almost all international organizations have adopted some form of human rights instruments that include the principles and obligations of human rights, in universal and regional treaties, which has translated into national legislation. With this development came the opening of avenues of redress for individuals whose rights had been violated and did not have access to a remedy within domestic law.¹⁰³ This development also occurred within the United Nations, where the consideration of human rights issues is a priority for all its organs and subsidiary organizations, including the Security Council, which has addressed some gross violations as a threat to

¹⁰¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) I.C.J. Reports 2004, General List No. 131, para 106.

¹⁰² D. Shelton, *Remedies in International Human Rights Law* (OUP 2016) 1.

¹⁰³ *ibid*, 1.

international peace and security, and will often demand from Member States to comply with human rights law. It recently did so in Security Council Resolution 2712 (2023), its first resolution concerning the situation in Gaza, where it reaffirmed that all parties to conflicts must adhere to their obligations under international law, including international humanitarian and human rights law.¹⁰⁴

Standing of individual in international human rights law

The legal status of the individual in international law can best be described as somewhat complicated and controversial. The reason for being the question of ‘*who is a subject under international law?*’ already causes discourse. As Klabbers rightly states, the main subjects of international law are (and have been) states¹⁰⁵, and the entities states decide to treat in a similar manner as to how they would treat other states.¹⁰⁶ Klabbers uses the condition of whether an entity enjoys direct rights or obligations under international law¹⁰⁷, and that if they do they are most likely a subject of international law. He explains that individuals do get rights under international law, specifically under human rights law.

History

For most of the history of international law, individuals were solely seen as citizens of states and, for this reason, were not seen as subjects of international law (given the law of nations was between States, meaning individuals need to be nationals of a State to be able to seek human rights protection). Rather, they were regarded as objects, with the exceptions for aliens or citizens of other states, which had to be granted basic levels of rights protection.¹⁰⁸ The first attempts at seeing individuals as subjects of international law came with the abolition of slavery. The 1885 General Act of Berlin Conference, which prohibited slavery in international law¹⁰⁹, and the subsequent 1926 Slavery Convention portrayed individuals as victims of

¹⁰⁴ UNSC Res 2712 (15 November 2023) UN Doc S/RES/2712.

¹⁰⁵ Jan Klabbers, *International Law* (4th edn, Cambridge University Press 2024) 71.

¹⁰⁶ Examples being: The Holy See, The Maltese Order.

¹⁰⁷ Jan Klabbers, *International Law* (4th edn, Cambridge University Press 2024) 72.

¹⁰⁸ *ibid*, 117.

¹⁰⁹ General Act of the Berlin Conference on West Africa, 26 February 1885, Art. 9: “**Seeing that trading in slaves is forbidden in conformity with the principles of international law as recognized by the Signatory Powers, and seeing also that the operations, which, by sea or land, furnish slaves to trade, ought likewise to be regarded as forbidden, the Powers which do or shall exercise sovereign rights or influence in the territories forming the Conventional basin of the Congo declare that these territories may not serve as a market or means of transit for the trade in slaves, of whatever race they may be. Each of the Powers binds itself to employ all the means at its disposal for putting an end to this trade and for punishing those who engage in it.**” [bold added].

international law, a view that proved to withstand the test of time, as it became the focus point of international human rights law. This line of rationale was used as well by the League of Nations when drafting laws on the protection of minorities and became the focus during the drafting of the international human rights law conventions after the establishment of the United Nations. Human rights law thus can be seen as having the primary purpose of protecting human beings from failures to uphold human rights by their governments.¹¹⁰

It is understandable now that human rights law applies to the law between a government and the governed. This was the interpretation post-World War II when the human rights law treaties were drafted, starting with the Universal Declaration of Human Rights in 1948 and its subsequent Conventions, The International Covenant on Civil and Political Rights (hereafter: ICCPR) and the International Covenant on Economic, Social and Cultural Rights (hereafter: ICESCR), both adopted in 1966. These two Covenants are binding and provide individuals with two sets of rights they can assert towards states. They come with obligations on states, whether those are negative (ICCPR) or positive (ICESCR). Violations of these rights can be brought before a competent organ¹¹¹ and remedies should be provided.¹¹² The Conventions that followed aimed towards the protection of rights of specific groups¹¹³ and, often included either in the main text or in Optional Protocols, treaty-bodies mandated to receive (both or either) individual and inter-state complaints of violations of the treaty and are able to provide non-binding recommendations.

Whilst this is an avenue that is theoretically open for individuals to be able to claim reparation, it is important to note that not all States Parties have accepted the jurisdiction of these bodies when it comes to the procedure of individual complaints. Only eight of the ten bodies in

¹¹⁰ Klabbbers, *International Law* (4th edn, Cambridge University Press 2024) 119.

¹¹¹ Art. 2(3)(b) ICCPR: ‘*Each State Party to the present Covenant under-takes: To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority for by the legal system of the State, and to develop the possibilities of judicial remedy*’;

¹¹² This provision is not included in the ICESCR, although the General Commentary of the Committee does provide a form of a remedy. See Committee on Economic, Social and Cultural Rights, ‘General Comment No. 3’ (1990) UN Doc E/1991/23 para. 5.

¹¹³ See for example the Convention on the Rights of the Child (Adopted 20 November 1989 UNGA Res 44/25, entry into force 2 September 1990) 27531 UNTS 1577 and the Convention on the Elimination of All Forms of Discrimination Against Women (Adopted 18 December 1979, entry into force 3 September 1981) 20378 UNTS 1249.

existence are mandated to receive individual communications¹¹⁴ as of the time of writing, and as De Schutter adequately puts ‘*The other powers [apart reviewing the State Reports on the implementation of their respective treaty and providing Concluding Observations] of these bodies play a comparatively much minor or even insignificant role.*’¹¹⁵ So whilst these bodies will be discussed in this Chapter, it is important to keep the nuance in mind. The main focus of the chapter will lie with the regional human rights mechanisms.

Difference of standing between international human rights law and other fields of international law

International law is an intriguing field of law, especially when it comes to its great variety of subjects and fields. It has many flaws and the status of the individual is controversial, however the two main flaws identified by Shelton are that it lacks a proper procedure for criminal sanctions and civil remedies against the perpetrator of international law.¹¹⁶ Given the limited subject-matter jurisdiction as one of the flaws of the International Criminal Court¹¹⁷ and the limit to inter-state disputes when it comes to the jurisdiction of the International Court of Justice¹¹⁸, it is easy to see why individuals trying to claim remedies due to violations of international law by States may get frustrated when trying to get justice. They are mostly unable to hold states accountable for their actions, apart from through domestic judicial organs, which as discussed in the previous chapter, comes with its own set of complications, especially in times during or post armed conflict.

International human rights law is an exception to the general field of international law and remedies. It is an area of international law where individuals may bring actions against states in international courts, however the power imbalance does remain, affecting the procedures

¹¹⁴ United Nations Office of the High Commissioner of Human Rights, ‘Individual Communications - Human Rights Treaty Bodies’ <<https://www.ohchr.org/en/treaty-bodies/individual-communications>> (Accessed 5 August 2024).

¹¹⁵ O. De Schutter, *International Human Rights Law - Cases, Materials, Commentary* (3rd edn, Cambridge University Press 2019) 870.

¹¹⁶ D. Shelton, *Remedies in International Human Rights Law* (OUP 2016) 8.

¹¹⁷ Art. 5(1) Rome Statute of the International Criminal Court: *The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.*

¹¹⁸ Art. 34(1) Statute of the International Court of Justice: “*Only states may be parties before the Court.*”

and the role of tribunals or human rights bodies to afford remedies.¹¹⁹ It is (as will be further explained below) one of the fields of law where the ARSIWA can make a fundamental difference and the progression of law is evergoing, given most tribunals have (as at least one of their) aims to ensure systematic human rights violations occur less often. Given the unique position of the individual as a central subject of international human rights law, they are provided with the proper ways of ensuring their rights are not violated and if they are, they will be adequately remedied for such violations.

Introduction of right to remedy

Before going fully into the substantive part of this Chapter, it is important to note there will be a slight discrepancy in the language, as there will be switches between talking about *reparations* and *remedies*. International humanitarian law and general international law speak of reparations when a violation of international law has occurred. In international human rights law this is slightly different as the words remedy and reparations may be used interchangeably, given there is no one agreed upon word for remedies to individuals in the field. An example of this is Article 13 of the European Convention of Human Rights which speaks of the “Right to an effective remedy”. For the purposes of this chapter, the word remedy will be used when referring to the rights of victims of international human rights law and reparations may be used to refer to the act of awarding the reparations to the victims.

Right to remedy

Remedies are the field of law dealing with the means by which a right is enforced or the violation of a right is prevented or redressed.¹²⁰ Capone sets out four kinds of remedies: by act of the party injured, by operation of law, by agreements between parties and by judicial remedies.¹²¹ The right to a remedy is particularly prevalent in international human rights and international criminal law, specifically in international criminal law, especially since the entry into force of the Rome Statute, the victim plays a central role in the proceedings and conviction and reparations are included as part of the proceedings.¹²² The structural remedies in

¹¹⁹ D. Shelton, *Remedies in International Human Rights Law* (OUP 2016) 8.

¹²⁰ F. Capone, ‘Remedies’ (last updated: October 2020) in A. Peters and R. Wolfrum (eds) (OUP 2008-) Max Planck Encyclopedias of international law <<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law:epil/9780199231690/law-9780199231690-e1089?rsk=yj6MI9K&result=9&prd=MPIL>> (accessed 27 June 2024)

¹²¹ *ibid.*

¹²² Please see the section on the ICC in Chapter 3 for more elaboration on this topic.

international human rights law have a goal to bring about changes in relationships within the State (between a government and its governed).¹²³ They are imposed by either a judicial organ or agreed upon by a State during settlement to avoid future violations of human rights law. These kinds of structural remedies do not replace or substitute the individual victims right to reparation.¹²⁴

The primary purpose of remedies is to restore the individual victim to the conditions they were in before the violation of international human rights law¹²⁵, also referred to as *restitutio in integrum*, and to provide them with some form of relief, whether that be compensation or other forms of non-pecuniary remedies¹²⁶. Future violations can only be addressed through declarations and promises of non-repetition. Remedies can have a dual meaning, given there is a procedural (remedies are the processed by which arguable claims of human rights violations are heard and decided, whether by court, administrative agencies or other competent bodies) concept of remedies and a substantive (remedies refer to the outcome of proceedings concept and the relief afforded to the successful claimant) concept of remedies.¹²⁷ According to Shelton, remedies are only owed to certain persons under certain conditions. The conditions she lists and that will shortly be discussed hereafter as necessary for the right to a remedy are the 1. Breach of an obligation; 2. Resulting Harm; 3. Identified or identifiable injured parties.¹²⁸

Breach of an obligation: The breach of an obligation in the context of human rights law refers to a state violating one of their obligations under human rights law, whether it be a positive or negative obligation. Any impairment of guaranteed rights (irrespective of which branch of government or organ conducted it, as human rights obligations are applicable for all state actors) which can be attributed under the rules of international law to the action or omission of a public authority constitutes an act imputable to the State and thereby the state is responsible for the conduct.¹²⁹ The guaranteeing of these rights has been proven to be more difficult than

¹²³ V. Fikfak, 'Structural Remedies: Human Rights Law' (last updated: May 2022) in A. Peters and R. Wolfrum (eds) (OUP 2008-) Max Planck Encyclopedias of international law <<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law-mpeipro/e3094.013.3094/law-mpeipro-e3094?rkey=j6MI9K&result=10&prd=MPIL>> (accessed 27 June 2024)

¹²⁴ *ibid*, para. 4.

¹²⁵ *ibid*, para. 6.

¹²⁶ Examples of this include the right to an effective investigation, information about events, locating and handing over remains.

¹²⁷ D. Shelton, *Remedies in International Human Rights Law* (OUP 2016) 16.

¹²⁸ *ibid*, 13 to 16.

¹²⁹ D. Shelton, *Remedies in International Human Rights Law* (OUP 2016) 13.

the guarantee of rights in fields of domestic law, like contracting or employment law, as there are no concrete standards codified in the human rights treaties that set out these obligations. This has proven to be an issue when it comes to the interpretation of certain rights, as judicial organs in different countries may have varying interpretations of the right. In the European Human Rights system, States can look towards the interpretation of the European Court of Human Rights, who, in their judgments, try to set out an interpretation of the ECHR that can be followed by domestic courts afterwards. An example of this can be found in *Öneryildiz v. Turkey* in the application of Article 2 (*right to life*).¹³⁰

Resulting harm: According to Shelton, there must be a direct causal link between the victim and the harm suffered. Only when this link exists and is proved does the right to a remedy arise.¹³¹ Examples listed in the UN Guidelines as harm suffered include but are not limited to: physical or mental harm; lost opportunities; material damage; moral damage and costs for legal assistance.¹³² The types of harm suffered, or types of damages, as stated by Bantekas and Oette, are similar to what is familiar in most legal systems and can be regarded as a reflection of general principles of law.¹³³

Identified or identifiable injured parties: Whilst there are many terms for the person filing the claim for redress, the word *victim* may be both the most obvious and the most controversial to use, given there is no exact definition in international law for victims. It is, however, a useful definition, given it identifies the party that was injured by the human rights violation and is claiming redress, with the added benefit that it includes deceased persons (and those filing on behalf of them or those that physically cannot file themselves). This criterion is one of the more obvious requirements, given most human rights courts and administrative bodies have as an admissibility requirement that claims cannot be made anonymously. An example of this can be found in the admissibility criteria of the ECtHR (Article 35(2)), which states that “*the Court shall not deal with any application submitted under Article 34 that is anonymous [...].*”

Concluding, these conditions bear great resemblance to the conditions for state responsibility as laid down in the ARSIWA, which is understandable given this is also conduct that can be attributed to the state and classified as internationally wrongful. This makes sense as most

¹³⁰ *Öneryildiz v. Turkey* (App No. 48939/99) Judgment of 30 November 2004, para. 63.

¹³¹ D. Shelton, *Remedies in International Human Rights Law* (OUP 2016) 15.

¹³² UN 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, para. 20.

¹³³ I. Bantekas and L. Oette, *International Human Rights: Law and Practice* (3rd edn, Cambridge University Press 2020) 718.

human rights tribunals, apart from an individual complaints mechanism, also deliberate on inter-state disputes.

Forms of remedy

The forms of remedy that can be claimed by applicants are similar to those that are laid out in the Reparations section of the ARSIWA. What will be clear to see is that the different regional human rights systems have slightly different objectives when it comes to the allocation of remedies, resulting in them using different forms of remedies. The types of remedies most common in international human rights law are declaratory judgments, restitution, compensation (nominal awards, pecuniary damages and moral damages) and non-monetary remedies such as satisfaction and remedial orders. The focus will lie on restitution and non-monetary remedies, as these are the most frequently referred to options and most controversial.

The goal of restitution is to take from the wrongdoer that to which the victim is entitled and give it to the victim.¹³⁴ Restitution is the preferred method of reparation across international law, not just in the field of human rights law, as it intends to undo the harm that has been done by the actor violating obligations of international law and reinstate the victim like the violation has not taken place. It usually is also what the victims are asking for, making it the preferred method of remedial orders. Where restitution is not possible, other remedies are offered as a substitute¹³⁵, given there are situations where it is frankly impossible to use restitution, like if the victim has been tortured, mentally or physically abused or murdered. Whilst in these cases other methods of remedy might not entirely cover the harm done, it is the best option, as the conduct cannot be reversed. The regional human rights courts also tend to choose restitution as their preferred method of remedy, given it allows them to avoid the assessment of damages.¹³⁶ This is especially relevant for the European Court of Human Rights, as they are notorious for awarding compensation having been reluctant in the past to specify a specific amount. In human rights law, most restitution claims concern the deprivation of rights (land, cultural property, employment etc).

¹³⁴ D. Shelton, *Remedies in International Human Rights Law* (OUP 2016), 298.

¹³⁵ *ibid* 298.

¹³⁶ *ibid* 298.

Non-monetary compensation aims to redress the harm and implement broad social benefits that can effectuate a comprehensive remedy.¹³⁷ There are various reasons as to why non-monetary compensation is the preferred method of remedy over compensation. Firstly, governments may be less responsive to less intrusive measures, such as awards of damages.¹³⁸ Secondly, it may be impossible to assess the damages properly because of the unique identity of what may have been lost¹³⁹. Lastly, non-monetary measures may be an incentive for less repeat violations, as they intend to bring forth structural change. One can also see in state practice that non-monetary measures are more often used, as compensation can be seen as a substitute for violating human rights, which is outright problematic.

When assessing the work of the tribunals, the European system and the American and African systems go in very different directions. Where the European Court has been traditionally hesitant in providing for non-monetary compensations (most requests being outright rejected), there is now a slow transition towards more acceptance, which started with the *Aslakhanova and others v. Russia* case.¹⁴⁰ The Inter-American Court of Human Rights however, has been very progressive when it comes to the non-compensatory remedies. The type of remedy that is awarded is dependent on the type of violation that has been committed by the State. The jurisprudence on remedies starts in the *Vélasquez-Rodríguez v Honduras*¹⁴¹ judgment, which is seen as a landmark piece of jurisprudence for the Court. The main concern for the Court is restoring the reputation of victims, which makes sense given the primary violations that the Court has dealt with over the years concern allegations of terrorism, abuse and so forth. The African Commission on Human and Peoples Rights has also taken a more progressive stance towards non-monetary compensation, especially when it comes to the rights of detainees. Concluding, these forms of remedies are important for international human rights, as it provides these systems and its victims with remedies tailored to their claims and injuries.

¹³⁷ *ibid* 377.

¹³⁸ *ibid* 377

¹³⁹ *ibid* 377

¹⁴⁰ *Aslakhanova and Others v. Russia*, (App Nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10) (Judgment 18 December 2012).

¹⁴¹ *Case of Velásquez Rodríguez v. Honduras (Merits)*, Inter-American Court of Human Rights, Series C No. 4 (29 July 1988)

Codification of the right to remedy - Universal and Regional human rights systems

Universal systems

The right to a remedy has been codified in international human rights law in both the universal and regional systems. Starting with the universal treaties, Article 8 of the Universal Declaration of Human Rights states that “*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*” As this is a non-binding provision, the right to remedy was also codified in the ICCPR. Article 2 paragraph 3 of the ICCPR sets out the right to a remedy when a provision of the ICCPR is violated by a state. The individual provisions of the Covenant, including Article 2, are binding on States as a matter of treaty obligation, on their own terms.¹⁴² Article 2 lays down general obligations for states and is of an ‘accessory’ character, meaning it may only be violated in conjunction with another substantive provision of the Covenant that can be found in part III.¹⁴³ Article 2 contains both a positive and negative legal obligation.¹⁴⁴ Important to note is that Article 2 does not limit itself to citizens of a State party. It references *all individuals*, meaning stateless persons and refugees under the jurisdiction of a State also can make claims based on this provision. There is a preference for judicial remedies in paragraph 3.¹⁴⁵ Whilst the ICESCR may not contain an explicit provision for the right to a remedy, the Committee on Economic, Social and Cultural Rights did state in General Comment No 3 that to ensure proper execution of the state obligations laid down in Article 2(1), States must take all measures to do so and judicial remedies may be justiciable if in accordance with the national legal system.¹⁴⁶

¹⁴² P.M. Taylor, 'Art. 2: To Respect and to Ensure Covenant Rights', *A Commentary on the International Covenant on Civil and Political Rights - The UN Human Rights Committees Monitoring of ICCPR Rights* (Cambridge University Press 2020) 59.

¹⁴³ *ibid* 60.

¹⁴⁴ Human Rights Committee, ‘General Comment No. 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (29 March 2004) UN Doc CCPR/C/21/Rev. 1/Add. 13 para 6.

¹⁴⁵ P.M. Taylor, 'Art. 2: To Respect and to Ensure Covenant Rights', *A Commentary on the International Covenant on Civil and Political Rights - The UN Human Rights Committees Monitoring of ICCPR Rights* (Cambridge University Press 2020) 78.

¹⁴⁶ Committee on Economic, Social and Cultural Rights, ‘General Comment No. 3’ (1990) UN Doc E/1991/23 para. 5.

UN 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

The United Nations General Assembly has also looked into the questions of reparations or remedies to victims of gross violations of international law. The document that is the most relevant for this research is the *UN 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*, which was passed by the General Assembly in 2005. The principles laid down in this document are non-binding but seen as highly authoritative, being based on the Van Boven principles. The resolution identifies the mechanisms, modalities, procedures and methods for the implementation of existing obligations under international human rights law and international humanitarian law. There are no new obligations.¹⁴⁷

The general obligation laid down in the principles is the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law.¹⁴⁸ There is a clear dual nature to be seen in the principles: access to justice and substantive remedies. An obligation is laid down in the third chapter that States have a duty to investigate gross violations of international human rights law (and serious violations of international humanitarian law constituting crimes under international law). Within the scope of the articles, the state is responsible for providing reparations for acts of omissions that constitute violations.¹⁴⁹ The various forms of reparation are also included in the Principles, with a notable diversion from the ARSIWA being that cessation of the breach is included among forms of satisfaction¹⁵⁰, whereas as Shelton correctly notes, in the ARSIWA this is an obligation prior to and independent of reparation.¹⁵¹ Furthermore, the remedy of satisfaction is broader than in the ARSIWA, given non-monetary remedies are important in human rights law, given the disparity of power between the state and the individual victim(s). These guidelines are quite effective, but implementation is difficult given the non-binding nature of the document.

¹⁴⁷ UN 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, preamble.

¹⁴⁸ *ibid*, principle 1.

¹⁴⁹ *ibid*, para. 3.(D).

¹⁵⁰ *ibid*, para. 22 (a).

¹⁵¹ D. Shelton, *Remedies in International Human Rights Law* (OUP 2016) 75.

Regional systems

In the regional human rights systems, the right to remedy has been codified and interpreted by the regional human rights courts. This section will briefly discuss the European, the Inter-American and African system, and their impact will be discussed more in detail below. In the European Convention of Human Rights, Article 13 codifies the right to an effective remedy. This provision is modeled on Article 8 UDHR.¹⁵² The European Court of Human Rights has interpreted article 13 to guarantee an effective remedy to everyone who claims that there has been a violation of their rights.¹⁵³ Remedies can take various forms, the most common in the European system being compensation; however, the focus has been shifting towards restitution as well. The American Convention of Human Rights codified its right to a remedy in Article 25, combining the right of access to Court and right to a remedy in the article aptly titled: “*Right to Judicial Protection*”. Paragraph 2 states the right to a remedy, the obligation to develop the possibilities for judicial remedy and to ensure that the competent authorities shall enforce such remedies.¹⁵⁴ The African Charter on Human and Peoples Rights does not have one explicit provision that relates to the right to remedy, but does include the right to have your cause heard (art. 7(1) AChHPR)¹⁵⁵ and the right to adequate compensation in case of spoliation of dispossessed people (art. 21(2) AChHPR).¹⁵⁶ These Courts have as one of their primary duties to award reparations to victims of human rights abuses where states have been unable or unwilling to do so. They have a more subsidiary role, as it is the primary obligation of states to award these remedies themselves.¹⁵⁷

¹⁵² Dinah Shelton, 'Human Rights, Remedies' (2006) Max Planck Encyclopedia of Public International Law - para. 13.

¹⁵³ *Case of Klass and Others v. Germany* (App. No. 5029/71) para. 64.

¹⁵⁴ Art. 25(2) American Charter on Human Rights: “*The States Parties undertake:*
a. *to ensure that any person claiming such remedy shall have his right determined by a competent authority provided for by the legal system of the state;*
b. *to develop the possibilities of judicial remedy; and*
c. *to ensure that the competent authorities shall enforce such remedies when granted.*”

¹⁵⁵ art. 1(1) African Charter on Human and Peoples Rights: “*Every individual shall have the right to have his cause heard. [...]*”

¹⁵⁶ Articles 21(2) of African Charter on Human and Peoples Rights: “*In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.*”

¹⁵⁷ D.Shelton, 'Human Rights, Remedies' (last updated: July 2006) in A. Peters and R. Wolfum (eds) *Max Planck Encyclopedia of Public International Law* <<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law:epil/9780199231690/law-9780199231690-e1738?rskey=zjBiLz&result=3&prd=MPIL>> (Last accessed 14 August 2024) para. 13.

Mechanisms set up for remedies (whether in force or not)

This section will discuss the various mechanisms that have been set up for individuals to be able to shine a light on violations of international human rights law by States. It will investigate the various UN bodies (whether treaty or organ), regional systems, domestic case law and analyse its effectiveness as a form of conclusion.

UN Mechanisms - The Human Rights Council

The United Nations has been actively involved with the promotion and upholding of standards of human rights since its inception in 1945. What began with the Universal Declaration on Human Rights in 1948 and the two human rights treaties in 1966, has grown to a vast network of working groups, treaty body mechanisms and general assembly resolutions. The permanent standing body concerned with human rights within the United Nations system is the Human Rights Council, which acts as a subsidiary organ of the General Assembly¹⁵⁸. It consists of 47 rotating states¹⁵⁹ that are responsible for the promotion and protection of human rights all around the globe.¹⁶⁰ It was established in 2006 by General Assembly Resolution 60/251¹⁶¹, replacing the Human Rights Commission. It states that it serves as an international forum on human rights issues with United Nations officials and mandated experts, states, civil society and other participants.¹⁶² Membership is open to all states that are members of the United Nations.¹⁶³ The Council has four different mechanisms at its disposal to fulfill the mandate it was assigned by the General Assembly, of which the most important for this thesis is the Complaints Procedure with its Working Groups on Communications and Situations (established to address consistent patterns of gross and reliably attested violations of all human rights in any part of the world and under any circumstances¹⁶⁴, open to both individuals and organizations¹⁶⁵) which will be the main focus for this thesis, as it is the procedure that is open to individual complaints.

¹⁵⁸ UNGA Res 60/251 (3 April 2006) UN Doc A/RES/60/251, para. 1.

¹⁵⁹ *ibid*, para 7.

¹⁶⁰ Office of the High Commissioner on Human Rights, 'Human Rights Council' <<https://www.ohchr.org/en/hrbodies/hrc/home>> (Accessed 9 July 2024).

¹⁶¹ UNGA Res 60/251 (3 April 2006) UN Doc A/RES/60/251.

¹⁶² Office of the High Commissioner on Human Rights, 'Welcome to the Human Rights Council' <<https://www.ohchr.org/en/hr-bodies/hrc/about-council>> (Accessed 9 July 2024).

¹⁶³ UNGA Res 60/251 (3 April 2006) UN Doc A/RES/60/251, para. 8.

¹⁶⁴ *ibid*, para 85.

¹⁶⁵ *ibid*, para 87(d).

The Complaints Procedure, as stated previously, is tasked to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.¹⁶⁶ The former Commission of Human Rights Resolution 1503 procedure was used as a base line, replaced and revised on the areas where it was not functioning as it was intended to.¹⁶⁷ The Complaints Procedure includes two Working Groups, the Working Group on Communications, which is tasked with reviewing the communications that are sent to the Council and whether or not they are admissible¹⁶⁸, and the Working Group on Situations, meant to (based on the information provided by the Working Group on Communications) present a report to the Council on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and to make recommendations on the course of action (normally written like a draft resolution or decision) for the Council.¹⁶⁹ The Complaints Procedure is the only complaint procedure covering all human rights and freedoms for all Member States of the United Nations¹⁷⁰ and is confidential to ensure cooperation with the State concerned.¹⁷¹ The procedure is open to all individuals (provided they fulfill the admissibility criteria) claiming to be a victim of a violation of human rights, including non-governmental organizations.¹⁷² This is unique, as it provides individuals a mechanism that has the mandate to cover all human rights treaties, the UDHR and the Charter of the United Nations. There are five potential outcomes to the process:

1. full discontinuation,
2. retention of the situation under review followed by a request to the state to provide further information,
3. retention under review and appointment of a country rapporteur,
4. discontinuation of the confidential procedure and reverting to a public consideration of the situation and recommendation of technical assistance,
5. capacity-building and advisory services through the OHCHR to the state under consideration.¹⁷³

¹⁶⁶ *ibid*, para 85.

¹⁶⁷ *idem*. para 85.

¹⁶⁸ *idem*. para 95.

¹⁶⁹ *idem*. para 98.

¹⁷⁰ *idem*. para 87(a)

¹⁷¹ *idem* para 100.

¹⁷² *idem* para 87.

¹⁷³ I. Bantekas and L. Oette, *International Human Rights: Law and Practice* (3rd edn, Cambridge University Press 2020) 173.

Up to 15,000 complaints are submitted each year, with a response rate by states of around 90%.¹⁷⁴ However, there is still rightful criticism of the HRC and its complaints procedure. Some of the main challenges faced by the body include not fully living up to its normative nature¹⁷⁵, the fact that bloc politics has very much dominated the working of the HRC and the amount of time the individual complaints procedures take.

UN Mechanisms - Treaty Body Mechanisms

Aside from the Human Rights Council, there are also the Committees established to assess the violations of the core human rights treaties. These Committees are established through the Convention they are attached to, and serve as mechanisms for, as their main tasks, the review of State Reports, inter-state complaints, and individual communications. These mechanisms are a progressive step when it comes to institution-building in the international field, taking away some of the sovereignty held by states as the sole interpreters of rights and obligations.¹⁷⁶ Bantekas and Oette state that these tasks are a result of the willingness of states to vest treaty bodies with the mandate of monitoring compliance with the human rights treaties.¹⁷⁷ However, given the progression of the amount of mechanisms available and the limited number of States that have accepted the individual communications procedure, one can ask the legitimate question whether states have the means to report and actively participate in the work of all of the treaty bodies equally, especially given the risk of duplication and system fatigue. One of the challenges that will be discussed below is the procedural and substantive struggle with state compliance. The focus in this thesis will lie on the Human Rights Committee when discussing the procedural aspects of these mechanisms, as it would be difficult to discuss all nine substantively and the procedural aspects of the Committees are very similar. The mandate of the mechanisms (hereafter: Human Rights Treaty Body) is limited to violations of the Convention they were created by (e.g. the Human Rights Committee can only make recommendations on violations of the ICCPR) and States have not made explicit reservations to.

¹⁷⁴ United Nations Human Rights Council, 'Human Rights Council Complaints Procedure' <<https://www.ohchr.org/en/hr-bodies/hrc/complaint-procedure/hrc-complaint-procedure-index>> (Accessed 10 July 2024).

¹⁷⁵ T. Rathgeber, *Performance and Challenges of the UN Human Rights Council: An NGOs View*, Friedrich-Ebert Stiftung (2013) 3.

¹⁷⁶ *ibid* 195.

¹⁷⁷ I. Bantekas and L. Oette, *International Human Rights: Law and Practice* (3rd edn, Cambridge University Press 2020) 195.

Methods of establishment, mandate and procedure

Methods of establishment

A Human Rights Treaty Body (with the notable exception of the Committee on Economic, Social and Cultural Rights being established by ECOSOC) is established by the States' Parties to a specific human rights convention and is based on the founding treaty that sets out its respective mandate.¹⁷⁸ Whilst it is officially only a body attached to the treaty, through its close institutional links to the UNGA, their annual reporting to the Secretary-General or UNGA¹⁷⁹ and the fact that they are supported by the OHCHR and the financing from the United Nations budget, they effectively are included in the UN human rights structure.¹⁸⁰ A Treaty Body has a certain number of (usually between 10 and 25) members which are nationals of the States' Parties to the Convention but serve in their independent and personal capacity.¹⁸¹ The Committees meet on a part-time basis. The main purpose of the Committees is the review of state reporting, one of the obligations laid down in these Conventions. Reports will indicate any progress made and difficulties found by the State in the implementation of the obligations established in the respective Convention.¹⁸²

Mandate

The mandate of these treaty bodies can vary, but usually it is comprised of a few main tasks: review of State Reports submitted to the Committee; review of inter-state complaints (if conditions for admissibility of these complaints have been met); writing General Comments and the review of individual complaints (if conditions for admissibility of these complaints have been met) Monitoring and adjudicating on complaints can be seen as their main tasks. Whilst it is easy to only focus on the complaints and adjudication mechanisms (as traditionally, this was how the effectiveness of a mechanism was measured), one should not understate the importance of the monitoring functions of these mechanisms. For this thesis, however, the focus should remain with the individual complaints mechanisms

Whether included in the main text of the Convention or in an Optional Protocol, the Committee will usually have some form of an individual complaints mechanism. The reason these

¹⁷⁸ *ibid* 197

¹⁷⁹ See for example Art. 45 ICCPR.

¹⁸⁰ *idem*.

¹⁸¹ See here for example Art. 28 of the ICCPR.

¹⁸² Art. 40(1) and 40(2) of ICCPR.

committees are important is that most of the core conventions have some form of a compensation provision. When taking the ICCPR as an example, Article 2(3) ICCPR sets out that States have an obligation to provide for adequate remedies. These Committees serve as a way of remedial justice for victims of violations of human rights who, crucially, have exhausted all domestic remedies.¹⁸³ Important to note is that for States' Parties these complaints procedures are not mandatory. An individual complaints mechanism only goes into force when a certain number of States have declared their acceptance of jurisdiction. In the case of the Human Rights Committee this is 10 States.¹⁸⁴ States must explicitly declare their willingness to accept this jurisdiction (see for example Articles 1¹⁸⁵ and 12¹⁸⁶ of the Optional Protocol to the ICCPR¹⁸⁷). It is thus not a surprise that for most of the treaties, many States are either not a party to the Protocol, have not declared their acceptance of jurisdiction, or entered with certain reservations. Examples of these States include China, USA, India and various Middle Eastern Countries.¹⁸⁸

Procedure

An individual who claims that their right in a specific convention has been violated has, as said above, the option of filing a communication/complaint/application with the treaty body that belongs to the convention. For this, several conditions have to be fulfilled. Whilst some may vary between Conventions, the conditions explained here are the main conditions found in all core conventions and their optional protocols. **The first**, most important and most often

¹⁸³ Example of this in Art. 2 Optional Protocol to the International Covenant on Civil and Political Rights: *"Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration."*

¹⁸⁴ Art. 9(1) Optional Protocol to the International Covenant on Civil and Political Rights: *'Subject to the entry into force of the Covenant, the present Protocol shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or instrument of accession.'*

¹⁸⁵ Art. 1 Optional Protocol to the International Covenant on Civil and Political Rights: *'A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant.'*

¹⁸⁶ Art. 12(1) Optional Protocol to the International Covenant on Civil and Political Rights: *'1. Any State Party may denounce the present Protocol at any time by written notification addressed to the Secretary-General of the United Nations. Denunciation shall take effect three months after the date of receipt of the notification by the Secretary-General'*

¹⁸⁷ Important side note, art. 12(2) does state that: *'Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under art. 2 before the effective date of denunciation'*.

¹⁸⁸ I. Bantekas and L. Oette, *International Human Rights: Law and Practice* (3rd edn, Cambridge University Press) 216.

recurring condition is that an individual must have exhausted all available domestic remedies before submitting a communication to the specific treaty body.¹⁸⁹ The reason for this is that, under the UN human rights system, States are obligated to provide access to judicial organs when a violation of a right laid down in the core instruments has occurred. As stated in General Comment 31, Art. 2 ICCPR provides an obligation for States to ensure that they have adopted the proper legislative and other measures to oblige by their legal obligations.¹⁹⁰ It would be counter-intuitive for States to have amended their legal systems for them to be circumvented by individuals who are able to directly apply to the respective Committee. **A second**, recurring condition is that complaints are not allowed to be anonymous (see Art. 3 Optional Protocol¹⁹¹), as *actio popularis* is mostly not allowed, meaning a victim or group of victims must be able to be identified (or the person submitting on behalf of the victim)¹⁹². Furthermore, it must concern a violation of an obligation/right laid down in the Convention, which is admissible *ratione temporis*, meaning either after the Committee has entered into force or after the declaration of a State has entered into force and within its territorial jurisdiction.¹⁹³ The exception to the *ratione temporis* rule is when it concerns continuing violations. Lastly, a communication may be considered inadmissible if it is already being investigated by another international body or settlement organ.¹⁹⁴

The Committee, after deciding whether or not the communication is admissible, will bring the communication to the attention of the State Party¹⁹⁵, who in turn will get an opportunity to, in written form, respond to the allegations with explanations clarifying the matter and the remedy, if any, that have been taken by that State.¹⁹⁶ The Committee shall then consider the

¹⁸⁹ See as example art. 2 Optional Protocol to International Covenant on Civil and Political Rights.

¹⁹⁰ Human Rights Committee, 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev. 1/Add. 13 para 7.

¹⁹¹ Art. 3 Optional Protocol to International Covenant on Civil and Political Rights: "*The Committee shall consider inadmissible any communication under the present Protocol which is anonymous, or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the Covenant.*"

¹⁹² S. Joseph, 'Committees: Human Rights Bodies' in Max Planck Encyclopedia of International Law A. Peters (ed.) (last updated April 2019) <<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law-mpeipro/e3527.013.3527/law-mpeipro-e3527?rskey=WCTg5h&result=7&prd=MPIL>> (Accessed 10 July 2024) para 38.

¹⁹³ *idem*.

¹⁹⁴ Art. 5(2)(b) Optional Protocol to ICCPR.

¹⁹⁵ see for example art. 4(1) Optional Protocol to ICCPR: '*Subject to the provisions of article 3, the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant.*'

¹⁹⁶ Art. 4(2) Optional Protocol to ICCPR.

communications with information received from both sides and share its views with the State and the individual. It will write up recommendations (either only the facts or the facts and recommendations), which include recommendations and possibilities for remedy of the situation,¹⁹⁷ and which are shared with the two Parties concerned and eventually made public. Important to note is that these are non-binding recommendations, although be it highly authoritative. None of the currently working treaty bodies have been given the power of enforcement, meaning it is up to the states themselves to implement the recommendations. What can happen is that a special rapporteur is installed for the monitoring of the follow-up, like, for example, that which is in the Rules of Procedure of the Committee Against Torture.¹⁹⁸ However, given the authoritative status of these bodies, non-compliance with any recommendations made by them is seen as a major flaw in the international community.

Challenges and reform attempts

As discussed in the introduction of this section, whilst these core mechanisms are a good progression for the remedial side of international human rights, they are not without their challenges. The challenges and attempts at reform and harmonization will now shortly be discussed, after which a conclusion will be drawn.

Some of the major challenges these mechanisms face are the backlog of work, non-compliance with their recommendations, general comments and reporting obligations by States and, sadly enough, system fatigue. Starting with the last-mentioned challenge, over the past decades, eight Committees have entered into force and started their work on monitoring the implementation of their respective treaties. For states, this effectively means that they have eight reporting duties (both the initial and recurring reports) to eight different institutions, not to mention participation (when declared to do so) in inter-state complaints and individual communication procedures. For many of the UN member states, this constitutes a large amount of work. Most

¹⁹⁷ S. Joseph, 'Committees: Human Rights Bodies' in Max Planck Encyclopedia of International Law A. Peters (ed.) (last updated April 2019) <<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law-mpeipro/e3527.013.3527/law-mpeipro-e3527?rskey=WCTg5h&result=7&prd=MPIL>> (Accessed 10 July 2024) para 70.

¹⁹⁸ Committee Against Torture, 'Rules of Procedure' (5 July 2023) UN Doc CAT/C/3/Rev. 7, Rule 120(1): *Follow-up Procedure: The Committee may designate one or more rapporteur(s) for follow-up on decisions adopted under article 22 of the Convention, for the purpose of ascertaining the measures taken by States parties to give effect to the Committee's findings.* Rule 120(2): *The rapporteur(s) may make such contacts and take such action as appropriate for the due performance of the follow-up mandate and report accordingly to the Committee. The Rapporteur(s) may make such recommendations for further action by the Committee as may be necessary for follow-up.*

of this work is also duplicated work, given the high level of similarity between the procedures of the Committees, meaning the procedure is not the most effective and can cause a strain on the capacity of the Member States to properly and effectively report and participate in the human rights system.¹⁹⁹ Furthermore, given the status of the human rights treaties, there has been a struggle with state compliance both in a procedural and substantive aspect. Bantekas and Oette describe the procedural aspect as the lack of timely reporting²⁰⁰ and the substantive aspect in the non-compliance of adequately implementing human rights obligations.²⁰¹ Furthermore, given not all States have declared they are accepting the jurisdiction of the mechanisms for inter-state and individual complaints, the effectiveness of the mechanisms universally can be questioned.

All these challenges have presented an obvious need for reform, which was also voiced by the UN High Commissioner on Human Rights, Louise Arbor, in 2005²⁰² and in the 2009 Dublin Statement on the Process of Strengthening the United Nations Human Rights Treaty Body System. What was drafted in 2009 are the Harmonized Guidelines on Reporting under the International Human Rights Treaties²⁰³, which were put together by the Committees at the request of the General Assembly (Res 52/118 and 53/138) to compile the guidelines regarding the form and content of reports by States Parties and harmonize them. This has made a significant improvement. Lastly, General Assembly Resolution 68/268 on *Strengthening and Enhancing the effective functioning of the human rights treaty body system*²⁰⁴ reaffirmed that full and effective implementation of international human rights law instruments by States Parties is of major importance to the efforts of the UN to promote respect for human rights²⁰⁵ and set out the goal for the treaty bodies to design a simplified reporting procedure and to ensure the submission of a common core document to avoid duplication. It furthermore

¹⁹⁹ I. Bantekas and L. Oette, *International Human Rights: Law and Practice* (3rd edn, Cambridge University Press 2020) 195.

²⁰⁰ *ibid* 195.

²⁰¹ *ibid* 195.

²⁰² United Nations Office of the High Commissioner on Human Rights, 'Statement of Louise Arbor, United Nations High Commissioner for Human Rights, to Commission on Human Rights Informal Consultations on Reform and Renewal of the Human Rights Programme' (20 June 2005) <<https://www.ohchr.org/en/statements/2009/10/statement-louise-arbour-united-nations-high-commissioner-human-rights-commission>> (Accessed 10 July 2024).

²⁰³ Human Rights Committee, Harmonized Guidelines on Reporting under the Human Rights Treaties (2009) HRI/GEN/2/Rev. 6.

²⁰⁴ UNGA Res 68/268 (21 April 2014) UN Doc A/RES/68/268

²⁰⁵ *ibid* preamble.

encouraged shorter observations by the Committees²⁰⁶ and implementation of its suggestions by 2020. Concluding, these mechanisms are a procedure within the field of international law; however, they do not come without risk, for both the state and the individual involved. There is high potential for the effective use of these mechanisms, but for this, active reform needs to still happen (which may include some of the biggest human rights offenders complying to the obligations laid down in the treaties).

Regional Mechanisms - Commissions and Courts

Regional Human Rights Commissions

Besides the universal system there are also regional mechanisms for individuals to file applications of violations of human rights by States. This section will shortly introduce these mechanisms, as they hang together with the functioning of the regional human rights courts. The mechanisms discussed are the Inter-American Commission of Human Rights and the African Commission on Human and Peoples Rights. The role of regional human rights mechanisms is to promote and defend human rights in the region that the mechanism was intended for, as the goals it is meant to achieve may vary from region to region.²⁰⁷

Inter-American Commission of Human Rights

The Inter-American Commission of Human Rights is a body established by the Organization of American States (OAS), which has the mandate over the American Convention of Human Rights as laid out in Article 33 of the American Convention on Human Rights (hereafter: ACHR). Its main function is to promote respect and defense for human rights²⁰⁸, and when given the competence, assess claims made in inter-state disputes.²⁰⁹ It also created a system of rapporteurs for the promotion of specific rights and has been created for its role in responding to serious violations in the 1970s and 1980s.²¹⁰ Article 44 of the ACHR opens the Commission to any person (or group of persons or NGO) to lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.²¹¹ The

²⁰⁶ *ibid.*

²⁰⁷ I. Bantekas and L. Oette, *International Human Rights: Law and Practice* (3rd edn, Cambridge University Press 2020) 240.

²⁰⁸ Art. 41(1) American Convention on Human Rights.

²⁰⁹ Art. 45 American Convention on Human Rights.

²¹⁰ I. Bantekas and L. Oette, *International Human Rights: Law and Practice* (3rd edn, Cambridge University Press 2020) 270.

²¹¹ Art. 44 American Convention on Human Rights.

admissibility requirements can be found in Article 46 ACHR and one of the recurring themes is the exhaustion of domestic remedies. The Commission has the power to, when the matter has not been settled, draw up a report with its conclusions (Article 50) and if it finds it to be necessary, refer the matter to the Court. The reason this last point is important is because the Court only grants the right to submit a case to States Parties and the Commission, meaning that individuals that fall under the jurisdiction of the ACHR do not have the opportunity to submit cases.²¹² They will always need to make sure their case is brought before the Commission first. This means that the way to justice is indirect, making it more difficult for individuals to claim reparations, as they are dependent on the Commission's review and procedural requirements.

African Commission on Human and Peoples Rights

The African system for human rights developed later than the American and European systems did. Only in 1981 was the African Charter for Human and Peoples Rights adopted and with it came the establishment of the African Commission on Human and Peoples Rights (ACmHPR). The Commission covers the most extensive spectrum of civil and political rights as well as economic, social and cultural rights. It is also the only major human rights treaty that includes a set of collective rights.²¹³ The Commission is allowed to receive and review communications other than those of States' Parties, but it is decided upon by the Members of the Commission which ones get considered.²¹⁴ Notable is that anonymity can be requested by the authors of communication, however their name should be noted on the original application.²¹⁵ One of the critiques that does arise about the Commission is whilst its methods of interpretation and reasoning (particularly on the decisions of international humanitarian and human rights law) are very progressive, they do appear to lack some form of coherence and consistency on certain aspects.²¹⁶ Especially as there is no African Court of Human and Peoples Rights (meaning the Commission is the first and final stop on the international stage, which will be discussed further below), this can become problematic, as the setting of precedent can be done slightly sloppily.

²¹² Art. 51(1) American Convention on Human Rights: "*Only the States Parties and the Commission shall have the right to submit a case to the Court.*"

²¹³ I. Bantekas and L. Oette, *International Human Rights: Law and Practice* (3rd edn, Cambridge University Press 2020) 281.

²¹⁴ Art. 55(1) African Charter on Human and Peoples Rights.

²¹⁵ Art. 56(1) African Charter on Human and Peoples Rights.

²¹⁶ I. Bantekas and L. Oette, *International Human Rights: Law and Practice* (3rd edn, Cambridge University Press 2020) 286.

Concluding, as the first stop for most individual applicants, these regional commissions and their importance should not be underestimated. They are the gateway to justice for most individual applicants, given they have exhausted all domestic remedies. While their work on admissibility may not always seem the most important, when putting it in perspective for a victim of a violation of a human right, this may be one of the most important moments of their journey to justice. The second step of this journey would be the courts, which will be discussed in the section below.

Regional Human Rights Law Courts

An important part of the regional human rights systems are the regional courts. These have the mandate to adjudicate and decide over human rights cases and can order remedial orders towards states. This section will discuss the European Court of Human Rights and the Inter-American Court of Human Rights and their relevance for remedies for individual victims of human rights violations.

European Court of Human Rights

The European Court of Human Rights is the court established in 1959 by the Council of Europe, which has the mandate to hear both inter-state cases²¹⁷ and individual complaints²¹⁸ (provided a State has accepted its jurisdiction). After the changes implemented by Protocol No. 14²¹⁹, individuals can directly file an application with the Court (provided they have fulfilled the conditions laid down in Art. 35 ECHR on admissibility), instead of having to first file an application with the Commission, who decided on admissibility. What does exist is Committees that get formed to decide on the admissibility of a case submitted by an individual, if the question asked is already well-established in the case-law of the Court.²²⁰ Both the Court

²¹⁷ Art. 33 ECHR: “Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.”

²¹⁸ Art. 34 ECHR: “The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

²¹⁹ European Convention on Human Rights Protocol No. 14 Amending the Control System of the Convention.

²²⁰ Art. 28(1) ECHR: “In respect of an application submitted under Article 34, a committee may, by unanimous vote,

- a. declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination;
- b. declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.”

and its Committees are strict with the admissibility of cases. In 2023, there were 68,450 pending applications. Of those, 31,329 were found inadmissible by single judges, Committees or the Chambers.²²¹ Of the cases that were found admissible, 971 judgments were delivered.²²² Judgments delivered by the Court are final²²³ and binding²²⁴ and enforcement is done by the Committee of Ministers of the Council of Europe, according to Article 46(2) ECHR.²²⁵ The ability of the Court to accept individual applications is laid down in Art. 34 ECHR²²⁶ and the admissibility criteria for individual applications, as laid down in Article 35 ECHR, includes the exhaustion of all domestic remedies, an application within six months of the final decision, a violation of the convention that has not been dealt with substantively by the Court before and non-anonymous application.

The right to an effective remedy, as explained above, in the ECHR is laid down in Article 13. It states that “*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.*” According to Schabas, the right to an effective remedy arises if the applicant has an ‘arguable complaint’ that there has been a violation of a Convention right²²⁷, which can arise even if the Court does not find a breach of another ‘substantive’ provision, as explained by the Court in *Boyle and Rice v. the United Kingdom*, where it made clear that the existence of a breach of another provision of the Convention is not a prerequisite of the application of Article 13²²⁸, as it also made clear in the

²²¹ Council of Europe - European Court of Human Rights, *Annual Report of the European Court of Human Rights 2023, 2024*) <<https://www.echr.coe.int/documents/d/echr/annual-report-2023-eng>> (Accessed 11 July 2024) 87.

²²² Ibid. This does not include any cases that were settled during the judicial procedure.

²²³ Art. 42(1) ECHR: “*Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.*”

Art. 44(2) ECHR: “*The judgment of a Chamber shall become final:*

- a. *when the parties declare that they will not request that the case be referred to the Grand Chamber; or*
- b. *three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested;*
- c. *when the panel of the Grand Chamber rejects the request to refer under Article 43.*”

²²⁴ Art. 46(1) ECHR: “*The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.*”

²²⁵ Art. 46(2) ECHR: “*The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.*”

²²⁶ Art. 34 ECHR: “*The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.*”

²²⁷ W. Schabas, ‘Art. 13 Right to an effective remedy/Droit à un recours effectif’, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 551.

²²⁸ *Boyle and Rice v. United Kingdom* (App. No. 9659/82 and 9658/82) (27 April 1998, Judgment) para. 52.

Klass and Others v. Germany judgment.²²⁹ The Court goes on to state that it can not just be any grievance, it has to be arguable under the convention.²³⁰ This means that even as a traditionally more ‘subsidiary’ right, it still is able to stand on its own and does not necessarily need a substantive provision that has been violated. Schabas in his commentary states that the relation between Article 13 and Article 35 is evident, given the presumption that an effective remedy exists in order to deal with an arguable complaint under the ECHR, that is capable of providing appropriate relief²³¹, which leads to the presumption that if there is no appropriate relief that has been exhausted by the Applicant, that the application fulfills the admissibility criteria of Article 35 and a violation of Article 13 may be found. When it comes to the effective remedy, part of this is ‘a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure’ as affirmed by the Court in *Abdulkhanov and Others v. Russia* and *Esmukhambetov and Others v. Russia*.²³² Whilst the right to an effective investigation is also included in Articles 2 (Right to Life)²³³ and 3 (Prohibition of Torture)²³⁴ of the ECHR, the investigations conducted under Art. 13 span a broader range and are not explicitly focussed towards only violations of the right to life or the prohibition of torture.

When it comes to remedies the Court can provide in cases, the main remedy laid down in the ECHR is just satisfaction in Article 41, which states that when there has been a violation by a High Contracting Party that is found by the Court, (and if the internal law of said party allows only partial reparation to be made), the Court shall, if necessary, afford just satisfaction to the Party.²³⁵ The types of satisfaction that the Court has given out include: a declaration that the state had violated the applicant’s rights, pecuniary damages, non-pecuniary damages and costs and expenses.²³⁶ The Court, historically, however, was not as progressive in handing out

²²⁹ *Klass and Others v. Germany* (Series A) (App No. 5029/71) (6 September 1978, Judgment) para. 64.

²³⁰ *Boyle and Rice v. United Kingdom* (App. No. 9659/82 and 9658/82) (27 April 1998, Judgment) para. 52.

²³¹ W. Schabas, ‘Art. 13 Right to an effective remedy/Droit à un recours effectif’, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 551.

²³² *Abdulkhanov and Others v. Russia* (App No. 22782/06) (Final Judgment 20 January 2014) para. 59. See also Court reference to *Esmukhambetov and Others v. Russia*, (App No. 23445/03) (Judgment 29 March 2011) para. 159.

²³³ W. Schabas, ‘Art. 2 Right to Life/Droit à la vie’, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 122.

²³⁴ W. Schabas, ‘Art. 3 Prohibition of torture/Interdiction de la torture’ *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 193.

²³⁵ Art. 41 ECHR

²³⁶ D. Shelton, *Remedies in International Human Rights Law* (OUP 2016) 209.

satisfaction measures, which is interesting given the wording of Art. 13 ECHR (see above). It is thus very strict when it comes to domestic remedies; however, it remains hesitant to give out non-monetary remedies itself. Its interpretation of the article was narrow and only in the *Vagrancy* cases gave out the first type of satisfaction.²³⁷ Also in the *Vagrancy* case was where the Court set out its criteria for affording just satisfaction: the Court finds a decision or measure taken by an authority of a Contracting State to be in conflict with the obligations arising from the Convention; there is an injured party, i.e. material or moral damage, and the Court considers it necessary to afford just compensation. The Court continues to have a restrained approach to its redress, for which Shelton gives as a possible reason that the individual was not the main focus of the system at its inception.²³⁸ The European Court has an inherent and treaty-based power to award non-monetary remedies, however, has refused to do so until fairly recently. One of the first cases in which it decided to award non-monetary compensation was *Alskhanova and Others v. Russia*. However, after many reforms, the Court seems more willing to adopt orders of individual or general measures when it deems them necessary in order to prevent further violations or help the state with redress. What helps with this is the interconnectedness of Articles 41 and 46 of the ECHR.

Inter-American Court of Human Rights

The Inter-American Court of Human Rights is an autonomous judicial institution that was created by the American Convention on Human Rights (ACHR) and functions under the auspices of the Organization of American States (OAS). The Court and the Inter-American Commission on Human Rights (discussed prior) are the two organs overseeing the fulfillment of the commitments made by States Parties as laid down in Art. 33 of the Convention.²³⁹ It has both advisory and contentious jurisdiction.²⁴⁰ The Court can hear cases brought before it by States Parties to the Convention and by the Commission,²⁴¹ as individuals do not have direct access to the Court and need to file their application with the Commission first (as discussed above). Victims (or their representation) are allowed to submit a brief containing pleadings,

²³⁷ *ibid* 209.

²³⁸ *ibid* 215.

²³⁹ Art. 33 ACHR: “*The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:*

- a. *The Inter-American Commission on Human Rights, referred to as “The Commission”; and*
- b. *The Inter-American Court of Human Rights, referred to as “The Court”.*”

²⁴⁰ Art. 64(1) ACHR.

²⁴¹ Art. 61(1) ACHR: “*Only the States Parties and the Commission shall have the right to submit a case to the Court.*”

motions and evidence (Art. 25 Rules of Procedure). Given that only these two parties can file applications to the Court, the case-load of the Court is significantly lighter when it comes to applications than that of the ECtHR. In 2023, 34 contentious cases were submitted²⁴², all of them filed by the Commission. Judgments by the Court are final²⁴³ and binding and States undertake compliance with them²⁴⁴. There is no political organ at the OAS mandated to monitor compliance and enforcement.²⁴⁵ The admissibility criteria are laid down in Article 46 ACHR and are similar to those of the ECtHR that remedies under domestic law have to have been pursued and exhausted: the petition must be lodged within six months of the final judgment, the subject is not pending in another international proceeding and that the application is not anonymous.²⁴⁶ However, the exhaustion of domestic remedies is not needed according to the ACHR when ‘*the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated*’.²⁴⁷ The Court reaffirmed this in the *Fairén Garbí and Solís Corrales* case, by stating that this provision is in favour of the State, which may waive its right, and this occurs when it is not timely invoked.²⁴⁸ This was also confirmed in the *Velásquez-Rodríguez* case (which will be discussed in more detail below), where the Court stated that the ‘*rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding. [...]*’²⁴⁹.

When it comes to the right to remedy and remedial measures by the Court, the Inter-American Court is known for being relatively progressive when it comes to remedies to individuals, even if it does not provide individuals direct access to the Court. The reparations procedure is laid down in Art. 63 ACHR. The Court has stated that ‘*reparations are measures aimed at removing the effects of the violations. [...]*’.²⁵⁰ Important to note is that the ACHR provides a

²⁴² Inter-American Court of Human Rights, *Annual Report 2023*, (2023) 41.

²⁴³ Art. 67 ACHR

²⁴⁴ Art. 68 ACHR.

²⁴⁵ G.L. Neuman, ‘Inter-American Court of Human Rights (IACtHR)’ (last updated January 2007) in *Max Planck Encyclopedias of International Law* Anne Peters (ed.) <<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law:epil/9780199231690/law-9780199231690-e832?rskey=Fhvsvg&result=1&prd=MPIL>> para 24 (last Accessed 11 July 2024).

²⁴⁶ Art. 46(1) ACHR.

²⁴⁷ Art. 46(2)(a) ACHR.

²⁴⁸ *Fairén Garbí and Solís Corrales* case, IACtHR, judgment of 15 March 1989, Series C No. 6, para. 109.

²⁴⁹ *Vélasquez-Rodríguez v. Honduras* case, IACtHR, judgment of 29 July 1988, Merits, Ser. C No. 4 para. 61.

²⁵⁰ *La Cantuta v. Peru (Merits, Reparations, and Costs)*, IACtHR, judgment of 29 November 2006, Ser. C, No. 162,

victim-centered approach to reparations²⁵¹, both through the authorization of the Court to be allowed to order the State to ensure that the victim be permitted to enjoy the right violated by the State and secondly through the power of the Court to be able to order a State to take measures to remedy the consequences of the human rights violation.²⁵² Lastly, the Court has the authority to order the State to pay the victim “fair compensation”. Article 63(1) of the ACHR provides the Court with the mandate to order compensation to an injured party when a violation of a right has occurred²⁵³ and, according to Pasqualucci, can be seen as the codification of a fundamental principle of international law on state responsibility.²⁵⁴ A difference between the ECHR and the ACHR is that the ACHR provides the Court with the opportunity of adopting provisional measures pending procedure, even when a case has not appeared before the Court yet if the Commission makes such a request.²⁵⁵ This happened for example in *Lovely Lamour v. Haiti*, where the Court required Haiti to adopt and guarantee all necessary and effective measures for Mrs. Lovely Lamour to get access to medical care.²⁵⁶ The preferable method and primary goal of the Court is to achieve full restitution (*restitutio in integrum*) if feasible. If it is not feasible, the Court will look towards a set of measures that may remedy the breaches and the consequences of these breaches.²⁵⁷ Whilst this includes compensation, it is clear that for some cases (especially violations of the right to life and prohibition of torture) financial compensation will never suffice to fix the hurt by victims or survivors.²⁵⁸ The amount of compensation is determined by the American Convention and the

para. 202, citing *Goiburú et al v. Paraguay* (Merits, Reparations, and Costs), IACtHR, judgment of 22 September 2006, Ser. C, No. 153, para. 143

²⁵¹ J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2012) 191

²⁵² *ibid* 191.

²⁵³ Art. 63(1) ACHR: *1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.*

²⁵⁴ J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2012) 190.

²⁵⁵ Art. 63(2) ACHR: *In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted by the Court, it may act at the request of the Commission.*

²⁵⁶ *Lovely Lamour v. Haiti* (4 July 2024) (Provisional Measures) Order of the Inter-American Court of Human Rights, p. 10.

²⁵⁷ *Almonacid et al v. Chile* (Preliminary Objections, Merits, Reparations and Costs), IACtHR, Series C. No. 154 (26 September 2006) para. 136.

²⁵⁸ J.M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2012) 191.

applicable principles of international law²⁵⁹ and must be proportionate to the injury caused by the violations.²⁶⁰

One of the landmark cases for the application of remedies of the Court was the *Vélasquez-Rodríguez v. Honduras* case, in which the Court has developed standard language when it comes to the awarding of reparations and has held that any violation of an international obligation that has caused damage creates a duty to make adequate reparation and that, based on a general concept of law, constitutes one of the fundamental principles of contemporary international law on state responsibility.²⁶¹ It goes on further to describe that reparation of harm consists in full restitution (*restitutio in integrum*)²⁶² and developed this sentence further to also include pecuniary compensation, measures of restitution, satisfaction and guarantees of non-repetition. As for emotional harm, the Court holds that indemnity may be awarded under international law and specifically for human rights violations, if based on the principles of equity.²⁶³ The Court shows in this case that the duty to investigate and the judgment on the merits are also part of the compensation²⁶⁴, given for moral damages, monetary compensation usually does not cover the damage and justice is requested by the victims.²⁶⁵ The Court awards monetary compensation for moral damages (as laid down in the merits judgment) for the families of both victims²⁶⁶, given the monetary (damage to income) and moral (forced disappearance of family members) compensation requested for the violations of the rights laid down in the American Convention. The Court has made, in comparison to the European Court, broad use of this jurisdiction and has awarded all forms of remedies, which includes ordering a state to take specific action to remedy a breach of the Convention.²⁶⁷ This is also visible in how the judges see their role, as it is extending beyond providing redress for victims in a case. The compliance rate of the States with judgments of the Court is also relatively high, given the extended implementation period. One of the criticisms that can be made is that the

²⁵⁹ *Case of Velásquez Rodríguez v. Honduras (Reparations and Costs)*, IACtHR, Series C. No. 7 (21 July 1989) para. 31.

²⁶⁰ *Case of Castillo Páez v. Peru (Merits)*, IACtHR Series C No. 34 (3 November 1994), para. 51.

²⁶¹ *Case of Velásquez Rodríguez v. Honduras (Reparations and Costs)*, IACtHR, Series C. No. 7 (21 July 1989) para. 25 and onwards

²⁶² *ibid*, para 26

²⁶³ *ibid*, para. 27.

²⁶⁴ *ibid*, para. 32.

²⁶⁵ *ibid*, para. 36.

²⁶⁶ *ibid*, para. 60.

²⁶⁷ D. Shelton, *Remedies in International Human Rights Law* (OUP 2016) 229.

jurisprudence is not always completely based on precedent, given compensatory measures are adopted on a case-by-case basis. The most frequent form of reparation used by the Court is compensatory measures.

Analysis

The work of the two Courts has proven important for international human rights law in many different aspects. Whilst the Courts protect similar rights, there are certainly differences in operation and even in interpretation. Where the Inter-American Court has a victim-forward approach to the awarding of reparations, the European Court is more hesitant with the awarding of reparations and compensation and has only started its practice more recently. Where both Courts have a similar provision regarding the exhaustion of domestic remedies prior to application, the Inter-American Court makes it explicitly clear both in legal provision and case law that this is a right established in favour of States and that this right can in fact be waived. The European Court has not been this forward. One of the problems that arises is the caseload, which is especially an issue for the European Court, who deals with backlog of cases frequently, given the right to individual application does come with many applications, whereas the Inter-American Court through the filtering by the Commission, experiences less of this problem. Concluding, both Courts have made significant progress when it comes to the awarding of reparations to victims. While there is still a long way to go, it is good to realize that regionally, victims can in fact find avenues that will provide them redress.

Conclusion of Chapter 2

The focus of chapter 2 was on the possibilities for individual victims of human rights law violations by States to claim redress and be able to get remedies from said States. What an analysis of the various unique aspects of human rights law shows is that through the evolution of the field of law, the individual has received a unique standing that it gets nowhere else in international law. Having the individual center stage together with the States makes for an interesting dynamic. Whilst they are not completely equal as Parties, the individual victims do have measures and mechanisms available to claim redress, even when they are unable to do so in the domestic jurisdiction of a State. The Human Rights Council, core treaty bodies and regional mechanisms provide opportunities for redress for those who were hurt.

Of course, these mechanisms are not without their flaws. System fatigue, bureaucracy, strict admissibility criteria, non-binding jurisdiction and reservations by States can still make it

difficult for individuals to be able to claim their reparations. Compliance by States is still a major factor in international human rights law, as it is in most fields of law, making victims dependent on how eager their (home) State is to take accountability for wrongful acts and ensure the legitimacy of the avenues of redress. Human Rights Law is still a controversial field in human rights; however, its importance should not be understated. The next chapter will focus on an analysis of both fields of law so far discussed and how victims of violations of international humanitarian law may be able to claim redress in international human rights law and how the field of IHL could be improved by the inclusion of mechanisms from IHRL.

Chapter 3: Analysis, comparison and alternative mechanisms for reparation

Introduction

The previous two chapters discussed the reparation mechanisms in both international humanitarian law and international human rights law that are avenues of redress available to individual victims. As was made clear in Chapter 1, it is difficult for individual victims to get reparations for violations of international humanitarian law by States, firstly, given their traditional role in this field as *needing to be protected* rather than being actors and secondly, as no concrete right to individual reparation exists in the current legal framework. Chapter 2 showed that the opposite is the case in international human rights law, where the individual is at the forefront and has the right and opportunity to seek avenues of redress when his or her rights were violated by States. This chapter intends to set out what mechanisms of reparations armed conflict victims can use to claim reparation, whether it is possible for them to use the human rights law mechanisms to claim reparations for violations which would traditionally fall within international humanitarian law and how the more victim-oriented view is slowly but surely entering into treaty provisions.

The interrelationship between international humanitarian law and international human rights law

International humanitarian law and international human rights law historically developed from different origins. As Henckaerts states, human rights law has grown out of domestic, constitutional law and humanitarian law developed from international law.²⁶⁸ This means that, until the inter-War period for minority rights²⁶⁹ and after World War II for the more broad development, human rights were mainly the concern of states and domestic administrations, whereas the international humanitarian law (or law of armed conflict) concerned hostile inter-State relations.²⁷⁰ Nevertheless, these two fields of law have become more related to each other

²⁶⁸ J.M. Henckaerts, 'Chapter VIII: Concurrent Application of International Humanitarian Law and Human Rights Law: A Victim Perspective' in Arnold R and Quéniwet N (eds), *International Humanitarian Law and Human Rights Law - Towards a New Merger in International Law* (Brill | Nijhoff 2008) 238.

²⁶⁹ See here attempts made by the League of Nations with their petition system for minority rights. See L. Castellanos-Jankiewicz 'Minority Rights Petitions: League of Nations' (Last updated: July 2020) in H. Ruiz Fabri (ed.) *Max Planck Encyclopedia of International Procedural Law* <<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law-mpeipro/e2719.013.2719/law-mpeipro-e2719?rskey=ltreAZ&result=1&prd=MPIL>> (Accessed 10 August 2024).

²⁷⁰ See footnote 265, see also T. Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument' 77(3) *American Journal of International Law* (1983) 593.

post World War II, given how the contemporary human rights treaties include rights (right to life, torture prohibition etcetera) that can be in risk of being violated by States during situations of armed conflict.²⁷¹ This has resulted in a trend of victims of violations that would traditionally be classified within international humanitarian law attempting to use human rights mechanisms (more specifically, regional human rights courts like the ECtHR and IACtHR) to claim reparation by asserting violations of human rights during the armed conflict, with the argument made by, for example, Sandoval, that a significant practice has been established on a right to reparation.²⁷²

Whilst this is to a degree a possibility, the International Court of Justice in its advisory jurisdiction has made clear that international human rights law is subject to international humanitarian law as the *lex specialis*, which means that in a situation where the two may conflict with one another, international humanitarian law prevails. This was confirmed by the International Court of Justice in its advisory opinions on the *Legality of the Threat or Use of Nuclear Weapons*²⁷³; the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*²⁷⁴, and most recently in its advisory opinion on the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*.²⁷⁵ All three and their impact on the development of reparation for individual victims will be discussed below. Important to bear in mind is the non-binding nature of advisory opinions of the International Court of Justice²⁷⁶. However, this does not stop the orders made by the Court from having a large political and academic impact.

Jurisprudence of the International Court of Justice

The Court started the line of jurisprudence regarding *lex specialis* and the interrelationship between the two fields of law in its advisory opinion on the *Legality of the Threat or Use of*

²⁷¹ T. Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument' 77(3) *American Journal of International Law* (1983) 593.

²⁷² C. Sandoval, 'International Human Rights Adjudication, Subsidiarity, and Reparation for Victims of Armed Conflict' in C. Correa, S. Furuya and C. Sandoval (eds) *Reparations for Victims of Armed Conflict* (Cambridge University Press 2020) 180.

²⁷³ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) I.C.J. Rep 1996 General List No. 95.

²⁷⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) I.C.J. Reports 2004, General List No. 131, p.136.

²⁷⁵ *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) (2024) General List No. 186.

²⁷⁶ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (Advisory Opinion, First Phase) I.C.J. Reports 1950 General List No. 8 p. 71.

Nuclear Weapons by stating (when asked if the ICCPR applies in times of armed conflict) that the protection of the ICCPR does not cease in times of war, “except by operation of Article 4 whereby certain provisions may be derogated from in time of national emergency.”²⁷⁷ However, the Court also clearly states (by using the right to life as example) that this only applies to rights which states are allowed to derogate from.²⁷⁸ The Court reaffirmed this in *the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* and went on to state that: ‘More generally, the Court considers that the protection offered by human rights conventions does not cease in armed conflict, save through the effect of provisions for derogation of the kind [of Art. 4 ICCPR]. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both of these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.’²⁷⁹

This paragraph has proven fundamentally important, as it provides the regional courts the opportunity to review situations where both branches of law may need interpretation, with the clear rule that in a situation of conflict, international humanitarian law prevails. In the same opinion, the Court stated that Israel has the obligation to make reparation for the damage to all the natural or legal persons concerned²⁸⁰, referring to its line of jurisprudence on reparation which started with the *Factory at Chorzów* case. Different from that original case was the inclusion of the phrase “*all the natural and legal persons*”, meaning that the Court recognized an individual right to reparation for victims of Israel’s conduct. This statement was most recently confirmed by the Court, when discussing the question of the legal consequences arising from the policies and practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (as requested by the General Assembly²⁸¹), where it stated once more that there is an obligation to provide full reparation for the damage caused by Israel for its internationally

²⁷⁷ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) I.C.J. Rep 1996 General List No. 95, para. 25.

²⁷⁸ *ibid*, para. 25.

²⁷⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) I.C.J. Reports 2004, General List No. 131 para 106.

²⁸⁰ *ibid* para 152.

²⁸¹ UNGA Res 77/247 (30 December 2022) UN Doc A/RES/44/247.

wrongful acts to all natural or legal persons concerned.²⁸² Whilst this does explicitly refer to international humanitarian law, the usage of the term “*all internationally wrongful acts*” leads to assume that this also includes violations of international humanitarian law.

Application of jurisprudence of ICJ by regional courts and mechanisms

This line of interpretation set out by the International Court of Justice has been followed by the regional human rights courts, for example by the European Court of Human Rights in the *Case of Al-Skeini and Others v. United Kingdom*, which was brought to the Court by six Iraqi nationals alleging an Art. 1 ECHR (Obligation to respect human rights)²⁸³ and Art. 2 ECHR (the obligation to investigate right to life violations) violation²⁸⁴ by the United Kingdom against them and their relatives through the conduct of the UK following the adoption of UNSC Resolution 1511, which established the Governing Council of Iraq’s authority over the country²⁸⁵ during the armed conflict in 2003. Using the interpretation of the ICJ and its own rules on extraterritorial jurisdiction, the ECtHR was able to admit the case and decide on a procedural violation that was not allowed to be derogated from (art. 2 ECHR). The applicants were able to apply for compensation under article 41, both monetary (rewarded) and to get an article 2 investigation (dismissed) and thus get some form of reparation for the violations of international law. This judgment is an example that the regional courts are able to use international humanitarian law for their determinations, however also having the freedom to choose not to, which will be more discussed in the section below on IHL victims in the IHRL mechanisms.

Developments and problems

Whilst these developments are good for the progression which is clearly needed, Camins quite clearly points out the dilemma that is faced by victims of violations of international humanitarian law (whether it be from lawful or unlawful conduct).²⁸⁶ She points out that there are three main problems: individuals lack reliable procedural mechanisms at the international

²⁸² *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) (2024) General List No. 186, para. 269.

²⁸³ *Al-Skeini and others v. United Kingdom* App no. 55721/07 (ECtHR 7 July 2011) para 95.

²⁸⁴ *ibid* para 95.

²⁸⁵ UNSC Res 1511 (16 October 2003) S/RES/1511 para 4.

²⁸⁶ E. Camins, 'Bridging Fault Lines: Exploring an Obligation under International Law to Assist Victims of Armed Conflict' (2023) *Harvard Human Rights Journal* 89 2010, 149.

level to claim reparations under international humanitarian law²⁸⁷; human rights mechanisms were not created to deal with large numbers of victims arising from armed conflict²⁸⁸; and practical impediments make claims under either branch of law challenging.²⁸⁹ There still is no widely ratified right to reparation for individual victims to claim independently in international law, like discussed in Chapter 1²⁹⁰. What is a possibility is reparations through diplomatic protection, as made clear by the International Court of Justice in the *Diallo* case.²⁹¹

However, there are positive developments in both academia and treaty negotiations that suggest the field of law might be on a slow progression towards the acceptance of the right. An example of this is the work by the International Law Association (hereafter: ILA). The ILA (more specifically, its International Committee on Reparation for Victims of Armed Conflict) worked on this topic from 2003 to 2014, and, whilst dividing the topic into substantive (led by Rapporteur Hofmann) and procedural (led by Rapporteur Furuya) issues, it established already in 2003 that the practice of domestic courts did not recognize this individual right (also not in the World War II cases) and that there had not been any major developments to suggest otherwise²⁹². In 2010, during the Hague Conference on Reparation for Victims of Armed Conflict, the Committee wrote a “*Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict*”, which summarized the developments made so far in the field²⁹³, whilst afterwards stating that these developments provide strong support for the assertion that current international law endorses the entitlement of reparation for individual victims.²⁹⁴ The Committee goes on to state that ‘*they can find no reason why the individual, who already enjoys strong protection under international human rights law, should have a weaker position under the rules of international law applicable in armed conflicts. [...]*’.²⁹⁵ The

²⁸⁷ *ibid* 149.

²⁸⁸ *ibid* 149.

²⁸⁹ *ibid* 149.

²⁹⁰ See the discussion in Chapter 1.

²⁹¹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* Merits, Judgment of 30 November 2010, I.C.J. Reports 2010, General List No. 103 para. 43 and 44.

²⁹² See R. Hofmann, ‘The 2010 International Law Association Declaration of International Law Principles on Reparation for Victims of Armed Conflict’ (2018) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (HJIL) 78 552.

²⁹³ International Law Association ‘Reparation for Victims of Armed Conflict (Substantive Issues)’ - The Hague Conference Report (2010) ‘Draft Declaration p. 5.

²⁹⁴ *ibid*, 18.

²⁹⁵ *ibid*, 18-19.

work of the ILA has proven highly influential, with frequent references of both academia and international courts.

It is not only the ILA that calls for an individual right to reparation. Similar calls came from the President of the International Criminal Tribunal for the Former Yugoslavia, Judge Claude Jorda, in his letter to the Security Council reporting on the twenty-second plenary meeting of the Judges of the ICTY. Whilst he did state that it would have not been beneficial for the Tribunal, given it would raise the already high workload and increase the length and complexity of the trials²⁹⁶, the report of the plenary meeting attached to the letter sets out the positive trend of reparation for victims (with references to the Van Boven Principles and the trend of international judicial bodies including reparation for victims into their jurisprudence or even their statutes²⁹⁷). While discussing the question of whether there is a right to reparation and the controversies that arise, given the more traditional leading interpretation of only states being eligible for compensation²⁹⁸, they do arrive at the conclusion that through the emergence of human rights law the traditional state responsibility concept has altered, meaning the procedural limitation victims had of only being able to seek reparation through their own government has been removed and the right to compensation has also been extended to aliens.²⁹⁹ They point out the strong tendency towards providing compensation to both States and individuals and to recognize the victim and their right through the various documents (Victims Declaration, Basic Principles, human rights documents and ICC statute) that were negotiated at the end of the twentieth century and around the turn of the century.³⁰⁰ They come to the conclusion that there does appear to be a right to compensation, be it very much underdeveloped, with the two main examples at the time being the UNCC and the EECC (discussed in chapter 1).³⁰¹

²⁹⁶ UNSC 'Letter dated 2 November 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General' (2 November 2000) UN Doc S/2000/1063 p. 3, see also in the report para. 31 and 35.

²⁹⁷ See here the reference to the Rome Statute and victim participation in UNSC 'Letter dated 2 November 2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General - Appendix: Victims' compensation and participation' (2 November 2000) UN Doc S/2000/1063 para. 12 and onwards.

²⁹⁸ *ibid*, para. 20.

²⁹⁹ *ibid*, para. 20.

³⁰⁰ *ibid*, para. 20.

³⁰¹ *ibid*, para. 21

However, both the ICTR Judges (who discussed this same issue at their plenary meeting as well) and the ICTY Judges came to the conclusion that including this right would mean an amendment to the Statutes of the Tribunals, even though the IFTY Statute does have a reference to victims and their right to seek compensation.³⁰² Given the concerns regarding impact on trial length, workload of the Chambers, the financial issues that may arise given the question of funding of compensation and the issues of equity and fairness to all victims, the Judges advised against the amendment of the Statute³⁰³. But they very clearly said that the right to compensation does exist for victims of crimes within the Tribunal's jurisdiction³⁰⁴ and a request was made for the Secretary General and Security Council to consider other methods of compensation. Whilst this letter and report may have been sent to the Security Council over twenty years ago, many of the statements made by the President and Judges still ring true today. Victims of war crimes through human rights law do have access to justice; however, it does not come without its share of problems, which will be discussed below.

Conclusion

Concluding, the relationship between international humanitarian law and international human rights law has grown significantly since 1945. The interplay between the two branches of law is, according to Camins, both appropriate and increasingly more evident.³⁰⁵ However, the issues are clear, especially given that no international or domestic court has ever gone as far as to conclude that a right for individuals to be awarded reparation for violations of IHL exists.³⁰⁶ This means that victims of IHL violations have to use other mechanisms to get awarded compensation, either in the human rights law system or through alternative mechanisms.

IHL victims in the IHRL system

Regional mechanisms jurisprudence

One of the solutions that has been used by victims of armed conflict is the regional human rights mechanisms. By alleging violations of human rights over which the mechanisms have jurisdiction, an attempt is made to hold States accountable for their conduct during armed conflict. This section will set out how the regional courts make an attempt at providing redress

³⁰² *ibid*, para. 24.

³⁰³ *ibid*, para. 47

³⁰⁴ *ibid*, para. 46.

³⁰⁵ E. Camins, 'Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law' (2016) *International Journal of Transitional Justice* 126 2010 128

³⁰⁶ *ibid*, 128

for the violations of human rights and interpret international humanitarian law, what has been stated in the case-law of the ECtHR and the IACtHR and the issues that arise and have been documented by academia. The focus of this section will be case-law that has, as its topic, situations of armed conflict where victims have gone to human rights tribunals for reparation instead and to what degree they were able to get compensation.

Case law

The line of jurisprudence established by the ICJ and set out above has also been followed by the regional human rights courts in their consideration of cases which deal with state responsibility in armed conflict and potential human rights violations. The cases discussed in this section mainly touch on situations of armed conflict where a State clearly violated the rules of armed conflict and victims attempt to get reparation through asserting human rights violations. There are many cases that deal with armed conflict situations, however, to stay concise, there has been one case chosen from the ECtHR and one from the IACtHR.

The two cases discussed will be *Abdulkhonov and Others v. Russia* for the ECtHR and *Las Palmeras v. Colombia* for the IACtHR. These are landmark cases, both in their own right. *Abdulkhonov and Others v. Russia* sets out the clear line of jurisprudence by the European Court regarding its application and interpretation of Article 13 ECHR and its line of interpretation when it comes to compensation for violations of right to life and right to an effective remedy. The case, which was part of a larger set of cases discussing the human rights violations by the Russian Federation during its military operations in Chechnya (both the first and second operation), set out the rules on right to a remedy and discusses the complexity of human rights violations in situations of armed conflict. *Las Palmeras v. Colombia* was also a landmark case for the right to a remedy in the American Court and comes with the additional interesting factor of the Commission putting forth the argument that the Court has the jurisdiction to consider whether or not violations of international humanitarian law against the victims (specifically Articles 3 and 4 of the 1949 Geneva Conventions) have taken place. This case sets out an interesting debate with arguments of both the Commission and the State on how this matter should be assessed and put the Court in the position to deliberate whether it could include considerations on these two provisions, which are not included in the American Convention on Human Rights, into its judgment. These cases show the difficulty of the Courts to be able to assess situations where, traditionally, the law of armed conflict does apply and to be able to apply human rights law, and whether victims are allowed to receive reparation.

European Court of Human Rights: Abdulkhanov and Others v. Russia

This case was in relation to the Russian military operations in Chechnya between 1999 and 2000 (the second military operation carried out by Russia against Chechnya). The applicants alleged that their relatives had been killed because of air and artillery strikes by the Russian military forces and claimed violations of Articles 2 (Right to Life); 6 (Right to fair trial) and 13 (Right to an effective remedy).³⁰⁷ The focus will lie on the considerations made by the Court regarding article 13. The applicants in this case had made efforts, through both attempting to apply to open a criminal investigation³⁰⁸ (which in the end was ongoing but due to procedural limits only included a very limited part) and civil claims to the Moscow District Court³⁰⁹, to be awarded reparation. Both procedures were denied, with the government asserting the right to fair trial under Article 6 ECHR had been fulfilled³¹⁰, while the applicants asserted a contrary position³¹¹.

When assessing whether the right to an effective remedy had been violated, the Court made it clear that when an individual formulates an arguable claim of killing, torture or destruction of property involving the responsibility of a State, an “effective remedy” in the eyes of the Court entails the payment of compensation, an investigation capable of leading to identification and punishment of those responsible and effective access of the complainant to the procedure.³¹² The Court confirms the arguments made by the applicants that the civil remedies were futile in the absence of an effective criminal investigation³¹³, given that the liability of death, injury and damage to personal property is not a civil matter.³¹⁴ The Court has an established line of jurisdiction (which was partially developed in the cases against Russia regarding the Chechenyan military operations) that if ‘*a criminal investigation into the application of lethal force was ineffective, the effectiveness of any other remedy was consequently undermined. [...] In such circumstances, the State has failed in its obligation under Article 13 of the*

³⁰⁷ *Abdulkhanov and Others v. Russia* (App No. 22782/06) (Final Judgment 20 January 2014) para. 3.

³⁰⁸ *ibid*, para. 12 to 34.

³⁰⁹ *ibid*, para. 35 to 40.

³¹⁰ *ibid*, para. 56.

³¹¹ *ibid*, para. 57.

³¹² *ibid*, para. 59. See also Court reference to *Esmukhambetov and Others v. Russia*, (App No. 23445/03) (Judgment 29 March 2011) para. 159.

³¹³ *Abdulkhanov and Others v. Russia* (App No. 22782/06) (Final Judgment 20 January 2014) para. 60.

³¹⁴ *ibid*, para. 60

Convention.³¹⁵ Regarding the application of Art. 41 (just satisfaction), the claims made by the applicants ranged between 40,000 and 200,000 euros.³¹⁶ The Court found that it was reasonable to award the applicants compensation, given there were clear violations of Articles 2 and 13³¹⁷, but made a clear table to ensure the right amounts of non-pecuniary damages were awarded.³¹⁸ Russia was ordered to pay the compensation within three months of the date of the final judgment³¹⁹.

This case illustrates that there is a possibility for victims of violations of international law by States to get compensation, however it is also clear that this cannot happen directly for violations of international humanitarian law and compensation may need to be claimed through the regional human rights courts for violations of international human rights law by States. What makes this more frustrating for victims is that to fulfill the admissibility requirements of the ECHR³²⁰ and the generally established rules of international law, domestic avenues must have been exhausted, which means victims must first attempt to claim compensation through the domestic legal or administrative system before they can apply to the regional human rights courts. Therefore, even when attempting to get reparation through the human rights system, it is made more difficult for victims of IHL violations given they still need to exhaust the domestic systems for admissibility, which is made more difficult by the traditional line of interpretation most courts still follow that a right to individual reparation does not exist.

Inter-American Court of Human Rights: Las Palmeras v. Colombia

As discussed in Chapter 2, Art. 25 of the American Convention on Human Rights provides the obligation for States' Parties to provide a remedy for persons asserting their rights under the Convention have been violated. Although it is not explicitly mentioned in the ACHR, the

³¹⁵ *ibid*, para. 62. See also as cited by the Court *Khashiyev and Akayeva v. Russia*, (App Nos. 57942/00 and 57945/00) (Judgment 24 February 2005) para. 121; *Isayeva and Others v. Russia*, (App. Nos. 57947/00, 57948/00 and 57949/00) (24 February 2005) paras. 147-149; *Aslakhanova and Others v. Russia*, (App Nos. 2944/06, 8300/07, 50184/07, 332/08 and 42509/10) (Judgment 18 December 2012) para. 156.

³¹⁶ *Abdulkhanov and Others v. Russia* (App No. 22782/06) (Final Judgment 20 January 2014) para. 65.

³¹⁷ *ibid*, para. 66

³¹⁸ *ibid*, para. 67 and table attached to judgment.

³¹⁹ *ibid*, judgment.

³²⁰ Art. 35(1) ECHR: *The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.*

Commission has in several reports presented arguments as to why IHL should be applied in situations between individuals against state parties.³²¹

The *Las Palmeras v. Colombia* case has been chosen to elaborate on how the Court has been faced with requests for application and interpretation of international humanitarian law and whether violations had taken place by the Commission, given the Commission during the preliminary objections raised that violations of Common Articles 3 and 4 of the Geneva Conventions 1949 had taken place.³²² Colombia rebutted these claims by stating that both the Inter-American Commission on Human Rights and Inter-American Court of Human Rights are not competent to apply international humanitarian law and other international treaties³²³ and furthermore that the domestic remedies had not been exhausted. The case concerns detainment and execution of six persons by the Putumayo Police Force during an armed operation on January 23, 1991, including the killing of a child on his way to school by firing from a helicopter.³²⁴

When assessing the preliminary objections, the Court paid special attention to the objection regarding the lack of competence of the Court. The State referenced back to the line of argument written by the Court in its advisory opinion that the Court ‘should only make pronouncements on the competencies that have been specifically attributed to the Convention.’³²⁵ The Commission rebutted this statement by stating that the principles enshrined in the American Convention and customary international law are also in Common Art. 3 of the Geneva Conventions, making its belief that both Court and Commission are allowed to interpret and apply the Conventions.³²⁶ Furthermore, the Commission stated that the existence of an armed conflict does not exempt Colombia from respecting the right to life. The Commission, furthermore, at the public hearing, made clear that it is inexact to fully exclude other sources of international law when deliberating violations of the Convention.³²⁷

³²¹ E. J. Buis ‘The Implementation of International Humanitarian Law by Human Rights Courts: The Example of the Inter-American Human Rights System’ in R. Arnold and N. Quéniwet (eds.) *International Humanitarian Law and Human Rights Law - Towards a New Merger in International Law* (Brill | Nijhoff 2008) 277.

³²² *Las Palmeras v. Colombia* (Preliminary Objections), Inter-American Court of Human Rights, Series C No. 67 (4 February 2000) para. 12.

³²³ *ibid*, para. 16.

³²⁴ *ibid*, para. 2.

³²⁵ *ibid*, para. 28.

³²⁶ *ibid*, para. 29.

³²⁷ *ibid*, para. 31.

The Court set out that it has, through the acceptance of its jurisdiction by States Parties and the ratification of the ACHR, the competence to determine whether any norm applied by a State (whether domestic or international law and in peace and in conflict) is compatible with the Convention or not, without normative limitation.³²⁸ However, the Court did in fact come to the conclusion that there is only the competence to see whether the norm applied is compatible with the norms of the State and not with the 1949 Geneva Conventions,³²⁹ meaning they will not be taken into account and the objection was admitted.³³⁰ In the merits phase of the judgment, this is clearly seen as only the American Convention is reviewed and no major mention of the Geneva Conventions is made by the Court.

This case shows that while it more often happens that the Commission brings forth cases where they argue violations of IHL, that the Court has its (rightfully so) hesitations about applying and interpreting norms other than the ones laid down in the American Convention on Human Rights. Added to this, and discussed in chapter 2, is the difficulty for victims given no direct access to the Court exists for individual victims. An application must always firstly be filed with the Commission, who, after deliberation and attempts at resolution, may decide to bring the case to the Court. Whilst the Inter-American Court has had its successes, it is not a suitable mechanism for victims of armed conflict to get the reparation they wish to receive.

Problems and conclusion

As clearly shown, though it is a positive development that IHL victims can use the Courts, the usage of the IHRL mechanisms by victims of IHL still is not the ideal solution and comes with limitations. The major issue is, as discussed previously and clearly set out by Evans, human rights mechanisms were not designed to address large numbers of victims in conflict situations³³¹, which becomes problematic as this has usually been the case with major armed conflict. Camins elaborates further on this point by setting out two of the further limitations of the usage of international human rights law in situations where international humanitarian law should traditionally apply: there are significant politico-legal challenges around the

³²⁸ *ibid*, para. 32.

³²⁹ *ibid*, para. 33.

³³⁰ *ibid*, para. 34.

³³¹ C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 127.

coterminous application of the two fields³³², especially (which is confirmed by the regional human rights courts in their jurisprudence) when it comes to the extraterritorial application of human rights law to situations of armed conflict, where the *lex specialis* principle comes back into play. Moreover, she states that remedies under human rights law will not be available to many victims of armed conflict, due to various reasons which can include but are not limited to: lack of an available forum, constraints of jurisdiction or admissibility, or procedural and practical difficulties in the making of claims.³³³ Lastly, given the practical lack of access to courts, it is clear that many of the victims of violations of international humanitarian law will never receive reparation.

Concluding, the usage of international human rights law courts by victims of international humanitarian law violations is a possibility, but results in a situation where courts are forced to assess whether they can hold states responsible and are allowed to interpret or apply a field of law that may fall outside their competence. This results in victims of international humanitarian law having to apply for human rights law violations (which are not mutually exclusive) when this is not the main reason, they want reparation (although it may be part of the reason).

Alternative mechanisms

Apart from the human rights courts, victims of violations of armed conflict have been looking and advocating for alternative mechanisms for reparation. Other mechanisms already included victims and reparation, but also have their limits. The types of mechanisms that will be set out are the reparation mechanism of the International Criminal Court, truth commissions (mainly used in Latin and South America) and victim assistance mechanisms incorporated in international conventions (for example the Convention on Cluster Munitions).

International Criminal Tribunal

The International Criminal Tribunal puts the victims of crimes committed under the Rome Statute in a central role of the proceedings against perpetrators. Whilst international criminal law and international humanitarian law are two different fields of international law, there are connections, especially when serious violations of international law give rise to war crimes and

³³² E. Camins, 'Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law' (2016) *International Journal of Transitional Justice* 126 2010 150.

³³³ E. Camins, 'Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law' 2010 150.

individual criminal responsibility.³³⁴ The ICC, as Salmon states, is the first criminal tribunal where a reparation system for victims of war crimes during armed conflict was introduced, which is a practice that was followed by later hybrid tribunals.³³⁵ Article 75 of the Rome Statute lays out that the Court will “*establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.*”³³⁶ Article 75(2) establishes that the Court has the ability to make an order against the convicted person specifying the appropriate reparations to be paid to victims, which can include restitution, compensation and rehabilitation, and which can be done through the Trust Fund for Victims.³³⁷

The Rules of Procedure and Evidence of the Court show clearly the intention to have the victim(s) play a central role in proceedings, as section III is dedicated to the procedural rights established for victims, which include but are not limited to: protective measures (Rule 87), the Application for participation of victims in the proceedings (Rule 89), Legal representation (Rule 90) and the subsection on reparations for victims. The subsection on reparations includes the procedural requirements for the victim’s request (Rule 94(1) Rules of Procedure), the Assessment of Reparations to be done by the Court, giving it the option to award either on an individual or collective basis or both (Rule 97(1) Rules of the Court)³³⁸, and how the Trust Fund is used to ensure reparations are made by the convicted person, even if they are not able to pay the compensation (which is where the Trust Fund steps in).³³⁹ Despite the young age of the Court (established in 2002), it has started to build a practice on reparation to victims, with the landmark and debut case being the Lubanga case in 2012.

³³⁴ C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012) 99.

³³⁵ E. Salmón and J.P. Pérez-León-Acevedo, 'Reparation for victims of serious violations of international humanitarian law: New developments | International Review of the Red Cross | Cambridge Core' (2022/04) 104 *International Review of the Red Cross* 1337.

³³⁶ Art. 75(1) ICC Statute: “*The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.*”

³³⁷ Art. 75(2) ICC Statute: “*The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in art. 79.*”

³³⁸ Rule 97(1) Rules of Procedure and Evidence of the International Criminal Court: “*Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems appropriate, on a collective basis or both.*”

³³⁹ Rule 98(1): “*Individual awards for reparations shall be made directly against a convicted person.*”

Difficulties of the ICC system

Whilst major progress has been made through the jurisprudence of the ICC in establishing the role of the victim and their necessity for reparations, it does not come without its difficulties. Important to establish is that reparations can only be awarded to victims of convicted persons. This follows from Article 75(2) which establishes that “The Court may make an order directly against a convicted person specifying reparations [...]”³⁴⁰ This means that the Court has no jurisdiction over actions that may be classified as crimes under the Rome Statute by States or non-state actors, a principle which follows from Article 25(1) on individual criminal responsibility which sets out that the Court has jurisdiction over natural persons and their crimes.³⁴¹ Paragraph 4 of this same article very clearly sets out that “*No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.*” This means that, in contrast to the International Court of Justice, the ICC has no jurisdiction over the actions of States, only over individual persons that a state is unable or unwilling³⁴² to prosecute or has been referred by a State Party³⁴³, the Security Council³⁴⁴ or by the Office of the Prosecutor³⁴⁵. Therefore, including not having jurisdiction over the actions of states that may be crimes under the Rome Statute, their jurisdiction is also limited by those cases that get referred to it. Victims of armed conflict that were not direct victims of the person being convicted by the Court are thus not able to claim any form of reparation. Sálmon argues that this approach and limited legal mandate can lead to problems as it ignores the complex situations in modern armed conflicts and the need to provide reparation for harm caused to victims by actors other than the convicted persons.³⁴⁶ This was also confirmed by Dwertmann, who makes the argument that given many of the convicted persons in front of the Court were acting ‘in name of the state’ or were de facto organs of the state, the state responsibility does arise, even when they do not fall under the jurisdiction of the ICC.³⁴⁷

³⁴⁰ Art. 75(2) ICC Statute.

³⁴¹ Art. 25(1) Rome Statute: The Court shall have jurisdiction over natural persons pursuant to this Statute.

³⁴² Art. 17(1)(a) Rome Statute: “*Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;*”.

³⁴³ Art. 14 ICC Statute

³⁴⁴ Art. 13(b) ICC Statute

³⁴⁵ Art. 13(c) ICC Statute and art. 15 ICC Statute.

³⁴⁶ E. Salmón and J.P. Pérez-León-Acevedo, 'Reparation for victims of serious violations of international humanitarian law: New developments | International Review of the Red Cross | Cambridge Core' (2022/04) 104 International Review of the Red Cross 1339.

³⁴⁷ E. Dwertmann, *The Reparation System of the International Criminal Court* (Brill | Nijhoff 2010) 53.

Concluding, the system built by the ICC is progressive and the first of its kind, but comes with large enough legal limitations that many victims of armed conflict will still not be able to claim reparations, due to not having been direct victims of convicted persons.

Truth Commissions

Salmón in their article provides an overview of the practice of truth commissions in South America and how some make recommendations for reparations programmes, each with distinctly different effects.³⁴⁸ The practice of establishing truth commissions post armed conflict has been especially prevalent in modern history in Latin and South America, where these commissions were established following non-international armed conflicts. Truth commissions can be described as institutions established to collect information about the facts of a prior conflict and attendant human rights violations, with a view to providing an accurate picture of what occurred during the conflict in a comprehensive report.³⁴⁹ Important to establish is that truth commissions, although the mandates may vary per organ, are not courts of law, meaning there are mostly no direct legal consequences for perpetrators.³⁵⁰ A second important aspect is that when serious crimes are under consideration (for example war crimes), some truth commissions do not accept these applications and refer them to tribunals, which, for example, happened in Sierra Leone.³⁵¹ These commissions, depending on their mandates, will make recommendations of reparation to governments, who then carry the primary responsibility to act on these recommendations. One of the most famous truth and reconciliation commissions is the Argentinian National Commission on the Disappearance of Persons, which investigated the 30,000 forced disappearances that occurred during the Dirty War.³⁵² One of the more problematic aspects of truth and reconciliation commissions is that their recommendations are usually not binding, meaning that victims have to rely on States for implementation. Therefore, they do not explicitly provide victims of violations of international humanitarian law with

³⁴⁸ E. Salmón and J.P. Pérez-León-Acevedo, 'Reparation for victims of serious violations of international humanitarian law: New developments | International Review of the Red Cross | Cambridge Core' (2022/04) 104 *International Review of the Red Cross* 1332.

³⁴⁹ A.G. O'Shea, 'Truth and Reconciliation Commissions' (last updated: December 2008) in A. Peters and R. Wolfrum (eds.) *Max Planck Encyclopedias of International Law* <<https://opil-ouplaw-com.uaccess.univie.ac.at/display/10.1093/law:epil/9780199231690/law-9780199231690-e882?rskey=g4a622&result=1&prd=MPIL>> (Accessed 30 July 2024).

³⁵⁰ *idem*, para. 25.

³⁵¹ M. V.S. Sirleaf, 'The Truth about Truth Commissions: Why they do not function optimally in post-conflict societies' (2014) 35 *Cardozo Law Review* 2280.

³⁵² E. Crenzel, 'Between the Voices of the State and the Human Rights Movement: Never Again and the Memories of the Disappeared in Argentina' 44(4) 2011 *Journal of Social History*.

reparations, making this a non-effective forum for victims. Another problem is that truth commissions may sometimes be of a more symbolic nature, meaning that whilst it is good that the victims get the attention, no real action gets taken and the victims are still denied their reparation. While it may relay the idea that justice is served, truth commissions cannot be seen as a water-tight, proper forum for reparations for victims of violations of international humanitarian law, as too many political and legal factors make its effectiveness uncertain.

Victim Assistance Models

The last development that has been gaining traction is the introduction of victim assistance provisions or models in newly developed treaties and conventions. Recent treaties that this has appeared in are the Mine Ban Treaty, the Convention on the Rights of Persons with Disabilities and the Convention on Cluster Munitions. To illustrate the usage of victim assistance models, Article 5 of the Convention on Cluster Munitions³⁵³ will be taken as an example for this section.

Victim assistance models are interesting as they do not empower individuals to claim reparation or assistance directly with the state, but reverse this concept to impose primary obligations on States which have jurisdiction over victims of violations of specific treaty obligations.³⁵⁴ In the treaties mentioned above, this obligation arises for States regardless whether it concerns international or non-international armed conflict and continues to exist in post-conflict situations.³⁵⁵ Furthermore, when taking the CCM as the mentioned example, it can contain an obligation for 'Each State Party in a position to do so' to provide assistance to other State Parties affected by the cluster munitions, through the various forums that are available³⁵⁶, as each State Party has the right to seek and ask for assistance in fulfilling its obligations, including the victim assistance obligations.³⁵⁷ Important to note as well, as Camins points out, is that victim assistance models represent a form of further particularisation of existing human

³⁵³ The CCM was adopted on 30 May 2008 and entered into force on 1 August 2010. At the time of writing (30 July 2024) there are 112 State Parties and 12 Signatories.

³⁵⁴ B. Docherty and A. Sanders-Zakre, 'The origins and influence of victim assistance: Contributions of the Mine Ban Treaty, Convention on the Rights of Persons with Disabilities and Convention on Cluster Munitions' (2023) 105 *International Review of the Red Cross* 254.

³⁵⁵ *ibid.* See also as an example Art. 1 CCM which refers to *under all circumstances*, meaning no differentiation is made between the different situations.

³⁵⁶ Art. 6(2) CCM: '*Each State Party in a position to do so shall provide technical, material and financial assistance to States Parties affected by cluster munitions, aimed at the implementation of the obligations of this Convention. Such assistance may be provided, inter alia, through the United Nations system, international, regional or national organisations or institutions, non-governmental organisations or institutions, or on a bilateral basis.*'

³⁵⁷ Art. 6(1) CCM: '*In fulfilling its obligations under this Convention each State Party has the right to seek and receive assistance.*'

rights obligations, rather than novel obligations.³⁵⁸ This statement and its impact are of major importance, as the question of derogation of state sovereignty through international obligations of protection of citizens is highly debated in international law. However, during the Belgrade meeting of States affected by cluster munitions in 2007, it was established that it is the territorial State that is best suited to assist the victims and, more importantly, that an obligation to assist victims is closely linked to every State's responsibility for the well-being of its citizens.³⁵⁹ This resulted in a victim assistance article with a broad obligation for States Parties, which includes, but is not limited to: the development of policy and domestic laws³⁶⁰; provide age- and gender-specific assistance, including medical care, rehabilitation and psychological support³⁶¹; data collection³⁶² and taking steps to mobilise both national and international resources³⁶³ to be able to assist States Parties asking for assistance³⁶⁴. What has effectively been codified is a right-based assistance approach³⁶⁵, as is also prevalent in the CPRD, meaning that States have to ensure that obligations are fulfilled.

The implementation of victim assistance mechanisms has been slowly but surely progressing. The Lausanne Declaration stated that *'If much remains to be done with regard to victim assistance, the pioneering, comprehensive provisions of the Convention in this domain are making a difference.'*³⁶⁶ During the first Review Conference, none of the States Parties had implemented the actions from the Vientiane Action Plan, but progress had been made in the designation of focal points to coordinate developments and the involvement of victims in the mechanisms by the States Parties with mechanisms already in place.³⁶⁷ Concluding, the development of these mechanisms is a major step forward for victims to have the right to

³⁵⁸ E. Camins, 'Bridging Fault Lines: Exploring an Obligation under International Law to Assist Victims of Armed Conflict' (2023) Harvard Human Rights Journal 89 2010 142.

³⁵⁹ M. Reiterer and T. Leibowitz, 'Commentary, Art. 5 Victim Assistance' in G. Nystuen and S. Casey-Maslen (eds), *The Convention on Cluster Munitions: A Commentary* (Oxford University Press 2010) 337.

³⁶⁰ Art. 5(2)(b) CCM.

³⁶¹ Art. 5(1) CCM and Art. 5(2)(h) CCM.

³⁶² Art. 5(1) CCM

³⁶³ Art. 5(2)(d) CCM

³⁶⁴ art. 6 CCM.

³⁶⁵ E. Camins, 'Between Rights, Sovereignty and Cooperation' (2022) *Journal of International Humanitarian Legal Studies*.

³⁶⁶ 'Lausanne Declaration - Protecting Lives, Empowering Victims, Enabling Development' in *Final report of the Second Review Conference*, Review Conference of States Parties to the Convention on Cluster Munitions (Geneva 25-27 November 2020 and 20-21 September 2021) (6 October 2021) UN Doc CCM/CONF/2021/6, para. 4.

³⁶⁷ 'Review of the Vientiane Action Plan' Review Conference of States Parties to the Convention on Cluster Munitions (Dubrovnik, 7-11 September 2015) (12 May 2015) UN Doc CCM/CONF/2015/3 para. 64.

assistance; however, the problem that does arise with these mechanisms is that it does not give victims an opportunity to claim reparation from a State, seeing as the State gets obligations from the treaties in question and there is no conferral of rights to individuals. This means that individual victims, firstly, have to live in a State that is party to a convention that includes victim assistance and, secondly, maybe more importantly, have to rely on the active participation of the State in the fulfillment of its obligations under the Convention. As seen prior, none of the States Parties have implemented full mechanisms and progress is slow, meaning that as a direct solution, victim assistance mechanisms do not work for individual victims of violations of international law by States that want to claim reparation.

Concluding, the mechanisms discussed provide some opportunities for victims to get forms of assistance and reparation. However, there are issues to be found with these mechanisms. Firstly, none of the mechanisms cover all persons who become victims during armed conflict. The ICC system only covers those who are victims of convicted persons by the Court, the truth commissions have varying mandates and usually do not provide redress for those on the side of the perpetrators and the victim assistance mechanisms can thus far only be found in very specific human rights and general international law treaties, with relatively low implementation rates. Secondly, these mechanisms (apart from to a degree the ICC) require cooperation of the States in question to act on the recommendations and implement policies to ensure reparation or assistance actually is granted to the victims. This means that reparation is dependent on the willingness and ableness of States that violated the rights, which can be seen as problematic. So, while these are good alternative mechanisms, they still do not solve the issue of victims of IHL violations to adequately claim reparation.

Analysis and what progress needs to be made in IHL?

As has been made clear throughout this thesis that a concrete right for individual reparation for victims of violations of international humanitarian law does not exist as of the time of writing.³⁶⁸ The result of this is, as shown in this chapter, that victims need to find alternative ways of justice and reparations. While progress is ongoing, the calls to implement an individual right to reparation have been sounding for years, as discussed throughout the previous chapters.

³⁶⁸ E. Camins, 'Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law' 128.

Furuya suggests that the right to reparation has two dynamic aspects, one being the expansion from a traditional right of a State to becoming an individual right and the other being the shift from inter-State resolutions of reparations claims (with the prevalent example of lump-sum claims) towards victim oriented mechanisms.³⁶⁹ What makes these two aspects difficult is the hesitancy of States to move with these developments, especially when it comes to granting the individual a concrete position as a victim and actor in international humanitarian law. Zegveld already highlighted this position two decades ago³⁷⁰, and whilst since then much progress has been made with the UN Guiding Principles and the two compensation tribunals with some opening for individuals, the majority of the statement that States are hesitant still rings true. Explanations of this can be traced all the way back to the discourse surrounding the interpretation of Article 3 Hague Convention IV 1907 and the fact that the major treaties in international humanitarian law have not been changed to include victims and/or civilians, which led to States following the dominant line of interpretation that compensation was only allowed on an inter-State level.³⁷¹ The argument can be made that responsibility and compensation is included in Additional Protocol I Article 91, however, this article, as a direct copy of Article 3 Hague Convention IV 1907, was intended to prevent the renunciation of all compensation due to breaches by persons in the service of the victor of an armed conflict.³⁷² Therefore, even with the positive developments, victims of international humanitarian law still often do not receive any form of reparation, meaning the alternative routes get sought.

However, as has been made clear in this section, these alternative mechanisms are not without their issues. The human rights courts are not built to handle the large number of cases that arise from armed conflict and often will run into both procedural and substantive issues. The ICC is only able to award reparations to victims of convicted persons and the other two mechanisms discussed (truth commissions and victim assistance mechanisms) are so heavily reliant on the participation of states, they often do not give active rights to the victims that their effectiveness can be questioned. What would be needed is a significant shift in perspective from the States, which has been called for by the international organizations (through for example the UN

³⁶⁹ S. Furuya 'The Right to Reparation for Victims of Armed Conflict - The Intertwined Development of Substantive and Procedural Aspects' in C. Correa, S. Furuya and C. Sandoval (eds), *Reparations for Victims of Armed Conflict* (Cambridge University Press 2020) 16.

³⁷⁰ L. Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) *International Review of the Red Cross* 498.

³⁷¹ ICRC, *Commentary of 1987 on the Additional Protocol I to the Geneva Conventions of 12 August 1949 Art. 91 - Responsibility* (1987) 3467.

³⁷² *ibid* 3449.

Guiding Principles) of ensuring state responsibility for violations of international humanitarian law towards civilian victims, and giving them the opportunity to be awarded reparation. This, however, would mean that not only Governments but also Courts would have to change their line of jurisprudence more radically than the current slower acceptance of the individual right to reparation. This would be the ideal situation, although highly unrealistic, given the current state of international affairs and recurring violations of IHL by States against its citizens in the various armed conflicts happening around the world in 2024.

Conclusion of Chapter 3

Although great changes have been happening in many fields of international law to include and prioritize the victims of violations of international law, international humanitarian law is slow to follow. What becomes clear from the Analysis above is that this is not solely a “legal” issue. Many factors interplay when it comes to issues such as the individual right to reparation, most importantly a political aspect which includes the willingness of States, who feel their sovereignty is threatened, to cooperate and work on a binding legal solution for those affected most by armed conflict, which is civilian victims, and give them an opportunity to hold States accountable for violations of international humanitarian law. It would furthermore require a widespread acceptance by domestic courts to change their lines of jurisprudence which have been consistent since before both World Wars to not just view States and non-State Actors as actors under international humanitarian law, but also civilians.

As shown in this chapter, as long as victims are not able to get their reparation directly from domestic courts, especially given the absence of a standing or ad hoc tribunal, they will make attempts via other routes such as the regional human rights courts and alternative mechanisms. The effectiveness of these mechanisms can be questioned, although they are positive developments towards an acceptance of an obligation of States to provide reparations for civilian victims and towards an individual right to reparation. Until then, more progress is needed to ensure more victims receive the reparation they desperately need and deserve in post-conflict situations.

Conclusion

The main intent of this thesis was to answer the question: *“Is there a right to individual reparation for victims of armed conflict and how can this right be used?”*. It would take a naive idealist to answer this question in a positive manner when asked if the right is solidified in international humanitarian law. If one is realistic and looks at academia, jurisprudence and the international legal framework, the answer to the research question is that in the framework of international humanitarian law a concrete, codified and, most importantly, widely accepted right to individual reparation does not yet exist as of the time of writing. This does not take away from the developments that have happened in non-binding legal instruments like the UN Guidelines, however, one cannot say these non-binding instruments have made the impact binding instruments may have.

There are various explanations for this answer, some of which which were described in Chapter 1 and can be summarized by the fact that the leading line of both interpretation and application in international humanitarian law is that reparation is a right only States are guaranteed, given the field of international humanitarian law is still a more traditional, inter-State, field of law. Even in 2024 where whilst inter-State conflict does still exist, the emergence of more non-international armed conflicts and conflicts with Non-State Actors should have most likely resulted in amendments to the field but didn't. Civilians are still seen as objects to be protected, and while it would be important to progress, a rapid and radical progression seems unlikely with the current political climate. Given the steady line of jurisprudence followed by domestic courts (the only option for victims of armed conflict) of only States being able to receive compensation (apart from the *Distomo* case in the Greek courts), the lack of mechanisms available to victims to file for reparation for violations of international humanitarian law and the unwillingness of States to create binding instruments of international law granting them this right, it is understandable that victims look towards other methods to be able to claim redress. Although progress was made with the compensation commissions discussed in Chapter 1 (UNCC and EECC), the work of both of these Commissions has ended and still required victims to apply through their home State to maybe get awarded compensation.

It is understandable, given the elaboration of the legal practice in international human rights law in Chapter 2, that individuals tend to look towards human rights law, especially as it contains the solidified right to reparation for victims of human rights law violations. With the

right to remedy and reparation laid down in both universal and regional human rights treaties, the established regional court practice from the ECtHR and the IACtHR in awarding reparation to victims of violations of human rights law, the UN Treaty Body Mechanisms whose influence may not be as large as was originally hoped but do still make an attempt to provide accountability towards states who violate the human rights laid down in the core treaties, and the regional commissions, the impact that human rights law has when it comes to reparations for victims is large, but not without its criticisms. Given the low ratification rates of the UN Treaty Body Mechanisms when it comes to acceptance of individual communications, the less than clean reputation of the Human Rights Council, the risk of system fatigue and the overloading of the regional human rights courts, redress still takes long and comes with the risk of not happening at all.

Considering these risks, the comparison and analysis in Chapter 3 was very much needed, given victims of armed conflict do tend to lean towards the usage of mechanisms which are meant for violations of human rights. This is not to say that violations of international human rights laws do not happen during armed conflict, however, usually this is an alternative option given the fact victims of armed conflict cannot hold states accountable for their violations of international humanitarian law. Whilst both fields of law apply in armed conflict, the line of jurisprudence set out by the International Court of Justice has proven fundamentally important in classifying international humanitarian law as the *lex specialis*, a line of jurisprudence followed by the regional human rights courts (where most victims end up making applications), resulting in situations where the Courts are not allowed to speak on situations given the *lex specialis* status of international humanitarian law. Other criticisms include the fact that these courts are not built to receive all applications from armed conflict, given the casualty numbers and victims of conflict usually are large. The alternative mechanisms discussed show good progression, especially when looking towards the reparations practice of the International Criminal Court, which also deals partially with violations of international humanitarian law in its jurisdiction but stays limited to providing reparations to the victims of convicted persons, or in the case of the victim assistance mechanisms, to the niche treaties without proper implementation.

Concluding, there is a long way to go in the development of international humanitarian law until victims of armed conflict can use a solidified right to reparation against states. As it currently stands, a cross-roads has been reached. Whilst non-binding documents like the UN

Guidelines clearly set out a right to reparation for victims of armed conflict, this is yet to be universally accepted and implemented in a binding document. Though this is frustrating, to a degree it is understandable when viewing this problem from the perspective of States. Giving victims of armed conflict an accountability mechanism, whether it be through a multilateral treaty, a tribunal or even just through domestic legislation, gives victims of armed conflict more rights and a voice in a field which is traditionally dominated by States. However, as there is currently no form of even an accountability mechanism for States to be held accountable by other actors than States for violations of international humanitarian law against its citizens or other persons, the calls for one from academia can be understood as well. Rapid change is desperately needed to ensure victims of armed conflict get the voice they deserve. Thus, whilst the research question has to be answered negatively, the author hopes to have set out a comprehensive overview of the fields of law and the problems that arise. The answer to the question “What needs to be done?” seemed relatively easy to find, but given the current state of international affairs (not just international law), impossible to implement. However, hope may not be lost that an individual right to reparation for violations of international humanitarian law by states may be codified in a binding legal document someday.

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Abstracts

English

The research focus of this thesis will lie on the principle of individual reparations, with the primary focus in international humanitarian law and secondary focus on international human rights law. The research will assess how individual victims of violations of international humanitarian law obligations by States can potentially be compensated for their damages. The mechanisms from international humanitarian law will be compared to the mechanisms used in international human rights law, where (in contrast to other fields of international law), the individual has rights it can claim compensation for when breached. There will be an assessment on how certain aspects of the international human rights law mechanisms could potentially be implemented in a more traditional field as international humanitarian law.

The section on reparations in international humanitarian law will be built up as follows: an introduction to the concept of reparations and state responsibility, there will be a short historical section which will explain why it is uncommon for individual victims of IHL violations by States to get compensated. After discussing the different interpretations of the concept of reparation, it will go into the concept of individual reparations and how this concept has been interpreted (and implemented) by domestic courts. Furthermore, there will be a description on how the principle of individual reparation has evolved over the last decades into a principle that is used by international adjudication mechanisms.

The chapter on international human rights law will discuss the principle of reparation for individuals in this field and what mechanisms are available to individual victims of breaches of human rights obligations by States. One of the bigger problems that will be discussed is the lack of enforcement powers by the mechanisms of the bigger human rights treaties. Furthermore, there will be an analysis on how regional human rights courts assess individual reparations for breaches of international human rights law by States and international human rights law courts.

The last chapter will assess how international humanitarian law could benefit from using more of the victim-oriented aspects of human rights law. There will be an analysis which compares how the two fields are assessed in the domestic courts and what will need to change in international humanitarian law that it will be possible for individuals to keep states accountable like is possible in human rights law. There is hope to conclude the assessment on a positive note.

German

Der Forschungsschwerpunkt dieser Arbeit liegt auf dem Prinzip der individuellen Wiedergutmachung, dabei in erster Linie auf dem humanitären Völkerrecht und in zweiter Linie auf den internationalen Menschenrechtsnormen. Es soll untersucht werden, wie individuelle Opfer von Verstößen gegen die Verpflichtungen des humanitären Völkerrechts durch Staaten entschädigt werden können. Die Mechanismen des humanitären Völkerrechts werden mit jenen des internationalen Menschenrechts verglichen, in welchem der Einzelne Rechte hat, für die er bei Verletzung eine Entschädigung verlangen kann. Ziel ist, zu prüfen, ob und wie bestimmte Aspekte der internationalen Menschenrechtsmechanismen in einem traditionellen Bereich wie dem humanitären Völkerrecht umgesetzt werden könnten.

Der Abschnitt über Wiedergutmachung im humanitären Völkerrecht ist wie folgt aufgebaut: Nach einer Einführung in das Konzept der Wiedergutmachung und der staatlichen Verantwortung folgt ein kurzer historischer Abriss, welcher erläutert, warum Entschädigungen einzelner Opfer durch Staaten nach Verletzungen des humanitären Völkerrechts unüblich sind. Nach einer Erörterung der verschiedenen Auslegungen des Begriffs der Wiedergutmachung wird auf das Konzept der individuellen Wiedergutmachung eingegangen und erläutert, wie dieses von den nationalen Gerichten ausgelegt (und umgesetzt) wurde. Außerdem wird beschrieben, wie sich die Leitidee der individuellen Wiedergutmachung in den letzten Jahrzehnten zu einem Grundsatz entwickelt hat, der von internationalen Rechtsprechungsmechanismen anerkannt und angewendet wird.

Im Kapitel über die internationalen Menschenrechtsvorschriften werden die Grundsätze der Wiedergutmachung für Einzelpersonen in diesem Bereich und die für individuelle Opfer von Verletzungen von Menschenrechtsverpflichtungen durch Staaten zur Verfügung stehenden Mechanismen behandelt. Der Nutzen und die Probleme dieser Mechanismen werden erörtert. Ein wichtiges diskutiertes Problem ist der Mangel an Durchsetzungsbefugnissen durch die Mechanismen der großen Menschenrechtsverträge. Zusätzlich wird analysiert, wie regionale Menschenrechtsgerichte individuelle Wiedergutmachungen für Verletzungen internationaler Menschenrechtsvorschriften durch Staaten und internationale Menschenrechtsgerichte beurteilen. Im dritten Kapitel wird versucht zu beurteilen, wie das humanitäre Völkerrecht von einer stärkeren Nutzung der opferorientierten Aspekte der Menschenrechte profitieren könnte. Es wird verglichen, wie die beiden Bereiche von den nationalen Gerichten bewertet werden und was sich im humanitären Völkerrecht ändern muss, damit Einzelpersonen Staaten analog zum Menschenrecht zur Rechenschaft ziehen können. Es besteht die Hoffnung, die Bewertung positiv abzuschließen.