2

Operationalising the Right of Victims of War to Reparation

Cristián Correa

I. INTRODUCTION

Do States have an obligation to provide reparation to victims for harm caused as result of armed conflict? If so, under what conditions and through which mechanisms can victims demand that obligation? Recent advances in international law have made answering this question increasingly difficult, because different approaches have developed to determine the character of the obligation to provide reparation to victims of war. The emergence of international human rights law has resulted in the individual occupying an ambivalent position in international law, whereby individuals are recognised as rights holders but nevertheless not fully recognised as subjects. States have often proved not to be the only – and, in many cases, not the best – guarantors of the rights of their citizens. International law, however, recognises the rights of individuals and has established mechanisms for their direct exercise without the mediation of the individual's State. However, those rights and mechanisms are governed by different legal frameworks of a universal and a regional nature, whose application also depends on how domestic legislation recognises those rights, making it difficult to determine the secondary obligations that derive from the breach of obligations under human rights law.

In answering these questions, this chapter will be divided into two main sections. The first (section II) will examine the obligation of States to provide reparation to victims of war by looking at the current status of international human rights law and international humanitarian law (IHL). The main thrust of this section will be an examination of the interplay between these two bodies of law, and of how to interpret them coherently to determine the degree of acceptance of and the conditions for exercising a right to reparation by victims of war. It is precisely the relationship between these two different legal

https://doi.org/10.1017/9781108628877.003 Published online by Cambridge University Press

sources of State obligations that has the potential to advance the right to reparation for victims of war.

The next section (section III) will analyse different mechanisms through which reparation has been provided to victims of armed conflict and will draw lessons from those experiences. Even though there is a wide array of mechanisms, including those established by human rights treaty bodies, international criminal courts, or domestic litigation, the focus here will be limited to those mechanisms that could include and guarantee access to large numbers of victims. This focus is important since armed conflicts usually result in heavy casualties and hence numerous victims. This section will investigate in concrete terms how to guarantee that all those who have suffered violations of their rights during armed conflicts can obtain reparation. This involves examining how two particular mechanisms established under the auspices of international law – the United Nations Compensation Commission (UNCC) and the Ethiopia–Eritrea Claims Commission (EECC) – have responded to the rights of victims (section III.A). The analysis will then turn to domestic mechanisms, including administrative reparation programmes for large numbers of victims of violations committed during internal armed conflicts – mechanisms that are often neglected by the literature on the responsibility of States under international law (section III.B). In most cases, these mechanisms are aimed at responding to violations of IHL and international human rights law. Thus they offer practical guidance for responding to violations of rights under both sources of law. Particular attention will be paid to arrangements made to guarantee the accessibility of a mechanism, to aspects of gender and the often-ignored position of women in armed conflict, and to the challenges of reconstruction and other State needs in its aftermath. A further consideration will be the importance of addressing personal harms – even more so than property losses.

The chapter will go on to draw from these examinations several lessons that can help us to identify the strengths and weaknesses of the different mechanisms (section III.C). In so doing, this chapter not only borrows from the rich analysis provided in the other chapters of this volume, but also tries to encourage a discussion that considers how the structure of these mechanisms could effectively respond to large-scale rights violations. These lessons are then the foundation of a series of proposals on how the right to reparation for victims of war crimes could be addressed (section IV). These proposals are intended to be realistic to ensure that promises are upheld and rights are translated into tangible results. By stressing the importance of a *realistic* approach, the recommendations try to practically

address the consequences of serious violations for the lives of victims and thereby to recognise victims' dignity.

II. THE POSSIBLE LEGAL FOUNDATIONS FOR AN INDIVIDUAL RIGHT TO REPARATION

There is much debate about whether or not States are obliged to provide reparation to victims and about the ability of victims to autonomously demand it. To some extent, this debate is the result of the ambiguous position of the individual in international law.[1] On the one hand, the individual's human rights are recognised; on the other hand, the individual's ability to make claims based on these rights still depends on the express consent of States, either by conventional acceptance or by customary acquiescence. It seems that public international law is still searching for a coherent position on the role of the individual following broad commitment in the UN Charter and the Universal Declaration of Human Rights to the promotion and respect of universal and equal rights of every individual, 'both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction'.[2] If IHL and international human rights law recognise the rights of persons, can those whose rights are violated make claims for reparation against the responsible State?

Much of this discussion has been informed by an analysis rooted in IHL: a body of law in which States are reluctant to accept individual rights. However, the right of victims of armed conflict to demand reparation from the responsible State cannot be defined without considering the obligations of States under international human rights law. For this reason, this section will start by examining the nature of the obligation under international human rights law to provide reparation to victims. Later, there will be examination of whether a similar obligation can be derived from IHL. This examination requires looking at how these two bodies of law interact and how this interaction can be interpreted coherently. Particular attention will be paid to what can be expected to remain an obligation under international human rights law even under the extraordinary circumstances of war. Moreover, it will be shown that the obligation to ensure an effective remedy persists.

[1] Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Cambridge: Cambridge University Press, 2016).

[2] Universal Declaration of Human Rights, GA Res. 217A(III), UN Doc. A/RES/3/217A, 10 December 1948, preamble.

A. *The Right of Victims to Obtain Reparation under International Human Rights Law*

Multilateral human rights treaties have recognised the right of victims of human rights violations to effective remedies. The International Covenant on Civil and Political Rights (ICCPR) establishes a general obligation (Art. 2(3)) to provide remedies to anyone whose rights and freedoms under the Covenant have been violated,[3] using similar language to Article 8 of the Universal Declaration of Human Rights. This obligation has been understood to be more than procedural and translates also into assuring 'the enjoyment of rights recognized under the Covenant [by the respective] judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretative effect of the Covenant in the application of national law'.[4] The Covenant also guarantees 'an enforceable right to compensation' for victims of unlawful arrest or detention.[5] The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) goes even further, specifying 'the right to seek … just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination'.[6] The Convention against Torture also establishes the obligation to 'ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible'.[7] More recently, the International Convention for the Protection of All Persons against

[3] Art. 2(3) of the International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171:

> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) 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 provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

[4] UNHRC, General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 15.

[5] Art. 9(5) ICCPR.

[6] Art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 UNTS 195.

[7] Art. 14(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), 10 December 1984, 1465 UNTS 85.

Enforced Disappearances (ICPPED) established 'the right to obtain reparation and prompt, fair and adequate compensation',[8] and defined the forms reparation should take for particular types of violation.[9] These conventions, however, do not establish specific international mechanisms for complying with these obligations, but rather impose an obligation on each State to 'ensure in its legal system that the victim . . . obtains redress and has an enforceable right to fair and adequate compensation'.[10] They rely on the State to guarantee the right to remedy. The Human Rights Committee has gone further by recognising that a general right to reparation for victims of violations of the rights established by the Covenant derives from the obligation to provide remedies:

> Article 2, paragraph 3 requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.[11]

Regarding the obligation to provide an enforceable right to victims of torture under the Convention against Torture, the Committee against Torture (CAT) has explicitly stated that:

> The obligations of States parties to provide redress under article 14 are twofold: procedural and substantive. To satisfy their procedural obligations, States parties shall enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the substantive level, States parties shall ensure that victims of torture or ill treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.[12]

[8] Art. 24(4) of the International Convention for the Protection of All Persons from Enforced Disappearance (Convention on Enforced Disappearance), 20 December 2006, 1716 UNTS 3.

[9] The Convention is still not universally accepted, though, having been signed by ninety-six countries and ratified or acceded to by fifty-five of them.

[10] Art. 14(1) Convention against Torture; Art. 24(4) Convention on Enforced Disappearance.

[11] UNHRC, General Comment No. 31 (n. 4), para. 16.

[12] CAT, General Comment No. 3. Implementation of Art. 14 by States Parties, 19 November 2012, UN Doc. CAT/C/GC/3, para. 5.

Regional instruments for the protection of human rights also recognise the right of victims of violations of their provisions to effective remedies, using similar language to the United Nations' conventions. Member States of the European Convention on Human Rights (ECHR)[13] and the American Convention on Human Rights (ACHR)[14] are obliged to provide effective remedies for victims of violations of the rights and liberties that they establish. The members of the African Charter on Human and Peoples' Rights (ACHPR) recognise the right of 'every individual to have his cause heard [comprising] the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'.[15]

The European Court of Human Rights (ECtHR) has affirmed that the obligation to provide effective remedies under Article 13 ECHR includes the existence of domestic mechanisms that can make reparation available to victims, in the form of compensation, at least for serious violations: 'In 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."[16]

Even if the Court admits that States have some discretion in complying with this obligation, it requires that 'its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State'.[17] This obligation does not necessarily require investigating all allegations of failure to protect persons from the acts of non-State actors or third persons, but it is certainly applicable 'for establishing any liability of States officials or bodies for acts or omissions involving the breach of their rights under the Convention'.[18] This is particularly true for breaches of Articles 2 and 3 ECHR, which protect the rights to life and personal integrity.

The Inter-American Court of Human Rights (IACtHR) has also examined the domestic mechanisms used for investigating violations and for providing reparation in cases of human rights violations:

[13] Art. 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, or ECHR), 3 September 1953, 213 UNTS 221.

[14] Art. 25 of the American Convention on Human Rights (ACHR), 22 November 1969, 1144 UNTS 123.

[15] Art. 7 of the African Charter on Human and Peoples' Rights (ACHPR), 27 June 1981, 1520 UNTS 217.

[16] ECtHR, *Bubbins v. United Kingdom*, Judgment of 17 March 2005, Application No. 50196/99, para. 171.

[17] ECtHR, *Paul and Audrey Edwards v. United Kingdom*, Grand Chamber Judgment of 14 March 2002, Application No. 46477/99, para. 96.

[18] *Ibid*, para. 97.

> When assessing the effectiveness of the remedies filed under the domestic administrative jurisdiction, the Court must verify whether the decisions taken by the jurisdiction have made an effective contribution to end impunity, to ensure non-repetition of the harmful acts, and to guarantee the free and full exercise of the rights protected by the Convention. In particular, these decisions may be relevant in relation to the obligation to make integral reparation for any rights violated.[19]

In this particular case, the IACtHR determined that Colombia breached the right to life and personal integrity of an opposition senator who was summarily executed, in a context in which the participation of military agents had been established in previous criminal and disciplinary investigations. Additionally, the Court assessed the process for determining State responsibility under administrative law, concluding that the failure to fully investigate the violations entailed a violation of the right to an effective remedy and judicial guarantees. In its judgment, the Court also considered that the reparation measures provided by the administrative procedure did not cover all of the violations committed and ordered supplementary forms of reparation.[20] In another case, the Court also examined the forms of reparation implemented not as a result of a court order but through a domestic reparation programme, assessing 'whether the compensation awarded meets the criteria of being objective, reasonable and effective to make adequate reparation for the violations of rights recognized in the Convention that has been declared by this Court'.[21] The approaches followed by both the IACtHR and the ECtHR are discussed in detail by Clara Sandoval elsewhere in this volume.[22]

In addition to examining the obligation of States to provide remedies and reparation for certain violations, these regional systems for the protection of human rights establish specific mechanisms for ordering reparation when it has been determined that a State has committed a breach of a primary rule. Article 41 ECHR, Article 63(1) ACHR and Article 27 of the Protocol to the African Charter on the Establishment of the African Court contain similar provisions, allowing the respective courts to order reparation (mostly in the form of compensation, except for the IACtHR, which developed a more comprehensive jurisprudence regarding the forms of reparation) if they have

[19] IACtHR, *Manuel Cepeda Vargas v. Colombia*, Judgment of 26 May 2010 (preliminary objections, merits, reparations and costs), para. 139.

[20] *Ibid*., para. 250.

[21] IACtHR, *Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, Judgment of 14 November 2014 (preliminary objections, merits, reparations and costs), para. 593.

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

found there to have been a violation of the rights recognised by the Convention and if deemed necessary. When making these orders, the IACtHR has based its decision not only on Article 63(1) of the American Convention, but also on the recognition that States have an obligation to provide reparation for breaches of international law, citing the *Factory at Chorzów* case[23] and other precedents. On these grounds, the Court has asserted that 'every violation of an international obligation which results in harm creates a duty to make adequate reparation'.[24] The Court has developed a strong jurisprudence affirming this obligation and the right of victims of human rights violations to receive reparation.[25] In a more recent development, the African Commission on Human and Peoples' Rights has also declared that:

> State Parties are required to ensure that victims of torture and other ill treatment are able in law and in practice to claim redress by providing victims with access to effective remedies. This includes the adoption of relevant legislation and the establishment of judicial, quasi-judicial, administrative, traditional and other processes. These processes should adhere to standards of due process and comply with the measures and protections envisaged under Article 1 of the African Charter.[26]

This General Comment draws on both African and universal instruments to support the existence of such a right.[27]

The International Law Commission (ILC) has implicitly affirmed the existence of an obligation that States provide reparation for human rights violations. When formulating the basic rules concerning the Responsibility of States for Internationally Wrongful Acts, the ILC made no distinction between the existence of an obligation to provide reparation for harmful acts committed in breach of multilateral treaties – or treaties concerning human rights – and bilateral treaties. The notion of what constitutes a breach used by the ILC is broad, defined as 'when an act of the State is

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

[24] IACtHR, *Velásquez Rodríguez v. Honduras*, Judgment of 21 July 1989 (Reparations and Costs), para. 25.

[25] For an analysis of the Court jurisprudence, see Cristián Correa, 'Artículo 63: Reparaciones y medidas provisionales', in Christian Steiner and Patricia Uribe (eds), *Convención Americana sobre Derechos Humanos: Comentario* (Bogota: Konrad Adenauer Stiftung, 2014), 817–88.

[26] 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. 9. See also *ibid.*, para. 8.

[27] *Ibid.*, paras 2–6.

not in conformity with what is required of it by that obligation, regardless of its origin or character'.[28]

Another piece of evidence for the existence of an obligation to provide reparation to victims of violations of international human rights can be found in the provisions regarding who is entitled to demand reparation. The ILC distinguishes between the existence of an obligation to provide reparation and who may invoke this responsibility arising from a breach of the obligation.[29] Article 33(2), for example, left open the possibility of rights that 'may accrue directly to any person or entity other than a State'.[30] The ILC even offers the example of human rights treaties that 'provide a right to petition to a court or some other body for individuals affected'.[31]

Some countries have addressed violations committed during internal armed conflict by means of administrative reparation policies.[32] These efforts have followed other experiences of providing reparation to victims of human rights violations within authoritarian or repressive regimes.[33] The norms that create these programmes are ambiguous with regard to the nature of the obligation they respond to; they use reparation terminology, but it is unclear how much they derive from an acknowledgement of State responsibility. The 2013 Peruvian Truth Commission report provides perhaps the clearest support for the idea that the reparation policy in that country derives from an acknowledgement of responsibility. When recommending establishment of the Comprehensive Reparations Plan, the Commission concluded that Peru was responsible for violations committed by all sides of the conflict. It reached this conclusion by analysing the conflict's complex causes and not only the particular violations. It also considered the need to provide a common response to all victims as an imperative for inclusiveness and reconciliation.[34] The law that created the Comprehensive Reparations Plan explicitly stated that its purpose was to provide reparation 'to victims of the

[28] ILC Articles on the Responsibility of States for Internationally Wrongful Acts, GAOR, 56th Sess., UN Doc. A/56/49(vol.I)/Corr.4, Art. 12.

[29] *Ibid.*, commentary on Art. 2(8), 72.

[30] *Ibid.*, Art. 33(2).

[31] *Ibid.*, commentary on Art. 33(4), 234.

[32] See section III.B for policies implemented by Guatemala, Peru, Sierra Leone, and Colombia. Sandoval, 'International Human Rights Adjudication', Chapter 3 in this volume, calls these programmes 'domestic reparation programmes'.

[33] Argentina, Chile, South Africa, Morocco, Uruguay, Brazil, Paraguay, and Ecuador.

[34] Comisión de la Verdad y Reconciliación, Informe Final, vol. IX, 104–5. For an analysis of this programme, see Cristián Correa, *Reparations in Peru: From Recommendations to Implementation* (New York: International Center for Transitional Justice, 2013), available at www.ictj.org/sites/default/files/ICTJ_Report_Peru_Reparations_2013.pdf.

violence that occurred during the May 1980 to November 2000 period, according to the conclusions and recommendations of the report of the Truth and Reconciliation Commission'.[35]

Germany and Austria have also implemented several policies aiming to provide compensation to victims of different violations committed by the Nazi regime. Those policies affirm that they are not based on an acknowledgement of State responsibility; rather, they are voluntary gestures. However, there are some aspects to these policies that implicate them as a response to something more than a moral obligation. The preamble to the Law creating the Foundation Remembrance, Responsibility and Future recognises the severe injustices inflicted by the National Socialists on slave and prison labourers, and that German enterprises not only participated in those injustices but also bear a historic responsibility. The law also aims to settle legal claims against enterprises by recognising that 'the German Bundestag presumes that this Law, the German–US intergovernmental agreement, the accompanying statements of the US government as well as the Joint Declaration by all parties to the negotiations provide adequate legal security for German enterprises and the Federal Republic of Germany'.[36] Assuming that the determinations of the Foundation have legal effect, it is possible to argue that this reparation policy derived from recognition of an obligation to provide such forms of compensation.

Domestic courts in Colombia[37] and Chile[38] have also recognised the right of victims of human rights violations under conditions of internal armed conflict to reparation, based on human rights obligations and their respective

[35] Art. 1 of Law 28,592 of 2015 of Peru.

[36] The Law on the Creation of a Foundation 'Remembrance, Responsibility and Future' of 2 August 2000 (Federal Law Gazette I 1263), preamble.

[37] The High Administrative Court (*Consejo de Estado*) of Colombia has frequently sentenced the State to pay reparation to victims of the internal armed conflict either as a direct or indirect responsibility of the armed forces, based also on both domestic law – considering it to be a failure of service according to Colombian Administrative Law – and violations of Protocol II of the Geneva Conventions. See, e.g., Consejo de Estado, *Marleny María Correa et al. v. Nación – Ministerio de Defensa – Ejército Nacional y Policía Nacional*, Judgment of 10 August 2015, 76001-23-31-000-2001-03818-01 (48392).

[38] Among others, Corte Suprema, *Tara et al. v. Fisco*, Segunda Sala, Judgment of 29 March 2016, Rol no. 2289–2015; *Episodio Tejas Verdes*, Judgment of 1 April 2014, Rol no. 1424–13. The use of IHL in Chile after the 1973 *coup d'état* looks out of place. However, the Court took into account the declaration of emergency powers by the military junta just days after the coup that claimed the existence of an armed conflict to justify the jurisdiction of military tribunals in time of war to judge dissidents and justified war-time sentences. See Cristián Correa, 'El Decreto Ley de Amnistía: orígenes, aplicación y debate sobre su validez', in Paulina Veloso (ed.), *Justicia, Derechos Humanos y el Decreto Ley de Amnistía* (Santiago: PNUD, 2009), 13–68.

domestic law. Dutch courts have come to a similar conclusion in cases of extraterritorial applicability of human rights obligations in the context of international armed conflict. In *Nuhanović v. The Netherlands*,[39] the Dutch Supreme Court found Holland responsible for failing to save the lives of people under the protection of its military battalion during a peacekeeping mission in Srebrenica. The Court based its decision on the failure of the State to comply with obligations under human rights law, citing the ECHR and the ICCPR, Bosnian domestic law and the ILC Draft Articles on the International Responsibility of States and Draft Articles on the Responsibility of International Organisations of 2011.[40] A more recent decision by the Appeals Court of The Hague has followed the same reasoning, carefully examining the conduct of the Dutch battalion to determine wrongdoing and confirming the obligation of the State to provide compensation (*vergoeding*).[41]

It can be concluded that there are legal precedents under international human rights law to affirm that States have an obligation to provide reparation to victims of serious human rights violations, particularly in cases of summary executions, torture, and other violations of a similar nature. The conventional law mentioned, the instruments of soft law, the jurisprudence of regional human rights courts and the practice of several States all support the conclusion that such practice is commonly, if not universally, understood as deriving from a legal mandate. The obligation consists mostly in States having to establish mechanisms in their domestic systems through which victims can exercise their right to obtain reparation, provided that those domestic systems comply with the requirement of fairness, effectiveness, and independence to allow decisions to be adequate, effective, and prompt. The obligation to establish these mechanisms affirms that victims have a right to have access to mechanisms that allow them to claim reparation individually. Even if individual victims do not have general mechanisms under international law through which they can directly demand their right to reparation – except when especially provided, as is the case for Article 41 ECHR and Article 63 ACHR – they still have a right to reparation and a right to demand the existence and effectiveness of domestic mechanisms.

[39] Supreme Court of the Netherlands, *The State of the Netherlands v. Hasan Nuhanoviç*, First Chamber, Judgment of 6 September 2013 (12/03324 LZ/IT).

[40] *Ibid*., para. 3.5.2.

[41] Gerechtshof Den Haag, *Stichting Mothers of Srebrenica et al. v. Staat der Nederlanden*, Judgment of 27 June 2017, ECLI:NL:GHDHA:2017:1761. See also www.nuhanovicfoundation.org/en/reparations-cases-2/the-State-of-the-netherlands-appeals-court-of-the-hague-decision-in-the-case-of-the-mothers-of-srebrenica-foundation/.

B. *The Right of Victims to Obtain Reparation under International Humanitarian Law*

Elsewhere in this volume, Shuichi Furuya provides a novel analysis of the existence of the right to reparation under international law.[42] His account of the evolution of this right need not be repeated here. At their inception, the 1949 Geneva Conventions recognised that States are liable for acts committed by their agents that constitute grave breaches of IHL. However, none of the provisions clearly established the right of individual victims to claim reparation. A 1952 International Committee of the Red Cross (ICRC) commentary on the Geneva Conventions expressly rejected that possibility, limiting that right only to States, based on the interpretation of the law at that time.[43] Article 91 of Additional Protocol I (AP I) to the Conventions contains an identical provision to that found in the IV Hague Convention. The text was not corrected to either narrow or expand its coverage, despite seventy years of changes in international law.

However, as Furuya notes, there has been significant change in the recognition of the rights of victims over the last thirty years, as expressed in non-conventional norms, especially those recognised in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law approved by the UN General Assembly.[44] The Resolution establishing the Basic Principles was adopted after a long discussion and process of negotiation, and was informed by analysis of the existing jurisprudence and the state of international law with regards to the obligation of States to provide reparation to victims of gross violations of human rights and serious breaches of IHL.[45] The document recognises that included among victims' rights to remedy for these types of violation are '[a]dequate, effective and prompt reparation for harm suffered'.[46]

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

[43] Jean Pictet, *I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary* (Geneva: ICRC, 1952), 373.

[44] 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.

[45] The debate included the work of a special rapporteur, a working group, and an independent expert who examined the status of international customary law on the matter and the practice of states. That was followed by consultative meetings with interested States, intergovernmental organisations, and NGOs, and all Member States were invited to submit additional comments. The adoption by the Commission on Human Rights was followed by an adoption by the General Assembly. See https://legal.un.org/avl/ha/ga_60–147/ga_60–147.html.

[46] Basic Principles (n. 44), para. 11(b).

As is made clear by their name, the Basic Principles and Guidelines on the Right to a Remedy and Reparation recognise not only obligations towards victims of violations of international human rights law, but also serious violations of IHL. After listing several provisions of international conventions and documents that establish the right of victims to effective remedies, the preamble of the Basic Principles emphasises 'that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms'.The sources of conventional law in support of the existence of a right to remedy and reparation for violations of human rights are manifold and clearly set out in the Basic Principles. The sources mentioned that affirm this obligation with regards to violations of IHL are more limited, making it more difficult to claim that the document does not entail new legal obligations, at least if considering conventional IHL on its own. In addition to the conventional sources mentioned above (Art. 3 of the 1907 Hague Convention and Art. 91 AP I), the Basic Principles refer to the obligations of individuals convicted by the International Criminal Court (ICC) and not to obligations of States.[47] However, it should be noted that, in the initial debates that led to the adoption of the Basic Principles, rapporteur Theo van Boven proposed an interpretation of gross violations of human rights and fundamental freedoms that included actions committed during international and non-international armed conflict. He also stated that, for the purposes of defining this topic:

> Guidance may also be drawn from common article 3 of the Geneva Conventions of 12 August 1949, containing minimum humanitarian standards which have to be respected 'at any time and in any place whatsoever' and which categorically prohibits the following acts: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[48]

[47] *Ibid*., para. 3(d).

[48] UNHRC, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report Submitted by Mr Theo van Boven, Special Rapporteur, 2 July 1993, UN Doc. E/CN.4/Sub.2/1993/8, para. 10.

The special rapporteur also cited Article 75 AP I in support of this assertion, according to which civilian or military agents are prohibited at all times and places to carry out, *inter alia*, murder, torture of all kinds, or corporal punishment.[49] Moreover, during the debate and in the contributions from Member States, the inclusion of severe violations of IHL was not seriously objected to.[50] Indeed, one of the independent experts addressed this question, stating:

> If the moral and conceptual point of departure for revising the guidelines on the right to reparation is the victim, then it follows that the guidelines should not exclude violations committed in the context of armed conflict. First, violations perpetrated during internal or international armed conflict may be at least as serious, if not more so, than those committed in peacetime. Second, international human rights law contains norms which permit no suspension, infringement or derogation, regardless of whether or not there exists a public emergency, even war. The right to reparation for violations of these non-derogable rights cannot be excluded from the revised guidelines. Moreover, as many of these non-derogable rights, such as the right not to be tortured, killed or enslaved, overlap with or are more clearly set out in norms of international humanitarian law, the expert considers it necessary to clarify the normative connection of the right to reparation to both international human rights law and international humanitarian law.[51]

The International Law Association (ILA) provides additional support for the existence of the right of victims of armed conflict to demand reparation, distinguishing the existence of such a right (a secondary right) from the existence of concrete mechanisms to exercise it (what might be called a tertiary right).[52] The ILA argues that an obligation in a multilateral treaty

[49] Art. 75(2) of Additional Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977, 1125 UNTS 3.

[50] Japan questioned the exact meaning of the recognition of the legal personality of the individual under IHL. See Commission on Human Rights, Views and Comments Received from States on the Note and Revised Draft Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, 22 December 1997, UN. Doc. E/CN. 4/1998/34, 9.

[51] UNCHR, Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Mr M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights Resolution 1998/43, 8 February 1999, UN Doc. E/CN. 4/1999/65, para. 84.

[52] ILA Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues) 2010, commentary on Art. 11, para. 1 (26). The term 'tertiary right'

can confer individual rights, giving victims of those violations a subjective right to reparation.[53]

Other sources mentioned by the ILA are based on Articles 27 and 30 of Geneva Convention IV[54] and Articles 7 and 78 of Geneva Convention III,[55] which the ILA claims can be considered a source of rights conferred to individuals. Liesbeth Zegveld also argues that:

> [T]he grave breaches provisions could be construed as conferring individual humanitarian rights against acts such as wilful killing, torture or inhuman treatment wilfully causing great suffering or serious injury to body and health. The same holds true for norms applicable in non-international armed conflicts, such as the prohibition of violence to life, outrages upon personal dignity, and humiliating and degrading treatment, stipulated in Article 3 common to the Geneva Conventions and in Article 4 of Additional Protocol II.[56]

If protected persons were only indirect beneficiaries of IHL, the Conventions would not have used rights-inflected language when referring, for example, to the non-renunciation of rights by prisoners of war.[57]

These precedents provide only mild recognition of the right of victims of war to obtain reparation. The ICRC study of customary IHL mentions several other cases of State practice. However, some of those references are opinions

is from Veronika Bílková, 'Victims of War and Their Right to Reparation for Violations of International Humanitarian Law', *Miskolc Journal of International Law* 4 (2007), 1–11 (11).

53 Cf. Christian Tomuschat, *Human Rights: Between Idealism and Realism* (New York: Oxford University Press, 3rd edn, 2014), 285.

54 Art. 27 of Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 UNTS 287, recognises rights to protected persons when affirming that '[p]rotected persons are entitled, in all circumstances, to respect for their persons'; Art. 30 affirms that '[p]rotected persons shall have every facility for making application to the Protecting Powers'.

55 Art. 7 of Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, 75 UNTS 135, recognises that prisoners of war have rights, stating that '[p]risoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention'; Art. 78 establishes that '[p]risoners of war shall have the right to make known to the military authorities in whose power they are, their requests regarding the conditions of captivity to which they are subjected. They shall also have the unrestricted right to apply to the representatives of the Protecting Powers.'

56 Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', *International Review of the Red Cross* 85 (2003), 497–526 (504).

57 See in detail Anne Peters, 'Direct Rights of Individuals in the International Law of Armed Conflict', in 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.

given in general by States[58] or pronouncements about obligations by other States.[59] Other instances of State practice being cited refer to reparation provided unilaterally by States absent clear *opinio iuris*, with some even expressing explicit reservations according to which those policies were held to be an acceptance of neither State responsibility nor an obligation to provide compensation for violations committed during World War II.

The ILA also lists precedents from national courts recognising the right of victims of armed conflict to reparation,[60] and even if these do not necessarily constitute a general acceptance of an individual right to reparation, they nonetheless demonstrate an increasing trend towards the understanding that it derives from a legal obligation.

In contrast, German courts have been reluctant to recognise the rights of victims of war to reparation. While consistently denying the claims of victims, however, some cases left room for accepting a contemporary right of victims of armed conflict to demand reparation. After some rulings left open the possibility of the existence of a right to reparation as *lege ferenda*,[61] more recent decisions have closed off that possibility. The German Federal Court of Justice (*Bundesgerichtshof*, or BGH) has affirmed:

> There is still no general rule of international law under which an individual is entitled to compensation or damages for violations of international humanitarian law. Despite the constantly advancing developments at the level of human rights protection, which have led to the recognition of the individual as a partial subject of international law as well as to the establishment of treaty-based individual complaints procedures, a comparable development in the field of secondary rules cannot be demonstrated. Claims for damages

[58] See, e.g., Croatia's comments on the 1997 version of the draft Principles and Guidelines on the Right to Reparations to Victims on the order of precedents of relatives of victims to receive reparations: Commission of Human Rights, Views and Comments (n. 50), 8.

[59] The reference to a 2001 Concurrent Resolution of the US House of Representatives relates to a pronouncement on the right of victims of sexual slavery during World War II to receive reparation from Japan.

[60] For example, the 1952 decision by the Higher Administrative Court of Münster (III A 1279/51, NJW 1952, 1030), which was based in an Allied High Commission Law, making only a general reference to Art. 3 of the 1907 IV Hague Convention, according to the ILA. A more recent case cited by the ILA is Gerechtshof te Amsterdam, Vierde meervoudige burgerlijke kamer, *Dedovic c.s. v. Kok, Van Aartsen and de Grave*, Judgment of 6 July 2000, in which a Dutch appellate court rejected the claims of distress suffered as result of NATO bombings in the former Yugoslavia because such distress did not amount to a harm resulting in violations of IHL. However, the ILA implicitly affirmed that victims suffering from such violations do have a right to reparation.

[61] BVerfG, *Distomo* case, Judgment of 26 June 2003, 42 ILM 1030, 1039 IV.2.bb; BGH, *Vavarin Bridge* case, Judgment of 2 November 2006, BGH III ZR 190/05.

> arising out of acts contrary to international law against third-country nationals are, as a matter of principle, still due ('*zukommen*') only to the home State.[62]

The Court asserted that the conclusion was based on 'a still valid conception of international law as an inter-state law [where] indirect international protection is granted to the injured individual by virtue of diplomatic protection'.[63] The decision has, however, been criticised for having excluded from the reach of jurisdictional examination actions committed by German State officials during armed conflict by means of a restrictive and originalist interpretation of the German State liability regime.[64] This criticism also affirms that the decision contradicts the jurisprudence of the ECtHR regarding the scope of application of the ECHR (see section II.C).

Another argument for recognising a right to reparation for victims of armed conflict based on both human rights law and IHL lies in the establishment of principles and procedures relating to reparation before the ICC. The Court affirmed its acceptance 'that the right to reparations is a well-established and basic human right, that is enshrined in universal and regional human rights treaties, and in other international instruments',[65] citing the provisions of the universal and regional human rights instruments. This is of particular relevance for the recognition of the right of victims of severe violations of IHL, because the Rome Statute operationalises the provisions forbidding grave breaches of IHL as crimes. The immediate source for the reparation orders by the ICC is Article 75 of the Rome Statute, which allows the Court to 'make an order directly against a convicted person'. This provision is not based on establishing State responsibility, yet it still affirms the existence of the right for victims. Moreover, the Court interpreted the obligation of States to provide 'other forms of cooperation', under Article 93, with regard to reparations limited to those set out at Article 93(1)(k), referring to '[t]he identification, tracing and freezing or seizure of proceeds, property and assets'.[66] The Assembly of States Parties had previously defined the scope of the jurisdiction of the Court in this regard as 'exclusively based on the individual criminal

[62] BGH, *Kunduz* case, Judgment of 6 October 2016, III ZR 140/15, para. 16 (author's translation).
[63] *Ibid.*
[64] Paulina Starski, 'The Kunduz Affair and the German State Liability Regime: The Federal Court of Justice's Turn to Anachronism', *EJIL: Talk!*, 5 December 2016, available at www.ejiltalk.org/the-kunduz-affair-and-the-german-State-liability-regime-the-federal-court-of-justices-turn-to-anachronism/.
[65] ICC, Decision Establishing the Principles and Procedures to Be Applied to Reparations, Trial Chamber I, ICC-01/04–01/06, 7 August 2012, para. 185.
[66] *Ibid.*, paras 150 and 276.

responsibility of a convicted person, therefore under no circumstances shall States be ordered to utilize their properties and assets, including the assessed contributions of States Parties, for funding reparations awards, including in situations where an individual holds, or has held, any official position'.[67]

This restriction is consistent with the regime established by the Rome Statute as a system of individual criminal responsibility. It is understandable that a criminal court dealing with the responsibility of individuals can neither assess State responsibility nor order States to provide reparation to victims. However, this does not mean that there is an absolute firewall between the judgments of the Court and the responsibility of States. A total separation is inconsistent with the types of crime covered, which in many cases require substantial control over resources and personnel that could allow establishing some level of responsibility of States. Moreover, it reflects the self-interest among States when defining international law in protecting themselves from liability, at the expense of the rights of victims of these crimes, even if the nature of the crimes might in many cases involve the responsibility of States. The findings of the Court can and should be used to establish State responsibility when the facts point towards substantial evidence that – in addition to the individual responsibility being determined by the Court – there could be State responsibility. This is not something to be ultimately decided by the Court, but in cases such as the investigation of crimes implicating a head of State whereby State resources were involved, it may be advisable for the Court to make a referral to another body to investigate and eventually establish State responsibility not only for the particular crimes investigated against the defendant, but also more generally on gross violations of international human rights law and IHL that could have been committed jointly with those crimes. This body could be the Human Rights Committee or the UN Security Council. Such referrals could help to provide a more comprehensive response to victims, not limiting reparation to the victims of the crimes of which the defendant is found guilty.

The system of liability established by the Rome Statute has other problems too. Since its reparation rulings can include victims of only the crimes of which the convicted person is found responsible, they leave many other victims without remedies. They can even render reparation decisions counterproductive, exacerbating intercommunity tensions and conflict. This is not a matter that the ICC can solve; it instead requires a coordinated effort with other mechanisms to establish the responsibility of States in relation to crimes found by the Court or violations committed in the wider context of those

[67] Resolution ICC-ASP/10/Res.3, adopted at the 7th Plenary Meeting on 20 December 2011.

crimes and which could reach victims of violations beyond those of which the accused has been convicted.

The precedents analysed show that the existence of an individual right to reparation from States for victims of war is not itself fully supported by IHL. Article 3 of the IV Hague Convention and Article 91 AP I are not yet univocally understood as contemplating a secondary right for victims. Even if the violations of IHL can be considered to have infringed rights of individuals, most commentators and decisions do not recognise the existence of a right for those victims to directly claim reparation.

What provides additional ground to affirm the existence of an individual right to reparation of victims of armed conflict, though, is the increased support that the evolution of human rights law provides. Courts that have recognised the rights of victims of armed conflict to reparation have used that source to complement the provisions of IHL and interpret them systematically.

C. *The Application of International Human Rights Law to Armed Conflict and the Right of Victims to Reparation*

The close relationship between human rights law and IHL can be observed in the preamble to Additional Protocol II of the Geneva Conventions (AP II), applicable to non-international armed conflict, which 'recall[s] that international instruments relating to human rights offer a basic protection to the human person' and 'emphasis[es] the need to ensure a better protection for the victims of those armed conflicts'.[68] This relationship, which is understandable in relation to human rights and its territorial applicability, also exists in the case of international armed conflict. Both fields have divergent origins and transformations, but up to only a certain point, because both stress the protection of human dignity and establish States' obligations. The recognition of human rights as a centrepiece of international law in the UN Charter occurred in reaction to the crimes committed during World War II, which led to the pillars of the regulatory edifice of both systems: the Universal Declaration of Human Rights, the 1949 Geneva Conventions, and the Convention on the Prevention and Punishment of the Crime of Genocide.

Even if, at its origins, this effect was unclear, the development of international human rights law and the changing nature of armed conflict have

[68] Preamble to the Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977, 1125 UNTS 609.

eroded the traditional separation between the two fields that had been prevalent since the origins of the law of war. The complexity of this relationship has been examined in depth in a previous volume of the Trialogues by Helen Duffy, who asserts that:

> [I]n recent decades there has been an overwhelming shift, such that the vast weight of international authority and opinion now confirms that [international human rights law] continues to apply in times of armed conflict. As such, the focus of the debate has shifted to *how* it co-applies alongside IHL . . . While, undoubtedly, some dispute on the relevance and applicability of human rights in armed conflict remains, . . . much of this reflects differing views on the pros and cons of how the law has developed, its historical or moral force, rather than on where the law stands today.[69]

This is less of a question in cases of non-international armed conflicts, in which human rights law is applicable in the territory of the State. The issue is more complex, however, for extraterritorial situations, in which in general human rights law is not applicable. Nevertheless, there is substantial support to affirm that the international human rights obligations of a State govern its conduct beyond its territory under a number of exceptional circumstances. Over the last two decades, we have seen a general deepening of the acceptance that international human rights law is applicable to the conduct of a State when it exerts 'effective control of the relevant territory and its inhabitants . . . exercis[ing] all or some of the public powers normally to be exercised by that government',[70] excluding situations entailing aerial bombing. Developing this notion further, the ECtHR has affirmed that State responsibility derives from several factors, including 'the strength of the State's military presence in the area [and] the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region'.[71]

This is consistent with the position adopted by the Human Rights Committee,[72] which used the concept of 'effective control' in cases of persons

[69] Helen Duffy, 'Trials and Tribulations: Co-applicability of IHL and Human Rights in an Age of Adjudication', in 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), 15–105 (19) (footnotes omitted).

[70] ECtHR, *Banković and Others v. Belgium and 16 other contracting States*, Grand Chamber Decision of 12 December 2001 (GC), Application No. 52207/99, Report of Judgments and Decisions 2001-XII, 355, para. 71.

[71] ECtHR, *Al-Skeini and Others v. United Kingdom*, Grand Chamber Judgment of 7 July 2011, Application No. 55721/07, para. 139.

[72] UNHRC, General Comment No. 31 (n. 4), para. 10.

detained by Uruguayan agents in Argentina and Brazil.[73] More recently, the Human Rights Committee has expressed that:

> [T]he Covenant applies with regard to all conduct by the State party's authorities or agents adversely affecting the enjoyment of the rights enshrined in the Covenant by persons under its jurisdiction regardless of the location . . . [and the State should] acknowledge that the applicability of international humanitarian law during an armed conflict, as well as in a situation of occupation, does not preclude the application of the Covenant.[74]

The International Court of Justice (ICJ) has supported this conclusion. In its Advisory Opinion on the *Israeli Wall* case,[75] the ICJ affirmed that violations of IHL give rise to an obligation of the State responsible for those breaches to provide reparation to those who suffered harm as a result. This served as the basis for the Court decision ordering reparation for violations of IHL and international human rights law in another international armed conflict: it decided that internationally wrongful acts committed by Uganda, including violations of IHL and international human rights law, which resulted in injury to the Democratic Republic of Congo and to persons in its territory gave rise to an obligation of Uganda to provide reparation for such violations.[76]

How these two different bodies of law interact, however, is not easy to delineate. The context of war, in which some forms of large-scale violence and destruction are permitted, makes many provisions under human rights inapplicable. However, this does not mean that the human rights obligations of States are entirely irrelevant in situations of war. Helen Duffy affirms the need for co-applicability, 'ensur[ing] that the human rights norms are not set aside to a greater extent than justified, consistent with the principle of IHRL [international human rights law] that permissible restrictions on rights should be no more than necessary'.[77] She exemplified this approach following the ECtHR's reasoning in *Hassan*,[78] in which 'each area of law informed the

[73] Human Rights Committee, *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979, UN Doc. CCPR/C/OP/1 at 88 (1984), para. 12; Human Rights Committee, *Lilian Celiberti de Casariego v. Uruguay*, Communication No. 56/1979, UN Doc. CCPR/C/OP/1 at 92 (1984), para. 10.

[74] UNHRC, Concluding Observations on the Fourth Periodic Report of Israel, 21 November 2014, UN Doc. CCPR/C/ISR/CO/4.

[75] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 136, paras 109, 152–3.

[76] 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.

[77] Duffy, 'Trials and Tribulations' (n. 69), 83.

[78] *Ibid.*, quoting ECtHR, *Hassan v. United Kingdom*, Grand Chamber Judgment of 16 September 2014, Application No. 29750/09, para. 106.

interpretation of the other – in interpreting the relevant rules of IHL, namely, the review by a competent body with "sufficient guarantees of impartiality and fair procedure", the Court returned to Convention standards'.

The interplay between these two bodies of law can be summarised with reference to the affirmation made by Christopher Greenwood when commenting on the ICJ's *Nuclear Weapons* advisory opinion: 'Instead of the treaty provisions on the right to life adding anything to the laws of war, it is the laws of war, which may be of assistance in applying provisions on the right to life.'[79] Greenwood offers four situations in which international human rights are of importance to the conduct of war:

1. determining the rights of people who may not be covered by IHL, as in the case of the nationals of a belligerent party;
2. helping to interpret some provisions of IHL, for example in defining the requirements by which due process in the context of war complies with the essential requirements of impartiality and independence;
3. in cases involving the occupation of territory and the rights of its inhabitants; and
4. in the provision of a more effective enforcement machinery.[80]

This poses an important question: to what extent does the factual description 'armed conflict' influence the *right of victims to an effective remedy* enshrined in Article 2(3) ICCPR?

Determining the extent of the right of victims of armed conflict to reparation requires assessing to what degree and under what conditions the right of victims to an effective remedy subsists or is affected by a situation of armed conflict. As the ILC Fragmentation Study concludes, 'this requires [a] weighing of different considerations and not just deciding based on the expression of a preference. Then it must seek reference from what may be argued as the systemic objectives of the law, providing its interpretative basis and *milieu*.'[81]

It can be concluded that the obligation of States to ensure *in their own legal system* that a victim of human rights violations can obtain redress and has an enforceable right to fair and adequate compensation is an obligation applicable, under the circumstances discussed, to armed conflict. This includes both

[79] Christopher Greenwood, 'International Humanitarian Law (Laws of War): Revised Report for the Centennial Commemoration of the First Hague Peace Conference 1899', in Frits Kalshoven (ed.), *The Centennial of the First International Peace Conference: Reports and Conclusions* (The Hague: Kluwer Law International, 2000), 161–259 (188).

[80] *Ibid.*, 189–90.

[81] ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 13 April 2006, UN Doc. A/CN.4/L.682, para. 107.

the existence of a mechanism in the domestic system to guarantee that right and the effectiveness of said mechanism to provide prompt and effective remedies to victims, considering the context. In addition, there is strong support for affirming the existence of the obligation of States to provide reparation to victims of human rights violations even in the context of armed conflict with regards to rights that are non-derogable, or when conditions for the suspension of those rights are not met due to proportionality or discrimination. Objections to recognising secondary rights of victims of war, which are still a frequent practice among States and courts, have not addressed the applicability of human rights law to armed conflict or its interplay and concurrent application with IHL. Looking 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. This limited interpretation results in a restriction on the rights of victims of armed conflict, because they would not be recognised as bearers of rights stemming from international human rights law.

III. THE PRACTICAL REALISATION OF THE RIGHT TO REPARATION IN ARMED CONFLICT

There is little effect on recognising the existence of a right if the mechanisms available for the right bearer are non-existent, inaccessible, or compromised by a lack of independence from the respective government. In cases of war, which often involve large numbers of victims who live in war-torn societies, questions about the availability of effective mechanisms are even more important. Not only do such questions require examination of what the different legal regimes offer, but also they require examination of what, in concrete terms, they have delivered to them.

A comprehensive examination of all of the available mechanisms is beyond the scope of this chapter.[82] Those mechanisms include international human rights bodies that are part of the United Nations' system of human rights protection, established by different treaties. They include the regional human rights mechanisms mentioned in section I, based on regional human rights conventions (the ECHR, ACHR, and APHRC). They also include international criminal courts, such as the International Criminal

[82] For a comprehensive assessment of the different mechanisms that exist in international law, see Dinah Shelton, *Remedies in International Human Rights Law* (New York: Oxford University Press, 3rd edn, 2015); Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (New York: Cambridge University Press, 2012).

Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Court for Sierra Leone (SCSL) and the ICC, as well as their respective mechanisms for ordering reparations or for helping victims to exercise their right to reparation through other tribunals. Among these mechanisms, the Trust Fund for Victims established by the Rome Statute offers a different approach, because it is not limited to victims of the particular crime. However, none of these international criminal courts has jurisdiction to establish the responsibility of the State.

Another possible route for realising the right to reparation relies on domestic courts. This includes, first, seeking reparation from courts belonging to the responsible State, which often involves obstacles in terms of the independence of courts, the application of the act of government or the political question doctrine; secondly, it involves seeking reparation through a third-party State – that is, neither the responsible State nor the State within which the violation was committed. When seeking State responsibility, this approach requires a party to overcome the obstacle of jurisdictional immunities.

Rather than discussing these different mechanisms in detail, the focus in this section will be on analysing those mechanisms that could be used in cases with large numbers of victims. Given the usually large-scale nature of armed conflicts, this approach aims to identify and assess how the right to reparation can be realised in practice for all victims of an armed conflict, as well as to respond to one frequent criticism – that is, the impracticability of a right of victims of war to reparation.[83] This focus is also apt to identify mechanisms suitable for reaching those victims who may have less information, connection, or resources to access justice and redress, particularly because courts or international bodies speak a language of law that is unfamiliar to many victims and are often located outside of the victims' State of nationality. This requires an examination of the degree to which existing mechanisms for redress have been effective in providing reparation to the poor, the marginalised, and women, among the potential victims in a conflict. From that analysis, some lessons will be distilled that might provide guidance on what to prioritise and which choices to make when designing mechanisms in the future.

Furthermore, this section will concentrate on how massive reparation efforts can, first and foremost, respond to the rights of victims of personal

[83] Christian Tomuschat, 'Specificities of Human Rights Law and International Humanitarian Law regarding State Responsibility', in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Northampton, Mass.: Edward Edgar, 2013), 198–222 (206–7).

harm. The intention is to stress the importance of responding to harms that cause severe suffering and affect the essential dignity of victims, particularly regarding the rights of life and personal integrity. This includes analysing one example of an internationally mandated reparation programme, the UNCC, and one example of reparation established by inter-State agreement, the EECC, both of which have dealt with personal harms. A further analysis then follows of several reparation programmes implemented to address the consequences of internal armed conflict, as well as in regard to post-authoritarian regimes, which have faced challenges that can offer lessons for addressing large-scale harm and personal loss resulting from armed conflict. The parallel between these two types of experience is not frequently explored when addressing reparation for victims of armed conflict and therefore may offer relevant insights.

Focusing in this way does not, however, mean dismissing the importance of the Trust Fund for Victims, the human rights mechanisms of the UN system, regional human rights commissions and courts, or the role of domestic courts. Each can be used effectively to respond to the rights of a particular victim or group of victims in the aftermath of a massacre or a particular military operation. They can also be used strategically, leading to broader class actions, or they can place political pressure on States to establish policies that could cover a whole category of victims, as was the case of the German Forced Labour Compensation Programme. Commissions of inquiry established by the Human Rights Committee have recommended broader reparation policies and political pressure deriving from the decisions of universal or regional human rights bodies can have similar effects.

A. *Reparation under International or Inter-State* Ad Hoc *Mechanisms*

Frequently, inter-State agreements after war are the result of extraordinary circumstances, which explains why there is no standard practice on defining them. After the atrocities perpetrated by its occupying forces, postwar Germany needed to come to terms with its neighbours and the international community to be accepted back into the community of nations. Establishing a common market in Western Europe and the need to ask for the protection of the United States and North Atlantic Treaty Organization (NATO) during the Cold War made this need more pronounced.

Resolutions of the UN Security Council establishing reparation mechanisms are also extraordinary in nature. The need to guarantee conditions for the return of large numbers of Bosnian refugees who fled to other European countries after evictions and ethnic cleansing required restitution of their

homes. This need helps to explain the creation of the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina. Security Council Resolution 687, which created the UNCC, is also a product of extraordinary circumstances – that is, the near-universal denunciation of the 1990 Iraqi invasion of Kuwait, the uncontested influence of the United States in the Security Council during the years following the collapse of the Soviet Union and the possible seizure of Iraq's oil exports. The apparent influence played by legal experts close to the Permanent Court of Arbitration (PCA) and the UNCC during the negotiation of the Algiers Agreement between Eritrea and Ethiopia might explain the creation of the EECC in addition to the Boundaries Commission.[84] Among the key factors underlying the creation of these mechanisms are political considerations made by the Permanent Members of the Security Council. The Commission of Inquiry on Darfur submitted two requests to the Security Council. One aimed at referral of the situation to the ICC; the other aimed at establishment of a compensation commission:

> ... not as an alternative, but rather as a measure complementary to the referral to the ICC. States have the obligation to act not only against perpetrators but also on behalf of victims. While a Compensation Commission does not constitute a mechanism for ensuring that those responsible are held accountable, its establishment would be vital to redressing the rights of the victims of serious violations committed in Darfur.[85]

However, Security Council Resolution 1593 responded only to the recommendation on referral to the ICC.[86] Victims' right to reparation, abundantly justified by the Commission in this particular situation 'on practical and moral grounds, as well as on legal grounds',[87] was wholly ignored. As Christine Evans points out:

> The indirect mention of the Trust Fund for Victims [encouraging States to contribute to it] is the only mention of the word 'victims', while the terms 'compensation' or 'reparation' do not figure at all in the resolution. Scholars' and the public debate at the time mainly focused on the political dimensions

[84] Ari Dybnis, 'Was the Eritrea–Ethiopia Claims Commission Merely a Zero-Sum Game? Exposing the Limits of Arbitration in Resolving Violent Transnational Conflict', *Loyola Los Angeles International and Comparative Law Review*, 33 (2011), 255–86 (259).

[85] International Commission of Inquiry of Darfur, Report to the Secretary-General, 25 January 2005, para. 590.

[86] Security Council Resolution 1593 of 31 March 2005.

[87] International Commission of Inquiry of Darfur, Report 2005 (n. 85), para. 592.

of the referral to the ICC, while the recommendation regarding compensation was treated as a peripheral issue.[88]

Even if extraordinary and *ad hoc* in nature, these examples offer interesting lessons that can be useful for defining reparations mechanisms for victims of armed conflict. For the purpose of this chapter, the most relevant cases are the UNCC and the EECC, because both examined claims involving personal harm caused by war, particularly killings and violations of physical integrity. Those limited to property rights, such as the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina, the Housing and Property Claims Commission of Kosovo, or the Iran–United States Claims Tribunal, are interesting too, but they offer few insights into how to respond to personal harms.[89]

1. The United Nations Compensation Commission

The UNCC had to address the daunting task of responding to large numbers of differing claims resulting from Iraq's 1990 invasion of Kuwait. The UNCC's mandate included harm resulting from violations of both the *ius in bello* and *ius ad bellum*,[90] even though the Commission largely addressed violations of the latter type. It received 2.6 million claims from ninety-six governments and it also allowed stateless persons to send their claims through non-State entities.[91] It awarded a total of 52.4 billion USD in compensation.[92] What is particularly relevant is that, despite the number and diversity of claims, the Commission assessed and granted awards that resulted in actual payments. Two conditions made this possible: (a) the particular nature of the Commission, which was responsible for distributing a fund that had a guaranteed source of income by means of a mechanism channelling a percentage of Iraqi oil sales to it; and (b) a departure from the traditional notion that States would represent the interests of the claimants.

The Commission did not receive claims directly, but through specially authorised governments and entities. However, the awards were granted individually and not in bulk to those States. The claimants were recognised as the subjects of their claims, even if a government played a significant role in

88 Evans, *The Right to Reparation* (n. 82), 144.
89 They are analysed by Furuya, 'Right to Reparation', Chapter 1 in this volume, section III.C.
90 Security Council Resolution 687 of 3 April 1992, para. 16.
91 Norbert Wühler and Heike Niebergall, *Property Restitution and Compensation: Practices and Experiences of Claims Programmes* (Geneva: IOM, 2008), 26.
92 UNCC, 'What We Do', available at www.uncc.ch/what-we-do.

collecting and sending their claims to the Commission, or in receiving the funds and making the direct payments to the victims through a process closely monitored by the Commission.[93]

Another relevant feature of the Commission was how it prioritised claims related to personal losses over property and corporations' claims for both processing and payment. This included: category A claims, involving individuals who had fled Kuwait after the invasion; category B claims, involving serious personal injuries, including the death of a direct relative; and category C claims, related to individual claims for losses of up to 100,000 USD. This latter category covered twenty-one types of loss, including losses occurred because of being forced to flee Kuwait as result of the invasion, other forms of personal injuries or anguish and property losses or a loss of income. Category D claims were similar to those of category C, but amounted to losses in excess of 100,000 USD. Category E claims addressed corporations and public-sector enterprises, and category F claims addressed governments and international organisations, including costs for evacuating citizens, government property damage, or environmental damage.[94]

Claims under categories A, B, and C needed to derive directly from certain violations resulting from Iraq's invasion and occupation of Kuwait. The first decision by the Governing Council of the Commission stated that claims under category A referred to people who left Kuwait between 2 August 1990 and 2 March 1991. Categories B and C included 'death, personal injury or other direct loss to individuals as a result of Iraq's unlawful invasion and occupation of Kuwait'.[95] Given that the majority of claims were about individual losses,[96] the Commission adopted different criteria for assessing each. An expeditious process granted 2,500 USD for those forced to leave the country, for serious personal injury, and for those whose spouse, child, or parent had died. The decisions were based on the provision of simple documentation regarding only the facts and dates, as well as the family relationship

[93] Norbert Wühler, 'The United Nations Compensation Commission', in 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), 213–29 (218).

[94] Wühler and Niebergall, *Property Restitution and Compensation* (n. 91), 27.

[95] UNCC, Criteria for Expedited Processing of Urgent Claims, 2 August 1991, UN Doc. S/AC.26/1991/1, para. 18.

[96] Of the 2,686,131 claims received, 2,667,129 were about personal losses, of which 923,158 were under Category A, 5,734 under Category B, and 1,738,237 under category C: see UNCC, 'Summary of Awards and Current Status of Payments', available at www.uncc.ch/summary-awards-and-current-status-payments.

in those cases involving death;[97] detailed documentation about the material or immaterial damages was not required. Additional losses had to be claimed under category C (up to 100,000 USD) or under category D for larger amounts, which required additional evidence.[98] For assessing claims for harms under category C, 'the Commission employed, in addition to individual review of claims where necessary, a variety of internationally recognized techniques for claims processing, including computerized matching of claims and verification information, sampling, and, for some loss elements in category "C", statistical modelling'.[99] To guarantee the availability of funds, the Commission made an initial payment of 2,500 USD for all approved claims under categories A, B, and C, followed by full payment of all awards under category B. Subsequent payment phases completed the award of claims under categories A and C, including some meaningful payments for the remaining categories.[100]

An overall examination of the compensation paid, however, shows that even if the majority of the recipients were individuals, most of the fund was used to pay claims under categories D, E, and F, which were also the most costly. Of the 47.9 billion USD paid, 13 million USD (less than 0.03 per cent) went to the 3,935 victims who suffered the death of a family member or who experienced serious personal injury under category B. More than 3 billion USD (less than 6.3 per cent) went to claimants under category A for losses resulting in having to leave Kuwait and more than 5 billion USD (less than 10.5 per cent) went to victims under category C.

Figure 2.1 compares the distribution of payments and claims awarded for each category. Some categories do not appear in the figure given their small relative size.[101]

On average, each claimant under category B received 3,400 USD. What remained went either to individuals or entities for harms that, in most cases, related to property losses, even if there were some claims under categories C and D that corresponded to loss of life or harms to personal integrity. It is illustrative to contrast the total amount for personal losses with that paid under category E1 (claims by corporations, private legal entities. or public-sector enterprises from the oil sector). Sixty-seven corporations received a total

[97] This amount was capped at 10,000 USD for families. See Wühler, 'The United Nations Compensation Commission' (n. 93), 221.
[98] UNCC, Criteria for Expedited Processing of Urgent Claims (n. 95) sections 10–15.
[99] UNCC, 'Claims Processing', available at www.uncc.ch/claims-processing.
[100] Wühler and Niebergall, *Property Restitution and Compensation* (n. 91), 93.
[101] Author's own illustration based on UNCC figures available at https://uncc.ch/summary-awards-and-current-status-payments.

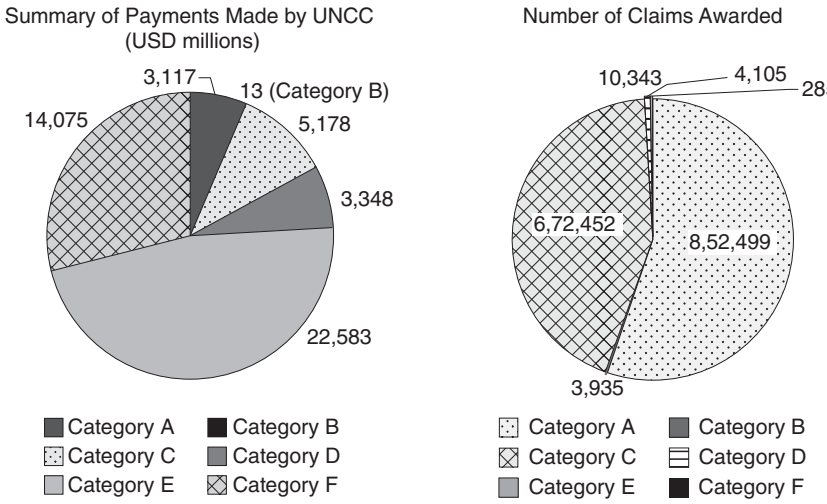

FIGURE 2.1 Distribution of Payments and Claims by the UNCC

amount of 17 billion USD. It is true that losing property, savings, or expected earnings can be devastating for individuals and families. However, such losses cannot be compared easily to losing a loved one or to experiencing torture. The disparity between the amounts awarded for the loss of life or harms affecting personal integrity and for loss of property is not the result of the Commission having erred in its assessment of the claims received, but of the general structure of the programme, which derived from its extraordinary circumstances and the power dynamics that led to its creation. Because it was able to tap into unprecedented resources seized from Iraq by the UN Security Council, the programme covered all types of harm, from personal to property. If the availability of funds had been more limited, as is common in cases of international war or internal armed conflicts – that is, in cases in which the wealth of the defeated party cannot be partially seized for funding reparation – the distribution of awards and even the structuring of categories defining the parameters for claimable losses would necessarily have been limited.

2. The Eritrea–Ethiopia Claims Commission

The EECC offers important lessons in two different aspects: the definition of violations of *ius in bello* that gave rise to liability; and the definition of compensation amounts for those violations that were established. However,

https://doi.org/10.1017/9781108628877.003 Published online by Cambridge University Press

despite these contributions, there are aspects of the Commission's work and framework that make it a dangerous precedent for addressing harms caused to victims of armed conflict. The results of the EECC show how inadequate it is to continue relying on inter-State arbitration procedures if the goal is to respond to harms suffered by victims of war.

The EECC assessed the claims presented by both States for loss, damage, or injury relating to the conflict and resulting from violations of IHL. The assessment made of each claim serves as useful guidance for evaluating under which conditions harms committed during an international armed conflict can lead to State liability, including the determination of how to define the degree of responsibility of the corresponding State for the harms caused. These are relevant contributions for the development of the case law on grave breaches of IHL and the obligation to provide reparation to victims. Particularly relevant are the standards used for assessing claims for indiscriminate shelling and aerial bombardment against civilian targets, taking into account the specific context and the role played by both parties in preventing civilian casualties.[102] The allocation of 'the percentage of the loss, damage or injury concerned for which [the Commission] believes the Respondent is legally responsible, based upon [the Commission's] best assessment of the evidence presented by both Parties' is also useful for establishing criteria when there are multiple causes operating at the time.[103] The work of the Commission also offers useful guidance for the examination of allegations of rape and sexual violence. It stressed that IHL protects persons subjected to rape and sexual violence, emphasising that rape 'is an illegal act that need not be frequent to support State responsibility'; the Commission 'look[ed] for clear and convincing evidence of several rapes in specific geographic areas under specific circumstances'.[104] It is also relevant that the Commission affirmed the obligation of the parties to 'impose effective measures, as required by international humanitarian law, to prevent rape of civilian women', especially in areas where large number of troops were in close proximity to civilian

[102] EECC, Partial Award: Central Front, Ethiopia's claim 2, 28 April 2004, Reports of International Arbitral Awards XXVI (2009), 155–94; EECC, Partial Award: Western Front, Aerial Bombardment and Related Claims, Eritrea's claims 1, 3, 5, 9–13, 14, 21, 25 & 26, 19 December 2005, Reports of International Arbitral Awards XXVI (2009), 291–349; Partial Award: Western and Eastern Fronts, Ethiopia's claims 1 & 3, 19 December 2005, Reports of International Arbitral Awards XXVI (2009), 351–80. See also President van Houtte's separate opinion on the aerial bombardment of the Hirgigo Power Station, Reports of International Arbitral Awards XXVI (2009), 346–9.

[103] EECC, Partial Award: Central Front, Ethiopia's claim 2 (n. 102), para. 23; Western Front, Aerial Bombardment and Related Claims, Partial Award (n. 102), para. 21.

[104] EECC, Partial Award: Central Front, Ethiopia's claim 2 (n. 102), para. 38.

populations for long periods of time, which was thought to generate the greatest risk of opportunistic sexual violence by troops.[105] Finally, the Commission made several distinctions regarding displaced persons and liability for violations of IHL, particularly between persons displaced as a result of fear, which the Commission called 'indirect displacement', and displacement resulting from orders or forceful actions – that is, 'direct displacement'.[106]

The Commission also developed an interesting notion for defining the compensation awards, considering the limited evidence of the harms. The Commission considered that the lack of evidence due to the nature and extent of the case demanded a trade-off. This notion was based on experiences of other bodies, such as the UNCC, where adopting less rigorous standards of proof resulted in reduced compensation levels. As the EECC explained, it 'took into account a trade-off fundamental to recent international efforts to address injuries affecting a large number of victims. Compensation levels were thus reduced, balancing the uncertainties flowing from the lower standard of proof.'[107]

The Commission used the notion of proximate cause to define causation. The criterion considered the foreseeability of the consequences resulting from the actor's violation as an element that 'provides some discipline and predictability in assessing proximity'.[108] However, foreseeability was used as a consideration and thus not a determinant factor. Other factors for determining the awards were:

> ... the nature, seriousness and extent of particular unlawful acts. It has examined whether such acts were intentional, and whether there may have been any relevant mitigating or extenuating circumstances. It has sought to determine, insofar as possible, the numbers of persons who were victims of particular violations, and the implications of these victims' injuries for their future lives.[109]

The EECC also made a distinction between the standard of evidence to establish that damage at all occurred:

> [F]or purposes of quantification, it has required less rigorous proof. The considerations dictating the 'clear and convincing standard' are much less compelling for the less politically and emotively charged matters involved in

[105] *Ibid.*, para. 39.
[106] EECC, Partial Award, Western and Eastern Fronts, Ethiopia's claims 1 & 3 (n. 102), paras 2, 138–9 and 142.
[107] EECC, Final Award: Ethiopia's Damages Claims, Reports of International Arbitral Awards XXVI (2009), 631–770 (634).
[108] EECC, Final Award: Eritrea's Damages Claims, Reports of International Arbitral Awards XXVI (2009), 505–630, para. 39.
[109] *Ibid.*, para. 40.

> assessing the monetary extent of injury . . . Requiring proof of quantification of damage by clear and convincing evidence would often – perhaps almost always – preclude any recovery. This would frustrate the Commission's agreed mandate to address 'the socio-economic impact of the crisis on the civilian population' under Article 5(1) of the Agreement.[110]

However, other criteria used by the Commission require more careful scrutiny and even robust criticism. One is the decision to determine liability not for each individual incident, but for 'serious violations of the law by the Parties, which are usually illegal acts or omissions that were *frequent or pervasive* and consequently affected significant numbers of victims'.[111] This standard for defining State liability resulted in the rejection of several claims not because the Commission found that they did not pertain to serious violations of IHL, but because they did not respond to a demonstrated pattern of abuse, were not widespread enough or were not of a pervasive nature. Violations such as summary executions, even if sufficiently established by the Commission, did not result in the ordering of awards in favour of the victims. Moreover, most of the claims accepted regarding *ius in bello* referred to looting and the destruction of property, because they complied with the requirement of being widespread. In three situations, the Commission did not apply this requirement, apparently because it considered the violations pervasive enough, even if insufficiently frequent, to form a pattern – namely, on assessing rape,[112] on the forceful displacement of the residents of a village,[113] and on the destruction of a monument of incalculable cultural value.[114]

Requiring some violations to be frequent and excluding summary executions from the notion of pervasiveness is a serious pitfall. The lack of a clear justification for this choice only compounds the problem. It is understandable that a cut-off criterion might be defined based on severity, but severity should refer to the nature of the violations suffered by victims entitled to reparation and not to the nature of the responsible State's wrongdoing, which the EECC assumed was demonstrated by the frequency and widespread nature of the violations. Defining a mechanism for assessing the rights of victims of war in

[110] EECC, Final Award: Eritrea's Damages Claims (n. 108), para. 36.

[111] EECC, Partial Award: Western Front, Aerial Bombardment and Related Claims (n. 102), para, 78; Partial Award, Western and Eastern Fronts, Ethiopia's claims 1&3 (n. 102), para. 53 (emphasis added).

[112] EECC, Partial Award: Central Front, Ethiopia's claim 2 (n. 102), para. 38.

[113] EECC, Western Front, Aerial Bombardment and Related Claims, Partial Award (n. 102), para. 139.

[114] EECC, Partial Award: Central Front, Eritrea's claims 2, 4, 6, 7, 8 & 22, 28 April 2004, Reports of International Arbitral Awards XXVI (2009), 115–53, paras 107–14.

contexts of large-scale violations does not imply adding a requirement for those violations to be systematic or widespread. As Emanuele Sommario rightly concludes, by limiting reciprocal claims to widespread and systematic violations, the parties absolved themselves of the liability they incurred in respect of grave breaches of the Geneva Conventions, because they imposed a restriction on victims who might otherwise pursue reparation through other means.[115]

The Final Award decision reveals too the shortfalls involved in relying on States to submit claims on behalf of their nationals. The Commission, facing time and resource constraints, opted 'not to utilise mass claims procedures envisioned as a possible option',[116] but to proceed in the same way as the UNCC: by receiving the claims of individuals only through their respective States or other bodies. However, a solution that was adequate in the context of the nature of the claims and the capacity of the States in the UNCC case was not appropriate to a conflict of this nature. The EECC had to overcome considerable obstacles in examining forms submitted by Eritrea that were incomplete, did not respond to the findings of liability by the Commission or lacked supporting evidence, highlighting the risk of relying on States with different capacities to conduct adequate outreach and registration.

The EECC held that '[t]he claims before the Commission are the claims of the Parties, not the claims of individual victims'.[117] It considered that it could assess only the damages of the claimant State, because fixed-sum damages to be distributed to the individual 'would not reflect the proper compensation of that individual'.[118] In the Commission's reasoning, since it was impossible to assess the conditions of detention for each prisoner of war, compensation amounts would not respond proportionally to the harm suffered; it was better to determine damages globally for each State, leaving to the States the task of distributing any award among the direct victims. The Commission encouraged the parties to compensate each victim appropriately, but limited its role to 'calculat[ing] the damages owed by one Party to the other'.[119] With regard to the awards for victims of rape, 'the Commission express[ed] the hope that Eritrea (and Ethiopia) will use the funds awarded to develop and support

[115] Emanuele Sommario, 'State Responsibility for Violations of International Humanitarian Law in the Work of the Eritrea–Ethiopia Claims Commission', in Andrea de Guttry, Harry H. G. Post, and Gabriella Venturini (eds), *The 1998–2000 War between Eritrea and Ethiopia: An International Legal Perspective* (The Hague: T.M.C. Asser Press, 2009), 393–407 (405).

[116] EECC, Final Award: Eritrea's Damages Claims (n. 108), para. 65.

[117] EECC, Final Award: Ethiopia's Damages Claims (n. 107), para. 209.

[118] *Ibid.*

[119] *Ibid.*

health programmes for women and girls in the affected areas',[120] but it could not guarantee that either party would do so.

A possible explanation for these limitations on the work of the Commission was the one-year time frame imposed by the Algiers Agreement in which to receive claims, and the need to simplify and expedite the process. However, if there had been an interest by any of the Parties or pressure from the Commission itself, there was no reason why the deadline could not have been moved to allow implementation of a mass claims process.[121] These constraints do not fully justify the Commission's shortfalls. The self-imposed mindset among the legal experts of the Commission, limiting matters to an inter-State process, provides the more relevant lesson on how a huge effort can result in little more than declaratory decisions.

The outcome of this extensive work was a process whereby the governments of Eritrea and Ethiopia competed between themselves on the question of which State could demonstrate that it had suffered *more violations* of IHL, so as to determine which of them suffered *more harm* as result of those violations. Tabling a debate about the existence of a violation of *ius ad bellum* did not help matters; rather, it increased the stakes for the competition of claims. The Commission examined each claim carefully and tried to subject each to rigorous legal reasoning, but it entirely failed to respond to the expectations and needs of victims, because it relied on the State-centred, lump-sum settlement approach that had been prevalent before 1990, but that which, as Furuya explains elsewhere in this volume,[122] has been superseded by a growing social consciousness of the right of individual victims to reparation. By expecting States to truly represent the interests of victims, the Commission failed in what was its most important task.[123]

B. *Reparation through State Administrative Processes*

On occasion, States have unilaterally instituted policies for providing reparation or assistance to victims of armed conflict. These policies are in line with the call in the UN Basic Principles for the establishment of 'procedures to

[120] *Ibid*., para. 110.

[121] Dybnis, 'Zero-Sum Game' (n. 84), 269–70.

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

[123] In support to this assertion, the US Court of Appeals of the District of Columbia considered that the Commission's inability to make an award directly to Nemariam and Eritrea's ability to set off Nemariam's claim, or an award to Eritrea based upon her claim against claims made by or an award in favour of Ethiopia rendered the Commission an inadequate forum: *Nemariam v. Federal Dem. Republic, Ethiopia*, 315 F.3d 390 (D.C. Cir. 2003).

allow groups of victims to present claims for reparation and receive reparation, as appropriate',[124] without depending on court decisions. Some even provided important precedents that led to the development of the UN Basic Principles. However, they are frequently omitted from studies about reparation under international law.

These policies have been defined by different States based on the understanding that they respond to a moral and political duty, that they are rooted in the States' human rights obligations, and, on occasion, that a State must specifically acknowledge its responsibility. This has occurred more often for internal armed conflicts, for example in the cases of Guatemala, Peru, Sierra Leone, Colombia, Nepal, Sri Lanka, and the Philippines. The nature of these programmes varies: some are a response to an acknowledgement of responsibility and, as such, can be considered forms of reparation, while others are framed as relief or assistance resulting from solidarity, social cohesion, or reconstruction imperatives. Yet others, as in Rwanda, target only Tutsi victims, or victims of the State's own recognised nationality, as was the case for the different laws providing assistance to victims in the former Yugoslavia. Some combine victims of violations of IHL committed during internal armed conflict perpetrated by different parties in the conflict with victims of human rights violations committed by repressive States. More extraordinary are policies that refer to violations committed by one State during an international armed conflict, as is the case with policies implemented by Germany to respond to violations committed by the Nazis.

The particular relevance of these policies is their ability to include large numbers of victims, making them more accessible and comprehensive than individual, or even collective, claims through courts or through international human rights mechanisms. Many of them have developed processes for registering victims and providing forms of reparation that are highly efficient, less formalistic, and more accessible than any court by not requiring legal representation or lengthy litigation. Some of these policies depart from the traditional approach of assessing claims or the approaches used in class action suits, simplifying the process by registering victims only according to standardised categories of violation and providing reparation measures to all those who suffered similar crimes. Similarly, they have not adhered to the reasoning usually used by courts or defined for violations of individual rights.

This flexibility, however, is also a matter of concern. The policies may have been defined without clear standards of how they should respond to legal obligations. The variety of the experiences and the lack of definition of what

[124] Basic Principles (n. 44), para. 13.

constitutes appropriate reparation are strong arguments for denying such a programme's character as a rights framework. Lacking a clear justification for the forms of reparation included in several of these programmes, and particularly compensation amounts, can give the impression that those definitions are arbitrary or that the awards are merely forms of assistance rather than a response to the recognition of rights. One particular aspect that is not sufficiently developed in how some programmes define reparation awards is their understanding of proportionality[125] and the need to 'take . . . account of individual circumstances'.[126] If individual circumstances are essential elements of the obligation to provide reparation, how can reparation programmes address them? The examination conducted by the IACtHR of some of these programmes, discussed by Sandoval elsewhere in this volume,[127] has contributed to challenging those cases where policies implemented do not respond to a rights framework. However, the question is complex, because standards defined for individual or exceptional violations are difficult to apply in contexts of massive violations not only because of the costs, but also because the process for determining reparation amounts could be burdensome and could translate into exclusion of those without sufficient documentation, or those who are not in a position to provide details about the violation they suffered or its consequences.

Those standards need to be based on two core principles, both of which are essential to ensure that the reparation effort will be 'adequate, effective and prompt',[128] which also means being realistic in terms of guaranteeing its implementation: focusing on the most pervasive violations; and guaranteeing accessibility to all victims of those violations. The first principle responds to the need to address violations that have created the most severe suffering, which compromises a society's ability to heal. In some cases, this requires limiting the violations to be covered to those considered more serious. The second principle is about making sure to include all victims of those violations, with particular consideration for those who must overcome obstacles if they are to exercise and claim their rights. This does not involve rejecting the legal framework for the right of victims to reparation, but interpreting the framework in a way that is consistent with these two

[125] Understood as compensation 'for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case': *ibid.*, para. 20.

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

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

[128] The essential characteristics of the right to reparation of victims of violations of IHL and international human rights as described by the Basic Principles (n. 44), para. 11.b.

principles. To explain them, the following sections will present the different ways in which a policy can be defined and implemented. This includes determining:

- which categories of victim to be covered;
- the forms of reparation for each category;
- the criteria needed for registering victims to guarantee accessibility;
- how to define implementation mechanisms for guaranteeing accessibility; and
- how these efforts relate to judicial decisions and to other reconstruction or collective forms of reparation.

To understand what these two principles – focusing on the most pervasive violations and guaranteeing accessibility to all victims of those violations – require, it is useful to examine efforts implemented to respond to large-scale violations. This is something that might be illuminated by analysing the experiences of different reparation programmes, examining how they interpreted the obligation to provide reparation and how they were able to reach the most affected victims. For that purpose, the following section will first analyse a number of reparation programmes (section III.B.1), the characteristic features of which in dealing with massive numbers of claims are then dealt with in the following section (section III.B.2).

1. Examples of Domestic Reparation Programmes

Although it is not possible to include a description of all domestic reparation programmes, some are of particular relevance for this study because they relate to post-conflict situations dealing with massive numbers of claims. To facilitate an understanding of the different experiences, this section will offer a brief explanation of the most relevant cases – namely, the programmes implemented in Guatemala, Peru, Sierra Leone, and Colombia. References to the policies implemented in Chile, even if they address human rights violations under a dictatorship, will also be included, as well additional examples from other countries.

a) reparation to victims of internal armed conflict in guatemala

Guatemala was affected by an internal armed conflict from 1962, when armed guerrilla groups rose up against the autocratic regime that had been accentuating the historical exclusion – that is, since the colonial period and up to and beyond independence – of indigenous and poor communities. The Cold War exacerbated the conflict, which increased in intensity,

https://doi.org/10.1017/9781108628877.003 Published online by Cambridge University Press

particularly during the early 1980s when government repression included acts of genocide against indigenous communities. One estimate puts the total people killed or forcefully disappeared during that time at more than 200,000. The Commission of Historical Clarification concluded that the State was responsible for 93 per cent of the violations; the guerrilla groups for the rest.[129] With the end of the Cold War, pressure intensified to reach an agreement, which was finalised in 1996. The agreement not only included the creation of a truth commission, but also emphasised a commitment to the humanitarian obligation to provide reparation to victims through governmental programmes.[130] The Commission made plans for a reparation programme to include the restoration of material possessions, compensation, and psychosocial and medical rehabilitation, and to combine individual and collective measures.[131] However, the government refused to implement these recommendations and subsequently failed to bring the programme into law.

Acuerdo Gubernativo 258–2003,[132] the equivalent of a presidential decree, finally established the National Reparation Programme[133] after successful negotiations between the government and civil society organisations. The Programme did not define the forms of reparation or the victims who would be included, however, leaving all of these definitions for further clarification by the Programme itself. These definitions changed over time as a result of the different authorities that headed the Programme, and as new governments came and went. Successive amendments to the *Acuerdo Gubernativo* established that the violations to be addressed by the National Reparation Programme were enforced disappearance, summary execution, torture, forced displacement, forced recruitment of minors, sexual violence and rape, violations against children, and massacres, as well as other violations to be added by the *Comisión Nacional de Resarcimiento*, the Programme's governing board. The Programme defined reparation measures only in general terms, as 'dignification of victims, cultural redress,

[129] Commission for Historical Clarification, Guatemala Memory of Silence: Conclusions and Recommendations, 17 and 20, available at https://hrdag.org/publications/guatemala-memory-of-silence-report-of-the-commission-for-historical-clarification-conclusions-and-recommendations/.

[130] Global Agreement on Human Rights, March 1994, para. 8.1.

[131] Commission for Historical Clarification, Guatemala Memory of Silence (n. 129), 50.

[132] Gobierno de Guatemala, Acuerdo Gubernativo No. 258–2003, 7 May 2003, Diario de Centro América Número 63, 8 May 2003.

[133] The name in Spanish is *Programa Nacional de Resarcimiento*, being the only reparation policy that uses the word *resarcimiento* ('reparation').

psychosocial reparation and rehabilitation, material restitution, and compensation'.[134] Most of the implementation efforts were focused on paying individual compensation to victims, but with limited results, considering the number of victims who effectively received compensation against the estimated number of victims.[135] Between 2005 and 2014, a total of 31,845 victims received compensation[136] for amounts equivalent to 3,300 USD for relatives of those killed or who had been disappeared, or 2,750 USD for survivors of torture or sexual violence.[137] There is no consolidated information available about the full implementation of this policy. Implementation seems to have been selective, including the provision of housing subsidies, psychosocial support, and seed capital for income generation activities, but covering only a few thousand victims. A Guatemalan newspaper reported that the Programme's total budget for 2017 and 2018, not limited to compensation payments, was 4.3 million USD – that is, 11.6 per cent of what it had been in 2006.[138]

b) the comprehensive reparations plan of peru Peru suffered an internal armed conflict that spanned 1980 through to 2000. A history of marginalisation in the Andean communities, increased by pervasive racism among Peruvian elites living in the coastal cities, led to the formation of the Communist Party of Peru (Shining Path), a Maoist movement that declared war on the 'bourgeois State' on May 1980, the day before the first presidential and congressional elections in seventeen years, after almost two decades of military dictatorships. Shining Path attacked the symbols of State authority and persecuted mayors, as well as community leaders and even entire communities who did not support them. Another subversive group, the Túpac Amaru Revolutionary Movement, also rose up, both in parallel and sometimes competing with Shining Path. The

[134] Acuerdo Gubernativo 619–2005, Amendment to Art. 2 of Acuerdo Gubernativo 258–2003.

[135] The Commission of Historical Clarification estimated that 200,000 persons were disappeared or killed during the conflict. See Commission for Historical Clarification, Guatemala Memory of Silence (n. 129), 17.

[136] Information provided at the request of the author on October 2015 from the Administration and Finance Division of domestic reparation programme.

[137] Berghof Foundation for Peace Support, Informe de la Evaluación Conjunta del Programa Nacional de Resarcmiento y de los Programas de Apoyo del PNR de GTZ y PNUD, Guatemala, 14 December 2007, 88, available at www.berghof-foundation.org/fileadmin/redaktion/Publications/Other_Resources/GT_Informe_Final_EC_PNR.pdf.

[138] Pavel Gerardo Vega, 'PNR sin presupuesto para resarcir a las víctimas del conflicto armado', *El Periódico*, 30 December 2017.

newly elected democratic government initiated a counteroffensive, which was fought mainly in the Andean region, resulting in the political persecution of opponents and the massacring of communities suspected of supporting Shining Path. The conflict persisted until the mid-1990s, when both groups were dismantled and their leaders imprisoned or killed. By this time, President Fujimori, elected in 1990, had increased his power and imposed an authoritarian regime on the country, controlling the parliament and decreasing the independence of the judiciary. Following a series of corruption scandals, the regime collapsed and Fujimori in November 2000 sought asylum in Japan. An interim government was established, which set up the Truth and Reconciliation Commission (CVR). The Commission conducted a wide investigation of the conflict, its causes and consequences, interviewing victims and reviewing thousands of testimonies, and organising public hearings at which the country learned about the suffering of victims. The CVR delivered its report in August 2003, in which it calculated that approximately 69,280 people had lost their lives or had disappeared, attributing 54 per cent of the violations committed to Shining Path, but also acknowledging State responsibility for 37 per cent of violations. Moreover, the Commission recognised that 75 per cent of the victims spoke Quechua or another indigenous language as their mother tongue, while representing only 16 per cent of the total population, stressing how violations focused overwhelmingly on indigenous people. As a result, the CVR made a series of recommendations, one of which was to establish a comprehensive reparation plan, later passed into law.[139]

Law 28,592 defined the structure and remit of the *Plan Integral de Reparaciones*,[140] including creation of an independent body, the Reparation Council, to register victims. The Law was complemented by more detailed bylaws – especially Decree 015–2006-JUS, which defined several subsidiary programmes (summarised in Table 2.1).[141]

The complexity of several of these programmes has made implementation difficult, and only collective reparation and compensation have been implemented with a wide coverage. The collective reparation programme was simplified to the implementation of a single project by each affected

[139] This summary is based on the findings of the Peruvian Truth and Reconciliation Commission, Final Report, 2003.

[140] Law 28,592 of 2005 Crea el Plan Integral de Reparaciones.

[141] Adapted from Correa, *Reparations in Peru* (n. 34), 7–8.

TABLE 2.1 *Peru's* Plan Integral de Reparaciones

PROGRAMME	SERVICES
Restitution of Civil Rights	Measures in this programme included: addressing the legal status of those disappeared by means of declaring them absent due to enforced disappearance;[142] restitution of civil rights to those unfairly indicted or prosecuted for terrorism or treason; elimination of criminal records of victims; provision of civil records to those who became undocumented; regularising property and inheritance rights of victims; and the waiver of fees and taxes imposed when initiating actions required to implement reparation, to be established by law in each case.
Education	This programme was directed at individuals whose schooling was interrupted as a result of violence, children of victims, and those forcibly recruited by self-defence committees.[143] These measures included: adult education and literacy programmes; access to primary education; access to vocational training; waivers of tuition, certificate and exam fees; student housing and meal stipends for qualified victims; and implementation of a full scholarship programme, covering tuition, books, transportation, and food for university and technical studies where victims could apply based on regional quotas to support students coming from the most affected areas.
Health Care	Directed at victims suffering from physical or mental ailments resulting from the violence, these measures included: delivering comprehensive healthcare services through public services, with a priority on serving children, women, and the elderly; building comprehensive community healthcare programmes, including rebuilding community support networks; recovery of historical memories about the conflict; and creating community programmes for emotional support. These community programmes also included clinical services according to the needs and resources of each area in the country, as well as establishing education and outreach programmes for promoting health, and preventing and improving the healthcare network infrastructure.

(continued)

[142] This legal solution provides responses to civil matters involving the family without having to declare their presumptive death – something that relatives of the victims often refuse to accept, particularly when the victim had been detained by State authorities and then disappeared.

[143] Some of these provisions were later modified by Decree 047–2011-PCM.

TABLE 2.1 (*continued*)

PROGRAMME	SERVICES
Collective Reparation	This programme was aimed at assisting families, peasant communities, indigenous communities, settlements, and other communal organisations affected by the conflict, as well as displaced families from conflict-affected communities that had resettled elsewhere. The measures included: assistance for regularising community property; human rights and conflict resolution training for communities and their leadership; communal participatory diagnosis for conflict prevention, peace education, and the promotion of a culture of peace; building of economic, productive, and commercial infrastructure; training to improve the capacity of community members to access economic opportunities; support for the return and resettlement of people displaced by the conflict; rebuilding and improving the infrastructure of basic services, communal properties, and others to be identified by the communities.
Symbolic Reparation	These measures provided for public gestures, including apologies from representatives of the State, letters to victims, and public ceremonies to promote wide outreach of the CVR report. These actions had to acknowledge the different types of victim. They included: reconciliation gestures such as renaming symbols or places associated with violations; closing jails that symbolised human rights violations; and naming streets, squares, bridges, roads, districts, or regions after 'heroes of peace'. These symbolic measures had to be implemented in consultation with victim groups. Other gestures include the government declaration of 28 August 2003 – the date on which the CVR report was delivered to the president – as the Day in Tribute to All Victims of Violence.
Promotion and Access to Housing[144]	These measures were directed at individual or collective victims whose homes were destroyed or who experienced severe damage to their homes as a direct result of violence. This special programme for building and assigning housing was to be implemented over time and in a decentralised way. This programme provides: support for the reconstruction of rural housing; support for the regulation of property rights; assistance in the resettlement of displaced persons and their preferential

(continued)

[144] This programme was not included in the recommendations made by the CVR, but was included in the law.

TABLE 2.1 (*continued*)

PROGRAMME	SERVICES
	inclusion in public housing programmes; and technical and financial assistance for self-built housing to displaced people living in provisional or precarious dwellings.
Economic Reparation (Compensation)[145]	This programme included as beneficiaries the following types of victim: relatives of victims who were murdered, extrajudicially executed, or disappeared; those victims who are partially or totally disabled, according to the evaluation made by the National Commission on Disability; and victims of rape. The amount ultimately approved was less than that recommended by the CVR.[146]

community, based on their choice, for a maximum of 37,000 USD.[147] A total of 1,852 communities or groups have received projects of this kind since 2007. Compensation amounts have been paid to 98,818 of the victims registered by the Reparations Council. Tens of thousands have received benefits from the healthcare, education, and housing programmes, but these did not reach all registered victims.[148]

[145] The law creating the PIR did not explicitly reference this type of reparation, but did empower the commission responsible for coordinating implementation (CMAN) to authorise other programmes. This shows the reluctance of Congress to expressly create a compensation programme, which was an important demand of victims and human rights organisations and was included in the CVR's recommendations. The Toledo administration did not want to commit itself to this programme either, but accepted it on the condition of establishing certainty about the number of victims. That is why the executive decree regulating the PIR Law did not define the modality and amount, but established that they would be defined once the registration process was complete and that the process should be completed within two years of the establishment of the Reparations Council.

[146] The CVR had recommended a lump sum, equivalent to 10,000 USD, to be distributed to families in a proportion of two-fifths to the widows or permanent partners, two-fifths to the children, and one-fifth to the parents of the deceased victims. This amount was based on the maximum amount received by members of self-defence committees as part of their demobilisation programme. For victims over the age of fifty, a pension equivalent to one half of the minimum salary was recommended. Decree 051–2011 defined an amount equivalent to 3,700 USD per victim.

[147] Correa, *Reparations in Peru* (n. 34), 12.

[148] The Reparations Council had registered 227,687 victims by 2018, of whom 85,391 were entitled to compensation as direct relatives of 41,529 victims who either disappeared or were killed and 39,408 as direct victims of sexual violence or of physical harms resulting in disability. See Consejo de Reparaciones, *Informe Todos los Nombres: Memorial Institucional del Consejo de Reparaciones 2006–2018* (Lima: Ministerio de Justicia y Derechos Humanos, 2018), 37, 42–5.

c) reparation after armed conflict in sierra leone A devastating armed conflict affected Sierra Leone from 1991 to 1999, at which point it was paused when a peace accord was signed in the Togolese capital of Lomé; it resumed after the peace accord until 2002. The conflict was mostly internal, but it had some international components, particularly as a result of Liberia's involvement.[149] The Truth and Reconciliation Commission (TRC) was established by domestic legislation by means of a 2000 Act, as was required under the peace agreement. The Commission identified a wide range of large-scale violations – including forced military recruitment, rape, and sexual slavery – committed by different armed groups that were primarily targeting civilians and children. Amputation was an especially frequent form of punishment used by some groups.[150] The TRC recommended awarding reparation according to different categories of victim, including: amputees; the war wounded, according to their degree of disability; victims of sexual violence; children who suffered physical violence, whose parents were killed, who were born from rape, or who suffered psychological violence; and war widows. Reparation measures recommended were described in detail for each category of victim and included: health care for individual victims, including physical and psychological care; pensions; educational benefits; skills training, microcredit, and micro projects for individuals or groups of beneficiaries; symbolic reparation, including apologies, memorials, and commemoration ceremonies and dates; the identification of mass graves and reburials; and community reparation.[151] The degree of specificity of the recommendations, detailing the type and provision of services for each category of victim, can serve as a useful guide for how to define a policy that addresses different harms caused in a conflict of this nature. Nevertheless, these detailed recommendations did not take into account the country's real capacity to implement the recommendations or the degree of political commitment from successive governments to allocate resources and prioritise victims. The gap between these recommendations and what actually has been implemented offers important lessons on how to define a policy.

Only limited measures were implemented, following a simplified adaptation of the recommendations, and labelled as 'interim reparation'. Those measures that were implemented were made possible by the contributions of the UN Secretary-General's Peacebuilding Fund (PBF) and the assistance provided by

[149] Truth and Reconciliation Commission, Witness to Truth, Report of the Truth and Reconciliation Commission (2005), vol. II, ch. 1, paras 46–9, and ch. 2, paras 346–413.
[150] *Ibid.*, vol. II, ch. 2, paras 80–105.
[151] *Ibid.*, vol. II, ch. 4, paras 87–209.

the International Organisation of Migrations (IOM). The PBF allocated an initial 3 million USD grant, which allowed the National Commission for Social Action (NaCSA), a government body with experience in implementing humanitarian aid, to register within a few months 29,733 victims in the categories established by the TRC and then to distribute a one-time interim payment equivalent of 100 USD to each of them.[152] Additionally, 235 victims of sexual violence were examined to determine if they needed treatment for HIV or sexually transmitted infections, or reconstructive surgery. Emergency surgery for other war wounded was also performed in thirty-one cases. Finally, community reconciliation ceremonies, adapted from the experience of the non-governmental organisation (NGO) Fambul Tok, were performed in forty communities.[153] Other PBF projects increased the number of victims who received these interim measures, but they all failed to build capacity or to convince the government to allocate resources for more substantial reparation, even if all of these projects were explicitly aimed at building such capacity.[154]

d) comprehensive reparation policy in colombia The internal armed conflict in Colombia, which had its origins in the early 1960s, resulted in more than 300,000 murders and enforced disappearances, the displacement of more than 7 million people, thousands of cases of forced military recruitment of minors, sexual and gender-based violence, and other serious violations.[155] Until 1995, few public policies addressed the consequences of these violations because successive governments refused to accept their magnitude, in part as a way of denying the scope of the conflict. The 2016 peace accord between the government and the main guerrilla group, the Colombian Revolutionary Armed Forces (FARC), has increased the possibility of peace. However, other guerrilla groups are still active and participate in organised crime

[152] Not all victims registered received the interim payment in 2009, and some of them had to wait for successive PBF projects that provided additional funding during 2010 and 2012.

[153] Mohamad Suma and Cristián Correa, *Report and Proposals for the Implementation of Reparations in Sierra Leone* (New York: ICTJ, 2009), available at www.ictj.org/sites/default/files/ICTJ-SierraLeone-Reparations-Report-2009-English.pdf.

[154] UN PBF, Support to the Implementation of the Sierra Leone Reparations Programme as part of the Recommendations of the Truth and Reconciliation Commission, Programme Number PBF/SLE/C-2.

[155] The government has registered more than 8.8 million victims, of whom 956,046 are relatives of those who were either disappeared or killed, or are direct victims of torture, sexual violence, forced recruitment, explosive devices, and kidnapping, and 7.4 million suffered displacement; all of these are entitled to reparations. Figures of victims' registration are permanently updated by the Victims' Unit, the government entity responsible for the implementation of the programme. They are available at www.unidadvictimas.gov.co/es/registro-unico-de-victimas-ruv/37394.

activities, including criminal gangs, drug trafficking, and the rearming of paramilitary organisations. There is therefore the risk of members of FARC morphing or migrating into criminal organisations.

In 2011, in response to mixed results from a number of different programmes implemented for delivering humanitarian aid either to those who had been displaced or who suffered severe violations, a Law on Victims and Land Restitution established a policy that included humanitarian assistance, reparation for human rights violations and violations of IHL, and a land restitution programme.[156] The reparation component of the law included: a variable compensation payment according to certain categories of victim; a comprehensive psychosocial and healthcare programme; a programme on house restitution through subsidies for certain victims; debt alleviation; access to educational training; and access to preferential conditions for employment. It also included measures on memorialisation, symbolic reparation, and the search for truth. The collective reparation programme is defined by bylaws, establishing an ambitious process of community consultation for the definition of a collective reparation plan, without a clear mechanism for guaranteeing its implementation. The land restitution programme is based on a dual administrative and judicial system, by means of specialised bodies, and a special procedure based on the reversal of the *onus probandi* in certain cases.

The compensation programme, which among all of the mechanisms has reached the most victims, expanded an older programme initiated in 2008 that provided lump-sum payments equivalent to: forty monthly minimum salaries (approximately 11,000 USD) for victims or the relatives of those who were forcefully disappeared, killed, kidnapped, or permanently disabled; thirty monthly minimum salaries for victims of other injuries, torture, sexual violence, and illegal recruitment; and twenty-seven monthly minimum salaries – later reduced to seventeen – for displaced families. The government has reported that, between 2009 and 2015, 584,068 victims received compensation,[157] and a February 2018 report announced that 39,808 victims had received compensation in 2016,[158] totalling 623,876. The number of victims covered is impressive, even if it is only a portion of the total number of victims registered.

[156] Law 1448 of 2011 Ley de Víctimas y Restitución de Tierras.

[157] Government of Colombia, Annual Report of the Implementation of Law 1448 of 2016, 146, available at www.unidadvictimas.gov.co/sites/default/files/documentosbiblioteca/ixinformedelgobiernonacionalalcongresoagosto2016.pdf.

[158] Government of Colombia, Annual Report of the Implementation of Law 1448 of 2017, 26–7, on file with the author.

Other programmes have been more difficult to implement. The rehabilitation programme started only two years after the Law was passed, and between 2013 and 2015 it provided psychosocial support services to 198,377 victims by means of twenty-four decentralised services.[159] The collective reparation programme, defined in ambitious terms and based on extensive community consultation, has proven even more difficult to implement. By March 2018, 620 communities had started the process of defining their reparation plan; 128 had already defined those plans,[160] several of which had started to implement some of the reparation measures agreed. However, none of these plans have been completed, including the eight plans used as pilot projects for defining the policy, which started in 2008.

An additional component, which was mentioned in the Law and rose to prominence as a result of the peace agreements between the government and FARC, is public apology and the acknowledgement of responsibility. Since the negotiations were advanced, FARC and the government have started not only to issue apologies, but also to organise activities in which representatives of both factions meet with victims, listen to them, acknowledge wrongdoing, and present their own apologies.[161]

e) REPARATION FOR HUMAN RIGHTS VIOLATIONS IN CHILE After a *coup d'état* in 1973, Chile was governed by a military dictatorship for seventeen years. The immediate months following the coup were particularly violent, as the military junta moved with extreme violence to detain and punish political, union, and community leaders linked to the deposed Allende government. The following years were characterised by a more selective, but no less intense, repression of opponents. Truth commissions and processes for registering victims implemented after the restoration of democracy in March 1990 established that a total of 3,225 people had been forcefully disappeared or killed, mostly at the hands of the police, the armed forces and security services, and 103 had been killed by subversive groups. More than thirty years after the

[159] Government of Colombia, Annual Report of the Implementation of Law 1448 of 2016 (n. 157), 124.

[160] Government of Colombia, 'Política de atención y reparación a víctimas', July 2018, available at www.unidadvictimas.gov.co/sites/default/files/documentosbiblioteca/xiiiinformegobiernonacionaljulio2018.pdf.

[161] For an examination of different experiences of public apologies, see Ruben Carranza, Cristián Correa, and Elena Naughton, *More Than Words: Apologies as a Form of Reparation* (New York: ICTJ, 2017), available at www.ictj.org/sites/default/files/ICTJ-Report-Apologies-2015.pdf. The Spanish version of this report includes a section that analyses recent ceremonies in Colombia, available at www.ictj.org/es/publication/disculpas-forma-reparacion.

events and in two successive processes of registration, 38,254 people were identified as victims of political imprisonment and torture.[162]

Different policies have been established for investigating the violations committed and for providing reparation to victims. Immediately after a new democratically elected government took office in 1990, the National Commission for Truth and Reconciliation – named the Rettig Commission after its chair Raúl Rettig – was established, which identified victims of killings and enforced disappearances, and recommended reparation measures to victims identified, which included only these categories of victim. Those recommendations were passed into law in 1992, establishing a reparation programme and an implementation body that continued to register additional victims whose claims had previously been rejected or who had not yet presented claims to the Commission.[163] The programme included the payment of a pension for life to spouses and parents of victims, as well as their children (up to twenty-five years of age, unless they were disabled, in which case the pension was paid for life). The amount was defined equally for all victims by means of a reference amount equivalent to the national monthly family income of 540 USD at that time, with annual adjustments according to inflation. That amount was used as a reference to define the amounts granted to each category of relative, with spouses receiving 40 per cent of the reference amount, parents, 30 per cent, and children, 15 per cent. If a family consisted of one spouse and two children, for example, they received a total of 378 USD monthly; a family that included a spouse, the mother of the victim, and three children received 621 USD. The pension was paid through the regular pension system and the first instalment comprised the equivalent of twelve payment rates to provide a more substantial initial amount. In addition, children up to the age of thirty-five received a scholarship to continue their studies, including full university tuition. Families were also granted access to the Comprehensive Health Care and Reparation Programme (PRAIS), which comprised teams of social workers, psychologists, and physicians running different programmes focusing exclusively on victims. Other subsidies were available with regard to housing for those who did not have a house and fulfilled other socioeconomic requirements. Additionally, sons of victims were exempted from the otherwise mandatory military service.[164]

[162] Informe de la Comisión Presidencial Asesora para la Calificación de Detenidos Desaparecidos, 'Ejecutados Políticos y Víctimas de Prisión Política y Tortura', 18 August 2011, available at www.indh.cl/bb/wp-content/uploads/2017/01/Informe2011.pdf.

[163] Law 19,123 of 1992.

[164] For a more complete description of the policies, see Elizabeth Lira, 'The Reparations Policy for Human Rights Violations in Chile', in Pablo de Greiff (ed.), *The Handbook of Reparations* (New York: Oxford University Press, 2006), 55–101.

Because this policy benefited only the relatives of those killed or forcibly disappeared, those who were expelled from civil services or public companies for political reasons also demanded compensation. As result of the political pressure, a series of laws were passed establishing a programme of retirement pensions or increasing the retirement funds based on the retirement programme in which each applicant was enrolled. Between 1993 and 2008, 141,009 people were registered under this programme and received some kind of benefit, depending on their situation. The programme has been criticised, however, for allowing some supporters of the dictatorship to benefit – because they fulfilled the legal requirements – and because politicians used their influence to allow their cronies to receive benefits on the basis of false claims. Additionally, the programme has consumed the most resources of all of the reparation policies implemented in the country.[165]

Only eleven years after the reparation law was passed (limited to killings and enforced disappearances), political pressure forced the government to expand the reparation process to survivors of political imprisonment and torture. Another commission was established to register victims, to formulate a full report on the use of political imprisonment and torture, and to make policy recommendations, including reparation to the survivors. The result was the creation of a supplementary reparation programme that included similar measures on rehabilitation, housing, and military service for sons of victims, as well as a pension (significantly lower than that for relatives of those killed or disappeared), and university scholarships for survivors, which – after an amendment several years later – could be transferred to a child or grandchild. These policies have been complemented by memorialisation initiatives, including: the building of monuments defined and, in some cases, built with the participation of victims; the distribution of the reports to victims, as well as to public and school libraries; official apologies by different authorities; efforts to identify the remains of the missing; the creation of a National Museum of Memory and Human Rights; and a slow, but consistent, process of bringing perpetrators to justice.

2. The Characteristics of Reparation Programmes

These programmes, and others of a similar nature offer interesting insights into the characteristics that are usefully defined when implementing

[165] Figures for the total expenses of the different programmes until 2003 contained in the annexes of the document Gobierno de Chile, Ministerio Secretaría General de Gobierno, 'No hay Mañana sin Ayer: Propuesta del President Lagos en Materia de Derechos Humanos', August 2003, available at https://bibliotecadigital.indh.cl/bitstream/handle/123456789/183/no-hay-manana.pdf?sequence=1.

reparation for large-scale violations in times of war. Of particular relevance is that several of these programmes have been implemented in countries with limited resources. These experiences commonly indicate that the following features are of special relevance:

(a) the definition of the categories of victim to be included, based on an assessment of the most serious violations committed;
(b) the definition of reparation measures that are adequate to respond to the most serious consequences that affect victims in the present;
(c) the implementation of a registration process with flexible standards according to the evidence that victims can provide;
(d) the establishment of implementation mechanisms that are accessible and appropriate;
(e) the definition of the relationship between reparation included in these programmes and the standards established by courts (particularly by regional human rights courts that might have jurisdiction to examine the legality of the criteria applied in the reparation programme); and
(f) the definition of how these programmes relate to other State priorities, including collective reparation, reconstruction, and policies for overcoming some root causes of the conflict in terms of previous patterns of marginalisation.

a) THE CATEGORIES OF VICTIM INCLUDED Given the large scale of the violations that these programmes tried to address, there is a need to be realistic and focus on the most serious. If a programme fails to do so, it risks making a commitment impossible to comply with and excluding victims of some serious violations as result of limited resources or capacity.

The decision regarding which victims to include sends a powerful message about the values that inspire the overall policy and the values underlying the wider reconstruction effort needed in a country recovering from a major conflict. In a post-conflict situation, defining the types of violation to be included is an essential factor for how the country or countries approach the healing that is needed, where life, personal integrity, gender equality, community cohesion, or property are more or less valued.

An initial definition sets the general scope of the programme, signalling whether it will cover victims from all sides of the conflict or only one, or whether or not it imposes limitations based on the conduct of the victim. The *Plan Integral de Reparaciones* of Peru included victims from all sides; it did not prioritise those who suffered violations at the hands of State agents, self-

defence groups armed and supported by the Peruvian Army, or the two subversive groups against which the State was fighting. However, it did exclude members of subversive groups themselves.[166] A comparable exclusion characterised the Colombian *Ley de Víctimas y Restitución de Tierras*,[167] except for victims of forced military recruitment who were demobilised before reaching the age of eighteen.[168] The Sierra Leone Programme also included victims from all sides without imposing limitations.[169] The Kosovo Law on the Status and the Rights of the Martyrs, Invalids, Veterans, Members of Kosovo Liberation Army, Civilian Victims of War and their Families limits reparation to those who suffered violation committed by Serbian forces or were 'imprisoned in enemy camps', but also admits people who were harmed by explosive devices or who were disappeared as a result of the war.[170]

The categories of violation covered by these programmes comprise primary violations of the right to life and physical integrity. Although, among these primary violations, enforced disappearances have also usually been included, it has proven to be good practice to include these in a separate category to avoid their exclusion as a result of narrow interpretations of 'death' or the requirement of particular forms of evidence (such as a death certificate). The relief programme implemented in Nepal,[171] for example, at first provided an assistance amount of 25 per cent to the relatives of those who had been

[166] Law 28,592 (2005), art. 4. The exclusion has been criticised on the basis that it negates the absolute nature of certain prohibitions, such as being subjected to torture. However, granting reparation to members of subversive groups is politically complex in a society that learned to demonise members of those groups during the conflict. Unfortunately, the IACtHR has also used its discretion in granting reparation to give support to this kind of exclusion. See Cristián Correa, 'Inter-American Court's Dangerous Precedent in Limiting Insurgents' Right to Reparations', 2015, available at www.ictj.org/news/analysis-inter-american-court-precedent-insurgents-reparations.

[167] This law is a response to several decades of internal armed conflict that has affected Colombia since the mid-1960s. The conflict involves the Colombian Revolutionary Armed Forces (FARC), as well as other guerrilla groups such as the National Liberation Army (ELN), paramilitary groups, and the Colombian Armed Forces. A recent peace agreement between FARC and the government has brought hopes for peace, but other threats still affect the country, such as the ELN, the resurgence of paramilitary groups, and the pervasive effect of drug trafficking and armed gangs.

[168] Law 1448 of 2011, art. 3. However, this exclusion has been renegotiated at the peace accords between the government and FARC, and it might be eliminated by means of the legislation being passed to enact the peace accords.

[169] Suma and Correa, *Reparations in Sierra Leone* (n. 153).

[170] Law No. 04/L-54 (2011), art. 3(1.12).

[171] The programme aimed at addressing the consequences of the Maoist insurgency that started in 1996, abolishing the monarchy, and was followed by a repressive response by the State. It lasted until peace agreements were signed in 2006. The number of victims is still not clear, but some estimates put the dead at 13,000 and the disappeared at 1,300.

disappeared compared to the amount provided to the relatives of the dead, without considering the similar effects of both violations.[172] Additionally, pairing the disappeared in identical categories with the dead usually leads mechanisms to ignore other consequences that result from disappearances, such as an uncertain legal status, or requiring relatives to either provide a death certificate or to declare the victims as presumptively dead – something that might not only be difficult and expensive, but also go against the convictions of the relatives.[173] Other policies, such as those in Argentina, Chile, Peru, and Colombia, have provided similar compensation amounts for disappearances and killings, but have nonetheless recognised the different nature of disappearances in terms of addressing the consequences of civil status and the uncertainty it creates.

With regard to violations of personal integrity, several distinctions can be made. One frequent approach is to define violations of personal integrity as those physical injuries causing different degrees of disability. This is often the result of applying categories defined for disability insurance adopted by military or labour law, regulated by norms that exclude those violations that do not cause permanent physical disability despite their significant and long-term impact on the victims. For example, this is the case for post-traumatic stress disorder or physical harms not often included in rigid disability assessments, such as fistula. Definitions that are not dependent on individual assessments of the degree of disability but on the fact of having experienced torture could be more encompassing and less burdensome for registration, as was the case for a policy implemented in Chile.[174] In policies addressing violations primarily targeting civilians, the types of violation covered have

[172] ICTJ, *From Relief to Reparations: Listening to the Voices of Victims* (New York: ICTJ, 2012), 16, available at www.ictj.org/publication/relief-reparations-listening-voices-victims.

[173] Cristián Correa, *Left in the Limbo: Addressing the Legal Consequences of Disappearances* (New York: ICTJ, 2020).

[174] The National Commission on Political Imprisonment and Torture, which examined torture allegations by large numbers of victims thirty years after their occurrence, did not require forensic evidence of torture, but concluded – based on an overall assessment of how widely torture was used during politically motivated detention and taking into account that 94 per cent of the more than 35,000 victims who presented testimonies made reference to some form of torture – that it was possible to subsume all claims in a category that included both political imprisonment and torture. The verification process was based on determining the veracity of political imprisonment (without making distinctions about its duration), the existence of more than one detention, or the specific allegations for torture. These other factors that would have made verification more complex were made irrelevant by granting all victims of verified cases the same life pension. See Comisión Nacional de Prisión Política y Tortura, Informe de la Comisión Nacional de Prisión Política y Tortura, 78, available at www.indh.cl/bb/wp-content/uploads/2017/01/informe.pdf.

not followed military insurance policies; instead, they have included violations most often suffered by civilian victims, as in Peru, Guatemala, and Colombia. Consequently, those policies have integrated a gender approach, distinctly covering violations more often – although not exclusively – suffered by women, including, but not limited to, rape and other forms of sexual violence.

Depending on the context of each policy, other violations have been included, such as illegal recruitment, internment, kidnapping, or other deprivations of liberty, deportation, and forced displacement. These decisions depend on the nature of the conflict and the assessment of which are the most serious violations that the policy can effectively cover. They can entail torture or other cruel, unusual, or degrading treatment, depending on the conditions of the internment or kidnapping suffered by victims; alternatively, they can refer to the forceful transfer of populations, depending on the circumstances under which the displacement occurred. The policy implemented in Colombia covers a wide range of these violations, including forced displacement, but of more than 8 million violations declared by a similar number of victims, close to 7,250,000 concern forced displacement, while approximately 370,000 concern killings, disappearances, torture, sexual violence, or kidnappings.[175] This has made the programme unmanageable, threatening its ability to effectively respond to victims classified under the latter categories. Even after an immense implementation effort, the compensation programme – one of the components of the policy – has been only partially successful.[176] In the case of the German Forced Labour Compensation Programme, in addition to internment for forced or slave labour, a separate fund was established for other personal injuries, which included victims of medical experiments, children separated from their interned parents and relocated into special institutions, and parents of children who died while in those institutions. The German Foundation Act originally included victims of severe physical or mental damage who were permanently disabled. However, since the number of claims received for the first categories exhausted that fund, this category was later excluded.[177]

These experiences offer a complex lesson in how to balance the attempt to offer a comprehensive policy that could cover all violations with the need to

[175] See the figures of victims' registration published by the Colombian Victims' Unit available at https://hrni.unidadvictimas.gov.co/RUV.

[176] Cristián Correa, *From Principles to Practice: Challenges of Implementing Reparations for Massive Violations in Colombia* (New York: ICTJ, 2015), available at www.ictj.org/sites/default/files/ICTJ_Report_ColombiaReparationsChallenges_2015.pdf.

[177] Wühler and Niebergall, *Property Restitution and Compensation* (n. 91), 30.

guarantee effective implementation. On the one hand, when deciding on the scope of a reparation effort, to what extent is it important to include all violations? On the other hand, how much caution should be exercised to ensure that what is promised will be delivered? Even if precedents that aim to provide reparation for all violations committed could be perceived as a positive outcome in themselves, this is not necessarily the best orientation for defining a policy. The wisdom of over-ambition needs to be questioned, as the Colombian case clearly points out. Such over-ambition can frustrate the ability to deliver on those promises, leading to lengthy processes of implementation that force victims to wait for years, or even decades, or to the exclusion entirely of some victims down the road.

Defining the categories of violation to be covered requires a decision on the complex matter of whether to include looting or the destruction or loss of property. Definitions have depended on the context, particularly in cases of ethnic cleansing or forced displacement implemented with the purpose of occupying the territory where victims lived. Restitution in these cases could serve as a way of reversing that illegitimate occupation. However, such a goal could be impossible if there were insufficient security conditions guaranteeing that return. Mass processes of property restitution were implemented by the Commission for Real Property Claims of Displaced Persons and Refugees of Bosnia and Herzegovina, the Commission for the Resolution of Real Property Disputes of Iraq, and the Housing and Property Claims Commission of Kosovo. Colombia also created a land restitution programme as part of its policy. But, in addition to security concerns, these programmes have faced two important difficulties:

1. the amount of work that processing claims requires, especially in contexts in which titling and property registries are unreliable or do not reflect the true rights of occupancy of those who suffered eviction; and
2. addressing second occupancy rights and providing for compensation when restitution is either not possible or not desirable, or when the second occupant is deemed *bona fide*.[178]

The latter difficulty represents a serious obstacle, because compensation for housing could be expensive. Moreover, the resources appropriated for the compensation of property losses will compete for those allocated for loss of life or violations of personal integrity. The decision about including property among the violations to be covered is therefore not an easy one. Moreover, in cases of large-scale violations and massive destruction, compensating for

[178] *Ibid.*

property losses can exponentially amplify the costs of the programme, as shown by analysis of the UNCC awards.[179] Even if the sums to be awarded are capped at a modest figure and eligibility limited to only those who have lost their main family residence, the comparison to what can be awarded to widows, victims of rape, or those tortured or disabled can result in a huge disparity. Such differences might undermine the values that the policy is trying to affirm, as the amounts for each category awarded by the UNCC demonstrate, and as can be seen by comparing the costs of the property restitution programmes implemented in Bosnia and Kosovo with their respective policies for reparation to civilian victims.

A final consideration regarding the violations to be included relates to harms suffered not by individual natural persons, but by groups of persons, legal entities, or States. The UNCC, for example, also included violations to the right to property suffered by legal entities and public entities.[180] The ethical, but also budgetary, dimensions of these decisions need to be carefully assessed, particularly in regard to the regressive effects they could entail for the distribution of funds from the whole pool of taxpayers that contribute to it.

b) the definition of reparation measures The Basic Principles on the Right to Remedies and Reparation provide a wide range of measures that can address the consequences of violations of human rights and IHL.[181] They are not binding law, but can be used as useful guidance because the Principles are based on an examination of existing experiences and precedents. Those measures go far beyond the tendency of courts to order compensation. They include restitution, several forms of rehabilitation that include, but are not limited to, physical forms, a wide array of satisfaction measures that can be especially appropriate for addressing the consequences of violations committed during internal armed conflict and important forms of guarantees of non-repetition. The IACtHR has developed an extensive jurisprudence on how the notions of restitution, compensation, rehabilitation, satisfaction, and

[179] See section III.A.1.

[180] Two different presidentially appointed commissions in Côte d'Ivoire – the Commission Dialogue Vérité et Réconciliation (CDVR) and the Commission Nationale pour la Réconciliation et l'Indemnization des Victimes (CONARIV) – had recommended the inclusion of moral persons as victims entitled to reparation for harms caused during the 2010–11 internal armed conflict, which contrasts with the inability of the country to implement reparation for victims of violations the rights to life and personal integrity.

[181] The document provides useful definitions of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition that can help to define a comprehensive reparation policy, including lists of examples of measures that could complement each other in their reparatory effect. See Basic Principles (n. 44), paras 19–23.

guarantees of non-repetition can help to define comprehensive forms of reparation. Some reparation programmes for human rights violations also include a combination of different measures implemented on a large scale – as was the case in Chile, where the first programme was designed before much of the discussion around the Basic Principles occurred, and more recently in Peru and Colombia.

One interesting aspect to note when defining reparation for massive violations is the tendency to focus the debate on the immediate harms caused at the time of the events, without paying much attention to the current condition of victims. This can be attributed to the notion of restitution of victims to the situation in which they were before the violation that is part of the basic legal understanding of reparation,[182] as well as from a property approach to reparation. Moving the focus towards personal harms allows for consideration of how the passage of time may have impacted on assessment of the relevant harms to be addressed. An examination of the consequences that victims suffer in the present as a result of past violations could be more useful and *appropriate* in redressing the violations. The need for a remedy to be appropriate – a notion common in international law instruments – can shape forms of reparation that, without losing the necessary causal links required for determining redress, could be more relevant to the current needs of victims. This is particularly true in cases involving rehabilitation services, medical care, and psychosocial support, in which limiting them to those consequences deriving directly from harms caused years or decades ago might be not only impossible but also cruel to victims. Services that provide full healthcare coverage require less resource to be devoted to assessing whether a victim is or is not covered and therefore more resources can be put into providing victims with actual services, as is the case for veteran services.

Responding to the current consequences for victims, instead of focusing on an examination of the harms caused in the past, does not necessarily result in an expansion of those violations to be redressed. On the contrary, in many cases, a limitation to what is relevant in the present can result in the exclusion of harms that no longer affect the lives of victims, which has a particular relevance, for example, in cases of property losses. In other cases, this could open the doors to forms of reparation that would not strictly follow a *restitutio in integrum* approach, such as through rehabilitation services, scholarships for the children of victims[183] or compensation being paid in the form of pensions

[182] Expressed in PCIJ, *Factory at Chorzów* (n. 23), 47.

[183] For example, the Chilean Commission on Political Imprisonment and Torture, which examined violations committed, in some cases, more than thirty years before, recommended

for direct victims and relatives affected by the violations. This could even be relevant for examining inter-State reparation claims, for example those discussed in Poland with regard to the harms caused by Germany during World War II. 'Appropriate' is a notion that allows claims to be addressed in light of the effects of the passage of time without resorting to notions such as statutes of limitation, which offer only an either/or answer.

The definition of the specific measures to be implemented depends on the context, the types of violation, and the different implementation alternatives. Some types of measure proposed by the Basic Principles are more appropriate to internal armed conflict than international armed conflict. Rehabilitation measures, including psychosocial support, medical care, physical therapy, or others that consist of services directly provided to victims, involve a degree of trust, as well as a personal relationship between the victim and the service provider, which those associated with the former enemy probably lack, even if some victims of internal armed conflicts usually lack such trust in State services too. In cases of international armed conflict, implementing rehabilitation services may require payments for those services to be implemented by the victims' own State – on the basis of nationality or residence – or by an international organisation, with guarantees that services will be effectively provided under appropriate monitoring and for the required period.

The existing experiences of reparation programmes for violations committed during internal armed conflict offer an important lesson for victims with regard to both the possibilities and effectiveness of implementation. An initial observation is the difference between those programmes that defined similar measures for all victims of the same categories and those programmes that added an individual assessment for each victim, particularly for defining compensation awards for the loss of life or violations of personal integrity. Individual assessments have been adopted for programmes addressing human rights violations committed in Morocco[184] and in Brazil.[185] The evaluation

establishing university scholarships for the children of survivors even if, in many cases, those children were born after the events: victims frequently expressed that they considered it to be more important for them to provide the means of educating their children than to be educated themselves and these victims were, on average, in their mid-fifties. Another recommendation made was the continuation of the pension for survivors to their spouses on the survivor's death. However, the government only partially followed these recommendations. See Comisión Nacional de Prisión Política y Tortura, Informe de la Comisión Nacional de Prisión Política y Tortura (n. 174), 523–5.

[184] Equity and Reconciliation Commission, *Final Report*, vol. 3 (Rabat: CCDH, 2009), 25–7.

[185] Paulo Abrão and Marcelo Torelly, 'The Reparations Program as the Lynchpin of Transitional Justice in Brazil', in Félix Reátegui (ed.), *Transitional Justice: Handbook for Latin America* (Brasilia: Amnesty Commission of Brazil-ICTJ, 2011), 443–85 (458–9).

was mainly based on the existence of material harm and the loss of opportunities, spanning employment status, the duration of the deprivation of liberty, or the life expectancy of the victim. The Moroccan experience has been criticised for its lack of transparency in defining the claims and because the criteria used for assessing harms failed to take into account the situation of women from rural or marginal areas, most of whom had no formal education or employment.[186] The disparities resulting from programmes that compensate according to an individual assessment of the harm can be perceived as fair and following adequate criteria. However, they can have a regressive effect, because they tend to result in higher compensation amounts for wealthier victims, who are better equipped to produce evidence of their loss. A policy that disregards socioeconomic status and thus provides similar compensation awards to victims could be easier to implement, because the only issue to assess would be the existence of the violation and the identity of the victim and/or their relatives. Individual verification of loss of income would, in general, require obtaining evidence of the income that victims had at the time, although it may require, more specifically, evidence of the exact duration of detention for instances of imprisonment or, for cases involving torture, the recovery period of the person prior to being able to return to work. In the context of massive violations committed years or decades in the past, it may be very difficult to find the relevant evidence, particularly when it is already difficult to obtain evidence of the detention itself. Limiting verification to establishing the existence of the violation and the identity of the victim can make a programme more accessible to victims who lack documentation, who did not have formal employment when the events occurred and who, in general, are poor or marginalised, including women. Even if it could be perceived as unfair from the perspective of wealthy individual victims, who can claim that they lost more or that the compensation amount offered has little material value for them, by not reinforcing strong socioeconomic disparities that may exist in the country, this solution offers a strong defence of the common dignity of all victims. This approach has been implemented in most of the reparation policies mentioned in this chapter.

Defining the compensation amount for each category of victim has become a difficult task. Acknowledging the profundity of this problem, Rosalina Tuyuc, an indigenous leader who was head of the reparation programme in

[186] Julie Guillerot *et al.*, *Morocco: Gender and the Transitional Justice Process* (New York: ICTJ-Foundation for the Future, 2011), 7, 26 and 28, available at www.ictj.org/publication/morocco-gender-and-transitional-justice-process.

Guatemala, decided to title the programme's first report *Life is Priceless*.[187] In several of the programmes examined, the amounts for compensation are randomly defined, because all of the possible parameters would nevertheless fall short for a large-scale programme. The Chilean compensation programme for victims of enforced disappearance and killing, however, offers an interesting parameter, because the pensions awarded were based on the national medium family income, as well as an initial payment of a full year of the pension.[188] This can signal an intention to guarantee a standard of life similar to that of the rest of the national community and to affirm a sense of belonging and membership, which was denied by the violation.[189] The South African Truth Commission likewise recommended the medium family income in urban and rural areas, not as a pension, but as a parameter for a compensation amount to be paid in twelve instalments over six years.[190] The Colombian programme bases the compensation amount, paid in one instalment, on multiplying the official minimum monthly salary with different factors, as explained in section III.B.1.d – even if, on the basis of socioeconomic indicators, it is not clear why forty salaries would be a standard of fairness for compensating a loss of life. In Peru, discussions for defining the final compensation amount suggested using as a precedent a similar policy that benefited relatives of members of self-defence groups armed and supported by the military who were killed in combat. However, the final amount was arbitrarily defined in PES 10,000 (approximately 3,700 USD at the time) – less than a third of the suggested amount.[191]

The Argentinean policy for reparation of arbitrary detention used a novel standard to define compensation. The amount was calculated for each

[187] Programa Nacional de Resarcimiento, La Vida no Tiene Precio: Acciones y Omisiones de Resarcimiento en Guatemala (2007), available at https://www.acnur.org/fileadmin/Documentos/Publicaciones/2008/6055.pdf.

[188] Arts 19–23 of Law 19,123 (1992). For a complete description of the reparation policies implemented, see Lira, 'The Reparations Policy for Human Rights Violations in Chile' (n. 164), 55–101.

[189] This approach to reparation is proposed by Cristián Correa, 'Reparations for Victims of Massive Crimes: Making Concrete a Message of Inclusion', in Rianne Letscher *et al.* (eds), *Victimological Approaches to International Crimes: Africa* (Cambridge: Intersentia, 2011), 185–233.

[190] Later, the government decided to expedite the process and pay only one lump sum slightly larger than one of those instalments would have been, but significantly less than the amount recommended. See Christopher J. Colvin, 'Overview of the Reparations Program in South Africa', in de Greiff (ed.), *The Handbook of Reparations* (n. 164), 176–214 (194, 209).

[191] The question has also been debated by Karl Zemanek, Peter Malanczuk, and Norbert Wühler during the discussions sessions reported in Randelzhofer and Tomuschat (eds), *State Responsibility and the Individual* (n. 93), 199, 245 and 248.

individual victim based on the 'highest category of the roster of civil servants of the National Public Administration, for each day of detention'.[192] Where the victim died whilst being detained, the amount was increased to the equivalent of five years of that same salary; if the person suffered severe injuries, it was increased to the equivalent of 70 per cent of that five years' salary. This standard was partly used to define the compensation amount for enforced disappearances, murder, and other similar severe violations, multiplied by 100. The definition of five years' salary or 100 monthly salaries was still random, but basing the amounts on the highest civil servant salary had symbolic meaning and resulted in amounts higher than those usually awarded by the IACtHR. The method of payment, however, through treasury bonds, reveals a less attractive aspect of this approach, because it left victims uncertain about the final amounts they could cash in and diluted the government responsibility, passing the obligation to future administrations.[193]

One possible way of addressing this problem is to define an amount based on socioeconomic indicators and a period that victims might require to overcome the effects of the type of violation suffered.[194] However, it is difficult to imagine or expect victims to necessarily recover after a certain period, which forces us to consider the option of a life pension.

Programmes based on the distribution of funds can result in even more random determination of sums, because the amount to be received by each victim would be the result of dividing the fund allocated by the number of victims registered, as is partly the case for the German Forced Labour Compensation programme, as well as the interim reparation awards paid in Sierra Leone, which distributed the 3 million USD allocated by the PBF.[195]

[192] María José Guembe, 'Economic Reparations for Grave Human Rights Violations: The Argentinean Experience', in de Greiff (ed.) *The Handbook of Reparations* (n. 164), 21–54 (32).

[193] Payments were given through treasury bonds that could be collected only sixteen years after they were issued. Victims could exchange them at market value. This is a system in which the administration at the time made a munificent promise to be fulfilled by the treasury of a future administration. The amount was particularly high when announced, because the Argentinean peso held parity with the US dollar – something that changed later when the peso was devaluated. Moreover, with the 2001 financial crisis, the bonds lost significant value for those who had not already sold them.

[194] For example, this has been recommended by the Kenyan Truth, Justice and Reconciliation Commission, which has proposed compensation through a ten-year pension for vulnerable victims of violations to the rights to life and personal integrity. Truth, Justice and Reconciliation Commission, Report of the Truth, Justice and Reconciliation Commission, vol. IV (2013), 106.

[195] The fund also covered the costs of registering victims, but its bulk was used for a lump-sum payment of 100 USD distributed to approximately 21,700 victims. See Suma and Correa, *Reparations in Sierra Leone* (n. 153), 7.

The arbitrariness of the determination can be compensated only by the implementation of other programmes that complement the awarding of money and provide more concrete support to help victims to overcome the consequences of the crimes suffered, such as rehabilitation measures, scholarships for children, acknowledgements of wrongdoing, memorialisation efforts, affirmation of the dignity of victims, or educational programmes to raise awareness of the injustices committed. However, as mentioned when describing the different experiences of implementation of reparation programmes, these measures are more difficult to implement and less relevant in cases of international armed conflict, because it is the wrongdoer who must acknowledge and learn from past wrongdoing if that acknowledgement and learning is to have any value for victims.

Another challenge in the definition of reparation measures is determining the categories of indirect victim to be included. In cases in which killings and disappearances define which relatives are to be entitled to receive reparation – either through compensation, rehabilitation, scholarships, or other measures – careful consideration is required. In most cases, this definition is left to the inheritance system operating in the respective country. However, this can pose a problem for disappearances or killings that have not been properly registered. Procedures for declaring the presumption of death are usually complex, requiring long waiting periods and imposing bureaucratic hurdles and costs that do not consider the special situation created by armed conflict, and which, in the main, disproportionally impact the poor. Relatives of those who have disappeared sometimes resist declaring their loved ones to be presumptively dead, because this can symbolise an end to their search and their demand that the State bring the missing back alive, as well as potentially leading to legal interpretations that result in declaring the statute of limitation for the criminal action.[196] Inheritance laws can also discriminate against women – a problem successfully addressed by the Moroccan policy, which established its own distribution system.[197] In Côte d'Ivoire, interim compensation awards are given to the family member who has made the claim, leaving the problem of distribution for the individual to manage. Victims' representatives have complained that, on occasion, a substantial part of the award has been seized by the deceased's brothers, reducing the resources available to widows and orphans.[198] Defining a specific distribution system between

[196] For example, legislations in Argentina, Bosnia and Herzegovina, Chile, Colombia, Peru, Sri Lanka, and Uruguay, as discussed in Correa, *Left in the Limbo* (n. 173).

[197] Guillerot *et al.*, *Morocco* (n. 186), 27–8.

[198] As reported by victims and expressed by Dr Oleh Kan, director of Victims Assistance at the Ministry of Solidarity, Women, Children, and Victims' Compensation of Côte d'Ivoire

relatives can avoid family feuds and guarantee that widows and orphans receive their fair share.

Another relevant situation concerns survivors of sexual violence and the determination of whether children born as a result of rape count as victims entitled to reparation. Peru and Colombia registered these children as a special category, acknowledging them as victims. However, this can create a difficult situation for the victims of rape, who reasonably try to shield their children from the potential stigma associated with such an acknowledgement, as has been reported in Uganda.[199] Although this issue has been discussed in several contexts, no specific policy has been defined. One alternative is to consider that all children of victims of sexual violence under a certain age suffer harm, directly or indirectly, as result of the assault suffered by their parent and the consequences – trauma, social stigma, marginalisation – derived from it. Based on this consideration, small compensation amounts or educational scholarships could be provided to all of them. In that way, children conceived as result of rape could receive reparation without being singled out, because they would receive the same benefits as their siblings. If similar forms of reparation are given to orphans and to children of survivors of torture, the chances of identifying and stigmatising victims of sexual violence would be reduced, and victims of rape would likely feel safer to apply and be registered.

Nevertheless, no matter how the compensation amounts are paid or defined, these payments by themselves are insufficient to address the deep frustration and sense of injustice that victims may feel in situations in which there is an unwillingness or incapacity to hold perpetrators to account or where investigations appear inadequate. Even if this is a criminal justice problem, the link between criminal justice and reparation is, as perceived by victims, extremely strong. Victims cannot be expected to feel satisfied with respect to their right to effective remedies if only reparation is provided.

c) REGISTERING VICTIMS Reparation policies based on common measures defined for each category of victim offer significant advantages in terms of the simplicity of the registration process. This approach requires only identification of the victim and verification of the existence of the violation. In five

during the conference on transitional justice, organised by the ICTJ in Abidjan on 27 October 2016 and attended by the author.

[199] Virginie Ladisch, *From Rejection to Redress: Overcoming Legacies of Conflict-Related Sexual Violence in Northern Uganda* (New York: ICTJ, 2016), available at www.ictj.org/publication/rejection-redress-overcoming-legacies-conflict-sexualviolence-northern-uganda.

years, Peru registered 182,350 victims[200] – a process that is ongoing at the time of writing. The Reparations Council, which is responsible for the registry, worked to attract a large number of registrar officers with knowledge of Quechua or other indigenous languages, recruiting them from a range of organisations, including churches, local NGOs, and municipalities. Registration involves filing a simple form that contains the information necessary to verify the existence of the violation.[201] The Council also allowed identity or kinship to be established by means of different documents, including baptism certificates or the testimony of community leaders.

The experiences of Peru and Sierra Leone are also interesting in terms of how outreach was performed during registration. In Peru, the Reparations Council visited the provinces that had the highest concentration of victims and organised hearings informing those in attendance about the registration process. It also responded to complaints from community leaders and municipal staff, and it clarified ambiguities. Mostly, however, the Council was able to include local leaders and to build trust in the registration process. Activities included asking leaders to define which geographical areas would be the most important to cover and who would be important allies in the effort to reach those areas: after facing strong rejection from the communities, the Council had realised that it first needed to ask the community's permission before entering indigenous areas. This consultation not only provided valuable information on how to conduct the process, but also eased resistance and distrust – a common factor after armed conflict – and contributed to a climate in which future mistakes and disagreements were more easily resolved.[202] In the case of Sierra Leone, organising district committees that included local community leaders provided important information on how to make adjustments during the middle of the registration process: information about which communities should be visited or which radio broadcasters should be used for outreach activities (i.e. distinguishing between those broadcasters that were widely listened to and those less so, such as the English-language UN radio channel that had initially been used for outreach despite having only a small audience), for example, proved invaluable.[203]

[200] Consejo de Reparaciones, *Informe Todos los Nombres* (n. 148), 55.

[201] Ruben Carranza, Cristián Correa, and Elena Naughton, *Forms of Justice: A Guide to Designing Reparations Application Forms and Registration Processes for Victims of Human Rights Violations* (New York: ICTJ, 2017), available at www.ictj.org/sites/default/files/ICTJ_Guide_ReparationsForms_2017_Full.pdf.

[202] Direct observation by the author on attending the first of these meetings in Huanta, February 2008. See also Consejo de Reparaciones, *Informe Todos los Nombres* (n. 148), 34–6.

[203] Suma and Correa, *Reparations in Sierra Leone* (n. 153), 4.

Some violations are more difficult to register than others, because they leave less evidence or because victims are too afraid to narrate them. This is particularly the case for sexual violence, especially because of the social stigma to which victims are very often exposed. Registering victims of sexual violence has proved challenging, because it requires both strict confidentiality and conditions conducive to gaining the victims' trust. Matching registrars and victims according to gender when there are signs of sexual violence has proved useful in Peru, Colombia, and Sierra Leone. In response to these obstacles, a special dispensation for lowering the evidentiary standard for sexual violence was adopted in Peru, which resulted in registering 4,623 victims of sexual violence – nine times more than the Truth Commission was able to report.[204]

Adapting standards of evidence to the particular circumstances of victims is a tool used not only in registering victims of sexual violence. During the different processes for registering victims of torture in Chile, which led to the registration of 38,254 victims, flexible standards of evidence were used in assessing the likelihood that victims could obtain any documented evidence of the violation, considering the circumstances of the events, the availability of mechanisms for seeking assistance at that time and place, and the degree of marginality of the victim. Testimonies without supportive documents were compared with other testimonies narrating similar circumstances, witnesses who could corroborate the story were sought, and attempts were made to identify common patterns related to the violations. Approximately 40 per cent of the testimonies received were approved, based on the identification of patterns and contextual information that made them very likely to be genuine. This method was particularly useful in assessing applications from victims claiming to have been imprisoned during the first months after the 1973 *coup d'état*, when detention and torture of political supporters of the deposed regime occurred on a massive scale, but human rights organisations were only starting to organise a response to defend victims, which only later led to better documentation of violations.[205] This allowed some of the most marginalised victims to be registered, particularly those who had no political connections or education to seek asylum, or to seek remedies before courts, as well as those who were too afraid or traumatised to seek other forms of assistance at the time.

D) DEFINING IMPLEMENTING MECHANISMS One of the most difficult aspects to assess is a reparation policy's effectiveness. Analysing reparation laws,

[204] Consejo de Reparaciones, *Informe Todos los Nombres* (n. 148), 37.

[205] Assessment conducted by the author, who was the legal secretary of the National Commission on Political Imprisonment and Torture during the 2003–5 registration process.

agreements, recommendations from truth commissions, or court judgments is easy compared to assessing the degree to which they have been implemented in practice. Deciding on what finally happened to victims and the degree to which rights recognised in reparation decisions have been translated into the effective delivery of the goods and services ordered requires significant research. Insufficient implementation is often the result of a lack of mechanisms for guaranteeing compliance and a lack of political will, but it can also be as a result of poorly defining how the measures established by laws, agreements, or judgments are to be implemented, and by which entities. This is particularly true of reparation measures that involve delivering services to a large number of victims and over a long period, such as education and rehabilitation programmes. But even merely paying compensation to a large number of victims – many of whom lack proper identification or bank accounts, or live in rural or marginalised areas – has proved challenging. Defining reparation measures requires consideration of how these measures will reach the estimated constellation of victims and the areas in which they reside.

In post-authoritarian or internal armed conflict situations, it has been possible to use existing public institutions, and in some cases NGOs, to provide these services. The public pension system is used in Chile to pay compensation pensions and the specialised rehabilitation programme is implemented through the public health system. But Chile is a country with relatively functional institutions and public services. Implementing similar rehabilitation services in Peru and Colombia, for example, has proved more difficult because of a chronic lack of funding, decentralisation with improper coordination and funding, and a deficit of trained healthcare professionals. In Bosnia and Herzegovina, these services are provided by a diverse roster of NGOs and local organisations, as well as a system of referral, with municipalities coordinated through a systematic policy based on a victims' registry capable of responding to the rights and needs of all survivors of sexual violence.[206] Other experiences regarding the provision of services to large numbers of victims have been conducted with targeted, short-term efforts. In Guatemala and Peru, psychosocial support is provided by a number of NGOs during exhumation processes; in Morocco, health care was provided for those requiring it during the activities implemented by the Equity and Reconciliation Commission; in Sierra Leone, surgery for the war wounded

[206] Igor Cvetkovski, Reparations for Survivors of Conflict-Related Sexual Violence in Bosnia and Herzegovina: Analysis of Services and Dataholders, in View of Moving Forward (IOM, unpublished draft report, 2015).

and women with fistula was provided by Mercy Corps during the short implementation period of reparation measures funded by the PBF. And the difficulties implementing these forms of reparation are not exclusive of large reparation programmes. Even judicial orders for reparation through services directed to certain communities, such as educational or rehabilitation services ordered by the IACtHR, are only sparsely implemented. These limited results emphasise the need to assess the existing institutional capabilities to define how rehabilitation or educational services can be implemented as reparation.

The designs of reparation policies need to include a clear definition of how the measures can be implemented and not allow this process to be a mere afterthought. In cases of international armed conflict, the definition of implementation mechanisms may be even more complex. As the case of the EECC proves, it is not enough to rely on States to provide reparation loosely defined by an arbitration body, even if the measures consist only in paying compensation or investing in infrastructure. The case of the UNCC shows that it is possible to deliver effective payments to victims by means of the respective States, but only if they are provided with funds allocated to that particular purpose, subjected to a monitoring and auditing process, and assigned funds to cover implementation expenses. It would be more difficult to define other forms of reparation, such as rehabilitation services or scholarships, without carefully identifying the entity responsible for implementing them in the country and the monitoring system to be set in place. The ILA, in its draft Procedural Principles for Reparation Mechanisms, has stressed the importance of supervision, recognising the results offered by the framework developed by the UNCC.[207]

e) the interplay of administrative reparation and regional human rights courts In situations of large-scale violations of human rights, regional human right courts have played a significant role in affirming the rights of victims to effective remedies and reparation. In particular, the ECtHR has examined the violations committed by Turkey – especially those perpetrated in connection with Turkey's actions regarding the Kurdistan autonomy movement and acts of terrorism linked to some of its supporters. Similarly, the IACtHR has examined violations committed by repressive regimes, as well as during internal armed conflicts, in Argentina, Brazil, Chile, Colombia, Guatemala, Peru, and elsewhere. The examination conducted by both regional human rights courts have included assessing the

[207] ILA, Draft Procedural Principles for Reparation Mechanisms, Report from the Washington Conference 2014, commentary on Principle 9.

policies implemented by some of those States to guarantee an expedient and large-scale process for registering victims and providing reparation for certain violations.

In the Latin American cases, sizeable administrative policies implemented by each State contrast sharply with the awards that can be provided and the standards defined by the IACtHR or by the Inter-American Commission on Human Rights in individual settlement cases that target a discrete number of victims. The Peruvian CVR registered close to 24,000 victims of killings and enforced disappearances. It estimated that, based on the average amounts resulting from decisions by the Inter-American Human Rights Commission and Court, a reparation programme would require more than 4.4 billion USD. Understandably, the government was reluctant to debate reparation.[208]

As Clara Sandoval discusses extensively elsewhere in this volume,[209] the IACtHR evaluated some of the reparation programmes implemented by Brazil, Chile, Colombia, and Guatemala when examining cases involving victims who had received awards under them. It has defined a series of criteria for analysing their 'objectivity, reasonability, and effectiveness'.[210] The evolution of the Court's jurisprudence in this area, says Sandoval, illustrates how the Court has shown deference when closely examining the mechanisms implemented. Such examination involves assessment of what has been effectively implemented under reparation policies and not only what the remedies available are.[211] In contrast, the ECtHR exhibits a greater deference towards States, including in assessing remedies provided to victims. However, it has ruled that the remedy provided by administrative procedures needs not only to be available to the victim, but also effective, and it has considered not providing the effective payment under such procedures to constitute a violation of Article 13 ECHR.[212] It is interesting to observe how both courts have moved towards analogous approaches even though they were initially coming from different positions on intervention or deference and even if they still differ in significant ways.

[208] Julie Guillerot and Lisa Magarrell, *Reparaciones en la Transición Peruana: Memorias de un Proceso Inacabado* (Lima: Aprodeh/ICTJ, 2006), 131.

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

[210] IACtHR, *Gomes Lund et al. ('Guerrilha do Araguaia') v. Brazil*, Judgment of 24 November 2010 (preliminary objections, merits, reparations, and costs), para. 303.

[211] See Sandoval, 'International Human Rights Adjudication', Chapter 3 in this volume, particularly her analysis of IACtHR, *Yarce and Others v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, 22 November 2016, and IACtHR, *Vereda La Esperanza v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, 31 August 2017.

[212] ECtHR, *Öneryıldız v. Turkey*, Judgment of 30 November 2004, Application No. 48939/99, para. 152.

It is not easy to find a solution to this problem. Judicial cases under human rights courts often look at particular incidents, involving either single victims or a few hundred victims at the most. Extrapolating those standards to hundreds of thousands of victims makes compliance with any programme impossible. Frequently, courts in these cases examine closely the situation of only a few victims who have received reparation from these programmes. From the perspective of those few victims, what those programmes provided is small compared with what courts have ordered. But if those victims receive full compensation based on the standards of courts, all of the other victims that do not have access to courts may reasonably feel treated as 'second-class victims'. What amounts to a fair decision from the perspective of a minority of victims can result in diminishing the political goals of reconciliation and redress implemented by a government and may even create divisions among the victims themselves. When examining the effectiveness of the remedies – as affirmed by the ECtHR – and the rationality, objectivity, and effectiveness of domestic programmes – as has the IACtHR – international human rights courts should, as Sandoval rightly argues, consider the general effectiveness of reparation programmes and not only their impact on the particular claimants they have in front of them.[213]

f) individual reparation, collective reparation and development policies addressing marginalisation In countries in which violence has targeted marginalised communities, or has been used against communities specifically to maintain or increase their marginalisation, individual reparation has proved insufficient. This is especially relevant where violations have been committed against ethnic, religious, or indigenous communities, as was the case in Aceh (Indonesia), Colombia, Guatemala, Kenya, and Peru, as well as where certain regions have been targeted by a combination of repression, discrimination, and abandonment, as in Morocco and Tunisia. These experiences are frequently overlooked by international law scholars even though they offer important lessons on the definition of collectivity and of collective harms and on implementation mechanisms.

It is important to distinguish collective reparations from reconstruction efforts or targeted development policies. The former should focus on harms of a collective nature suffered by a community and its members as a result of violations that impacted its collective values, as was defined in the Peruvian programme. This is particularly the case with regard to indigenous

[213] See Sandoval, 'International Human Rights Adjudication', Chapter 3 in this volume, section IV.

https://doi.org/10.1017/9781108628877.003 Published online by Cambridge University Press

communities, given their cultural and religious relationship with the land and their specific identity. Peru and Colombia have both implemented collective reparation policies, mostly for indigenous, ethnic, or rural communities. In Colombia, they have included other entities, for example the labour movement, the *Unión Patriótica* political party, the National Indigenous Organisation, and the University of Córdova, given the different forms of severe political repression they suffered. This expansion has proved complex, because demands from these organisations are more political in nature, aiming, *inter alia*, to alter policies or laws about the labour movement, or the political participation of different indigenous communities. In Colombia, the programme has become unmanageable, because each collective reparation plan, even if designed with participation of the community itself, fails to define clearly what the State is supposed to implement. This results in uncertainty regarding the State's commitment on when and how it has to deliver reparation.[214] Peru's collective reparation programme, limited to a single project defined by the community, has resulted in a higher rate of completion. However, those single and isolated projects not accompanied by additional improvements to basic services or economic opportunities have been less able to better the conditions of those communities or to have a reparatory effect.[215]

Addressing collective harms and the broader consequences of armed conflict can go beyond community reparation schemes, because they may extend across larger regions. The collective reparation programme in Morocco targeted eleven regions affected by marginalisation, repression, and discrimination, including one neighbourhood in Casablanca. Local organisations proposed a fund for development projects, which was implemented. Additionally, the government increased investment in infrastructure on the same areas and implemented projects to remember victims, as well as projects aiming to transform former centres of secret detention into community and cultural centres.[216] In the case of Tunisia, the region of Kasserine has filed a request to the Tunisian Truth and Dignity Commission, *l'Instance Verité et Dignité*, to be considered a victimised and targeted region, and hence deserving of reparation.[217] It is still too early at time of writing, however, to know how

[214] Correa, *From Principles to Practice* (n. 176), 20.

[215] Correa, *Reparations in Peru* (n. 32), 11–14.

[216] Julie Guillerot and Ruben Carranza, *The Rabat Report: The Concept and Challenges of Collective Reparations* (New York: ICTJ, 2009), available at www.ictj.org/sites/default/files/ICTJ-Morocco-Reparations-Report-2009-English.pdf.

[217] Tunisian Forum on Economic and Social Rights, 'Request to Declare the Region of Kasserine as "Victim" ', available at https://asf.be/wp-content/uploads/2015/11/ASF_TUN_R--gionVictime_201506_EN.pdf.

this programme is going to be implemented. It is unclear whether these cases should be considered reparation for human rights violations or development policies guaranteeing equal access to rights and opportunities. However, there is no doubt that policies mitigating marginalisation, for example in the region where lack of opportunities sparked the Tunisian revolution and the Arab Spring, is both a need and a form of redress.

Any reconstruction effort should also be focused on addressing those historical marginalisation and discrimination issues that could have contributed to the conflict or to the way in which the armed conflict impacted on some areas more than others. The policies implemented in Peru offer a good example of distinguishing reparation from reconstruction and of how each complements the other. The Peruvian Truth Commission observed that most of the violations, particularly the killings and disappearances, occurred in the highlands and Amazon regions inhabited mostly by indigenous communities. The Commission was shocked to learn the effects the internal armed conflict had on those areas, but the commissioners were perhaps more astonished to realise how little attention all that suffering received from the people living in the coastal cities: attention was paid to the conflict only when those cities were affected. The Commission linked the sources of the conflict, as well as the pervasive methods used by Shining Path and the armed forces in those regions, to the degrees of marginalisation and the existing racism among educated, middle-class, and elite Peruvians. It realised that any sustainable peace could be based only on tackling the racism and marginalisation affecting those vast regions. The Commission did not confuse reparation for victims with long-term societal transformation; it made a separate set of recommendations for decentralisation, the allocation of resources at the regional level and participatory mechanisms for regional budgets, the provision of basic social services, and for promoting respect for the cultural rights of indigenous communities, including in the provision of services and through the promotion of bilingual education.[218]

In addition, but separate from individual and collective reparation focused on specific communities, Peru directed a social programme for overcoming poverty, which consisted of conditional cash transfers aiming to create incentives for children to attend school and for families to access other social services in the regions said by the Truth Commission to have been affected by both marginalisation and violence during armed conflict.[219] In a similar

[218] Comisión de la Verdad y Reconciliación, *Informe Final*, vol. IX, 84–102.

[219] Ruben Carranza, *The Right to Reparations in Situations of Poverty* (New York: ICTJ, 2009), 4, available at www.ictj.org/sites/default/files/ICTJ-Global-Right-Reparation-2009-English.pdf.

approach, the country made an extraordinary effort to address both marginalisation and massive victimisation caused by the destruction of civil registries and documentation in the regions controlled by Shining Path in its declared war against the 'bourgeois State'. The response was not only reconstruction of those registries, but also a massive registration process aiming to provide the inhabitants of those same regions with identity documents addressing the structural deficiencies of the registry system, which particularly affected indigenous and marginal inhabitants.[220] In another example of focusing a social policy on a particularly vulnerable population affected not only by conflict but also historically by marginalisation, Peru has implemented an aggressive educational policy, increasing its funding and improving the coverage of primary and secondary education in the affected areas, including bilingual education, which has increasingly improved the educational attainment of rural and indigenous children.[221]

C. *Lessons for Designing Reparation Policies for Armed Conflict*

The different experiences discussed in the previous sections offer important lessons on systems for defining reparation for victims of war. A distinction needs to be drawn, though, between situations in which reparation needs to be defined for either individual or a small number of victims and cases with massive violations involving a large number of victims. However, even when addressing singular cases, the broader question of how other victims from the same armed conflict can access reparation ought to be asked. In situations of war, when violence is exercised on a massive scale, the chances of abuses affecting large numbers of victims are high and it is likely that one judicial complaint reflects only the tip of the iceberg.

Class action suits can also be effective in reaching a wide range of victims. They should definitely be explored as an option, particularly when they allow using low or flexible standards of evidence that could facilitate victims' access. Such suits will, of course, still have to overcome some of the obstacles faced by courts in terms of sovereign immunity and judicial doctrines on the acts of

See also Nicola Jones, Rosana Vargas, and Eliana Villar, 'Conditional Cash Transfers in Peru: Tackling the Multi-Dimensionality of Poverty and Vulnerability', available at www.unicef.org/infobycountry/files/Conditional_Cash_Transfers_In_Peru_-_Tackling_The_Multi-Dimensionality_Of_Poverty_And_Vulnerability.pdf.

[220] Correa, *Reparations in Peru* (n. 32), 21–2.

[221] Cristián Correa, 'Education Overcoming Massive Human Rights Violations', in Clara Ramírez-Barat and Roger Duthie (eds), *Transitional Justice and Education: Learning Peace* (New York: Social Science Research Council, 2017), 131–75 (138–9).

government, on the political question or other forms of judicial deference to government, particularly in situations comprising national security, assessing the conduct of the military or foreign affairs.

The lessons developed in this section will provide useful guidance for interpreting the legal framework that governs the right to reparation for victims of human rights or IHL violations. They can help to determine a proper understanding of proportionality, the scope of violations that need to be included, and what constitutes the notion of *restitutio in integrum* in cases of large-scale violations. They can also help to enrich the notions of adequacy and promptness (as endorsed in the General Assembly's Basic Principle 15) in a way that prioritises the accessibility and effectiveness of reparation.

1. The Advantages of Comprehensive and Large-Scale Reparation Processes

Treating violations as more than isolated incidents allows the operational or more systemic failures that led to multiple violations of humanitarian law to be more effectively determined. This might help to address the violations more comprehensively, and to define adjustments and reforms that could help to guarantee non-repetition. Additionally, as explained with regard to the domestic reparation programmes, this approach supports development of a policy defined by clear prioritisation of the categories of victim according to a certain hierarchy of violations in a way that can contribute to affirming the most fundamental values that govern society, stressing gender considerations, as well as the importance of reaching poor and marginalised victims. This is particularly important when the limited availability of resources means that some categories of victim will be left out of the reparation effort. Additionally, if the policy targets certain violations considered the most severe, it is unnecessary to add a requirement that the violations either exhibit a systematic character or be of a widespread nature, as the EECC did, which is inappropriate in defining the right to reparation. This would allow all victims of those severe violations to be included without distinction.

In situations in which all sides of a conflict committed severe violations, intentional decisions to include all types of violation of the same severity can guarantee that victims of the same violations on all sides are included in an *ex officio* programme – something that cannot be guaranteed via litigation. On the one hand, judicial decisions granting reparation to only those few victims who end up with successful claims can create resentment among other victims who do not have equal access to justice, which will likely be the less (socially and politically) well connected or even those in most need of reparation. On

the other hand, judicial decisions could impel political solutions that might result in agreements or policies addressing a wider group of victims – but even if this is true, it remains the case that a comprehensive policy will be better than isolated decisions and that the latter are useful to the degree only that they could lead to the former. Litigation should not be limited, but encouraged to obtain wider results.

2. Defining the Most Serious Violations

A reparation process needs to prioritise the most severe violations of human rights – those affecting human dignity the most. The process also needs to guarantee implementation, which demands promises and commitments that will be fulfilled. This requires those involved to be honest about what is possible, which means making decisions on the types of violation and victims than can and cannot be included by means of a transparent and accountable decision-making process. Such decisions need to be based on human rights principles, including both non-discrimination and a gender-based approach. The experiences examined in this chapter make a strong case for prioritising violations to the right to life, including disappearances, and violations to personal integrity, including rape and other serious forms of sexual violence, torture, and harms causing personal disability. If those categories are sufficiently covered, other violations to personal liberty could be included, such as the forced recruitment of children, internment violating IHL provisions, deportation, and ethnic cleansing. This means adopting a different approach to that used by claims commissions, particularly the UNCC and the EECC, which accepted claims for all types of violation without any such prioritisation.[222] Property violations should be addressed only after more severe violations have been sufficiently covered. If violations of property are included, the context and availability of resources may be such that it is necessary to limit them to those losses that are crucial to the future lives of victims or to overcoming the legacies of the conflict, such as housing and the repatriation of displaced populations, and perhaps to include a cap on the awards available. These decisions should be based on assessment of the present-day consequences of those violations rather than a rigid approach based on restitution to the pre-loss situation.

[222] The UNCC did not need to prioritise among different violations, because it relied on practically unlimited funding as a result of unique political and economic conditions.

3. Defining a Preliminary Budget Based on Estimates

A second element essential to the definition and distribution of reparation is the availability of resources. If promises are to be kept, a clear picture of the projected costs and the funding sources is necessary.[223] Successful experiences, beyond the extraordinary case of the UNCC, derive from a genuine political commitment among responsible States. State budgets fund reparation policies, which means making projections of the number of victims in each category and the possible costs of reparation measures. Some of those costs can be shored up by existing policies, but to guarantee effectiveness, additional resources will be needed to cover the extra reparation services that those policies are required to deliver. The advantage for the State is that working with victims of war can result in significant improvements in the rehabilitation capacity of the healthcare system, for example regarding the provision of mental health or physical rehabilitation services for the whole population, or the capacity to respond to victims of domestic violence, sexual violence, or other violent crimes.

Registration processes are unpredictable, so projections can never be exact. Budgets need to be preliminary, with room for adjustment. Implementation strategies need to be adaptable, for example making initial compensation payments during the process. Pensions offer the advantage of spreading the budgetary impact over decades, while guaranteeing an income that provides at least minimum – and perhaps even decent – conditions for the rest of victims' lives. However, a reliable system of distribution must underpin pensions and victims must be certain that they will continue to be paid despite changes in government.[224]

Defining how funds will be transferred to the implementing agencies is also essential and, in cases of international armed conflict, that imposes additional hurdles. Monitoring and auditing are core, including interviewing victims to assess their perception of compliance. Funding also matters to how reparation is understood: if reparation is an obligation derived from responsibility for wrongdoing, it cannot be supplemented by donors. Such assistance in addressing the dire needs of victims will certainly be welcome, but only as an adjunct to what ought to be primarily a commitment by the State responsible. Additionally, several of the long-term measures frequently needed to address

[223] ILA, Draft Procedural Principles (n. 207), commentary on Principle 10.

[224] That governments will reliably comply with long-term commitments cannot be taken for granted. A survivor of sexual violence in Kenya told the author once that she did not want a pension, but a single amount, because she 'did not trust the Kenyan Government'.

severe violations of human rights require long-term funding – something that donors rarely provide.

4. Defining Standardised Measures Appropriate to the Consequences of the Different Categories of Violation for Victims

The experience of the UNCC with regard to violations of the right to life and physical integrity (particularly in terms of how category B claims were handled), as well as reparation programmes implemented in several of the countries at which this chapter has looked, is indicative of the importance of defining similar measures per violation category. These measures can also be defined in terms of the current consequences that those violations have on victims rather than in terms of restoring victims to a living condition in the distant past, which is all but impossible. This practical approach can allow for a simplification of the registration procedure, reducing administrative costs and processing times. It is difficult enough to gather evidence of events that happened perhaps decades ago, and to assess the causal links between the violations committed and harms suffered by victims. The common experiences among national reparation policies stress the effectiveness of providing similar compensation amounts to all those who suffered similar violations, presuming that they all experienced analogous harms. Moreover, it has proven important to base the mechanisms for distributing the reparation awards among the victims or family members on standardised categories. These experiences stress the importance of rehabilitation and educational services as forms of reparation, particularly for those affected by physical violence or trauma, as well as the need for special mechanisms for children. However, such measures are more complex to implement and require certain domestic capacity to carry them out – something that can be challenging.

This approach has been criticised as insufficient by the UN Working Group on Enforced Disappearances. Examining the system of compensation based on pensions implemented in Chile, the Working Group considered that:

> [T]his universal system does not allow for the assessment of individual damages or of the suffering of the disappeared person or their relatives. The reparations required by the Declaration [on the Protection of All Persons from Enforced Disappearances] must remedy the direct consequences of the enforced disappearance, and that means the particular situation of each person and each case must be considered.[225]

[225] UNHRC, Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Mission to Chile, 29 January 2013, UN Doc. A/HRC/22/45/Add.1, para. 45.

This conclusion does not take into account the need to balance the requirements to guarantee accessibility against how promptly reparation is made to a large number of victims. Individual assessments, as recommended by the Working Group, may require considerable efforts and introduce differences among victims based on their socioeconomic status or their ability to provide evidence of loss of income. A standardised system based not on individual assessments of harms but on an evaluation of the consequences suffered in general by all victims of the most serious violations could help to shape a set of measures and amounts that could be effective in addressing the worst consequences of those violations. This system satisfies the requirement that reparation should be proportional if the measures defined by each category are sufficient to respond to the consequences that victims of such categories generally still suffer, even if not to the exact losses suffered by every single individual. This demands the participation of victims in the definition of such general measures. This approach could be more effective for guaranteeing prompt and expedient implementation, as well as for reaching more victims under the categories selected. What might be reasonable and fair in judicial settings for the determination of individual compensation might not be the best option when determining reparation for large numbers of victims. Furthermore, the IACtHR has also decided general awards in cases involving large numbers of victims.[226]

The identification of who to include as final recipients of reparation might also depend on the context. The ILA suggests that massive claims processes might use relevant distinctions that follow hereditary law or specially defined mechanisms, such as the UNCC, the German Forced Labour Compensation Programme or the Housing and Property Claims Commission of Kosovo.[227] The correction to the inheritance distribution used by the Moroccan Equity and Reconciliation Commission is an interesting example of a special system designed to counteract a domestic law on inheritance that was discriminatory to women. Another practical approach is to include relatives according to their proximity to the victim, creating benefits for those who could be considered most affected by the loss, disregarding the inheritance system, as in the cases of Chile and Peru. These programmes recognise as indirect victims only the

[226] This has been a standard practice in cases of massacres. For example, in a case involving hundreds of summary executions, the Court provided standardised amounts for the direct victims and their closer relatives based on lists prepared by the applicants and verified by the IACtHR. See IACtHR, *El Mozote and nearby places v. El Salvador*, Judgment of 25 October 2012 (merits, reparations and costs), para. 384.

[227] ILA, Draft Procedural Principles (n. 207), commentary on Principle 6.

spouse, the children, and the parents of the direct victim, presuming that, in general, these are the ones who suffer most.

A final consideration is that standardised forms of reparation that allow for the registration of victims who may lack evidence, be poor, or feel unsafe prioritises accessibility for the most vulnerable among victims of the most serious crimes. This is essential to comply with what the ILA recognises as the 'right of victims to have access to an effective mechanism to claim reparation'.[228] This formulation is based on existing international law instruments quoted by the ILA, which states that 'a dissociation of the substantive right to reparation and the procedural capacity to assert this right is not beneficial to the victims'.[229] If accessibility is so important, it can be said that it should be considered more relevant than strict fairness in the sense of individual assessment of harms. This is particularly true when individual awards are based on the strict definition of proven harms, where a high threshold of evidence might result in the exclusion of massive numbers of the most vulnerable victims, or when the determination of harms could expose victims to serious trauma or social stigma.

5. Considering Implementation Mechanisms

The experience of the UNCC, as well as of the national reparation programmes described throughout this chapter, also demonstrates the importance of having clear rules about how measures are going to be implemented and reach victims. In situations of international armed conflict, this endeavour is even more complicated. It could lead to the conclusion that it is impossible to provide rehabilitation or educational services and that all efforts should be focused on compensation. However, limiting reparation to compensation risks being perceived by victims as a reduction of the suffering experience to nothing more than money. Forms of satisfaction, including the acknowledgement of responsibility and measures to guarantee non-repetition, might be relevant too, as could measures to strengthen the mechanisms for preventing violations of IHL by the responsible party's military by requiring them to examine and learn from their own wrongdoing. Having a strong monitoring mechanism guaranteeing that compensation will reach victims is also essential. What is unacceptable is represented by the end result of the EECC: a mere net transfer of resources from one country to the other of the difference between the reciprocal damages that each of them caused. The lack of

[228] *Ibid.*, Principle 1.
[229] *Ibid.*, commentary to Principle 1.

https://doi.org/10.1017/9781108628877.003 Published online by Cambridge University Press

effective payments of reparation awards, particularly after the immense investment of time and resources that the EECC required, constitutes a huge failure, not least from the perspective of victims.

6. Registering Victims Instead of Claims, Using Flexible Standards of Evidence

By foreseeing standard reparation measures instead of individually assessed claims, the process is simplified, thereby reducing costs and making it more expedient. It allows focus to fall on understanding the context of the violations and being able to better assess the veracity of claims related to specific violations. Some of the standards developed by the EECC, the jurisprudence of the ECtHR, and some domestic court judgments mentioned in sections II.B and II.C of this chapter offer important criteria for defining which types of violation of IHL should be covered by a reparation policy. Organising cases into broader situations to be examined together on the basis of their specific context can support processing. Even if the EECC had made a reference to lowering its requirements for assessing cases of sexual violence, its overall condition of limiting the assessment to violations of a systematic nature was not pertinent for defining who was a victim of a violation and therefore deserving reparation.

An inter-State mechanism that excludes individual application or a claims process that is based on high standards of evidence will most likely not offer *appropriate* reparation, because each will exclude victims that cannot produce such evidence. Another core notion, derived from human rights, is *non-discrimination*, which demands sufficient flexibility so that those with fewer opportunities to exercise their rights are included. Reparation measures, however, might need to respond to a causal link, using the notion of *conditio sine qua non* between the violations and the current conditions affecting victims. This link can be established through a general assessment of the consequences affecting victims of similar violations in the present rather than assessment of each of them. If a significant number of survivors of torture experience a higher incidence of health complications than is statistically average for their age, it would be desirable to provide them with full and free access to health care that is not limited to consequences directly linked to the types of torture suffered, especially when decades have passed; if a significant number of survivors or their children have attained low levels of education, reparation should include measures for assisting their enrolment into educational programmes without forcing them to prove an individual causal link or limiting access to those who were studying at the time of the events. By using

the notion of appropriateness and non-discrimination in defining general reparation measures, the practices mentioned in this chapter challenge the formalistic approaches usually used by courts or arbitration tribunals for determining reparation.

This requires understanding reparation not as a response to harms that need to be established and linked to certain violations, but as a response to the violations themselves. It can be presumed that the killing or disappearance of a loved one, or being raped or tortured, cause severe harm. A simplified process for registering the victims of these violations can make reaching all of the victims easier. In contrast, registering claims and assessing each harm can result in a significant obstacle for those who cannot produce the requisite evidence.

The importance of registering victims of certain violations and not claims can be better understood when examining two different dimensions of how a rigid adherence to individual fairness can result in regressive policies. An attempt to provide strict proportionality for each case requires the claimant to present comprehensive evidence of their loss. Less educated victims, those who were part of informal economies or lacking documents, or those who suffered violations that left little evidence, as well as those fearing stigma, reprisals, or shame, will be less likely to provide such evidence. Additionally, determining compensation based on individual proportionality will result in higher awards for those who can prove that they lost more. In the context of poverty or limited budgets, this could result in transferring a disproportionate part of the budget to the successful and higher claims, which in most cases would be to wealthier victims.

Effective registration, like that conducted in Peru, highlights the importance of using the language spoken by victims, the need for registrar officials to have knowledge of the region and the affected communities, and taking into account the gender of registrar officials. The registration process needs to be designed holding in mind the legacies of mistrust and fear that usually remain after violent conflicts. The flexible criteria used by several of the registration processes operating under national policies are also good practices to consider. Registration should be based on what – under the specific circumstances – victims could be reasonably expected to provide in terms of documentation. Documentation requirements should be assessed according to different standards for different types of victim, based on the likelihood that the particular person could have been able to document the particular type of violation suffered and on their present ability to obtain such documentation.[230] This

[230] For example, the National Commission of Political Imprisonment and Torture of Chile considered a flexible standard of 'moral conviction' about the veracity of the testimonies,

https://doi.org/10.1017/9781108628877.003 Published online by Cambridge University Press

requires considering, for example, their gender, age, educational level, degree of fear at the time of the violation and later, and ability to obtain assistance immediately after the events that could have produced documentation of the violation or plausible witnesses. The registration process needs to be particularly sensitive to gender issues, taking into account the difficulties women encounter when navigating bureaucracies; it must also take into account the obstacles other marginal victims may face regarding registration. The use of flexible criteria to guarantee the access of victims, who understandably might have less evidence to prove the violations they suffered, cannot be understood as a violation of the non-discrimination principle that should be guiding the process. The ILA has also recognised the importance of providing special support to certain groups of victim and of adopting gender- and child-sensitive approaches precisely to *avoid* discrimination.[231] Moreover, registering victims might require additional efforts to reach those who face registration obstacles and even to reopen registration processes to include those who were unaware or were too afraid or distrustful during initial efforts.[232] In sum, these flexible criteria are not a deviation, but a proper adaptation of the law to the specific circumstances for avoiding exclusion and discrimination that rigid procedures based on what would be expected in normal circumstances and in orderly societies would cause.

7. Collective Reparation, Assistance, Reconstruction, and Responding to Root Causes and Marginalisation

In addition to individual reparation, some of these experiences illustrate the importance of considering other needs resulting from armed conflict. In cases of conflict affecting particular communities with strong cultural identities, especially indigenous communities, forms of collective reparation may need to be considered. Collective reparation might help to repair the social fabric of those communities, and to restore some aspects of their tradition and culture that could have been affected by massive violations. This could help those communities to recover and contribute to their living conditions. However,

requiring more evidence in cases in which it was likely that the victim could have been able to obtain such evidence at the time of the events, and not requiring such high standards in situations in which massive and undocumented detentions were committed and there were no human rights organisations working in the area. See Report of the National Commission of Political Imprisonment and Torture, 2005, 73–4 (it should be noted that the author was legal secretary of this Commission from 2003 to 2005).

[231] ILA, Draft Procedural Principles (n. 207), commentary on Principle 3.

[232] *Ibid.*, commentary on Principle 6.

when specifying forms of collective reparation, it is important to consider the actual capacity to deliver effective measures. This requires not only assessing the harms and the demands from the members of the affected community, but also determining what is possible to implement, by which entity, with what costs and when.

In addition to collective forms of reparation to affected communities, in the aftermath of conflict there is a need to reconstruct devastated areas, infrastructure, and services. Reconstruction differs from reparation, and from collective reparation, because it does not necessarily respond to violations of IHL. In defining a reconstruction policy, it is important to consider its overlap, complementarity, or possible competition with the reparation policy. If a reparation policy is based on the prioritisation of victims of the most serious violations, there is the need to consider the conditions of the population, which may have suffered some indirect consequences of violence or may have experienced violations that the reparation policy cannot cover. This requires additional efforts to address the urgent needs of those excluded from a reparation policy that focuses only on the most serious violations, and to respond to the imperative for reconstruction and economic recovery. Assistance for refugees and displaced persons to return or resettle, which should not be confused with reparation, is still required. If violations of property rights cannot be included in a reparation programme, reconstruction policies that guarantee access to basic services, education, health care, infrastructure, communications, sanitation, or electricity are essential preconditions if people in the affected areas are to recover from the conflict. The destruction of a workshop or a retail store might not be straightforwardly compensated, nor might a looted plantation, but several years after the destruction better roads to receive supplies and to sell products, or a local school, might be welcomed by those affected by the looting and destruction. These measures, which are not strictly reparation but development policies, can also help to reduce resentment among those who did not receive reparation. Additionally, functioning schools and healthcare centres might help victims to avoid having to use all their compensation to cover their educational and healthcare needs.

The policies mentioned with regard to Peru offer interesting examples of how this can be done in practice. The experience of targeting regions affected by both violence and marginalisation with specific development policies shows how these two approaches (reparation and reconstruction) can work together without being confused. The effort to provide identity documents to mostly unregistered indigenous persons living in those regions and the increased enrolment of children from those regions in

school, paired with promoting bilingual education, are other interesting examples to explore.

IV. CONCLUSIONS

The existence of a right to reparation for victims of war under international law has not been fully developed or accepted. However, recent decisions by national and international courts provide guidance for wider acceptance, particularly by interpreting human rights obligations in the context of armed conflict. There is an increased recognition among States that their obligation under international law to ensure that victims of human rights violations have an effective remedy involves a right of those victims to reparation and there is significant State practice applying this in cases of internal armed conflict. This practice is analysed in detail elsewhere in this volume by Clara Sandoval.[233] The applicability of international human rights law to situations of armed conflict allows us to address some of the ambiguity of IHL with regard to the right of victims to reparation. The obligation of States to establish accessible and effective remedies is applicable to violations committed during armed conflict. A vacuum still exists regarding the obligation of non-State parties in armed conflict to provide reparation for grave breaches of IHL, but that gap can be narrowed or closed by the application of tort law against those actors.[234] Moreover, in practice, some States have assumed a general responsibility towards all victims of an internal armed conflict, as in the cases of Peru, Colombia, Sierra Leone, or Guatemala.

There have been few judicial decisions that affirm the general acceptance of the right of victims based on the applicability of human rights law in contexts of war, but *Nuhanović*,[235] *Stichting Mothers of Srebrenica*[236] and *Al-Skeini*[237] each provide strong support for this recognition, which is consistent with how the ICJ interpreted the interplay between international human rights law and IHL in the *Israeli Wall* case.[238] These precedents rebut the arguments used in *Kunduz*[239] by the Federal Court of Justice of Germany to reject in absolute terms the existence of an obligation under IHL to provide

[233] Sandoval, 'International Human Rights Adjudication', Chapter 3 in this volume.
[234] For the current state of IHL on the obligations of organised armed groups to make reparation, see Furuya 'Right to Reparation', Chapter 1 in this volume, section V.A.2.
[235] Supreme Court of the Netherlands, *Nuhanović* (n. 39).
[236] Gerechtshof Den Haag, *Stichting Mothers of Srebrenica* (n. 41).
[237] ECtHR, *Al-Skeini* (n. 71).
[238] ICJ, *Israeli Wall* (n. 75).
[239] BGH, *Kunduz* (n. 62).

https://doi.org/10.1017/9781108628877.003 Published online by Cambridge University Press

reparation to victims of war and to argue that the State liability regime does not apply per se to actions or omission of the armed forces of Germany during war. A possible review of this case by the ECtHR might shed light on these points, and the degree to which it is admissible to limit State liability for violations of international humanitarian law based on domestic law and to consider IHL without taking into account international human rights law. Still, the reluctance of the United States to accept responsibility for the actions of its armed forces beyond the narrow scope allowed by existing mechanisms and the deference that its courts show to the other branches of government in these matters will remain serious obstacles for the universal acceptance of this right. Other countries, such as Japan and France,[240] also show reluctance to recognise this right.

Another relevant legal development will be to the degree to which the African Court of Human and Peoples' Rights will interpret the obligation to provide effective remedies and reparation during armed conflict under Article 27 of the Protocol to the African Charter. In addition to the recent decisions by the ECtHR, the IACtHR has been a strong advocate for making applicable the obligation under Articles 8 and 25 ACHR to investigate violations during internal armed conflict, but it is unlikely that it will have to address this question in regard to international armed conflict unless Latin American countries are exposed to those situations, perhaps through their increasing contribution to peacekeeping operations.

The mechanisms for obtaining reparation are to be set by the respective national legislation. Those mechanisms need to fulfil basic requirements of independence and effectiveness. Most countries have such mechanisms in place and their courts can interpret their international obligations as giving them jurisdiction. Regional human rights systems that recognise the compulsory jurisdiction of a region's courts offer an additional avenue for victims to demand this nascent right, as well as for supervising and advancing how domestic systems recognise it and provide reparation to victims.[241] These obligations under international human rights law are applicable in contexts of armed conflict, even in international armed conflict, as far as the respective State exercises effective control over the situation that led to a violation.

The exact obligation on how to fulfil the mandate to provide remedies, and the exact conditions required for guaranteeing the independence and

[240] Conseil d'État, Societé Touax et Societé Touax Rom, 23 July 2010, (2011) 115RGDIP 1001. On Japan, see Furuya, 'Right to Reparation', Chapter 1 in this volume, section II.B.

[241] See, on this supervision, Sandoval, 'International Human Rights Adjudication', Chapter 3 in this volume.

effectiveness of the mechanisms, may vary according to military conditions and other contextual elements. Similarly, the assessment of the existence of a violation under international human rights law in a situation of armed conflict requires analysing the context, examining issues of proportionality and military necessity, and interpreting human rights provisions through the lens of IHL and other relevant norms in an effort to determine which of those provisions are relevant and applicable to a situation of armed conflict. Domestic courts and other independent mechanisms interpreting domestic legislation regarding the responsibility of the State for the actions of its agents should take into account these obligations derived from international law to determine reparation awards to victims.

However, even if this interpretation of the law is strengthened, the solutions might remain too flawed to be capable of responding to the rights of victims of armed conflict. Isolated domestic court decisions, supported by decisions of regional human rights courts, may provide only a chaotic patchwork of solutions and reach no more than a handful of victims. Decisions on reparation may benefit only those capable of effectively litigating at what many victims would consider foreign courts unless significant reforms for establishing military compensation courts on the ground results from this evolution. Perhaps a more positive outcome would be if the threat of domestic or regional human rights litigation pressures States to enact more independent mechanisms for investigating possible violations committed during war and to improve preventive mechanisms for reducing those violations.

The kind of objections mentioned and the concerns about possible large-scale litigation from victims of armed conflict seem to explain why some courts refuse to acknowledge the existence of the right of victims to reparation. This seems more a problem of the inadequacy of courts and of individual judgments to deal with large numbers of violations than a fundamental objection to the existence of such a right. Awarding reparation through a comprehensive policy could help to address those objections while honouring the idea that victims have legal rights. These mechanisms could be set by States, in cases of internal armed conflict, or by inter-State agreements, such as the EECC. International mechanisms, like that suggested by Furuya elsewhere in this volume,[242] could make an important contribution to assisting victims with their suffering, but could hardly be considered reparation if they are not based on acknowledgement and funding from the States responsible.

The identification of an adequate mechanism to address massive violations of rights during armed conflict is challenging. This is an area in which *ad hoc*

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

international mechanisms, which are those most studied in this field, have provided only limited results and have much to learn from domestic reparation programmes on their ability to respond to concrete victims. Providing adequate responses to victims of war demands the setting up of mechanisms that could guarantee accessibility to all victims – at least those affected by the most serious violations to the rights to life and personal integrity, and perhaps even by not covering violations to the right to property. This may require a non-judicial approach, whereby accessibility is prioritised over the formal requirements and individual claim assessments that often characterise judicial litigation and international arbitration. This could be the result of political pressure, the cumulative effect of litigation or political and/or peace agreements. The designers of these mechanisms have significant lessons to learn, both positive and negative, from the experiences of administrative reparation programmes, as well as from the UNCC and EECC.[243] They need 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. In this interpretation effort, they could benefit from the experiences of domestic reparation programmes. These programmes offer useful guidance on how to clearly prioritise those violations that will be included, based on a hierarchy derived from human rights, and particularly the values of life and personal integrity, as well as non-discrimination principles. They should definitely allow direct engagement by victims and examine critically the assumption that States are the best guarantors of the rights of their citizens.

The practices analysed throughout this chapter offer insights into how to define reparation to reach all victims affected by the most severe violations in ways that can provide a substantial reparative effect on the current consequences of those violations, makes only promises that can be fulfilled, offers victims effective and simplified mechanisms for registering and verification, and does not rely on claims and individual assessments of harms, but on establishing the consequences suffered in general by victims of similar violations and on forms of reparation that protect the identity of those (particularly women) who fear stigma. This approach to reparation can prioritise accessibility, focusing on reaching the most marginal victims. These lessons can

[243] One overlooked issue that arose during the ICJ case on *Jurisdictional Immunities* between Germany and Italy was the use Italy made of the funds it received after the agreements of 2 June 1961 and 30 July 1963, and the degree to which they reached individual victims whose harms those agreements were supposed to address. See ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99. In the EECC, the failure to effectively pay reparations to victims is even worse, because claims were individually assessed and decided, but neither State followed through with payments.

contribute to developing standards that are adequate to situations of massive violations, but which still respond to a rights-based approach, not leaving governments with excessive leeway on how to define what is adequate and proportionate.

These reparation efforts, focused on a narrow circumscription of the most serious violations, allow for the targeting of individual victims without threatening the economic recovery of countries emerging out of war. They can also respond to harms of a collective nature, by means of participatory processes that could identify both what is most needed and what is practicable. These efforts can serve to provide stability and peace by showing how a society cares for those who were indisputably most affected by war. They allow States to find a reasonable way of responding to their obligations towards victims while not imposing an impossible burden on the rest of society. Moreover, they can provide a strong message about the values that societies hold sacred: the common dignity and value of life, and the personal integrity of all, even former enemies. These are important foundations for post-conflict reconstruction.