# Conclusion

## *Reparation for Victims of Armed Conflict – At the Interface of International and National Law*

Anne Peters

### I. INTRODUCTION

The issue is no longer *whether* to grant reparation to victims of armed conflict, but *how*, as the present Trialogue has brought to the fore. The contributors dealt with matters such as the identification and registering of claims, the procedures and the types of reparation. A salient question here is whether the entitlement to reparation is rooted in international law or is a matter of national law. In theory, the latter question seems all-important because only an entitlement based on international law would mean that States are obliged by law to grant reparation. However, all three chapters show that reparation results only from an interplay between international and domestic law. Shuichi Furuya is most explicit on this point: if domestic institutions and procedures are not built up, then any entitlement to reparation based on international law remains virtual – a 'pie in the sky', as he puts it.[1]

Before pulling together further findings, some methodological remarks are in order. The Trialogue design is supposed to tease out the pluralism inherent in the discourse of international law. The choice of contributors to one Trialogue seeks to accentuate the multi-perspectivism that helps us to understand international legal problems in a deeper way. The three authors of this Trialogue work in different continents (Asia, America, and Europe), and we expected and encouraged them to pursue different approaches (a more traditional international law analysis, a practitioner's take, and an approach focused on human rights). These authors share one important characteristic: they are all nationals of States that have been confronted with claims by unsatisfied war victims (Japan), or States still grappling with the legacy of

[1] Furuya, 'Right to Reparation', Chapter 1 in this volume, 19.



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dictatorship or civil war (Chile and Colombia).[2] Obviously, the topic of reparation for victims of armed conflict receives academic attention in these countries, because it is highly relevant in practice. Often, citizens of States whose budgets and capacities are at risk of being overwhelmed by entitlements for individual reparation of foreign nationals after an inter-State war tend to pronounce themselves against such reparation in principle.[3] Conversely, academics in States with a high number of victims are frequently sympathetic to reparation programmes.[4] These scholarly positions may be well founded and are not invariably biased. But to properly assess the possible impact of epistemic nationalism, a research design that pays systematic attention to the *Vorverständnis* ('pre-understanding') of the writers is warranted.[5] The trio of authors invited to participate on the basis of these reflections have produced three accounts with similar normative orientation: they are favourable towards reparation. They are not antagonistic but complementary.

The legal evolution on the individual right to reparation is traced by Christian Marxsen in the Introduction to this volume[6] and by Shuichi Furuya in Chapter 1.[7] Importantly, the new or emerging norm flows from various 'sources', some of which are mere rivulets, while others amount to outright floods. Starting in 1988 with the *Velásquez Rodríguez* judgment of the Inter-American Court of Human Rights (IACtHR),[8] every decade has seen

[2] Shuichi Furuya is a national of Japan. Cristián Correa is Chilean and also holds US citizenship. Clara Sandoval was born in Colombia and is a Colombian/UK citizen. The fact that our search for experts yielded these three authors illustrates another phenomenon affecting the legal analysis of highly politicised legal issues, ranging from quotas for women to animal rights. The vast majority of authors dedicating ink to them are sympathetic to the legal instrument they examine. Reparation for victims of armed conflict is among those topics that incite so much passion that they are rarely discussed thoroughly and in depth by scholars who oppose individual reparation as a matter of legal policy. It seems as if only those in favour are willing to invest energy and time into the research.

[3] See, e.g., Albrecht Randelzhofer and Christian Tomuschat (eds), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague: Martinus Nijhoff, 1999); Wolff Heintschel von Heinegg, 'Entschädigung für Verletzungen des humanitären Völkerrechts', *Berichte der Deutschen Gesellschaft für Völkerrecht* 40 (2003), 1–61.

[4] See, e.g., Filippo Fontanelli, 'Sketches for a Reparation Scheme: How Could a Germany–Italy Fund for the IMIs Work?', in Valentina Volpe and Anne Peters (eds), *Remedies against Immunity?* (Berlin/Heidelberg/New York: Springer, 2020), forthcoming.

[5] Anne Peters, 'Introduction to the Series: Trialogical International Law', in Mary-Ellen O'Connell, Christian Tams, and Dire Tladi, *Self-Defence against Non-State Actors*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 1 (Cambridge: Cambridge University Press, 2019), xi–xxv.

[6] Marxsen, 'Emergence of an Individual Right', Introduction to this volume.

[7] Furuya, 'Right to Reparation', Chapter 1 in this volume.

[8] IACtHR, *Velásquez Rodríguez v. Honduras*, Merits, 29 July 1998, para. 166 (emphasis added): 'As a consequence of this obligation [under Art. 1(1) of the American Convention on Human

a new milestone. In 1998, the Rome Statute was signed, allowing the International Criminal Court (ICC) to order reparation for victims of international crimes.[9] In 2005, the United Nations General Assembly adopted the Basic Principles on Remedies and Reparation.[10] The Resolution lacks any formal legal quality as binding law, but it has nevertheless turned out to be a 'pivotal instrument' – arguably, a 'catalyst' for further legal developments.[11] In 2012, the ICC Trial Chamber spelled out the principles and procedures to be applied to reparations in *Lubanga*, which the Appeals Chamber confirmed, with some modifications, in 2015.[12] These principles were refined in subsequent case law.[13] But where do we stand now?

Rights], the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, *if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation*.' See also IACtHR, *Velásquez Rodríguez v. Honduras*, Reparations and Costs, 21 July 1989.

9 Art. 75 of the Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3 (hereinafter ICC Statute). See also *ibid*. Art. 79 on the Trust Fund for Victims; Rules 94–9 of the ICC Rules of Procedure and Evidence; Resolution ICC-ASP/1/Res.6, Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, 9 September 2002.

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

11 Clara Sandoval, 'The Legal Standing and Significance of the Basic Principles and Guidelines on the Right to a Remedy and Reparation', *Heidelberg Journal of International Law* 78 (2018), 565–9 (564 and 567). One of the rapporteurs in this project described the Principles as a 'monumental milestone in the history of human rights as well as international criminal justice': M. Cherif Bassiouni, 'International Recognition of Victims' Rights', *Human Rights Law Review* 6 (2006), 203–79 (278). For a more sober assessment, see Fin-Jasper Langmack, 'The Normative Value of the Basic Principles and Guidelines on the Right to a Remedy and Reparation', *Heidelberg Journal of International Law* 78 (2018), 569–75, on the Resolution's legal function as weak evidence for the existence of a customary right to reparation.

12 ICC, *Situation in the Democratic Republic of the Congo in the Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, Trial Chamber I, ICC-01/04–01/06, 7 August 2012; ICC, *Situation in the Democratic Republic of the Congo in ICC, Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with AMENDED order for reparations (Annex A) and public annexes 1 and 2, Appeals Chamber, ICC-01/04–01/06, 3 March 2015.

13 ICC, *The Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, Trial Chamber II, ICC-01/04–01/07, 24 March 2017. As a leader of a militia group, Katanga had been convicted as an accessory to one count of a crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property, and pillaging) committed during an attack on a village in the Ituri district of the Democratic Republic of the Congo (DRC) in 2003. His liability was set at 1 million USD, to pay individual reparation, i.e. compensation in the form of symbolic awards of 250 USD to each victim: *ibid*., paras 264 and 306. The third reparation proceeding before the ICC resulted in *The Prosecutor v. Jean-Pierre Bemba Gombo*, Final decision on the reparations proceedings,

## II. REGIME INTERACTION AND CROSS-FERTILISATION

The three authors disagree about the present state of the law. Shuichi Furuya opines that 'an individual right to reparation has been accepted since the 1990s; therefore, under *current* international law, a State is obliged to make reparation to individual victims who suffered harm from its violations'.[14] Furuya thus postulates an 'emerging individual right to reparation under customary international law'.[15] In contrast, Cristián Correa finds 'that the existence of an individual right to reparation from States for victims of war is not itself fully supported by IHL [international humanitarian law]'.[16] (But Correa adds that '[l]ooking exclusively to IHL to establish whether this secondary right exists is an artificial limitation that contradicts the accepted interpretation of the scope of the obligations States have under human rights law'.[17]) Clara Sandoval leans towards Furuya's position, pointing to thick practice: '[U]nder international human rights law, significant practice has accumulated on the right to reparation for victims of armed conflict as a result of the work of international human rights mechanisms and domestic courts adjudicating on this right, as well as States undergoing transitional justice processes and setting up domestic reparation programmes.'[18]

ICC-01/05–01/08, 3 August 2018. The reparation proceedings were closed as a result of Bemba's acquittal.

[14] Furuya, 'Right to Reparation', Chapter 1 in this volume, 62. A number of scholars share this view. See notably Paola Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?', in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Humans Rights Law* (Oxford: Oxford University Press, 2011), 305–27 (326):'Individuals now hold primary rights towards states in the event of armed conflicts and therefore they also enjoy the right to reparation in cases of violations.' In that sense, see also Roland Bank and Elke Schwager, 'Is There a Substantive Right to Compensation for Individual Victims of Armed Conflicts against a State under International Law?, *German Yearbook of International Law* 49 (2006), 367–412; Andreas Fischer-Lescano, 'Subjektivierung völkerrechtlicher Sekundärregeln', *Archiv des Völkerrechts* 45 (2007), 299–381; Carla Ferstman, 'The Right to Reparation for Victims of Armed Conflict', in Mark Lattimer and Philippe Sands (eds), *The Grey Zone: Civilian Protection between Human Rights and the Laws of War* (Oxford: Hart, 2018), 207–29 (229). Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge: Cambridge University Press, 2012), 43, concludes that 'state responsibility for reparations in favour of individuals has acquired certain customary standing'; see also *ibid.* at 127.

[15] Furuya, 'Right to Reparation', Chapter 1 in this volume, 43.

[16] Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, 110. This view is shared, e.g., by Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: Cambridge University Press, 2016), 202–10, with further references.

[17] Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, section I.C; see also *ibid.*, section II.C.

[18] Sandoval, 'International Human Rights Adjudication', Chapter 3 in this volume, 180.

It may well be the case that, for the time being, customary international law does not provide for a 'hard' international entitlement to reparation for violations of the international law of armed conflict.[19] But this snapshot of international humanitarian law (IHL), seen in clinical isolation from human rights law and frozen at the current moment, does not close the debate; rather, that diagnosis is only the beginning of the conversation. Shuichi Furuya points out that, in the end, the distinction between the international *lex lata* and the *lex ferenda* 'does not seem productive' because what counts is the overall trend of a 'social consciousness' that points in the direction of reparation and what matters is the political will to establish reparation programmes in the domestic systems.[20]

The dynamism in the law on reparation for victims of armed conflict is the result of an interaction between different subfields of international law – namely, IHL, human rights law, international criminal law, and the law of State responsibility. This interaction is not without frictions and contradictions, but it has so far overall resulted in a legal evolution towards the recognition of victims and of their rights. Shuichi Furuya speaks of a 'cross-fertilisation of developments in different fields on recognising the individual right to reparation'; 'the victim-oriented perspective in international law has been developed through cross-referencing'.[21]

The confluence and cross-fertilisation of international criminal law and human rights law to form a connected regime on individual reparation is surprising at first glance, because the duty-bearers differ. Because ICC proceedings are conducted against individuals accused of international crimes, the liability for reparation is borne exclusively by the convicted perpetrator and not by States. However, as Cristián Correa explains, this assignment does not erect an 'absolute firewall between the judgments of the Court and the responsibility of States'.[22] When negotiating the ICC Statute, some States

[19] On the identification of a customary rule in this context, see Christian Marxsen, 'What Do Different Theories of Customary International Law Have to Say about the Individual Right to Reparation under International Humanitarian Law?', *Heidelberg Journal of International Law* 78 (2018), 581–7.

[20] Furuya, 'Right to Reparation', Chapter 1 in this volume, 19. Among the countless scholarly propositions for a further development of an individual right to reparation for violations of IHL, the International Law Association (ILA) Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues) 2010 stands out. For a summary, see Rainer Hofmann, 'The 2010 International Law Association Declaration of International Law Principles on Reparation for Victims of Armed Conflict', *Heidelberg Journal of International Law* 78 (2018), 551–5. Hofmann was co-rapporteur for the topic of reparation in the ILA alongside Shuichi Furuya.

[21] Furuya, 'Right to Reparation', Chapter 1 in this volume, 45.

[22] Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, 109.

strongly resisted the prospect of being forced to bear any financial burden of reparation. However, it is obvious that a war lord such as Lubanga will never be able to personally pay the 10 million USD of reparation that Trial Chamber II allotted to him.[23] For the most part, under the ICC Statute, reparation is not paid out of the private pockets of the criminals but out of the Trust Fund for Victims established under Article 79 – a fund that is fed by voluntary contributions by governments and which undertakes fundraising efforts itself.

Most importantly, this Trialogue has drawn out two factors that are most strongly impacting on the practice – and, arguably, also the international law – of reparation. The first is *international human rights law*, as developed by the regional human rights courts (section III); the second is the post-conflict *domestic* law and policies of countries emerging from totalitarianism and civil strife (section IV).

## III. THE IMPACT OF HUMAN RIGHTS

Cristián Correa and Clara Sandoval recall that a number of human rights conventions, the case law of the most active regional human rights courts – namely, the IACtHR and the European Court of Human Rights (ECtHR) – and numerous legal and quasi-legal documents have firmly established that victims of gross human rights violations (notably, but not limited to, intense violations of the right to life and physical integrity) are entitled by law to reparation in all its forms, including monetary compensation. Importantly, this has been established by the case law as an entitlement flowing from the States' obligation to remedy gross human rights violations in their domestic legal systems separately from the possibility that a regional human rights court may award a victim just satisfaction in monetary form.[24] All three contributions to this Trialogue explicitly or implicitly demonstrate the paramount importance of international human rights law.

The abundant case law of regional human rights courts on widespread and massive human rights violations in the course of armed conflict (be it

[23] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Decision setting the size of the reparations award for which Thomas Lubanga Dyilo is liable, Trial Chamber II, ICC-01/04–01/06, 21 December 2017. Lubanga had been convicted for the recruitment of child soldiers. The ICC reckoned with thousands of victims and allotted *ex aequo et bono* a sum of 8,000 USD for each victim. Accordingly, the Chamber set the total reparations award for which Mr Lubanga was liable at 10 million USD: *ibid.*, paras 259 and 281. The decision was confirmed on appeal: ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals against Trial Chamber II's 'Decision setting the size of the reparations award for which Thomas Lubanga Dyilo is liable', Appeals Chamber, ICC-01/04–01/06 A7 A8, 18 July 2019.

[24] See also n. 50.

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international or non-international) has been the true motor of the legal evolution of the right to reparation.[25] Of course, these courts' jurisdiction remains limited to human rights violations; the human rights courts are not authorised to pronounce on violations of IHL. The theory and practice of a co-application of human rights law in armed conflict have much eroded the boundary between human rights law and IHL, but they have not torn it down.[26] This is quite obvious for reparation, too. The General Assembly Principles of 2005 treat gross violations of international human rights law and serious violations of IHL side by side.

Similarly, to give only one example, in the *Armed Activities* case, the International Court of Justice (ICJ) mentioned the 'violations of international human rights law and of international humanitarian law' in one breath.[27] The Court considered 'that those acts resulted in injury to the DRC [Democratic Republic of the Congo] and to persons on its territory. Having satisfied itself that this injury was caused to the DRC by Uganda, *the Court finds that Uganda has an obligation to make reparation accordingly*.'[28] The Court did not say *to whom* reparation was owed, and the process of negotiation between the two State parties about this reparation is still dragging on.[29] If ever completed, the event will form new State practice on reparation, possibly also for individuals.

In the law as it stands now, however, the right to reparation is acknowledged as part of the *lex lata* only for violations of human rights, not for violations of IHL. This legal situation is unsatisfying. The key policy argument for granting reparation not only for violations of human rights but *also* for violations of the rules of armed conflict is, of course, that atrocities committed in war almost inevitably affect the personal integrity of victims. Once it is accepted – as a matter of principle – that human rights apply also in armed conflict, most of these abuses must be qualified as violations of the right to life, physical integrity, and/or property, often in conjunction with the guarantees against discrimination on the basis of race or gender. It would be patently unjust to grant reparation only to those victims who fall under the human rights umbrella while leaving out those who cannot juridically claim a human rights

[25] See notably Sandoval, 'International Human Rights Adjudication', Chapter 3 in this volume.

[26] See Ziv Bohrer, Janina Dill, and Helen Duffy, *Law Applicable to Armed Conflict*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 2 (Cambridge: Cambridge University Press, 2020).

[27] ICJ, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment of 19 December 2005, ICJ Reports 2005, 168, para. 259.

[28] *Ibid*. (emphasis added).

[29] The latest development is the ICJ decision of 13 November 2019 to postpone the public hearings on the question of reparations that was due to open on 18 November 2019.

violation (e.g., because they were abused by non-State actors in violation of IHL and not by armed forces of a State). Under the premise that 'pure' violations of IHL are not compensable, only the latter group of victims would remain without reparation, while the former group would get reparation under the heading of human rights. The consistent treatment of these two groups of victims is a matter not only of coherence of the international legal order as a whole, but also of justice. Although there are good arguments against applying human rights in situations of armed conflict,[30] it is unlikely that the trend towards co-application of human rights and IHL will be reversed. Thus the quest for reparation of individual victims of violations of IHL will not yet end.

Most importantly, a right to reparation does not imply handing out full compensation to everyone at all costs. Human rights law itself offers the tools for balancing the victim's interests against other concerns and values. Conceived of as a human right[31] (or as a correlate to human rights[32]), a right to reparation can itself be subject to lawful limitations based on public policy grounds if certain conditions are met and a bottom line is not undercut. The UN General Assembly's Principle 15 on Remedy and Reparation says that any reparation must be 'adequate, effective and prompt'. This formula conveys the intrinsic flexibility of the right to reparation and, at the same time, sets minimum requirements whose open terms grant sufficient leeway for taking a given State's economic and political situation into account.

Along these lines, all three authors in the Trialogue agree that the right to reparation is not an all-or-nothing question. Notably, Clara Sandoval underlines that the '[k]ey tasks for the future are precisely to indicate if and how the human right to reparation for such atrocious violations could be limited in a legal and legitimate way by domestic reparation programmes, as well as which are the core obligations of this right without which it will lose its meaning'.[33] According to Cristián Correa, the provisions about reparations

[30] See notably Ziv Bohrer, 'Divisions over Distinctions in Wartime International Law', in Bohrer, Dill, and Duffy (n. 26), 106–96.

[31] Most institutions and authors seem to accept or imply this qualification. See only ICC, *Situation in the Democratic Republic of the Congo in the Prosecutor v. Thomas Lubanga Dyilo*, Decision establishing the principles and procedures to be applied to reparations, Trial Chamber I, ICC-01/04-01/06, 7 August 2012, para. 185 (emphasis added): 'The Chamber accepts that the right to reparations is a well-established and basic *human right*.' Shuichi Furuya cites the same. But for a qualification of the right to reparation as a different type of international right, see Peters, *Beyond Human Rights* (n. 16), at 188 and 436–71.

[32] Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (New York: Cambridge University Press, 2012), 42 and 126.

[33] Sandoval, 'International Human Rights Adjudication', Chapter 3 in this volume, 264.

can and should be interpreted in ways that allow for an adequate response to the large scale of the violations committed during armed conflict. This might entail narrow interpretations and proportionate limitations of the right to reparation: '[T]his interpretation effort . . . could benefit from the experiences of domestic reparation programmes.'[34] Shuichi Furuya accepts that 'States may restrict the scope of reparation by concluding an agreement', but insists that these restrictions must satisfy some requirements familiar in human rights law. A complete waiver agreed in an inter-State treaty would strike at the essence of the right to reparation and is therefore impermissible in the human rights paradigm.[35] In other words, the paradigm of human rights has already shaped the structure of the law on reparation.

## IV. THE INTERACTION BETWEEN INTERNATIONAL AND DOMESTIC LAW

The contributions to the Trialogue have shown that the interaction between national and international law is much more complex and deformalised than outdated theories of monism or dualism suggest. Cristián Correa's main message is that the international or transnational post-conflict law has much to learn from domestic reparation programmes.[36] The domestic reparation programmes can help to 'interpret the provisions of international human rights law with regard to the right to remedy and reparation in a way that responds appropriately to massive violations'.[37] Clara Sandoval analyses how regional human rights courts defer to national reparation activities under the heading of subsidiarity. She suggests that the courts should espouse a more 'positive' approach in which the function of the principle of subsidiarity as *complementarity*, rather than as abstention, stands out. To that end, the regional human rights courts need to inquire more deeply into whether national arrangements satisfy international standards on reparation and could thus pressure States into better practice.[38] Better domestic practice can also result from allowing victims to choose their forum (either a domestic or an international one). This may become a positive incentive for policy-makers to establish an attractive domestic mechanism, as Shuichi Furuya highlights.[39]

[34] Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, 177.
[35] Furuya, 'Right to Reparation', Chapter 1 in this volume, 70–1.
[36] Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, esp. section III.C.
[37] *Ibid*., section IV.
[38] Sandoval, 'International Human Rights Adjudication', Chapter 3 in this volume, esp. section V.
[39] Furuya, 'Right to Reparation', Chapter 1 in this volume, 84–6.

Furuya's main message is that the right to reparation is real only when procedures are in place to implement it. These procedures are inevitably rooted in the domestic law of the relevant States. All varieties of reparation programme – those based on international instruments or on a combination of inter-State treaties, agreements between private parties, and/or national legislation, as listed by Shuichi Furuya,[40] as well as the domestic programmes in Guatemala, Peru, Sierra Leone, Colombia, and Chile, as analysed by Cristián Correa[41] – have brought into being detailed procedures from which best and worst practices can be extracted. Arguably, these experiments have even yielded some common procedural principles, especially if read together with the International Law Association's 2014 Procedural Principles for Reparation Mechanism.[42] Of course, none of this has the quality of hard international law. But the domestic, inter-State, and, in various ways, transnationalised exercises arguably light the way for further legal development.

While international law is per se implicated in the settlement of any international armed conflict between two States, it seems advisable also to involve international actors in the aftermath of non-international armed conflict. In that constellation, it is – as Shuichi Furuya states – 'totally unrealistic to expect the victims' State, or its domestic courts, to settle reparations in the interest of those victims'.[43] The involvement of international players – both international organisations and third States – is essential in securing reparation also for those victims who are perceived as undeserving by those wielding power and to support the State institutions, which are typically weak in the post-conflict constellation.[44] Thus 'both political and financial support and assistance from the international community is indispensable'.[45]

In fact, national practice has already been embedded into an international framework. The most powerful international legal levers are the provisions on domestic remedies enshrined in all of the human rights conventions – namely, Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR),[46] Article 13 of the European Convention on Human Rights

[40] *Ibid.*, section III.C. Furuya lists twelve mechanisms for the period between 1991 and 2006.
[41] See *ibid.*, section VI; Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, sections III.A and III.B.
[42] International Law Association Resolution 01/2014, Reparation for Victims of Armed Conflict, Procedural Principles for Reparation Mechanism.
[43] Furuya, 'Right to Reparation', Chapter 1 in this volume, section III.C.
[44] Sandoval, 'International Human Rights Adjudication', Chapter 3 in this volume.
[45] Furuya, 'Right to Reparation', Chapter 1 in this volume, section VIII.
[46] 16 December 1966, 999 UNTS 171.

(ECHR),[47] Article 25 of the American Convention on Human Rights (ACHR)[48] and Article 26 of the African Charter on Human and Peoples' Rights (ACHPR)[49] – which oblige States to provide for effective remedies in their national legal systems.[50] These clauses do *not* in themselves force States to grant reparation, but stimulate that trend – if only by activating the national tort law or national rules on State liability.[51] The ECtHR especially has interpreted Article 13 ECHR in that sense, explicitly stating that, '[i]n the case of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, *compensation* for the non-pecuniary damage flowing from the breach should, in principle, be available as part of the range of redress' to be offered by the State by virtue of Article 13 ECHR.[52]

As Clara Sandoval notes, the ECtHR has even, in the course of a pilot procedure, proactively *recommended* a State (in that case, Slovenia) to set up an *ad hoc* domestic compensation scheme for mass violations of the right to privacy and set the Slovenian government a deadline of one year for compliance.[53] The reason the Court gave was that it had 'found that the applicants were not awarded proper financial redress for the years during which they were in a position of vulnerability and legal insecurity and that, as matters currently stand, the possibility of obtaining compensation at the domestic level in civil proceedings or before the State Attorney's Office is still remote'.[54] The ECtHR case concerned thousands of persons, mainly originating from other former republics of the dissolved Socialist Republic of Yugoslavia, who had been 'erased' from the Slovenian register of permanent residents for political reasons.

[47] 4 November 1950, 213 UNTS 221 (formally, the European Convention for the Protection of Human Rights and Fundamental Freedoms).

[48] 22 November 1969, 1144 UNTS 123.

[49] 27 June 1981, 1520 UNTS 217.

[50] These clauses should be interpreted as embodying international *rights* to an effective remedy even if they are mostly couched in the language of State obligations to provide these remedies: Peters, *Beyond Human Rights* (n. 16), 187. See also *ibid.* at 480–5 on the *right* to local remedies as a correlate of the local remedies rule and as a requirement of the principle of subsidiarity.

[51] Leander Beinlich, 'Access Granted, Access Barred? Exploring the Interplay of Human Rights and States' Domestic Liability Regimes in the Context of Individual Reparation Claims', *Heidelberg Journal of International Law* 78 (2018), 625–9.

[52] ECtHR, *Bubbins v. United Kingdom*, Judgment of 17 March 2005, App. No. 50196/99, para. 171 (emphasis added).

[53] Sandoval, 'International Human Rights Adjudication', Chapter 3 in this volume, 241 and 252, citing ECtHR (Grand Chamber), *Kurić and Others v. Slovenia*, Judgment of 26 June 2012 (Merits and Just Satisfaction), App. No. 26828/06, para. 412. The ECtHR order came only after the national Constitutional Court had intervened and pointed out measures that were, however, not fully implemented by the Slovenian government.

[54] ECtHR, Kurić (n. 53), para. 412.

So the relevant violations of the right to private life did not result from war crimes; rather, they were a consequence of the civil war in Yugoslavia.

In the aftermath of *international* armed conflict, it is still conceivable that the reparation for individuals is claimed, collected, and distributed by their State of nationality. For example, the Agreement between Eritrea and Ethiopia[55] foresaw that only the involved States could assert these claims. Cristián Correa analyses the practice of the Eritrea–Ethiopia Claims Commission (EECC) and assesses the exercise as a failure: 'By expecting States to truly represent the interests of victims, the Commission failed in what was its most important task.'[56]

It is therefore important that the 'individualisation' of the right to reparation not only happens in the dimension of the substantive law, but also is reflected in the procedures. The option to take their claim in their own hands – and to be heard – empowers victims.

With regard to procedural obligations, the constant refinement of the obligations to investigate stands out. These are a component of the procedural limb of the human rights conventions' guarantees of the right to life and limb. For example, in the *Kunduz* (*Hanan*) case (pending at time of writing), on the bombing of a truck ordered by a German military commander during armed conflict in Afghanistan, complainants before the ECtHR are arguing that Germany did not conduct sufficient investigations as required by Articles 2 and 3 ECHR.[57] Indeed, as the ECtHR and Committee of Ministers of the Council of Europe have highlighted, 'in the absence of an effective investigation capable of leading to the identification and the punishment of those responsible, a request for compensation is theoretical and illusory'.[58]

However, individualised procedures have serious drawbacks. They pose the risk that some – or even many – are left behind, especially victims belonging to socially disadvantaged groups. Most importantly, the individualised processing of claims almost inevitably creates burdensome, costly, and slow administrative machineries. With these risks looming, the proper design of procedures that are both effective and legitimate is therefore paramount.

[55] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000.

[56] Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, 126.

[57] ECtHR, *Hanan v. Germany*, App. No. 4871/16, 26 February 2020 (Grand Chamber).

[58] Committee of Ministers, *Guide to Good Practice in Respect of Domestic Remedies of 18 September 2013*, 34. The Committee refers to ECtHR, *El-Masri v. 'The former Yugoslav Republic of Macedonia'*, App. No. 39630/09, 13 December 2012, para. 261; *Cobzaru v. Romania*, App. No. 48254/99, 26 July 2007, para. 83; *Carabulea v. Romania*, App. No. 45661/99, 13 July 2010, para. 166; *Soare and Others v. Romania*, App. No. 24329/02, 22 February 2011, para. 195.

To conclude, the main contribution of international law for the reparation of victims of armed conflict might be *procedural*. This can be seen as one aspect of an overall 'proceduralisation' at the international–national law interface, where 'international and domestic law are more subtly interweaved'.[59] And there seems to emerge a 'shared responsibility'[60] of national and international actors in the field of reparation for victims of armed conflicts too.

## V. 'TRANSFORMATIVE REPARATION'? BETWEEN LAW AND POLITICS, COURTS AND LEGISLATORS, THE PAST AND THE FUTURE

At the heart of the matter of reparation lies the delineation of the realms of law and politics, but also the entanglement of these spheres. Are there – and should there be – *legal entitlements* to reparation or should these be awarded (or withheld) as a matter of political discretion – the result of a complex balancing of factors such as avoiding a State's financial exhaustion and deeper reconciliation through cultural measures, as opposed to the 'buying off' of victims with 'blood money'?

The two pathways, law and politics, are exemplified by the strategies of litigation seeking reparation by court order, on the one hand, and political lobbying seeking reparation through legislative and administrative programmes, on the other. Cristián Correa points out that the judicial branch is actually not designed to deal with huge numbers of victims and, in doing so, risks producing a 'chaotic patchwork' of solutions.[61] In any case, a fixation on court decisions (which have typically denied victims a right to reparation for violations of IHL) would be myopic. Domestic courts' reluctance in granting reparation is more about their concern for the separation of powers in their national legal systems than it is a verdict against reparation for victims. Rather than being seen only as a negative answer to the question of a customary rule on reparation, national court decisions should be appraised, says Shuichi

[59] Thomas Kleinlein, 'The Procedural Approach of the European Court of Human Rights: Between Subsidiarity and Dynamic Evolution', *International and Comparative Law Quarterly* 68 (2019), 91–110 (110).

[60] This concept has been coined for the relationship between the ECtHR and the Convention States. High-Level Conference on the Implementation of the European Convention on Human Rights, Our Shared Responsibility, Brussels Declaration, 27 March 2015; High-Level Conference on the European Human Rights System in the Future Europe, Copenhagen Declaration, 13 April 2018.

[61] Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, 176.

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Furuya, as a stimulus urging the national law-maker to establish reparation programmes, which, after all, also have the potential to satisfy victims.[62]

Thus a proper survey of State practice and *opinio iuris* must take note of reparation programmes established by legislators, often in collaboration with international and non-State actors. However, it is very difficult to identify any belief among such States that they are obligated by law (not to mention international law) to set up such schemes. In addition, the case law of the regional human rights courts can, as Cristián Correa points out, put pressure on States to set up mechanisms for investigation and redress.[63] Ultimately, adequate reparation might emerge from a combination of litigation, legislation, and peace agreements.

The tension between law and politics also shows up in the dichotomy of reparation versus reconstruction. As Cristián Correa underlines, most existing national programmes sit somewhere on a spectrum between the two poles. Only Guatemala's programme bears the word 'reparation' in its title. Simplistically put, reparation is about the past, while reconstruction is about the future. Reparation is (first of all, although not exclusively) for individual victims,[64] while reconstruction is for the entire society. Of course, all of these dimensions must be taken into account in a transition from war to peace. 'Transitional justice' is exactly about balancing the partly antagonistic objectives of delivering justice, stabilising the country, reconciling society, and satisfying victims.[65]

The concept of 'transformative' reparation seeks to bridge the gulf between merely restoring a *status quo ante*, which was itself the breeding ground of violence and war, and purely future-oriented development policies.[66] The

[62] Furuya, 'Right to Reparation', Chapter 1 in this volume.

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

[64] Rule 97 of the ICC Rules of Procedure and Evidence allows the Court to 'award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both'. On the issue of individual and collective reparations, see ICC, *Prosecutor v. Ahmad al Faqi al Mahdi*, Judgment on the appeal of the victims against the Reparations Order, Appeals Chamber, ICC-01/12-01/15 A, 8 March 2018. See Thore Neumann, 'The ICC's Reparations Order in *re al Mahdi*: Three Remarks on Its Relevance for the General Discussion on Reparations', *Heidelberg Journal of International Law* 78 (2018), 615–21.

[65] Cf. Joanna Quinn, 'The Development of Transitional Justice', in Cheryl Lawther, Luke Moffett, and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Cheltenham: Edward Elgar, 2017), 11–33.

[66] Seminally Rodrigo Uprimny Yepes, 'Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice', *Netherlands Quarterly of Human Rights* 27 (2009), 625–47; for a seminal contribution with regard to sexual violence, see Ruth Rubio-Marín, 'The Gender of Reparations in Transitional Societies', in Ruth Rubio-Marín (ed.), *The Gender of Reparations: Unsettling Sexual Hierarchies while Redressing Human Rights Violations* (Cambridge: Cambridge University Press, 2009), 63–120.

IACtHR established this concept in its *Cotton Field* judgment on the notorious femicides in and around the Mexican city Ciudad Juárez.[67] The Court did not use the term 'transformative', but said that 'the reparations must be designed to change this situation, so that their effect is not only of restitution, but also of rectification. In this regard, reestablishment of the same structural context of violence and discrimination is not acceptable.'[68]

The African Commission on Human and Peoples' Rights (ACHPR) has notably espoused the idea with regard to redress for instances of torture and other cruel, inhuman, or degrading treatment:

> The *ultimate goal of redress is transformation*. Redress must occasion changes in social, economic and political structures and relationships in a manner that deals effectively with the factors which allow for torture and other ill-treatment. This transformation … *requires broad interpretation of State Parties' obligations to provide redress*, including putting in place legal, administrative and institutional frameworks to give effect to the right to redress.[69]

However, the concept of transformative reparation is beset by theoretical and practical problems.[70] Against the background of huge implementation gaps, ostensibly 'transformative' reparation measures risk patronising victims and/or raising false expectations. It is crucial that reparation programmes make only 'promises that can be fulfilled' and effectively reach a large number of victims.[71] In fact, emancipation and social change cannot be ordered.[72] Perhaps it is better, analytically and in practical terms, not to conflate 'reparation' and 'reconstruction', but rather to acknowledge that while the policies might converge and overlap, they may also be in conflict and competition with one another.[73]

[67] IACtHR, *Case of González et al. v. Mexico* (*Cotton Field*), Judgment (Preliminary Exceptions, Merits, Reparations and Costs), 16 November 2009.

[68] *Ibid*., para. 450. See Ruth Rubio-Marín and Clara Sandoval, 'Engendering the Reparations Jurisprudence of the Inter-American Court of Human Rights: The Promise of the *Cotton Field* Judgment', *Human Rights Quarterly* 33 (2011), 1062–91.

[69] ACHPR, General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, March 2017, para. 8 (emphasis added).

[70] See, critically, Franziska Brachthäuser and Anton Haffner, 'Transformative Reparation: Should Reparation Change Societies?', *Heidelberg Journal of International Law* 78 (2018), 587–9; Brianne McGonigle Leyh and Julie Fraser, 'Transformative Reparations: Changing the Game or More of the Same?', *Cambridge International Law Journal* 8 (2019), 39–59.

[71] Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, 177.

[72] Brachthäuser and Haffner, 'Transformative Reparations' (n. 70), 589.

[73] Cf. Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume.

## VI. OUTLOOK

The ongoing trend towards individual reparation for violations of the law of armed conflict should be viewed in the context of an overall 'individualisation of war'.[74] This individualisation is a matter not only of fact but also of law. And it concerns not only the side of the victims but also the side of those involved in committing, condoning, or inciting violence, both directly and indirectly. For example, in some conflicts corporations and churches are playing disgraceful roles that raise the question of their legal responsibility for the violence committed.

A key question therefore is what legal responsibility armed groups have for the violence committed. Because most armed conflicts are now non-international ones, violations of IHL and of human rights by members of armed opposition groups are rampant. The question of reparation for such violations therefore demands urgent answer. Shuichi Furuya sees armed groups as obliged to make reparation, pointing to practice in the Philippines, Darfur, and Afghanistan.[75] In contrast, Cristián Correa diagnoses a legal 'vacuum'.[76] Of course, individuals who commit war crimes that fall under the jurisdiction of the ICC will, if tried and convicted, be liable for reparation under the special provision of Article 75 of the ICC Statute. But, outside the narrow range of international crimes, it is not easy to identify and explain that non-State armed groups (and/or their members) are bound by the rules of IHL and have direct obligations under this body of law in the first place.[77] The Protocol Additional II to the Geneva Conventions (AP II), which governs non-international armed conflict, does not contain any provision about reparation that would match that under Article 91 of Additional Protocol I (AP I).

Hard international law is therefore unavailable and only soft law documents accommodate non-State actors to any extent. The UN General Assembly's Principles on Remedy and Reparation mention any 'other entity' that should, when found liable, provide reparation to victims.[78] Similarly, the ILA

[74] Jennifer Welsh, Dapo Akande, and David Rodin (eds), *The Individualisation of War: Implications for the Ethics, Law and Politics of Armed Conflict* (Oxford: Oxford University Press, 2020), forthcoming.

[75] Furuya, 'Right to Reparation', Chapter 1 in this volume, 62–4.

[76] Correa, 'Operationalising the Right of Victims', Chapter 2 in this volume, 174. Correa opines that this legal gap can be narrowed or closed by the application of national tort law against those actors.

[77] For an explanation of the primary IHL-based obligations of members of armed groups, see Peters, *Beyond Human Rights* (n. 16), 222–31.

[78] Basic Principles (n. 10), para. 15.

Declaration of International Law Principles on Reparation says that 'non-State actors' may be a responsible party against which victims have a right to reparation.[79] But these provisions cannot, in themselves, create legal obligations, including obligations to repair incumbent on non-State armed opposition groups. As a result, because of the uncertainty surrounding the primary obligations of armed groups under IHL and the absence of an explicit hard law clause on reparation for violations of non-criminalised rules of IHL, no secondary obligation – notably, the obligation to make reparation – can be identified in the law as it stands.[80]

Importantly, human rights law cannot fill the gap. The reason is that the armed groups are not directly bound by human rights treaties. To fill this void, the UN General Assembly's Principles on Remedy and Reparation postulate a subsidiary responsibility of the State, saying that 'States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations'.[81] But this is only a hortatory clause – a pious wish.

With all remaining problems and gaps, there still is a 'global momentum towards the individual right to reparation'[82] for violations of international law applicable in armed conflict. This momentum can be interpreted as a manifestation of a broader paradigm shift in the international legal order as a whole – namely, what has been called its humanisation. Maybe the 'humanisation' of international law (with all of its utopian or even cynical aspects) is nowhere more tangible than in the laws of war[83] and they are accentuated when it comes to reparation. One of the protagonists of the 'humanisation' school, ICJ Judge Antônio Cançado Trindade, made this point:

> The reductionist outlook of the international legal order, which came to prevail in the nineteenth and early twentieth centuries, beholding only absolute State sovereignties and subsuming human beings thereunder, led reparations into

[79] Arts 5(2) and 6 of the ILA Declaration of International Law Principles (n. 20).

[80] For an attempt, see Paloma Blázquez Rodríguez, 'Does an Armed Group Have an Obligation to Provide Reparations to Its Victims? Construing an Obligation to Provide Reparations for Violations of International Humanitarian Law', in James Summers and Alex Gough (eds), *Non-State Actors and International Obligations* (Leiden: Brill Nijhoff, 2018), 406–28. See also Annyssa Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution', in Noemi Gal-Or, Cedric Ryngaert, and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place* (Leiden: Brill Nijhoff, 2015), 304–22.

[81] Basic Principles (n. 10), Principle 16.

[82] Furuya, 'Right to Reparation', Chapter 1 in this volume, 89.

[83] It is no coincidence that the classic study deals with the law of armed conflict: Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006).

> a standstill and blocked their conceptual development. This latter has been retaken in current times, contributing to the historical process of humanization of contemporary international law. … When damages ensuing from grave violations of the international law of human rights and international humanitarian law have occurred, … the ultimate beneficiaries of the reparations due are the victims, human beings as subjects of international law.[84]

From this perspective, the victims must occupy centre stage and therefore reparation must go directly to them.

However, the current global constellation seems hostile towards the stabilisation under international law of any reparation for victims of armed conflict. The contributors to this Trialogue acknowledge that we are witnessing 'a new and hard backlash' (to use Clara Sandoval's words) against international human rights law and its protagonists, the regional human rights courts.[85] This backlash occurs on the political level, as a strategic manoeuvre conducted by populists and autocrats.[86] But there is also a theoretical pushback, fuelled by a range of ideologies. Critics in the 'left' camp have announced the 'end' of human rights,[87] from both neo-Marxist[88] and post-colonialist[89] perspectives. At the other end of the spectrum, more conservative and mainstream voices deplore a human rights 'proliferation'[90] and a 'twilight' of human rights,[91] and have envisaged a 'post-human rights era'.[92]

[84] ICJ, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Order (Fixing of the time-limit: Counter-memorial on reparations), Separate Opinion of Judge Cançado Trindade, 6 December 2016, 1137 *et seq.*, paras 17 and 20.

[85] Sandoval, 'International Human Rights Adjudication', Chapter 3 in this volume, 217. See generally Mikael Rask Madsen, Pola Cebulak, and Micha Wiebusch, 'Backlash against International Courts: Explaining the Forms and Patterns of Resistance to International Courts', *International Journal of Law in Context* 14 (2018) 197–220; specifically on the IACtHR, see Ximena Soley and Silvia Steininger, 'Parting Ways or Lashing Back? Withdrawals, Backlash and the Inter-American Court of Human Rights', *International Journal of Law in Context* 14 (2018), 237–57.

[86] Veronika Bílková, 'Populism and Human Rights', *Netherlands Yearbook of International Law* 49 (2018), 144–73.

[87] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart, 2000).

[88] Paul O'Connell, 'On the Human Rights Question', *Human Rights Quarterly* 40 (2018), 962–88.

[89] Makau Mutua, 'Is the Age of Human Rights Over?', in Sophia A. McClennen and Alexandra Schultheis Moore (eds), *The Routledge Companion to Literature and Human Rights* (London: Routledge, 2016), 450–8.

[90] Jacob Mchangama and Guglielmo Verdirame, 'When Defending Liberty, Less Is More: The Danger of Human Rights Proliferation', *Foreign Affairs* (24 July 2013).

[91] Eric Posner, *The Twilight of Human Rights Law* (Oxford: Oxford University Press, 2014).

[92] Ingrid Wuerth, 'International Law in the Post-Human Rights Era', *Texas Law Review* 96 (2017), 279–349.

These varieties of opposition notwithstanding, the pull of human rights seems unbroken in practice, and the idea of individual reparation follows suit. Although it is not possible to predict the future trajectory of international law, its current two-pillar structure, resting on States *and* individual human beings, seems to stand firm.[93] Despite a recent turn towards States in several fields of international law and policy (e.g., health and trade law), the voices of victims – as members of oppressed groups and *as individuals* – continue to be heard.

This Trialogue demonstrates that the real problem of reparation for the victims of armed conflict is no longer denial in doctrine and theory; rather, the problem is implementation.[94] The UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence has observed 'progress in law and practice' with regard to reparation for victims in the aftermath of gross violations of human rights and serious violations of IHL.[95] However, he found that the 'gap in implementation … reaches *scandalous proportions*' and he noted a '*dismal record in the implementation* of reparations'.[96]

At this point, the law reaches its limits – limits in various dimensions.[97] First, as a social system and a mode of governance, the law is relatively weak in comparison to other systems such as politics, the economy, finances, and culture. Second, international law, which almost completely lacks compulsory adjudication, enforcement, and sanctioning mechanisms, has a notoriously thin normativity, sitting at the 'vanishing point of law', as Hersch Lauterpacht famously put it.[98] Armed conflicts typically result from structural problems rooted in society. The transition to a sustainable peace requires a change of culture, which might be supported by distributing money

[93] For this conceptualisation, see Steven Ratner, *The Thin Justice of International Law* (Oxford: Oxford University Press, 2015).

[94] In this sense, see also Luke Moffett, 'Transitional Justice and Reparations: Remedying the Past?', in Cheryl Lawther, Luke Moffett, and Dov Jacobs (eds), *Research Handbook on Transitional Justice* (Cheltenham: Edward Elgar, 2017), 377–400 (400): 'A major challenge to reparations in times of transition is not getting them on the political agenda or recommended by a truth commission, but having them implemented.'

[95] Pablo de Greiff, *Report by the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, UN Doc. A/69/518, 14 October 2014 (quote from the summary).

[96] *Ibid.* (emphases added).

[97] Moreover, we need to distinguish the limits of law (in general) from the limits of a rights-based approach and, finally, the specific problem of a possible 'inflation' of human rights such as deplored by Mchangama and Verdirame, 'When Defending Liberty' (n. 90). This Trialogue, however, is not the place to pursue this matter.

[98] Hersch Lauterpacht, 'The Problem of the Revision of the Law of War', *British Yearbook of International Law* 29 (1952), 360–82 (382).

to victims, but might also be slowed by factors such as envy among those left without compensation and neglect of other social work. Legal processes, including reparation processes, have only a very modest capacity to deliver transformation promises.[99]

Finally, and most profoundly, reparation can never bring back beloved ones, turn back the clock, and efface suffering. Reparation means 'repairing the irreparable'.[100] In the words of a South African psychologist with practical experience in post-Apartheid transition and reconciliation, '[i]t is only the ongoing combination of truth, justice and survivor-support that may one day be sufficient to make some survivors feel at ease with the idea of accepting reparations as a symbolic replacement for what has been lost'.[101]

[99] In this sense, with regard to 'transformative reparations', see McGonigle Leyh and Fraser, 'Transformative Reparations' (n. 70), 58.

[100] Brandon Hamber, 'Repairing the Irreparable: Dealing with the Double-Binds of Making Reparations for Crimes of the Past', *Ethnicity and Health* 5 (2000), 215–26.

[101] *Ibid.*, 226. That author coordinated a Transition and Reconciliation Unit at the Centre for the Study of Violence and Reconciliation in Johannesburg.