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## The individual right to reparation for victims of sexual violence during armed conflict in international law - theory and practice

Research dissertation presented for the approval of Senate in fulfillment of part of the requirements for the Master of Law (LL.M.) in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Law (LL.M.) dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

## Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AfCoHPR	African Commission on Human and Peoples' Rights
AJIL	American Journal of International Law
ATCA	Alien Tort Claims Act
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECoHR	European Commission on Human Rights
ECtHR	European Court on Human Rights
EJIL	European Journal of International Law
ICESCR	International Covenant on Economic, Social and Cultural Rights
IACHR	Inter-American Convention on Human Rights
IACtHR	Inter-American Court on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International humanitarian law
ILA	International Lawyers Association
ILC	International Law Commission
ILM	International Legal Materials
IRRC	International Review of the Red Cross
PCIJ	Permanent Court of International Justice
SC	United Nations Security Council
SCSL	Special Court for Sierra Leone
TRC	Truth and Reconciliation Commission
UN	United Nations
UNCC	United Nations Compensation Commission

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The individual right to reparation for victims of sexual violence during armed conflict in international law - theory and practice

*“a right without a remedy is no right at all”*  
*Lord Denning<sup>1</sup>*

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<sup>1</sup> Lord Denning in *Gouriet v. Union of Post Office Workers* - [1978] AC 435; [1977] 3 WLR 300; [1977] 3 AllER 70

## Introduction

According to John Locke the protection of private rights assures the protection of the common good.<sup>2</sup> According to positivists human rights lawyers, cooperation and mutual respect are the most advantageous behaviour for individuals and a society.<sup>3</sup> The foremost aim of the international community today is to ensure peace and prevent violations.<sup>4</sup>

A rich body of international law seeks the protection of individuals against violations committed by their states and committed during armed conflicts, occupation or transition. States are obliged to respect customary international law and the treaties they are members of. In the case of violations of their international obligations states are responsible to make adequate reparation for the harm they caused.<sup>5</sup>

Today civilians are the most affected victims of the waging of war which international law has not been able to prevent yet.<sup>6</sup> Among them the number of victims of sexual violence is increasingly high.<sup>7</sup> Nevertheless there is still a widespread culture of denial of gender-based violence and a lack of effective national and international prosecution of the perpetrators and redress for the victims.<sup>8</sup> For a long time sexually violent acts, especially rape seemed to be treated by society and law as an inherent and inevitable part of war and armed conflicts, ignored and treated as a sad side-effect and not amounting to a severe crime.<sup>9</sup>

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<sup>2</sup> John Locke *Second Treatise of Government* (first published 1690), edited by C.B. McPherson (Cambridge: Hackett Publishing Company, 1980).

<sup>3</sup> see T Meron *Human Rights in International Law*, Vol. I (1984) at 79.

<sup>4</sup> This is also represented in the Charter of the United Nations, especially Art.2(4).

<sup>5</sup> A Cassese, *A International Law* (2001) at 197; see also Art. 36 ILC Draft Articles on State Responsibility 2000.

<sup>6</sup> see E Odio-Benito *Sexual Violence as a War Crime* in P Fernández-Rodríguez *The New Challenges of International Humanitarian Law* (2005) 163 at 164.

<sup>7</sup> See Chapter I for numbers and examples of sexual violence.

<sup>8</sup> see K Askin *Prosecuting Wartime Rape and other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles* in (2003) 21 *Berkeley Journal of International Law* 288.

<sup>9</sup> B Bedont and K Hall Martinez *Ending Impunity for Gender Crimes under the International Criminal Court* in: (1999) Vol. VI, Issue 1 *The Brown Journal of World Affairs* 65 at 65.

Although there is now a rising attention from scholars and the international community for gender-based violence<sup>10</sup>, the focus of analysis and legal debate around transitional justice lies more on the prosecution of perpetrators than on the interests of the victims especially in regards to reparative questions. There is still a need to address the marginalization of victims within the framework of post-conflict negotiations, and within it, the marginalization of women as victims of sexual violence.

The relatively recent but fundamental shift in international law towards the recognition of the rights and duties of individuals opens the doors for an individual right to reparation for victims of violations of human rights and international humanitarian law and an appropriate recognition of victims' rights.

This paper discusses where all these issues, sexual violence in armed conflicts, victims' perspectives and reparation come together. It aims to explore how far international law has developed towards a right to victims of sexual violence to reparation and to what extent this right can be enforced, if at all. It will consider the relevant provisions of international law, their capability to provide reparation and their interpretation by judicial bodies and it will look at some examples of practical attempts to seek reparation for internationally wrongful acts. This approach tries to combine existing law with new ideas and practical experiences to demonstrate the complex development of international law where legal matters and societal demands intersect.

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<sup>10</sup> Askin Prosecuting war time rape (note 8); C Chinkin Rape and Sexual Abuse of Women in International Law in (1994) 5 *EJIL* 1; two main studies on the impact of armed conflict on women have been undertaken: Women, Peace and Security, Study submitted by the Secretary-General pursuant to Security Council resolution 1325 (2000), (New York: United Nations, 2002) and "Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building." By Rehn, Elizabeth/ Ellen Johnson Sirleaf, published by UNIFEM, 2002 Available under: <http://www.unifem.undp.org/assessment/index.html>. October 2002 (all internet sites have been accessed on 30 March 2007), the U.N. has also appointed a Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices.

## Chapter I

### Victims of sexual violence during armed conflicts

*Massacres kill the body. Rape kills the soul. And there was a lot of rape.*  
Major Brent Beardsley, Peacekeeper in Rwanda<sup>11</sup>

#### 1. Sexual violence as a weapon of war

Any violence, physical or psychological, carried out through sexual means or by targeting sexuality presents an act of sexual violence<sup>12</sup> including the conspiring, ordering, inducing, or aiding and abetting in the perpetration of such acts.<sup>13</sup> Sexual violence has several faces, one of the ugliest being rape. Others are forced pregnancy, forced sterilisation, forced abortion, forced prostitution or sexual enslavement and forced nudity.

Some sexual violence during armed conflicts is committed against boys and men, but the overwhelming majority of this violence is committed against women and girls<sup>14</sup> which most likely experience conflicts as civilians.<sup>15</sup>

Sexual violence is highly effective in terrorising and destroying entire communities and the will and soul of the victim, therefore it forms a dangerous weapon during armed conflicts. Gender-related crimes are systematically used as instruments of war and are pervasive and alarming features of contemporary armed conflicts.<sup>16</sup>

Sexual violence is committed for several reasons, sometimes ordered or encouraged, sometimes with the intent to kill, sometimes with the intent to

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<sup>11</sup> Examination-in-Chief of Brent Beardsley, former aide to the force commander, U.N. peacekeeping mission in Rwanda (UNAMIR) ICTR Prosecutor v. Bagasora, Kabiligi, Ntabakuze, Nsengiyumva, Case No. ICTR-98-41-T, Trial transcript, 20 January 2004.

<sup>12</sup> According to the Final Report of Special Rapporteur Ms. Gay J. McDougall, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict*, E/CN.4/Sub.2/1998/13, at 7–8.

<sup>13</sup> see art. 25 of Rome Statute of the International Criminal Court (ICC) adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, , U.N. Doc A/CONF. 183/9.

<sup>14</sup> Askin Prosecuting Wartime Rape (note 8) at 297.

<sup>15</sup> Although, they might be combatants as well. This paper focuses on sexual violence against women which experience the violations as civilians.

<sup>16</sup> This has been recognized by various judgements of the ICTY and ICTR; see Chinkin Rape and Sexual Abuse of Women in International Law (note 10).

impregnate, sometimes on ethnic, racial, political or gender grounds, and always as an expression of power and contempt within a broader strategic content.<sup>17</sup>

The perception of the position of women lies often somewhere between representing the property of the men, the sexual trophy exchangeable between male enemies, a symbol of national and ethnic collectives and the passive unprotected civilian.<sup>18</sup> The shared common reality is that they are affected by armed conflicts as direct victims of severe violence and anarchistic and discriminatory behaviour.

In 1994 mass rape and sexual mutilation were central to both the ideology and execution of the genocide in Rwanda. Between 250.000 and half a million women were raped and sexually abused.<sup>19</sup> Women were especially targeted because of their gender and role in society. Some observers believe that almost every woman and adolescent girl who survived the genocide was raped.<sup>20</sup>

In Sierra Leone's armed conflict, sexual violence was committed on a much larger scale than amputations, for which the conflict is well known today. Thousands of women and girls of all ages, ethnic groups, and socioeconomic classes were subjected to widespread and systematic sexual violence, including individual and gang rape, torture and sexual slavery.<sup>21</sup> It affected 50% of all women in Sierra Leone.<sup>22</sup> Rapes were perpetrated by both sides of the conflict, partly by the pro-government forces (SLA) and the militia (CDF) but mostly by the rebel forces of the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the West Side Boys, a splinter group of the

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<sup>17</sup> C De Than and E Shorts *International Criminal Law and Human Rights* (2003).

<sup>18</sup> Ibid; See for more critical arguments H Charlesworth and C Chinkin *The boundaries of international law – A feminist analyse*. (2000).

<sup>19</sup> Human Rights Watch Africa Report by B Nowrojee Shattered Lives- Sexual Violence during the Rwandan Genocide and its Aftermath September 1996 available under: <http://www.hrw.org/reports/1996/Rwanda.htm>.

<sup>20</sup> C Bonnet Le viol des femmes survivantes du génocide du Rwanda," in R Verdier et al *Rwanda: Un génocide du XXe siècle*, (1995), p. 18.

<sup>21</sup> For detailed information about sexual violence during the conflict see the report by Human Rights Watch 'We will kill if you cry: sexual violence in the Sierra Leone conflict' (2003) available under: <http://www.hrw.org/reports/2003/sierraleone/sierleon0103.pdf>.

<sup>22</sup> Special Rapporteur on Violence against Women Coomaraswamy, Radhika, *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women*, Commission on Human Rights 58<sup>th</sup> Sess., U.N. Doc. E/CN.4/2002/83/Add.2 (2002) at 15.



AFRC<sup>23</sup>. Many women died as a consequence of the violence of their rapes while others miscarried.

In northern Uganda teenage girls were forced into sexual slavery as “wives” of the Lord’s Resistance Army commanders, who subjected them to rape and other sexual violence, unwanted pregnancies, and the risk of sexually transmitted diseases, including HIV/AIDS. Rape and sexual violence were also frequently committed by the UPDF soldiers.<sup>24</sup>

Sexual violence against women has been a weapon of war to subjugate the civilian population over four years in the Democratic Republic of the Congo. 40,000 female civilians, girls and women have been raped during the conflict.<sup>25</sup> Most of the forces<sup>26</sup> involved in the conflict frequently and sometimes systematically raped women and girls.<sup>27</sup>

In the conflict in Darfur the western province of Sudan, armed forces and militia members (esp. Janjaweed) raped thousands of women during attacks and inside IDP camps. Tens of thousands of women were frequently abducted into sexual slavery for days or months and suffered under the forced displacement and violence.<sup>28</sup>

These cases illustrate the alarming frequency of crimes of sexual violence in armed conflicts and underline the importance to grant high priority and maximum attention to the prosecution of perpetrators and to the support of victims.

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<sup>23</sup> B Nowrojee Making the invisible war crime visible: post conflict justice for Sierra Leone’s rape victims (2005) 18 *Harvard Human Rights Journal* 85 at 90.

<sup>24</sup> Human Rights Watch Report *Uprooted and Forgotten – Impunity and Human Rights Abuses in Northern Uganda* September 2005 available under: <http://www.hrw.org/reports/2005/uganda0905>.

<sup>25</sup> C Booth and M Du Plessis The International Criminal Court and victims of sexual violence’ 3 (2005) *SACJ* 241 at 242.

<sup>26</sup> Combatants of the RCD, Rwandan soldiers, the Mai-Mai, armed groups of Rwandan Hutu, and Burundian rebels of the Forces for the Defense of Democracy (FDD) and Front for National Liberation (FNL).

<sup>27</sup> see Amnesty International *Democratic Republic of Congo: Mass rape- time for remedies* October 2004, AFR 63/018/2004 available under <http://web.amnesty.org/library/index/engaf620182004>.

<sup>28</sup> Report of the International Commission of Inquiry on Darfur to the U.N. Secretary-General pursuant to Security Council Resolution 1564, 25 January 2005 para 333; Amnesty International *Sudan-Darfur: Rape as weapon of war: sexual violence and its consequences* 19 July 2004 available under: <http://web.amnesty.org/library/Index/ENGAFR540762004>

## **2. Victims of Sexual violence and their need for reparation**

The impact of armed conflicts on women ranges from mental and physical including reproductive harm, economic disasters to the breakdown of their families and communities.

All forms of sexual violence cause serious injuries. Rape involves serious physical damage to a woman's body. Sometimes women are raped so violently that they bleed to death or suffer irreparable tearing in the genital area, causing long-term incontinence and severe infections.<sup>29</sup> Rape often requires treatment for abrasions and tears; some women need suturing. Antibiotic treatment is necessary. If provided within hours, emergency contraception could prevent an unwanted pregnancy and HIV infection, but this kind of direct help for rape victims is almost unthinkable in armed conflicts.

Victims of sexual abuse and violence suffer persistent health problems long after the actual conflict ended. Often they suffer from serious gynaecological problems for their entire lives. Sexual violence can destroy the ability to become pregnant, which can lead to further social effects.

The majority of victims of sexual violence face the risk of sexually transmitted infections (STIs). Many rape victims are infected with HIV and are facing death due to the lack of adequate treatment against AIDS.

The silence and stigma surrounding rape and other acts of sexual violence makes it very difficult for women to talk about their experiences and to seek help. The mental effects of sexual violence should not be underestimated; they vary from anxiety, post-traumatic stress disorders to depression and even suicide.<sup>30</sup> Without appropriate treatment many women continue to live with the trauma inflicted upon them. In Rwanda, AVEGA, a self-help organization of widows offering both physical and psychological care, has estimated that four out of five women have continued until today to suffer psychological trauma from the 1994 genocide.<sup>31</sup> More attention needs to be given to these effects of conflict and to the way women process and cope with their experiences. Due to the lack of attention to conflict-related sexual violence, only very few assistance

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<sup>29</sup> for Sierra Leone see Nowrojee Making the invisible war crime visible (note 23) at 85.

<sup>30</sup> UNIFEM Report 'Women, War and Peace' (supra note 10).

<sup>31</sup> Ibid.

programs have been established e.g. in Sierra Leone for women and girls who were subjected to rape and sexual slavery during the civil war.<sup>32</sup>

Many women fall pregnant as a result of rape. During some conflicts women were intentionally made pregnant with the aim to destroy the maternal blood line and to impose on them a child from another tribe or ethnic group.<sup>33</sup>

In Rwanda between 2000 and 5000 children, often called “children of hate” were born, some of them have been abandoned, some of them are being raised by their mothers.<sup>34</sup> Rape victims have to make a difficult and painful decision to keep the child or not. Rape is such a stigma that many women choose abortion just so the men in their families would not know they had been raped. Women who do decide to keep the babies often experience family rejection and social isolation.<sup>35</sup>

Only a few women are in the position to seek an abortion early enough in their pregnancy. In many countries abortion is still illegal and only available ‘underground’ for high prices.<sup>36</sup> Young girls especially who were raped and who can’t afford (financially or socially) an abortion face serious implications for their health and well-being, due to their early pregnancy. Their bodies have not developed enough to deliver safely and they are too young to become mothers.

In respect to rape committed during armed conflicts the United Nations have continuously urged all States and relevant organizations to give serious consideration to the recommendations in the reports of the Special Rapporteur of the Commission on Human Rights on the situation of human rights, in particular the recommendation concerning provision for the continuation of necessary medical and psychological care to victims of rape within the framework of programmes to rehabilitate women and children traumatized by

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<sup>32</sup> Nowrojee Making the invisible war crime visible (note 23) at 88.

<sup>33</sup> e.g. during the conflict in Rwanda 1994.

<sup>34</sup> see B Nowrojee ‘Your justice is too slow – Will the ICTR Fail Rwanda’s Rape Victims?’ UNRISD Paper November 2005 available under: <http://www.unrisd.org/publications/opgp10>.

<sup>35</sup> see Human Rights Watch, Global Report on Women’s Human Rights (1995).

<sup>36</sup> Abortion is illegal in Sierra Leone but available for \$ 100 which is more than the average annual income of most Sierra Leoneans.

war, as well as the provision of protection, counselling and support to victims and witnesses.<sup>37</sup>

Apart from direct effects of violence, women also face disastrous health conditions due to the breakdown of services and population movements. The lack of health care and other social goods contributes to the spread of disease. Women are affected in very particular ways. They face issues specific to their biology and to their social status.<sup>38</sup> Women carry the burden of caring for others, including those who are sick, injured, elderly or traumatized. This in itself is stressful and often contributes to illness. The Human Rights Watch report for Rwanda states that '[w]omen survivors are struggling to make ends meet, to reclaim their property, to rebuild their destroyed houses, and to raise children: their own and orphans.'<sup>39</sup>

Many women have lost their male relatives on whom they previously relied on for economic support. They have no financial means to care for their own health not to mention the health of their children and other dependents. Nevertheless women play an important role in the aftermath of armed conflicts in searching for victims or their remains and trying to sustain and reconstitute families and communities.

Victims of sexual violence need the institutions of law to contribute to a wider acceptance that sexual violence constitutes a serious violation of international law by showing a visible commitment to prosecute the perpetrators. Furthermore they need reparation to rebuild their lives, to deal with trauma and serious illness like AIDS, and to enable them to re-join their communities and participate in the process of transitional justice.

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<sup>37</sup> See e.g. U.N. General Assembly Res. 51/115, 7 March 1997 on the report of the Third Committee (A/51/619/Add.3 and Corr.) Rape and abuse of women in the areas of armed conflict in the former Yugoslavia U.N. Doc A/RES/51/115.

<sup>38</sup> This was stated in Fourth World Conference on Women, Action for Equality, Development and Peace, Beijing Declaration and Platform for Action, U.N. Doc. A/Conf.177/20 (1995) para 135.

<sup>39</sup> See Nowrojee Shattered Lives (note 19).

## Chapter II

### The goals of transitional justice and the rights of victims

Societies which emerge from armed conflicts or periods of rule by oppressive regimes need to re-establish a commitment to the rule of law and respect for individual and collective rights to maintain peace and a stable society.<sup>40</sup> According to the UN report on ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ transitional justice is the process societies go through to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and to attain reconciliation.<sup>41</sup> This can only be achieved by fighting impunity of the perpetrators, upholding the victims’ rights, preventing future violations, and reconciliation within the society, re-establishing the rule of law, and reaffirming the principle of legality.<sup>42</sup>

#### *Impunity and prosecution*

Impunity can be fought by holding accountable those who bear responsibility for the events of the past. Violations of international human rights and humanitarian law can be addressed in different ways. Within a transitional justice process society has the choice<sup>43</sup> whether it grants amnesty to some or all perpetrators of the past, often in exchange for testimonies, or whether it opts for prosecution without amnesty provisions.<sup>44</sup> If society decides to prosecute the perpetrators it will often limit its focus on the perpetrators with greater responsibility.<sup>45</sup>

Many countries in post-conflict situation have the problem that their judiciary suffers from the lack of infrastructure and logistics and the shortage of

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<sup>40</sup> Y Naqvi The right to the truth in international law: fact or fiction? in: (2006) 861 *IRRC* 245 at 245.

<sup>41</sup> Report of U.N. Secretary-General to the SC of 23 August 2004 on “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies”, U.N. Doc. S/2004/616

<sup>42</sup> Naqvi (supra note 40) at 246.

<sup>43</sup> This choice can be limited when the Security Council of the United Nations decides to refer the situation to the ICC. For the relation of amnesty and the ICC see: D Robinson Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court in (2003) 14 *EJIL* 481.

<sup>44</sup> Often societies chose a mixed approach. For example, in Sierra Leone, both a Special Court dealing with main perpetrators and a Truth and Reconciliation Commission dealing with certain violations of the past were established.

<sup>45</sup> For example in Sierra Leone according to Article 1 of the Statute of the Special Court for Sierra Leone the Court prosecutes persons who bear the *greatest* responsibility for serious violations of international humanitarian law.

qualified staff. For example, during the civil war in Sierra Leone the RUF subsequently destroyed most of the national courts, which were systematically targeted along with other institutions of state power as part of the rebel strategy.<sup>46</sup>

An alternative to national courts are international criminal courts, such as the ad-hoc tribunals established for the Former Yugoslavia<sup>47</sup> and Rwanda<sup>48</sup> or the International Criminal Court (ICC)<sup>49</sup>; or the so called internationalized or hybrid courts like the Special Court for Sierra Leone<sup>50</sup> or the Extraordinary Chambers in Cambodia.<sup>51</sup> Such courts may substitute the lacking national judiciary but moreover, an international procedure which condemns the violations of international law and holds the perpetrators accountable will send a message that impunity for such crimes will not be tolerated by the international community. This may contribute to prevent acts of revenge by victims and to ensure better compliance with the law. Therefore it serves the goal to prevent future violations hence to maintain long-term peace.<sup>52</sup>

#### *Victims and their right to know the truth*

Victims play several roles in the process of transitional justice. They can contribute to establish the truth and to maintain and restore peace and on the other hand transitional justice needs to uphold their rights to achieve peace and the rule of law.

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<sup>46</sup> M Malan *The Challenge of Justice and Reconciliation in: Monograph 80 Sierra Leone: Building the Road to Recovery* at 140.

<sup>47</sup> It was established by S.C. Resolution 827, 25 May 1993, U.N. Doc. S/RES/827 (1992), reprinted in 32 I.L.M. 1203.

<sup>48</sup> Established by S.C. Res. 955, 8 November 1994, reprinted in 33 I.L.M. 1602. It serves as a tribunal to prosecute persons responsible for genocide, crimes against humanity, and violations of Common Art. 3 to the Geneva Conventions and of Additional Protocol II committed in Rwanda and Rwandese citizens responsible for such acts in neighbouring States between 1 January and 31 December 1994 as laid down in Article 1 of its Statute.

<sup>49</sup> It was set up by an international treaty and exercises jurisdiction over the most serious crimes of international concern (article 5 of the Statute) (note 13).

<sup>50</sup> It was established by agreement between the United Nations and the government of Sierra Leone on the 16 January 2002. It is mandated to try persons most responsible for serious violations of international humanitarian law and Sierra Leonean law in the territory of Sierra Leone since 30 November 1996.

<sup>51</sup> For a overview and wide analyse of Internationalized Criminal Courts see: C P Romano and A Nollkaemper and J Kleffner *Internationalized Criminal Courts – Sierra Leone, East Timor, Kosovo, and Cambodia* (2004).

<sup>52</sup> see for a further analyse of effects of transitional justice: P Hazan *Measuring the impact of punishment and forgiveness: a framework for evaluating transitional justice* in (2006) 861 IRRC 19, see also U.N. S.C. Res. 955 (note 48).

From the victims' perspective the truth plays the main role in transitional justice. They want to know what happened and why. They want the state and society to recognize their innocence and suffering and to acknowledge the truth. Many victims are ready to forgive, but they need to know who to forgive and for what.<sup>53</sup> Another important aspect of transitional justice for victims is reparative justice in form of compensation and restitution.

From the legal perspective it has been acknowledged that victims have a right to truth.<sup>54</sup> Articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions of 1949 provide the right to know the fate of relatives and the obligation of parties to armed conflicts to search for persons who have been reported missing.<sup>55</sup>

Establishing the truth contributes to the aims of transitional justice. Exposing the truth provides the society with information about the background and circumstances of the past violations and thereby it enables it to prevent future violations. Researching the truth can set up a historical record which can assist public debates about the past, which would strengthen the credibility of judicial work and which would encourage the formation of a national identity. Knowing the truth is an important requirement for reconciliation, as Tomuschat says: '[p]eaceful coexistence in a given society cannot be based on a truncated and manipulated perception of the past'.<sup>56</sup> Therefore the right to truth should be addressed as complete as possible.

Documentation of the truth is one function of the judicial system, even if it is considered as a by-product of dispute settlement mechanisms.<sup>57</sup> Sometimes the justice system is the only institution which brings light into the darkest

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<sup>53</sup> L Lax Amnesty, Reparation and the Object of Reconciliation in the Context of South Africa's Truth and Reconciliation Commission in: E Doxtader and C Villa-Vicencio *To Repair the Irreparable: Reparation and Reconstruction in South Africa* (2004) page 230; for South Africa see Truth and Reconciliation Survey, 2001 available under: <http://www.ijr.org.za>.

<sup>54</sup> In the context of Latin-America people refer to "el derecho a la verdad"; see also C Tomuschat Darfur – Compensation for the Victims in (2005) 3 *Journal of International Criminal Justice*, 579 at 581

<sup>55</sup> see M Crettol and A M La Rosa, The missing and transitional justice: the right to know and the fight against impunity in (2006) 861 *IRRC* 355

<sup>56</sup> Tomuschat Darfur – Compensation for the Victims (note 54) at 581

<sup>57</sup> Naqvi (note 40) at 245

corners of armed conflicts. The participation of victims in trials can make a decisive contribution to establish the truth.<sup>58</sup>

International tribunals in particular represent an approach of the international community to seek the truth. For example, the International Criminal Tribunal for Rwanda stands in the public light as *the* place to prosecute and interpret the events of 1994. After the death of Slobolan Milosevic ICTY Prosecutor Carla de Ponte made clear that with the testimonies of witnesses in the case against the former leader the four-year trial had collected evidence for the historical record and therefore achieved some of its objects.<sup>59</sup> Thus the right to truth had been satisfied to some extent.

Truth and Reconciliation Commissions represent a new way of revealing the truth. They are established to act as a mechanism for healing and national reconciliation to encourage the peace process.<sup>60</sup> The main purpose of a truth commission is to investigate past human rights violations, and to issue a comprehensive official report of its findings, together with recommendations.<sup>61</sup>

### *Society in transition*

One of the dilemmas of transitional justice lies in the difficulties to find criteria under which victims should be identified. Armed conflicts and repressive regimes such as apartheid victimise almost everyone.<sup>62</sup> Perpetrators and their supporters can easily become victims of acts of revenge in the chaotic cycles of violence.<sup>63</sup> In this context the achieved stability is sometimes too sensible to bear talks about “the truth” and reparation for victims. On the other hand without facing the past and the interests of victims the stability will not hold for long.

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<sup>58</sup> C Jorda and J de Hemptinne The Status and Role of the Victim in: Cassesse et al. The Rome Statute of the International Criminal Court. A Commentary, Vol. 2 (2002), 1387 at 1394

<sup>59</sup> Press Conference by the ICTY Prosecutor, Carla Del Ponte, The Hague, 12 March 2006, available at: <http://www.un.org/icty/latest-e/index.htm>.

<sup>60</sup> Robinson (note 43) at 482.

<sup>61</sup> Malan (note 46)

<sup>62</sup> Some scholars question the possibility to achieve consensus as to who are the victims of a system that affected everyone in society.

<sup>63</sup> see M Minow *Breaking the Cycles of Hatred: Memory, Law, and Repair* (2002) page 15



The public's reaction is often to downplay or to reject outright the confrontation with the past. This is even more evident in cases of sexually violent acts. The wide-spread belief that wartime violence and rape are inevitable casualties of war is still stronger and louder than the voices calling for gender sensitivity and recognition of women's rights. In cases of calls for justice a long time after the actual violations happened, such as the lawsuits filed in the 1990's arising out of atrocities from World War II, many people just want to forget the bad unpleasant past instead of confronting themselves with crimes committed by their parents or grandparents.

This collective amnesia and reluctance to listen to victims, and to acknowledge their suffering and to restore their dignity and to face the past can be overcome by providing a platform for victims to seek reparation, public acknowledgement, and apologies, which are important requisites for reconciliation and positive transition.

#### *Reparation for victims*

Reparation to victims is always one of the most controversial and complex issues within the field of transitional justice. This becomes additionally complicated by the demands and circumstances of political transition. The implementation of reparation schemes is ostensibly dependent on the political, cultural and historical circumstances specific to each country.

Reparation entails an exchange of money, land or services, as well as an acknowledgment of responsibility and wrongdoing, which can polarise the post-conflict society into good and bad ones, into winners and losers. Determining who is an innocent victim and who attacked that innocence can be painful and is always difficult. This is even truer in cases of large-scale victimisation resulting from mass atrocities in armed conflicts.

In regards to monetary reparation there is a constant fear that states may be overburdened with compensation obligations after an armed conflict.<sup>64</sup> This

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<sup>64</sup> Tomuschat argues in this direction in Darfur – Compensation for the Victims (note 54)

might be the reason for so much hesitation by scholars and courts and even the United Nations to support clearly a right to reparation.<sup>65</sup>

The decision to deliver reparation in form of monetary compensation requires a strong financial commitment. States that have just experienced an armed conflict are usually not in the position to backup such a commitment. Even financially stronger states are generally reluctant to acknowledge an enforceable right of individual victims to obtain compensation.

On the other hand a state in transition cannot ignore the rights of the victims in regards to reparation if it wants to re-establish the rule of law.

To establish peace and the rule of law countries have to overcome the cycles of hate and violence from the past and include everybody in the formation of a new democratic society. Reparation is necessary and important in a very practical way. It supports victims in rebuilding their lives and enables them to actively join the society.

### **Chapter III**

#### **The individual right to reparation**

##### **1. State responsibility and the obligation to make reparation**

Apart from other motivations like moral duty, public good or the concern to restore peace, the rule of law and human dignity in the country after an armed conflict, there is a long-standing legal principle in international law that responsibility for an internationally wrongful act leads to the duty to make reparation for the damages caused by such an act.<sup>66</sup>

This has been acknowledged by Grotius as early as in 1646 in form of the legal maxim that ‘every fault creates the obligation to make good the loss’.<sup>67</sup>

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<sup>65</sup> The language used in Conventions and Drafts is far from clear. For examples States chose very carefully the words for their payments and try to avoid the word reparation.

<sup>66</sup> I Brownlie *Principles of Public International Law* 5th ed, (1998) 435–6; According to the PCIJ Case Concerning the Factory of Chorzow (Merits) Judgement from 13 September 1928, PCIJ Series A No. 17, para 28 ‘it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.’ Other legal consequences of a wrongful act are the obligation to cease the act and to guarantee non-repetition. See also Cassese *International Law* (note 5) page 197.

<sup>67</sup> Hugo Grotius in *De Jure Belli ac Pacis* in Chapter XVII.

It is now codified in the ILC Draft Articles on the Responsibility of States for Internationally wrongful acts, representing the view of highly recognised publicists in international law.<sup>68</sup>

According to the Permanent International Court of Justice (PICJ) the legal aim of reparation is 'to wipe out the consequences of an illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed'.<sup>69</sup> The ICJ approved this jurisprudence recently in *Democratic Republic of Congo v. Belgium* in 2002.<sup>70</sup>

In case of material damages the State must provide restitution in kind. If restitution is not possible or only partial recovery of the material damages can be offered, the State must make compensation.<sup>71</sup> According to article 36 (2) of the ILC's Draft Articles on State Responsibility '[t]he compensation shall cover any financially assessable damage including loss of profits insofar as it is established'.

In regards to the use of terms, 'reparation' refers to the range of all measures that might be taken in response to a breach of international law.<sup>72</sup> Compensation only means the monetary form of reparations. It only embraces the financially assessable damage suffered by the injured state or individual.<sup>73</sup> In respect to financially assessable damages the commentary on art. 36 of the Draft Articles on State Responsibility states that: [a]wards of compensation encompass material losses (loss of earnings, pensions, medical expenses etc.) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment. It is disputed and often denied that compensation in international law involves punitive damages.<sup>74</sup>

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<sup>68</sup> Art. 1 of ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, reprinted in Report of I.L.C. of 53<sup>rd</sup> Sess., I.L.C. (2001), U.N. Doc. A/56/10, 2001.

<sup>69</sup> PCIJ Case Concerning the Factory of Chorzow (note 66) para 29.

<sup>70</sup> ICJ Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*) Judgement of 14 February 2002, published in 41 I.L.M. 536 (2002).

<sup>71</sup> Cassese *International Law* (note 5).

<sup>72</sup> *ibid*

<sup>73</sup> *ibid*

<sup>74</sup> see C Gray *Judicial Remedies in International Law* (1990) page 75

Satisfaction as another form of reparation covers for example the non-compensatory ‘moral damage’ and can consist in ‘acknowledgment of a breach, an expression of regret, a formal apology or another appropriate modality.’<sup>75</sup>

In general, state responsibility arises out of violations of international law committed by individuals acting on behalf of the state, even if they exceed their authority or contravene instructions.<sup>76</sup> States are responsible for the *ultra vires* acts of officials committed within their apparent or general scope of authority and they are also responsible for the omission of its organs when they are under a duty to act.<sup>77</sup> States are also responsible for all acts committed by their ‘armed forces’ regardless of whether such forces acted as State officials or private persons.<sup>78</sup>

Certain conduct of private individuals can also be attributed to a State. In respect to the modern ways of armed conflicts and new classes of combatants arriving on the stage, the law on state responsibility has started to adapt. As the ICJ in the *Nicaragua case* indicated, *effective control* over a paramilitary operation or unit can cause responsibility for violations of human rights and international humanitarian law.<sup>79</sup>

Today there is a growing number of practice of holding a state responsible for violations of international humanitarian law committed by private persons or groups which are not military organised, in cases where the State subsequently acknowledged or adopted the acts of these persons.<sup>80</sup>

The ICTY confirmed in *Tadić* that in order to attribute the acts of a military or paramilitary group to another state, it must be proved that the state

<sup>75</sup> see Art. 37 (2) of the ILC’s Draft Articles on State Responsibility (note 68)

<sup>76</sup> see Art. 7 of the ILC’s Draft Articles on State Responsibility (note 68); for armed forces of a State see Art. 3 1907 Hague Convention IV and Art. 91 of 1977 Add. Protocol I to the Geneva Conventions.

<sup>77</sup> Cassese *International Law* (note 5)

<sup>78</sup> *The Prosecutor v. Duško Tadić aka “Dule”* Appeal Chamber, Judgement of 15 July 1999, Case No. IT-94-1-A para 98 see footnote, see also M Sàssoli State Responsibility for violations of international humanitarian law in (2002) 84 *IRRC* 401 at 405

<sup>79</sup> The Court required ‘that (i) a Party not only be in effective control of a military or paramilitary group, but that (ii) the control be exercised with respect to the specific operation in the course of which breaches may have been committed.’ ICJ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.), (Merits) Judgement of 27 June 1986 [1986] ICJ Report 14 paras 114, 115.

<sup>80</sup> see J M Henckaerts and L Doswald-Beck Customary *International Humanitarian Law Vol I (Rules)* (2005) page 535; see also Art. 11 of ILC’s Draft Articles on State Responsibility (note 68)

wields *overall control* over the group.<sup>81</sup> The Court further set out that individuals or groups could be regarded as *de facto* State organs, 'if specific instructions concerning the commission of the particular acts had been issued by that State to the individual or group in question or the unlawful act had been publicly endorsed or approved *ex post facto* by the State at issue.'<sup>82</sup>

The conduct of private individuals without any connection to the state cannot cause state responsibility.<sup>83</sup> Nevertheless all individuals acting on behalf of a state or not might be held criminally responsible, this in turn doesn't preclude the State's responsibility. Article 25 (1) of the Rome Statute of the ICC specifies that no provision 'relating to individual criminal responsibility shall affect the responsibility of States under international law'.

In respect to the origin or character of the obligation of the State the Arbitration Tribunal in the *Rainbow Warrior* case held that 'any violation by a state of any obligation, of whatever origin, gives rise to state responsibility and consequently, to the duty of reparation'.<sup>84</sup> In *Gabčíkovo-Nagymaros Project* the ICJ found it well established that 'when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect'.<sup>85</sup>

## 2. Individual rights in international law

Asking for an individual right to reparation one must consider firstly whether individuals can have rights in international law at all. This goes back to the controversial discussion whether individuals are subjects of international law. Thereby a distinction must be drawn between the ability to have a (substantive) right to reparation and to have a (procedural) remedy to enforce such right.

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<sup>81</sup> *The Prosecutor v. Tadić*, Decision on Defence Motion on Jurisdiction, 10 August 1995, Case No. IT-94-1, para 191.

<sup>82</sup> *ibid* para 137.

<sup>83</sup> See article 11 (1) of the I.L.C. Draft Articles on State Responsibility (note 68).

<sup>84</sup> *Rainbow Warrior Case (New Zealand v. France)* International Arbitration Award 30 April 1990.

<sup>85</sup> ICJ Case concerning the *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgement of 25 September 1997, [1997] ICJ reports 7, para 47; the Court referred to Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950, p. 228; and Article 17 of the ILC Draft Articles on State Responsibility.

The conventional or classic theory of international law sees states as the only subjects of law; therefore it recognises them as the only bearholders of rights and duties.<sup>86</sup> Following this traditional concept of international law a right to reparations in case of a breach of international law can only belong to the state against which a violation took place. According to this theory individuals in international law are no more than objects; therefore they cannot be bearers of rights under international law.<sup>87</sup> Injuries inflicted upon an individual must be considered as injuries of his or her State hence reparation can only be claimed by the State. Within this framework an individual right to claim reparation appears to be unthinkable.

This concept prevailed for a long time in international law. Individuals needed the state to mediate for them under the concept of diplomatic protection or within general negotiations including reparation. In practice, war reparation negotiations were handled between states mostly with diminutive or no attention to the victims. There is still a strong and widely spread opinion<sup>88</sup> that only states can claim reparation in case of violations of international law and that there is no customary international law stating that individuals are entitled to claim reparations in case of a breach of international law. However, there is no rule of international law either which precludes individuals from acquiring rights under customary or conventional international law.

With the greater attentiveness to human rights law and in particular to the rights of victims of gross human rights violations and grave violations of international humanitarian law, the role of individuals in international law has started changing significantly.<sup>89</sup> Already in 1928 the PCIJ ruled in its Advisory Opinion on the Jurisdiction of the Courts of Danzig that:

`it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be

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<sup>86</sup> See e.g. L Oppenheim *International Law: A Treatise*, I (1905); R Provost *International human rights and humanitarian law* (1996).

<sup>87</sup> Ibid (Oppenheim) page 200

<sup>88</sup> see C Tomuschat Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law in A Randelzhofer and C Tomuschat (eds.) *State responsibility and the individual: reparation in instances of grave violations of human rights* (1999) 1-25.

<sup>89</sup> See P K Menon The international personality of individuals in international law: a broadening of the traditional doctrine 1 *Journal for Transnational Law. & Politics* 151.

the adoption by the parties of some definite rules creating individual rights and obligations and enforceable by the national courts'.<sup>90</sup>

Today the ILC Commentary to the Draft Articles on State Responsibility states that today individuals may be regarded as the ultimate beneficiaries of certain international norms and therefore the holders of the relevant rights.<sup>91</sup>

In respect to the enforcement of an individual right to reparation, some scholars argue that one should distinguish between the individual, as the subject of enforceable claims on the international level and the individual as the beneficiary of a system of international law, in which the states are the subjects and actors, but in which they are directed to take action and assert claims on behalf of individuals<sup>92</sup>. The latter might be an in-between situation with practical advantages but it cannot be more than a procedural compromise.

The Court of Justice of the European Communities found that a person's capacity, when his or her rights have been violated, to appeal to a judicial procedure to enforce such rights is the expression of a general principle of law, which has its basis in the constitutional traditions of the member States'.<sup>93</sup>

Contemporary international law is already developing towards the enforcement of individual rights. Today states can enable individuals to assert certain rights before international bodies.<sup>94</sup> For example the Torture Convention<sup>95</sup> enables individuals to submit petitions to the Committee against Torture and many human rights conventions confer on their respective commissions the competence to receive individual communications concerning the existence of cases of human rights violations.<sup>96</sup>

In its Advisory Opinion about *Reparation for Injuries suffered in the service of the United Nations* from 1949 the ICJ acknowledged that, like a state

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<sup>90</sup> PCIJ Advisory Opinion No. 15, Jurisdiction of the Courts of Danzig, 1928 P.C.I.J. (ser. B) No. 15 para 17.

<sup>91</sup> ILC Draft Articles on State Responsibility (note 68).

<sup>92</sup> See A Orakhelashvili *The Position of the Individual In International Law* in (2001) 31 *California Western International Law Journal* 241 at 245.

<sup>93</sup> EUECJ *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, Judgement of 15 May 1986 [1986] R-222/84 paras 17, 18.

<sup>94</sup> Provided the State against which the complaint is filed has recognized the competence of the judicial body.

<sup>95</sup> United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (Dec. 10, 1984).

<sup>96</sup> See next chapter to reparation and human rights.

seeking redress for damage inflicted upon one of its nationals, the United Nations as an international organization may claim reparation for damages not only caused to itself but also in respect of damages suffered by its agents.<sup>97</sup>

This shows that the traditional concept of international law conferring rights and procedural capacity exclusively to states is dissolving.

Hersch Lauterpacht argues that the position of the individual in international law cannot be unaffected by certain developments that empower individuals to protect their rights before international tribunals and impose on them duties directly under international law.<sup>98</sup>

Relating to the fact that individuals appear in international law mostly as victims or at least as protected civilians, recent developments in international law referring to the protection of civilians and victim's rights should be acknowledged as support to empower individuals with rights in international law more generally.

Many treaties of international humanitarian law take the importance of civilians and victims into consideration.<sup>99</sup> For example, art. 6(3) of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction<sup>100</sup> obliges each State Party in a position to do so, to provide assistance for the care and rehabilitation, and social and economic reintegration, of mine victims. International criminal law has made huge steps towards more attention to victims.<sup>101</sup> Studies were also undertaken by the United Nations, for example by the UN Commission on Human Rights on the rights of victims of gross violations of human rights. At its sixty-first session the Commission adopted 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

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<sup>97</sup> ICJ *Reparation for Injuries suffered in the service of the United Nations*, Advisory Opinion of 11 April 1949 [1949] ICJ Reports 179.

<sup>98</sup> In: L Oppenheim International Law 636 (H. Lauterpacht ed., 8th ed. 1955).

<sup>99</sup> See for example 1949 Geneva Conventions and the 1977 Additional Protocols.

<sup>100</sup> entered into force 1 March 1999.

<sup>101</sup> see chapter II 5.2 The role and status of victims before international criminal courts.



International Humanitarian Law, which clearly support an individual right to reparation.<sup>102</sup>

The International Law Association initiated recently in 2003 a project on “compensation for the victims of war” reviewing the law of war and human rights with a focus on the rights of victims to compensation.<sup>103</sup> They are planning to present a Declaration of International Law Principles on Compensation to Victims of War in 2010.

Moreover, international law is already dealing today with individual criminal responsibility for international crimes.<sup>104</sup> It is time to accept that international law should and can provide substantive and procedural rights to individuals too.

### **3. Reparation for human rights violations**

Today the human rights doctrine forces States to give account to how they treat their nationals.<sup>105</sup> Influenced by Locke’s social contract, this doctrine has a tremendous impetus to respect of the dignity of all human beings.<sup>106</sup>

International human rights law contains a large number of conventions, treaties and declarations providing individuals with certain inalienable and legally enforceable rights protecting him or her against state interference and the abuse of power by governments.<sup>107</sup> The most important and here considered ones are the Universal Declaration of Human Rights (UDHR)<sup>108</sup>, the International Covenant on Civil and Political Rights (ICCPR)<sup>109</sup>, the International Covenant on Economic, Social and Cultural Rights<sup>110</sup>, and more specific conventions such as the Convention against Torture and Other Cruel,

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<sup>102</sup> UN General Assembly Res. 2005/35, UN Doc. E/CN.4/2005/59. (hereafter UN Principles on Right to Remedy).

<sup>103</sup> see the website of the committee: [http://www.ila-hq.org/html/layout\\_committee.htm](http://www.ila-hq.org/html/layout_committee.htm).

<sup>104</sup> see e.g. G Werle *Principles of International Criminal Law* (2005)

<sup>105</sup> Cassese *International Law* (note 5) page 349

<sup>106</sup> *ibid*

<sup>107</sup> see Akehurst’s *A Modern Introduction into International Law* (1997) page 209.

<sup>108</sup> Universal Declaration of Human Rights, U.N. GAOR, 3d Sess. Part I, U.N. Doc. A/810, 171, 1948.

<sup>109</sup> Adopted by UN GA Res. 2200 A (XXI), published in I.L.M. 368, entered into force 1976.

<sup>110</sup> Published in 6 (1967) I.L.M. 360, entered into force 1976.

Inhuman or Degrading Treatment (Convention against Torture)<sup>111</sup>, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>112</sup>, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women on Violence.<sup>113</sup>

There are three regional human rights systems covering the European, Inter-American, and African region governed by their regional treaties such as the European Convention on Human Rights and Fundamental Freedoms (ECHR)<sup>114</sup>, the Inter-American Convention on Human Rights (IACHR)<sup>115</sup> and the African Charter on Human Rights (AfCHR)<sup>116</sup>. There is currently no Asian regional human rights system. In the African region the establishment of a judicial body to ensure the implementation of the Convention is still not finished. An African Court on Human and Peoples' Rights was established by a protocol to the African Charter<sup>117</sup>, but since ideas for a different court came up, the originally planned court has not started working.<sup>118</sup> Thus the protection of rights listed in the African Charter rests solely with the African Commission on Human and Peoples' Rights, a quasi-judicial body, modelled on the UN Human Rights Committee, with no binding powers.

### **3.1 Sexual violence as violation of human rights law**

#### **3.1.1 Human rights law provisions relating to sexual violence and violence against women**

Cruel, inhuman or degrading treatment or punishment is prohibited by several international human rights instruments.<sup>119</sup> To be free from such acts belongs to

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<sup>111</sup> Published in 24 (1985) I.L.M. 535 entered into force 1987.

<sup>112</sup> Signed 18 December 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33, entered into force 1981.

<sup>113</sup> Inter-American Commission of Women, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, opened for signature June 9, 1994, 33 I.L.M. 1534, available at <http://www1.umn.edu/humanrts/instree/brazil1994.html>.

<sup>114</sup> Published in 213 U.N.T.S. 221, entered into force 1953.

<sup>115</sup> Published in 9 (1970) I.L.M. 673, entered into force 1978.

<sup>116</sup> Published in 21 (1982) I.L.M. 59 entered into force 1986.

<sup>117</sup> Adopted in Ouagadougou, Burkina Faso, June 10, 1998, entered into force January 25, 2004.

<sup>118</sup> In July 2004 the AU determined that the ACtHPR should be merged with the African Court of Justice. In July 2005, the AU Assembly decided a draft instrument shall establish the merged court in 2006.

<sup>119</sup> Art. 5 ACHPR; Art. 7 ICCPR, Art. 3 ECHR, Art. 5 IACHR.

the fundamental and non-derogable rights in international human rights law.<sup>120</sup> It includes without doubt acts of sexual violence, as the ECtHR has already confirmed it in the case of rape in *Aydin v. Turkey*.<sup>121</sup>

Moreover, the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, including sexual and reproductive health is guaranteed by several instruments too, for example by Art. 7 of ICESCR.<sup>122</sup>

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which entered into force on 25 November 2005, provides comprehensive and specific guarantees in relation to women's human rights. Art. 1 stipulates that '[e]very woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited.' Art. 11 especially refers to the protection of women during armed conflict.

Living free from violence is a human right. For example Article 3 of the American Convention on Violence against Women states that '[e]very woman has the right to be free from violence in both the public and private spheres'. The Convention prohibits any form of violence against women, 'physical, sexual, or psychological'. In December 1993, the UN adopted the Declaration on the Elimination of Violence against Women, which addresses violence against women as a human rights violation.<sup>123</sup>

These are only some examples which show that acts of sexual violence clearly constitute violations of human rights law.

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<sup>120</sup> E.g. Article 4 of the ICCPR specifies the provisions which are non-derogable and which therefore must be respected at all times. These include the right to life; the prohibition of torture or cruel, inhuman or degrading punishment and others.

<sup>121</sup> ECtHR *Aydin v. Turkey* Judgement from 25 September 1997, 1997 VI Reports p. 1988.

<sup>122</sup> see also Art 14 of The Protocol to the African Charter on the Rights of Women in Africa which also states that States must also protect the reproductive rights of women by authorizing abortion in cases of sexual assault, rape, incest.

<sup>123</sup> UN General Assembly Res. 48/104, Declaration on the Elimination of Violence against Women (CEDAW), 20 December 1993, UN Doc A/Res/48/104.

### 3.1.2 Application of human rights law in times of armed conflicts

According to the UN Secretary-General human rights are construed to apply 'always, everywhere and to everyone'.<sup>124</sup> Armed conflicts<sup>125</sup> might be situations under exceptional conditions of hostilities and armed battle, but they do not lead automatically to the exclusion of the applicability of law.

Although international humanitarian law regulates armed conflicts and provides stipulations for the conduct, it is not the exclusive applicable law. Common Art.2 to the 1949 Geneva Conventions states that the conventions apply '[i]n addition to the provisions which shall be implemented in peacetime.'

The International Court of Justice acknowledges in its Advisory Opinion about *Legality of the Threat or Use of Nuclear Weapons* that international humanitarian law only influences the interpretation of human rights.<sup>126</sup> It further ruled that 'the protection of the International Covenant of Civil and Political Rights does not cease in times of war except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.'<sup>127</sup>

In its Advisory Opinion about the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the ICJ made it clear that 'the protection offered by human rights conventions does not cease in case of armed conflict' and therefore human rights law remains applicable during armed conflicts.<sup>128</sup> Furthermore the Court stated that the ICCPR 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'.<sup>129</sup>

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<sup>124</sup> UN Secretary-General *Respect for Human Rights in Armed Conflicts* UN Doc. A/8052 (1970) 13 para 25.

<sup>125</sup> An armed conflict has been defined by the ICTY as 'exist[ing] whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.' in *Tadic Appeals Chamber Decision on Jurisdiction* (note 8) para. 70.

<sup>126</sup> ICJ *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Reports 226, para 25.

<sup>127</sup> *ibid*

<sup>128</sup> ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Reports 136, para 106.

<sup>129</sup> *ibid* para 111.

Thus, some provisions of human rights law might be subjects to derogation in the event of an armed conflict constituting a state of emergency<sup>130</sup>, but certain norms are non-derogable thus are guaranteed even during armed conflicts.<sup>131</sup>

For example art. 4(2) of the ECHR forbids any derogation from the right to life, the freedom from torture, cruel, inhuman and degrading treatment or punishment, freedom from slavery and other rights. Moreover, the European Court of Human Rights has ruled in *Aydin v. Turkey* that:

Article 3 of the Convention enshrines one of the fundamental values of democratic societies and as such it prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Article 3 admits of no exceptions to this fundamental value and no derogation from it is permissible under Article 15 even having regard to the imperatives of a public emergency threatening the life of the nation or to any suspicion, however well-founded, that a person may be involved in terrorist or other criminal activities<sup>132</sup>

The rules on reparation remain applicable in times of armed conflicts too. For example Art. 27 Para 1 of the Inter American Convention on Human Rights also foresees the suspension of certain provision for times of armed conflicts but states in Para 2 that this does not authorize any suspension of certain rights<sup>133</sup> and the judicial guarantees essential for the protection of these rights. The Court has confirmed that the right to an effective remedy and to provide redress is part of these judicial guarantees.<sup>134</sup>

The ECtHR has recently granted compensation under art. 41 ECHR to victims of the conflict in Chechnya.<sup>135</sup>

It is worth mentioning that the African Charter, unlike the other two human rights treaties, does not allow for state parties to derogate from their treaty

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<sup>130</sup> See e.g. art 4(1) ICCPR which authorizes derogation in the case of public emergency.

<sup>131</sup> see Y Dinstein *The Conduct of Hostilities Under the Law of International Armed Conflict* (2004) page 23; the right to life also encompasses unlawful killings in battle, see J M Henckaerts and L Doswald-Beck *Customary International Humanitarian Law, Vol.I Rules* (note 80) page 313 et seq.

<sup>132</sup> *Aydin v. Turkey* (note 121) para 81

<sup>133</sup> Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality).

<sup>134</sup> ACtHR Advisory Opinion OC-9/87 of Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 25(8) American Convention on Human Rights, Judgement of 6 October 1987, Series A No.9, para 22-24.

<sup>135</sup> ECHR *Isayeva v. Russia* Judgement of 24 February 2005 para 331, Russia had not derogated any rights guaranteed by the Convention.

obligations during emergency situations. In *Commission Nationale des Droits de l'Homme et des Libertes v. Chad* the African Commission on Human and Peoples Rights held that ` even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.<sup>136</sup>

Many scholars support the view that human rights law and international humanitarian both apply to armed conflicts.<sup>137</sup> There is now a further debate on the extraterritorial applicability of human rights law especially in the context of occupied territories.<sup>138</sup>

In respect to non-international conflicts where international humanitarian law still lacks some applicable protection the application of human rights law can even provide better protection and some kind of regulation of conduct during the conflict.<sup>139</sup>

### 3.1.3 Violations committed by non-state actors

First of all, Human Rights Conventions are treaties between states and are intended to protect individuals from acts by their states and not from acts by private individuals.<sup>140</sup> Hence it is clear that violations of treaty provisions committed by state actors violate the respective treaties and therefore constitute human rights violations<sup>141</sup> but it is more questionable if violations committed by non-state actors lead to the same result.

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<sup>136</sup> Commission Nationale des Droits de l'Homme et des Libertes v. Chad Communication No. 74/92, 11 October 1995 para 21.

<sup>137</sup> E.g. L Doswald-Beck and S Vité International humanitarian law and human rights law in (1993) 293 *IRRC* 94; H Heintze On the relationship between human rights law protection and international humanitarian law in (2004) 86 *IRRC* 798.

<sup>138</sup> See N Lubell Challenges in applying human rights law to armed conflict in (2005) 860 *IRRC* 737 at 739.

<sup>139</sup> Ibid at 746.

<sup>140</sup> Apart from that the direct imposition of obligations on individuals by human rights law is also possible. See PCIJ in Jurisdiction of the Courts of Danzig (1928) Series B No. 15 at 17-18 and for further discussion Provost (note 86) p. 62.

<sup>141</sup> In regards to the question of imputability of an international wrong to a State see Cassese *International Law* (note 5) page 187.

In respect to the character of human rights law the obligation of states is not finished by respecting human rights, it also entails the duty to take preventive measures against occurrences of violations of human rights by private actors.<sup>142</sup>

Several human rights bodies, including the Inter-American Court of Human Rights (IACtHR), have held that states can be held responsible for the actions of non-state actors in specific cases.<sup>143</sup> In the *Velásquez-Rodríguez* case the IACtHR laid out the responsibility a state incurs when it has not adequately investigated the actions of non-state actors.<sup>144</sup> It stated that article 1 of the Inter-American Convention on Human Rights requires that ‘the State has a duty to take reasonable steps to prevent, investigate and punish any violation of the rights recognized by the Convention’.<sup>145</sup> If it doesn’t exercise this duty with ‘due diligence’ it can be held liable for the acts committed by private individuals.<sup>146</sup> It further held that ‘a State violates human rights when the State allows private persons or groups to act freely and within impunity to the detriment of the rights recognised by the Convention.’<sup>147</sup>

In the decision *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*<sup>148</sup> the African Commission on Human and Peoples’ Rights applied a similar “due diligence” test.<sup>149</sup> In a case concerning killings and ill-treatment during the armed conflict in Chad it held that:

‘Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into

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<sup>142</sup> See Art. 2 (2) ICCPR, see also D Chirwa The Doctrine Of State Responsibility As A Potential Means Of Holding Private Actors Accountable For Human Rights in (2004) 5 *Melbourne Journal of International Law* 1 at 11.

<sup>143</sup> see Henckaerts and Doswald-Beck Vol. I (note 80) page 532; see also Chapter II part 1 State responsibility.

<sup>144</sup> IACtHR *Velásquez Rodríguez v. Honduras*, 29 July 1988, Serie C No. 4 (1988) para 176. This case dealt with the countless disappearances of persons in the early 1980s in Honduras.

<sup>145</sup> Ibid 174

<sup>146</sup> ibid para 76

<sup>147</sup> ibid para 166

<sup>148</sup> AfCoHPR Communication No. 155/96 (2001).

<sup>149</sup> See Chirwa (supra note 142) at 14

murders. Chad therefore is responsible for the violations of the African Charter.<sup>150</sup>

The European Court of Human Rights has also made important rulings in this respect in cases involving Turkey. In *Kiliç v. Turkey* the European Court concluded that Turkey had not done enough to protect a pro-Kurdish journalist who had been harassed, received death threats, and was ultimately shot to death.<sup>151</sup>

In cases of sexual violence states could be in violation of human rights conventions for failing to provide security for the women once the government knew that human rights violations were likely and for failing to provide due diligence in investigating, prosecuting, and punishing the perpetrators. This is at least applicable to states which are in the position to exercise effective control over the territory and inhabitants, which is not necessarily the case in situations of armed conflicts.

At least the applicability of human rights law on acts of sexual violence committed by non-state actors is not automatically suspended. In respect to ongoing human rights violations committed by private individuals in several African countries, state responsibility for not preventing, not investigating and not punishing is most likely to be applicable.<sup>152</sup>

### **3.2 The right to reparation under human rights law**

Several UN bodies and organizations have called upon the international community to give due attention to the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and international humanitarian law.<sup>153</sup>

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<sup>150</sup> AfCoHPR No. 74/92 (1995) para 22.

<sup>151</sup> ECtHR *Kilic v Turkey* Judgement 28 March 2000 Reports of Judgements and Decisions 2000-III.

<sup>152</sup> For the situation in Darfur see the Report of the UN Inquiry Commission (note 28).

<sup>153</sup> See e.g. Commission on Human Rights Resolution 1999/33 *The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms*, 26 April 1999.



The object and purpose of international human rights law is to protect the individual human being.<sup>154</sup> It was intended to endow individuals directly with basic rights.<sup>155</sup> It can be argued that due to the existence of primary rights for individuals, an infringement of an individual right should lead to an individual right to reparation as a secondary right.<sup>156</sup> Many human rights treaties indeed provide a remedy, both substantive and procedural, for individuals suffering injury from unlawful conduct by state authorities, which can lead to reparation.

### 3.2.1 The right to an effective domestic remedy

The European and Inter-American Courts can receive applications from individuals concerning the alleged breaches of provisions of their respective conventions on human rights.<sup>157</sup>

Under human rights treaty law the general obligation of states to respect and ensure all rights recognized in the human rights conventions of which they are parties, leads in case of violation to the obligation of providing an effective domestic remedy.<sup>158</sup>

Article 13 of the European Convention on Human Rights stipulates that individuals whose rights as set forth in that Convention are violated shall have 'an effective remedy before a national authority'. Art. 25 of the American Convention on Human Rights contains an explicit right to effective recourse to a competent court or tribunal.

The Inter-American and the European Court of Human Rights have ruled that this right *can* entail the payment of compensation. In the case *Aksoy v.*

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<sup>154</sup> This has been confirmed by the ICJ in: Reservations to the Convention on Genocide, 1951 I.C.J. REP. 15, 23 (Advisory Opinion of May 28). Apart from that one should bear in mind that first of all human rights treaties create rights and impose obligations on states.

<sup>155</sup> Provost (note 86) p.18.

<sup>156</sup> E Schwager and R Bank An Individual Right to Compensation for Victims of Armed Conflicts? Paper for the I.L.A., August 2005, available under: <http://www.ila-hq.org/pdf/Compensation%20for%20Victims%20of%20War/IndividualRight-Bank-Schwager.pdf>.

<sup>157</sup> e.g. for the European Court of Human Rights, any person subject to the jurisdiction of any of the member states may address himself or herself to the court claiming to be a victim of a violation of the Convention.

<sup>158</sup> See M Nowak The right of victims of gross human rights violations to reparation in F Coomans et al. (ed.) *Rendering Justice to the Vulnerable – Liber Amicorum in Honour of Theo van Boven* (2000) 203 at 204.

*Turkey*<sup>159</sup> the ECtHR ruled that 'the notion of an effective remedy entails in addition to the payment of compensation where appropriate, a thorough and effective investigation'.<sup>160</sup>

Though, in other cases the Court found that its declaration of a violation alone provided sufficient redress to the victim.<sup>161</sup>

In 1995 in the *Papamichalopoulos and Others v. Greece* case<sup>162</sup> the Court referred to the question of redress, where it found that 'a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach'. It stated that: 'if the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it'.<sup>163</sup> In *Akdivar v. Turkey* it showed the limits of this duty: 'if *restitutio in integrum* is in practice impossible the respondent states are free to choose the means whereby they will comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard'.<sup>164</sup>

In regard to the implementation of its decisions the ECtHR has stated that the determination of a violation of a human rights 'establishes the duty of a state to follow the decision, which includes the payment of compensation, if necessary.' However, the judgements of the Court are only legally binding at the international level. In the case of an established breach of its obligations the State is internationally bound to make reparation within its own legal system.<sup>165</sup>

According to General Comment 31, of 26 May 2004, of the UN Human Rights Committee, 'Article 2(3) [ICCPR] requires that State Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the

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<sup>159</sup> ECHR *Aksoy v. Turkey* Judgement of 18 December 1996, (1996) VI Reports of Judgements and Decision, 2272.

<sup>160</sup> *ibid* para 98.

<sup>161</sup> E.g. ECtHR *Sunday Times v United Kingdom*, Judgement of 6 November 1980, Series A No 217 (1981), para 388

<sup>162</sup> ECtHR *Papamichalopoulos and Others v. Greece*, Judgment of 31 October 1995, Series A No. 330-B.

<sup>163</sup> *Ibid* para 439

<sup>164</sup> ECtHR *Akdivar v. Turkey*, Report of Judgements and Decisions 1998-II, para 723-24.

<sup>165</sup> See Cassese *International Law* (note 5) page 366

obligation to provide an effective remedy, which is central to the efficacy of the Article 2(3), is not discharged.<sup>166</sup>

The Inter-American Court of Human Rights ruled in *Velásquez Rodríguez v. Honduras*<sup>167</sup> that as a consequence of the state's obligation to ensure human rights the state must not only prevent, investigate and punish any violation of the rights recognized in the Convention, it must also, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.<sup>168</sup>

In *Caballero-Delgado and Santana v. Colombia* the Court found that Colombia, by not providing adequate reparation to the injured party had failed to comply with the duties art. 1 of IACHR imposes on her.<sup>169</sup>

More human rights treaties contain obligations for state parties to provide reparation within their domestic legal system. For example, art. 6 of the Convention on the Elimination of All Forms of Racial Discrimination provides a right to reparation. Art. 14 of the UN Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment grants a right to compensation for all victims of acts of torture. Article 2(3) of the International Convention of Civil and Political Rights contains the obligation of State parties to develop the possibilities of judicial remedies as well as to ensure that the competent authorities shall enforce such provided remedies. Furthermore it provides a right to compensation for certain violations of the treaty provisions, e.g. for victims of illegal arrest or detention in arts. 9(5) and 14(6) ICCPR.

Furthermore, the UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power stipulates that States should develop and make readily available appropriate rights and remedies for victims.<sup>170</sup>

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<sup>166</sup> General Comment UN Doc. CCPR/C/21/Rev.1/Add.13, at para 16.

<sup>167</sup> IACtHR *Velásquez Rodríguez* (note 144).

<sup>168</sup> *Ibid* para 174.

<sup>169</sup> *Caballero-Delgado and Santana v. Colombia* Judgement of 8 December 1995, Series C No. 22, Para 57-59 see 17 *Human Rights Law Journal* 24.

<sup>170</sup> Article 21 of the UN General Assembly Res. 40/34, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted on 29 November 1985.

### 3.2.2 Human Rights Courts' Competence to order reparation

Apart from imposing the duty on states to provide a domestic remedy including the payment of compensation, some human rights courts possess the authority to order reparation to individuals.

Article 41 (50) of the European Convention on Human Rights mandates the European Court of Human Rights to afford just satisfaction to victims. It states:

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

This provision is clearly meant to be in favour of the injured individual.<sup>171</sup>

If the Court awards 'just satisfaction' to the applicant under Article 41 of the Convention, the state's obligation to comply with the judgement involves the payment a sum of money or other forms of satisfaction, which covers, as appropriate, pecuniary and non-pecuniary damage and/or costs and expenses.<sup>172</sup>

The using of the words 'if necessary' indicates that the Court enjoys a broad measure of discretion whether to grant reparation at all. According to the case law of the ECtHR the power of the Court to grant reparation is very limited.<sup>173</sup> Nevertheless it has used it in several cases already. In cases of gross violations of human rights the Court awarded quite substantial amounts of compensation for non-pecuniary damages such as physical suffering, anxiety and distress of the victims.<sup>174</sup>

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<sup>171</sup> R Mazzeschi *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview in (2003) 1 Journal for International Criminal Law* 339 at 340.

<sup>172</sup> The payment of such compensation is a strict obligation which is clearly defined in the judgment.

<sup>173</sup> see Nowak (note 158) at 211

<sup>174</sup> *Aksoy v. Turkey* : 4,283,450,000 Turkish Lira; *Aydin v. Turkey* (note 121) 25.000 Pounds; *Kurt v. Turkey* Judgement of 25 May 1998 Reports of Judgements and Decisions 1998-VI: 25.000 Pounds)

The case *Aydin v. Turkey* from the year 1997 involved the rape and ill-treatment of a female detainee.<sup>175</sup> The Court found the rape of a detainee by a state official to be a particularly `abhorrent form of ill treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim<sup>176</sup> and that `rape leaves deep psychological scars on the victim.<sup>177</sup>

The Court held that the applicant's rape and ill treatment while in state custody for the purpose of eliciting security-related information constituted torture in violation of Article 3 of the Convention.<sup>178</sup> The Court awarded non-pecuniary damages in the amount of GB £25,000 to be converted in Turkish liras due to its finding of a violation of Article 3.<sup>179</sup>

Article 63 (1), sentence 2 of the Inter- American Convention on Human Rights states that in cases of violations of the rights established in the Convention the Court shall `rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party´.

In the *Aloeboetoe case* the Court has stated that it is under an obligation of customary international law to award reparation.<sup>180</sup>

In respect to the scope of reparation the Inter-American Court has held that restitution of the harm consists in full restitution (*restitutio in integrum*) which includes the restoration of the prior situation, the reparation of the consequences of the violation, and the indemnification for patrimonial and non-patrimonial damages, including emotional harm.<sup>181</sup> The Court has awarded moral or non-pecuniary damages in several cases, e.g. for the suffering under illegal custody getting beaten and killed.<sup>182</sup>

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<sup>175</sup> ECtHR *Aydin v. Turkey* (note 121). The Applicant alleged that upon arrival at the police headquarters, she was separated from her father and sister-in-law, stripped, tortured, beaten and raped.

<sup>176</sup> *ibid* para 83

<sup>177</sup> *Ibid* para 83

<sup>178</sup> *ibid* para 87

<sup>179</sup> It also awarded costs and expenses associated with Applicant's legal representation.

<sup>180</sup> *Aloeboetoe and Others v. Suriname*, Judgement of 4 December 1991, Series C No. 11 (1991) IACtHR Annual report 1991) para 43.

<sup>181</sup> IACtHR *Velásquez Rodríguez* (note 144) para 26

<sup>182</sup> IACtHR *Aloeboetoe* (*supra* note 180) para 51

In *Velásquez-Rodríguez* it has refused to award punitive damages arguing that the concept of punitive damages 'is not applicable in international law at this time'.<sup>183</sup>

In regards to requested damages the Court's Rules of Procedure provide that representatives of the victims or their families may present their evidence and arguments directly to the Court in the reparation phase of the case.<sup>184</sup>

Before the European and Inter-American Court only the 'injured party' shall receive reparation. This means only the victim of the human rights abuse, the person who is directly affected by the violation is entitled to reparation.<sup>185</sup>

In case of a deceased victim or a victim who remains missing, the Court has ruled that his or her entitlement to pecuniary and non-pecuniary damages automatically passes to his or her heirs by succession.<sup>186</sup> In contrast, the ECtHR passes non-pecuniary damages for the victim's emotional distress to the heirs only 'if necessary' to advance 'the cause of justice'.<sup>187</sup>

Apart from the competence to order compensation the IACHR authorizes in art. 63 (1) the Court also to order a state to take remedial measures. In a case involving executions in Suriname the Court awarded collective reparation in form of re-opening of a school and medical dispensary.<sup>188</sup> Under art. 63 (1), the Court could also require that the State provides medical care to a victim of sexual violence.<sup>189</sup> The authority of the IACtHR is in this aspect broader than that of the ECtHR which is limited to (financial) compensation.<sup>190</sup>

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<sup>183</sup> IACtHR *Velásquez-Rodríguez* (note 144) para 38, see also J M Pasqualucci *Victims Reparation in the Inter-American Human Rights System in (1996/1997)* 18 *Michigan Journal of international law* 1 at 42.

<sup>184</sup> IACtHR Rules of Procedure adopted by the Court at its 34<sup>th</sup> session 9-20 September 1996, Art. 57(1).

<sup>185</sup> see Art. 63 (1) of IACHR and ECtHR *Sunday Times v UK* 38 ECtHR Series A 1981 para 8

<sup>186</sup> IACtHR *Aloeboetoe* (note 180) para 54

<sup>187</sup> ECtHR *X v. United Kingdom*, Series A, 55-B (1982) para 18-19

<sup>188</sup> IACtHR *Aloeboetoe* (note 180) para 96. The Court argued that 'the compensation fixed for the victim's heirs includes an amount that will enable the minor children to continue their education until they reach a certain stage. Nevertheless, these goals will not be met merely by granting compensatory damages; it is also essential that the children be offered a school where they can receive adequate education and basic medical attention.'

<sup>189</sup> see Pasqualucci (supra note 183) at 10.

<sup>190</sup> *ibid* at 10.

Article 27 of the Protocol on the African Charter on Human and Peoples' Rights also foresees that: '[i]f the Court finds that there has been violation of a human or peoples rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.' The future will demonstrate how the African Court will use its power.

So far the jurisprudence of the European and Inter-American Court has been criticized for rather referring the issue to the competent domestic bodies instead of showing a commitment to use the authority to order reparation it.<sup>191</sup> Others have highlighted that especially the IACtHR has made important contributions to international human rights jurisprudence in the field of remedies and reparation.<sup>192</sup>

#### **4. Reparation for violations of international humanitarian law**

International humanitarian law focuses on the protection of persons against the dangers of war and armed conflicts by providing rules for fighting an armed conflict and the treatment of combatants and non-combatants.<sup>193</sup> Nevertheless it could also provide reparation when such protection fails. The main treaties that regulate armed conflicts are the 1907 Hague Conventions and Regulations<sup>194</sup>, the four 1949 Geneva Convention with annexes<sup>195</sup>, and the two 1977 Additional Protocols to the Geneva Conventions.<sup>196</sup>

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<sup>191</sup> Ibid, see also Tomuschat Darfur Compensation for the victims (note 54).

<sup>192</sup> see e.g. S Davidson Remedies for Violations of the American Convention on Human Rights in (1995) 44 *International and Comparative Law Quarterly* 405 at 413; D Padilla Reparations in *Aloeboetoe v. Suriname* in (1995) 17 *Human Rights Quarterly* 541.

<sup>193</sup> C Greenwood Historical Development and Legal Basis in D. Fleck (ed.) *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 1 at 102.

<sup>194</sup> Convention Respecting the Laws and Customs of War on Land, adopted on 18 October 1907 in The Hague, entered into force on 26 January 1910.

<sup>195</sup> The Conventions signed at Geneva on August 12, 1949 consist of the following: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 75 U.N.T.S. 287.

<sup>196</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1331 and Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609, both entered into force 7 December 1978.

#### 4.1 Sexual violence as violation of international humanitarian law

Although acts of sexual violence in armed conflicts are prohibited by international humanitarian law, a number of feminist academics argue that international humanitarian law continues to fail women's interests and needs.<sup>197</sup> The UN Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, described rape as the 'least condemned war crime.'<sup>198</sup>

The possibility to prosecute rape under international humanitarian law exists since the late 19<sup>th</sup> century. As early as in 1863 the Lieber Code<sup>199</sup> stated in art.44:

'All wanton violence against persons in the invaded country, [...] all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence.'

According to the Geneva Conventions and the Additional Protocols civilians shall be protected in armed conflicts. Art. 27 Para 2 of the Geneva Convention IV stipulates that '[w]omen shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.'<sup>200</sup> This provision does not prohibit violence against women but obliges states to protect women against attacks.

Odio-Benito has pointed out that 'out of the 34 dispositions to protect women, 19 are basically for the protection of children, placing women in the accepted role of guardians more than subjects of their own rights'.<sup>201</sup>

The determination of the nature of armed conflicts is important for the applicability of the rules of international humanitarian law.

In regards to international conflicts sexual violence is not listed among the grave breaches of the Geneva Conventions and additional Protocols but most scholars argue that it constitutes a grave breach by implication within explicit categories such as 'torture or inhuman treatment' or wilfully causing great

<sup>197</sup> see J Gardam and M Jarvis *Women, Armed Conflict and International Law* (2001).

<sup>198</sup> Special Rapporteur on Violence Against Women, *Preliminary Report on Violence Against Women, Its Causes and Consequences*, U.N. Doc. E/CN.4/1995/42 (1994). at 263

<sup>199</sup> Instructions for the Government of Armies in the Field, 24 April 1863, prepared by Francis Lieber during the American Civil War, and promulgated by President Abraham Lincoln as General Orders N° 100.

<sup>200</sup> For international armed conflicts see also Art. 76 of Additional Protocol I.

<sup>201</sup> E Odio-Benito (note 6) at 165



suffering or injury to body or health'.<sup>202</sup> Declarations by the International Committee of the Red Cross (ICRC)<sup>203</sup> and now Art. 8 (2) (b) (xxii) of the Rome Statute confirm that acts of sexual violence constitute grave breaches.

In regards to internal armed conflicts Common art.3 to the 1949 Geneva Conventions and 1977 Additional Protocol II to the Conventions provide protection against sexual violence.

Common Article 3 to the Geneva Conventions – which constitutes a customary rule<sup>204</sup> - provides a minimum standard of behaviour which prohibits violence to life and the person, cruel treatment and torture, humiliating and degrading treatment. It is clear that rape falls under such prohibited behaviour, although it is not expressly mentioned.<sup>205</sup>

Even in the case where states are not parties<sup>206</sup> to 1977 Additional Protocol II some rules have become part of customary law and therefore are applicable to all non-international armed conflicts regardless whether the state is a party to the Protocol or not.<sup>207</sup> Among these rules we find the prohibition of 'rape, enforced prostitution and any form of indecent assault' in Art. 4(2)(e) and "slavery" in Art. 4(2)(f) of Additional Protocol II.

Many scholars argue that the prohibition of sexual violence in international humanitarian law has emerged to a norm of *jus cogens* one of the most fundamental standards of the international community.<sup>208</sup>

Sexual violence can also be prosecuted under several provisions of the Genocide Convention.<sup>209</sup> According to Article II(b) of Genocide Conventions one of the acts which can constitute genocide is an act *which causes serious*

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<sup>202</sup> see e.g. T Meron Rape as a Crime under International Humanitarian Law in (1993) 87 *AJIL* 424 at 426.

<sup>203</sup> ICRC, Aide-Mémoire (Dec. 3, 1992); Commentary On The Geneva Conventions Of 12 August 1949: Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War 598 (1958).

<sup>204</sup> now codified in Art. 8 (c) of the Rome Statute of the ICC, for the customary character see ICJ Nicaragua v USA (note 79) and the report submitted by the U.N. Secretary-General to the Security Council pursuant to Res. 808 (1993).

<sup>205</sup> See Chinkin Rape and Sexual Abuse in International Law (note 10) at 7.

<sup>206</sup> for example Sudan is not a party.

<sup>207</sup> L Moir *Law of internal armed conflict* (2002).

<sup>208</sup> D Mitchell The Prohibition Of Rape In International Humanitarian Law As A Norm Of *Jus Cogens*: Clarifying The Doctrine in (2005) 15 *Duke Journal Of Comparative & International Law* 219 at 225; Askin Prosecuting Wartime Rape (note 8) at 293

<sup>209</sup> Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277

*bodily and mental harm to members of a protected group.* It has been acknowledged by international tribunals that rape can be one of these acts.<sup>210</sup> A resolution by the General Assembly of the UN also states that rape becomes genocidal when it has been carried out on a massive and systematic basis for the purpose of destroying the family and community life of the victims and of 'cleansing' the vicinity of all other ethnicities by causing mass flight, and births of a tainted bloodline.<sup>211</sup>

Article II (c) refers to acts *deliberately inflicting on the group conditions of life calculated to bring about its physical destruction on whole or in part.* The 'slow death' which rape victims suffer dying of bleeding caused by the violence can fall under this category. Article II (d) of the Genocide Convention refers to acts *imposing measures intended to prevent births within the group.* Sexual violence especially rape can cause serious injuries leaving the women unable to get pregnant or give birth anymore or they may be denied of this role by their communities because of the attack.

Therefore acts of sexual violence clearly constitute violations of several conventions of international humanitarian law and customary international law which both seek to protect individuals.

#### **4.2 The right to reparation for violations of international humanitarian law**

There are strong arguments and an increasing state practice supporting the opinion that international humanitarian law (IHL) endows individuals with justiciable rights including the right to compensation for violations of IHL.

Customary international law imposes an obligation on states to make full reparation for the loss and injuries caused by violations of international humanitarian law.<sup>212</sup> Art.38 of the Second Protocol to the Hague Convention for the Protection of Cultural Property explicitly refers to the duty to make

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<sup>210</sup> see chapter II 5 sexual violence and international criminal law.

<sup>211</sup> Rape and Abuse of Women in the Areas of Armed Conflict in the Former Yugoslavia, GA Res. 49/205 (XLIX) UN GAOR, UN Doc. A/Res/49/205 (1995).

<sup>212</sup> See Henckaerts/ and Doswald-Beck *Customary International Humanitarian Law Vol. I* (note 80) page 537 (Rule 150)

reparation for violations of IHL.<sup>213</sup> Article 3 of the 1907 Hague Convention IV states that:

`[a] belligerent party which violates the provisions of the said Regulation shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces`.

This obligation was restated, with regard to grave breaches of the 1949 Geneva Conventions, in each Convention, providing that `[n]o High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding article [on grave breaches]`.<sup>214</sup> Many peace treaties and post-conflict settlements contain reparation clauses based on this obligation.<sup>215</sup>

The same provision can now be found in Art. 91 of 1977 Additional Protocol I to the Geneva Conventions of 12 August 1949 relating to the protection of victims of international armed conflicts. There is no doubt that these provisions grant the right to compensation but the question is to whom.

#### *Rights for individuals in international humanitarian law*

Some scholars and courts, mostly the same who deny individuals the status of being a subject in international, argue that international humanitarian law does not give rights to individuals at all.<sup>216</sup>

It is hardly convincing that international humanitarian law does not provide rights to individuals. First of all, the international humanitarian law's

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<sup>213</sup> Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1951

<sup>214</sup> Common Article on grave breaches, found respectively at 51/52 /131/148.

<sup>215</sup> e.g. Peace treaty for Japan, Luxembourg Agreement between Germany and Israel, Protocol Nos. 1 and 2 of the Luxembourg Agreement between Germany and the Conference on Jewish Material Claims against Germany; Agreement on Refugees and Displaced Persons annexed to the Dayton Accords; US-Germany Agreement concerning Final Benefits to Certain US Nationals Who Were Victims of National Socialist Measures of Persecution (Prinz Agreement); Agreement on the Foundation `Remembrance, Responsibility and the Future` concluded between Germany and the United States, 2000.

<sup>216</sup> Provost (note 86) at 27; Tomuschat argues that international humanitarian law provides individual rights solely as far as the violation in question amounts to an international crime defined by the ILC Draft on State Responsibility see: A Randelzhofer The Legal Position of the Individual under Present International Law in A Randelzhofer and C Tomuschat (eds.) *State responsibility and the individual: reparation in instances of grave violations of human rights* (1999) at 11

approach is victim-oriented.<sup>217</sup> Furthermore there are provisions which are clearly in favour of the protection of individuals and which are even running contra states' interests by imposing limitations on their opportunities of warfare.<sup>218</sup> For example, art. 27 of Geneva Convention IV states that:

[p]rotected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.'

Article 7 of Geneva Convention III declares that prisoners of war may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention. Moreover, some provisions provide individuals with rights to request or file a complaint. For example art. 78 of Geneva Convention III gives prisoners of war in the context of international conflicts the right to make known their requests regarding the conditions of captivity to which they are subjected and to complain about such conditions. Similarly, art. 30 of the Geneva Convention IV provides all protected persons with the right to file a complaint with the Protecting Powers, the ICRC and the National Red Cross about an infringement of the Convention.

In fact many rules contain elements of so called individual benefits.<sup>219</sup> For example, the grave breaches provisions can be seen 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. Norms applicable to 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 art. 4 of Additional Protocol II are more examples. In fact international

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<sup>217</sup> Sàssoli (note 77) at 402

<sup>218</sup> see K Ipsen *Völkerrecht* 5<sup>th</sup> ed. (2004) para 65 note 2, see also G Aldrich Individuals as Subjects of International Humanitarian Law in J Makarczyk, (ed.) *Theory of International Law at the Threshold of the 21<sup>st</sup> Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 851-859

<sup>219</sup> L Zegveld Remedies for victims of violations of international humanitarian law in (2003) 85 *IRRC* 497 at 506; C Greenwood *International Humanitarian Law (Law of War)* in: F Kalshoven *The Centennial of the First International Peace Conference 2000* (2000) 161 at 250; Schwager and Bank (note 156)

humanitarian law contains guarantees to the benefit of individuals which go beyond what is protected by non-derogable human rights.<sup>220</sup>

Furthermore, it can't be the idea of international humanitarian law to lay the protection of individuals and the exercise of their rights in the hands of their states. In situations of international armed conflicts the authority and functions of a state might be weak or even non-functional; therefore the individual needs in the area of international humanitarian law, protection independent of the assistance of its state.<sup>221</sup> Some provisions protect individuals independently of their nationality, for example art.13 of Geneva Convention IV.<sup>222</sup>

The Diplomatic Conference which led to the adoption of the Geneva Conventions already recognized in 1949 that:

[i]t is not enough to grant rights to protected persons and to lay responsibilities on the States; protected persons must also be furnished with the support they require to obtain their rights; they would otherwise be helpless from a legal point of view in relation to the Power in whose hands they are´.

*Art. 3 Hague Convention IV providing an individual right to compensation*

The German Federal Constitutional Court stated in 2004 that individuals enjoy rights under international humanitarian law<sup>223</sup> but that article 3 of Hague Convention IV does not contain an individual right. The Court mentioned art. 1 of the ILC Draft on State Responsibility but unfortunately it did not provide further arguments for its interpretation of Article 3.

A deeper analysis of art. 3 Hague Convention IV is therefore required. According to article 31 (1) of the Vienna Convention on the Law of Treaties of 23 May 1969 `a] treaty shall be interpreted in good faith in accordance with the

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<sup>220</sup> J Kleffner Improving Compliance with International Humanitarian Law Through the Establishment of an International Complaints Mechanism in (2002) 15 *Leiden Journal of International Law* 237 at 241.

<sup>221</sup> see Y Dinstein Human Rights in Armed Conflict in T Meron (ed.) *Human Rights in International Law: Legal and Policy Issues* Vol.2 (1984) 345 at 347.

<sup>222</sup> The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war.

<sup>223</sup> Federal Constitutional Court (BVerfG) 2 BvR 1379/01 from 28.6.2004 available under: [http://www.bverfg.de/entscheidungen/rk20040628\\_2bvr137901.html](http://www.bverfg.de/entscheidungen/rk20040628_2bvr137901.html).

ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'.<sup>224</sup>

In regards to the wording of article 3, the provision only mentions the party which is liable but does not name the potential holder of the right to claim compensation at all.<sup>225</sup> There is no doubt that this provision obliges states to pay compensation, but there is no suggestion in the wording supporting the argument that states should have the exclusive right to possess and exercise the right to seek such compensation. Some scholars even argue that the use of the word 'compensation' reflects the intention to grant reparation to individuals.<sup>226</sup>

The history of the Hague Conventions provides more support for an individual right to claim compensation. According to Kalshoven, article 3 was intended to contain an individual right to compensation.<sup>227</sup> He bases his arguments mostly on the *travaux préparatoire* of the Hague Conventions. They are of particular relevance for the interpretation of the Conventions since at that time interpreters followed predominantly the subjective approach. The German delegate von Gündell proposed originally two articles dealing with compensation, differentiating between payment to persons nationals of neutral states and persons nationals of an enemy state. His proposal was refused but the intent to grant compensation to individuals was never questioned or denied.<sup>228</sup>

In respect to the interpretation of article 3 Hague Convention IV, the development in international law must also be considered. Human rights law presents the strongest argument for the development of the status and rights of individuals in international law and many norms of international humanitarian law are similar in function and nature to human rights norms in contemporary international law.<sup>229</sup> Therefore provisions of international humanitarian law have to be interpreted in accordance with the achieved status and rights of individuals. The achievements of human rights law require that the

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<sup>224</sup> Art. 32 is part of customary international law and therefore applicable.

<sup>225</sup> see Schwager and Bank (note 154) at 20

<sup>226</sup> Mazzeschi (note 171) at 341

<sup>227</sup> F Kalshoven *State Responsibility for Warlike Acts of the Armed Forces* (1991)40

*International and Comparative Law Quarterly* 827 et seq.

<sup>228</sup> *ibid*

<sup>229</sup> See Cassese *International Law* (note 5) page 331; Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* in respect of the interplay between treaties of humanitarian law and human rights law (note 126); see also Doswald-Beck and Vité, (note 137) at 94

interpretation of rights created by international humanitarian law should be in favour of individuals, whenever possible.<sup>230</sup> Thus, article 3 Hague Convention IV should be interpreted in the wider sense of its meaning hence providing the right to individuals suffering from violations committed by states. The fact that individuals have relied on this provision in very few occasions has been due to procedural limits and is not an argument against the content of the article.

The report of the UN Commission of Inquiry on Darfur states that even if article 3 was initially not intended to grant individuals the right to compensation, it does so in the meanwhile.<sup>231</sup> The report also quotes Judge C. Jorda who stated that 'provisions [on State responsibility for war crimes and other international crimes] may now be construed to the effect that the obligations they enshrine are assumed by States not only towards other contracting States but also vis-à-vis the victims, i.e. the individuals who suffered from those crimes. In other words, there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses.'<sup>232</sup>

#### *Other grounds for a right to reparation*

Searching for a legal basis for an individual right to reparation in international humanitarian law Art. 3 Hague Convention IV is not the only possible provision in search for a cause of action to seek reparation for an injury caused by a violation of a rule of IHL.

The official Commentary on the Additional Protocols of 1977 of the International Committee of the Red Cross in regards to the interpretation of article 91 of Protocol I suggests that an individual right of victims exists for any violation of the laws of war.<sup>233</sup>

Following the decision of the PCIJ in *Factory at Chorzów* the existence of a secondary right to compensation seems to be a necessary consequence of a

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<sup>230</sup> See Mazzeschi (note 171) at 341

<sup>231</sup> UN Commission of Inquiry on Darfur (note 28) para 593

<sup>232</sup> *ibid* para 597.

<sup>233</sup> ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 at 1056.

violation of international law. Some scholars also argue that the obligation to make reparation automatically arises as a consequence of the unlawful act.<sup>234</sup> Therefore, if there has been a violation of an individual right, there must be an individual right to claim reparation for such violation.

Schwager and Bank state in a paper for the ILC that the individual right to reparation 'could also result as a general secondary right from a violation of a primary right of the individual'.<sup>235</sup>

The decision of the PCIJ on the *Factory at Chorzow* goes into the same direction affirming that there is no need for a written reparation provision, when it states that [i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.<sup>236</sup>

International tribunals have inferred from this principle - that an international delict generates an obligation of reparation, and that reparation must wipe out the consequences of the wrongful act- an inherent power to afford remedies.<sup>237</sup>

The ICJ has affirmed this in respect to the right of individuals in its advisory opinion on the *Construction of a Wall in the Occupied Palestinian Territory*. It stated that 'Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned' and that it 'also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction'.<sup>238</sup> The Court deduced such obligation from the customary rule of state responsibility to make

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<sup>234</sup> E C Gillard *Reparation for violations of international humanitarian law* in (2003) 85 *IRRC* 529 at 532.

<sup>235</sup> Schwager and Bank (note 156) at 24.

<sup>236</sup> PCIJ *Factory at Chorzów* (note 66) reaffirmed in ICJ *Reparation for Injuries Suffered in the Service of the United Nations* (note 97) para. 184.

<sup>237</sup> D Shelton *Righting Wrongs: Reparations in the Articles on State Responsibility* in (2002) 96 *AJIL* 833 at 835.

<sup>238</sup> (note 128) para 151 and 153



reparation in case of internationally wrongful acts without referring to a specific norm.

It can therefore be argued that the position of individuals in international law as subjects and holders of rights in international law including IHL, automatically provides them with a right to reparation in case of violations of their rights. Therefore, the provision which contains the individual right which was violated in combination with the customary rule stating every wrongful act leads to the duty to make reparation can serve as a cause of action to seek reparation.

*Practice of States and international organisations in respect to a right to reparation for individuals*

Some scholars argue that there is not enough state practice to acknowledge the existence of an individual right to reparation.<sup>239</sup> The lack of state practice might hinder the development of customary international law but it cannot serve as an argument to deny the existence of an individual right to compensation *de lege lata*. Apart from that, there is a growing number of domestic courts conferring rights to individuals under international humanitarian law and in some cases granting reparation to individuals.

A German Administrative Court of Appeal ruled in 1952 that article 3 Hague Convention IV provides an individual right to compensation.<sup>240</sup> It granted compensation based on article 3 for the violation of international humanitarian law.

The Amsterdam District Court, Gerechtshof Amsterdam also recognized in 2000 the possibility of deriving individual rights from international humanitarian law by confirming the right to invoke the rules, even if it then rejected the claim for other reasons.<sup>241</sup>

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<sup>239</sup> E.g. C Tomuschat *Reparation for Victims of Grave Human Rights Violations* in (2002) 10 *Tulane Journal of International and Comparative Law* 157 at 173.

<sup>240</sup> Germany, OVG Münster, 19 ILR (1952), 632-4. An individual was seriously injured by a vehicle of the occupying power.

<sup>241</sup> Gerechtshof Amsterdam, Vierde meervoudige burgerlijke kamer, *Dedovic v. Kok et al.*, Judgement of 6 July 2000.

The Italian Corte Suprema di Cassazione explicitly presumed in 2004 in the *Ferrini* case<sup>242</sup> the possibility of individual rights to compensation to be enforced through civil litigation. The Court held that an Italian, deported to Germany for slave labour in 1944, was entitled to compensation for violations of international humanitarian law, as Germany was not entitled to claim state immunity.<sup>243</sup> This decision is a good example to show that immunity might be the bigger obstacle to reparation claims before domestic courts than the argument that individuals lack the right to seek reparation.

US Courts have ruled out sovereign immunity<sup>244</sup> of states and granted reparation to individuals in several cases.<sup>245</sup> Thereby arguments have been made that states which committed jus cogens violations and other violations of firmly established restrictions of customary and conventional international law forfeited their right to sovereign immunity.<sup>246</sup>

More judgements indicate what could be possible if the ‘immunity wall’ would break down and universal civil jurisdiction would be possible.<sup>247</sup> In a case also involving Germany, a Greek court awarded damages to a great number of the inhabitants of the Greek village of Distomo who were victims of a massacre committed by German SS during World War II.<sup>248</sup> The Greek Supreme Court Areios Pagos, affirmed the decision that Germany had to pay individual compensation, in its judgement from 4 May 2000.<sup>249</sup> It found that crimes such as reprisals against innocent and wholly uninvolved citizens in form

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<sup>242</sup> Corte Suprema di Cassazione *Ferrini v. Federal Republic of Germany* (Cass. Sez. Un. 5044/04) 11 March 2004 reproduced in: 87 (2004) *Rivista di diritto internazionale* 540.

<sup>243</sup> It held that immunity does not apply to violations of such peremptory international norms as those prohibiting war crimes and crimes against humanity. The Court of first instance the Tribunal of Arezzo dismissed the suit for lack of jurisdiction.

<sup>244</sup> In the United States the Foreign Sovereign Immunities Act of 1976 provides some exceptions from the general rule that States enjoy sovereign immunity before foreign courts.

<sup>245</sup> See Chapter III Part 3.

<sup>246</sup> United States Court of Appeals Ninth Circuit *Altman v. Austria* Judgement of 12 December 2002 *Federal Reporter*, 3d SERIES, 317 (2002) page 954; for an even stronger opinion see. Judge Wald of the District of Columbia Circuit in her dissenting opinion in *Princz v. Fed. Republic of Germany*, 26 *F.3d* 1166, 1176-85 (*D.C. Cir.* 1994)

<sup>247</sup> This question of universal civil jurisdiction can't be addressed here but it is a worth mentioning new development.

<sup>248</sup> Prefecture Voiotia v. Federal Republic of Germany, Case no. 137/1997, Court of First Instance of Leivadia, 30 October 1997 see 92 (1997) *AJIL* 765.

<sup>249</sup> Hellenic Supreme Court 4 May 2000, see: 95 (2001) *AJIL* 198.

of terror operation against the local population were not protected by immunity; therefore Germany could not seek this kind of protection before the court.<sup>250</sup>

More generally, there are many examples for the practice of states to provide reparation for victims on the basis of agreements in the aftermath of conflicts. New governments of Chile, Argentina and Brazil have agreed to institute reparation programs for victims of the former military dictatorships.<sup>251</sup> Several Eastern European countries have established compensation schemes for victims of the former regimes.<sup>252</sup> In Bosnia- Herzegovina the Dayton Peace Agreement created a special Commission on Real Property Claims to provide restitution or compensation to the citizen who lost their land in the context of the armed conflict.<sup>253</sup>

By resolution 692 in 1991 the UN Security Council decided to establish a Claims Commissions to regulate claims of individuals and states in relation to Iraq's invasion and occupation of Kuwait.<sup>254</sup>

UN Security Council Resolution 827 which established the ICTY states that 'the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law'.<sup>255</sup>

The UN Commission on Human Rights stated in 1999 in a resolution on systematic rape, sexual slavery and slavery-like practices that '[s]tates must respect their international obligation to [...] compensate all victims of human rights and humanitarian law violations' and called upon states to 'provide

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<sup>250</sup> Ibid at 200

<sup>251</sup> N Roht-Arriaza Reparations in the aftermath of repression and mass violence in E Stover and H Weinstein (eds.) *My Neighbor, My Enemy Justice and Community in the Aftermath of Mass Atrocities* (2004) 121 at 124.

<sup>252</sup> see e.g. R David and S Yuk-ping Victims on Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic in (2005) 27 *Human Rights Quarterly* 392

<sup>253</sup> General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Accords), Annex 7, Agreement on Refugees and Displaced Persons, signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska, Dayton, 22 November 1995, Art VII; Art. 1(1) of the Agreement provides that 'all refugees and displaced persons [...] shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them'.

<sup>254</sup> see Chapter III Part 5

<sup>255</sup> UN SC Res. 827 (note 47) para 7

effective [...] compensation for un-remedied violations in order to end the cycle of impunity with regard to sexual violence committed during armed conflicts'.<sup>256</sup> The Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflicts has pointed out repeatedly that 'the right to an effective remedy is clearly essential in overcoming impunity and non-accountability for sexual slavery, rape and other acts of sexual violence in armed conflict, and the rights of victims of these atrocities must be vindicated and redressed. The failure to provide any forum or mechanisms for the redress of rights violations would clearly constitute a further violation of international norms and obligations, as would any discrimination against women in exercising their rights to redress.'<sup>257</sup> In resolution from 2005 it stated again that '[v]ictims of sexual violence, as a particularly vulnerable part of society should be treated with compassion and their dignity and right to redress must be respected'.<sup>258</sup> For the question of redress it referred expressly to the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>259</sup>

### *The enforcement of the right to reparation*

There has been an argument made that there can be no individual right to reparation due to the fact that there is no international procedure under which the individual could exercise such right.

First of all, a distinction needs to be made between the right and the respective remedy. The right to reparation is a secondary right that *follows* from the breach of a primary right, such the right to life. There is no rule stating that the right to a remedy depends on the existence of actual enforcement mechanisms. One could better argue that international judicial bodies need to

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<sup>256</sup> UN Commission on Human Rights Res. 1999/16, 26 August 1999 para 9 and 12

<sup>257</sup> UN Commission on Human Rights, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during armed conflicts* (note 12), para 89

<sup>258</sup> UN Commission on Human Rights Res. on Systematic rape, sexual slavery and slavery-like practices during armed conflicts, Report of the United Nations High Commissioner for Human Rights 11 July 2005, U.N. Doc. E/CN.4/Sub.2/2005/33.

<sup>259</sup> (note 102).

establish adequate procedure in response to the development of secondary rights.

The PCIJ affirmed in *Jurisdiction of the Courts of Danzig* the existence of a right for individuals under international law enforceable before national courts without the requirement of an international enforcement mechanism.<sup>260</sup>

Moreover, even if a mechanism is available it cannot guarantee effective enforcement. Limitations such as state immunity or the political question doctrine can restrict the exercise of a right but they do not put the existence of the right itself in question.<sup>261</sup>

Therefore the right to reparation can exist even if it cannot be personally enforced (yet) by individuals before international or national courts or tribunals.<sup>262</sup>

Apart from that, there have been already possibilities for victims of violations of international humanitarian law to act on an international level. As early as 1919 the Treaty of Versailles<sup>263</sup> provided in article 297 that the nationals of the Allied and Associated Powers could bring actions against Germany before Mixed Arbitral Tribunals established by the Treaty itself.

Today, international supervisory bodies allow complaints submitted by individuals and the Inter-American Commission on Human Rights has already applied directly those provisions of international humanitarian law which protect the right to life.<sup>264</sup> In the *Tablada* case the Commission applied IHL based on the idea to fill the gaps the 1969 Inter-American Convention on Human Rights leaves open in responds to armed conflicts.<sup>265</sup>

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<sup>260</sup> PCIJ *Jurisdiction of the Courts of Danzig* (note 90) para 17

<sup>261</sup> It can also be argued that for practical reasons an individual could need his or her state to act on his or her behalf before international tribunals which would not deny the individual character of the right.

<sup>262</sup> For similar argumentation see Mazzeschi (note 171) at 343 and Sàssoli (note 77) at 419.

<sup>263</sup> Treaty of Versailles, June 28, 1919, art. 297, 13 AJIL. 151, 306 (Supp.1919).

<sup>264</sup> see C M Cerna Human Rights in Armed Conflicts: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies in F Kalshoven & Y Sandoz (eds.) *Implementation of International Humanitarian Law* 31-67 (1989).

<sup>265</sup> Juan Carlos Abella and others v. Argentina (La Tablada case), 30 October 1997, Report No. 55/97 Case No. 11.137, Argentina OEA/SER/L/V/II.97, Doc. 38 at 44, the IACtHR has not approved this approach.

Notwithstanding these recent developments, there is still a need for international fora available for victims of violations of IHL.

Concerned with the inadequate situation for victims of violations of IHL, the substantial and procedural aspects of the right to reparation have been discussed by many scholars.<sup>266</sup> Resolutions and drafts by the United Nations<sup>267</sup> and the International Law Association<sup>268</sup> have been published supporting the argument that there is an individual right to reparation under international humanitarian law and which suggest further steps towards international procedures and enforcements.

An interesting proposal was launched at the Hague Appeal for Peace and Justice for the 21<sup>st</sup> Century in 1999. Recommendation 13 of the Hague Appeal suggests an individual complaints procedure for violations of international humanitarian law.<sup>269</sup> Apart from the positive effects for the victims it could, according to the supporters of the proposal, contribute to improve compliance with international humanitarian law.<sup>270</sup>

There have also been scholars calling for a Permanent International Claims Commission (PICC) for victims of violations of international humanitarian law which should be closely linked to the Permanent Court of International Arbitration (PCIA) in The Hague.<sup>271</sup>

## **5. Reparation and international criminal law**

### **5.1 International criminal law and acts of sexual violence**

International criminal law is based on the long established principle of individual criminal responsibility for violations of international humanitarian

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<sup>266</sup> E.g. Mazzeschi (note 171), Schwager and Bank (note 156), Kalshoven (note 227).

<sup>267</sup> e.g. UN Principles of a Right to Remedy (note 102)

<sup>268</sup> The ILA has established a Committee which is currently working on a general survey of theories and practices relating to compensation for victims of war. See: <http://www.ila-hq.org>

<sup>269</sup> The Hague Agenda for Peace and Justice for the 21<sup>st</sup> Century is available under: <http://www.haguepeace.org/appeals/english.html>. The Agenda was adopted by the General Assembly as UN Doc. A/54/98 (20 May 1999). There is also a Draft available on the website: <http://www.haguepeace.org>

<sup>270</sup> see Kleffner (note 220) at 237.

<sup>271</sup> M Kamminga Towards a Permanent International Claims Commission for Victims of Violations of International Humanitarian Law available under: <http://arno.unimaas.nl/show.cgi?fid=3610>

law. Should a state not wish to, or not be in a position to, prosecute perpetrators of violations of international humanitarian law, the crimes can be tried by international criminal tribunals instituted by treaty or by binding decision of the United Nations Security Council.

The latter established two ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) in 1993, and for Rwanda (ICTR) a year later. Many writers and the United Nations saw the establishment of such tribunals as important contribution to the restoration and the maintenance of peace.<sup>272</sup> Since then so called internationalized or mixed tribunals have been established to deal with atrocities in countries like Sierra Leone, Cambodia and East Timor.<sup>273</sup>

*The jurisprudence of ICTR and ICTY in regards to sexual violence*

The provisions in the statutes of the ICTY and ICTR enable the courts to prosecute certain acts of sexual violence.

In respect to crimes against humanity, both statutes expressly mention only rape as a sexual offence that may constitute such a crime.<sup>274</sup> Therefore rape can be prosecuted separately as a crime against humanity when committed as part of a widespread or systematic attack. Rape and other sexually violent acts can also be prosecuted as crimes against humanity under the torture, persecution, enslavement and 'inhuman acts' provisions.<sup>275</sup>

In respect to war crimes, sexual violence can be prosecuted under the provisions of ICTR Statute in article 4(a) 'Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment'<sup>276</sup> and in article 4 (e) 'outrages upon personal dignity, in particular humiliating and degrading

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<sup>272</sup> Malan (note 46) at 142

<sup>273</sup> see Romano et al. (note 51)

<sup>274</sup> Art. 3(g) ICTR Statute, Art. 5 (g) ICTY Statute; see also Art. 2(g) SCSL Statute

<sup>275</sup> For example the ICTR found that forced nudity, typically committed as a distinct offence separate from rape crimes, falls within the scope of 'other inhuman acts' and therefore constitutes a crime against humanity. See ICTR Prosecutor v Akayesu Trial Chamber I, Judgement of 2 September 1998, Case No. ICTR-96-4-T, para 688.

<sup>276</sup> Semanza was convicted under article 4(a) for instigating the rape and torture of a women, see The Prosecutor v. Semanza Judgement and Sentence, Case No. ICTR-97-20-T, 15 May 2003

treatment, rape, enforced prostitution and any other form of indecent assault’; and under the grave breaches provisions in article 2 of the ICTY Statute.

Left with these incomplete provisions, the jurisprudence of the ICTY and ICTR has contributed much to the interpretation of international criminal law in regards to the prosecution of sexual violence.<sup>277</sup> In the *Akayesu* trial the ICTR developed the first definition of rape in international law.<sup>278</sup> Trial Chamber I considered that ‘rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts’. It defined rape as ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’<sup>279</sup> and held that this includes acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.<sup>280</sup> The Appeal Chamber has affirmed that force or threat of force, while providing clear evidence of non-consent, is not per se an element of the offence of rape.<sup>281</sup>

In regards to the prosecution of rape as torture the ICTR has ruled that the severe mental and physical pain and suffering caused by rape and sexual assault can constitute torture.<sup>282</sup> According to the ICTY Trial Chamber in the *Celibici* case “[t]here can be no question that acts of rape may constitute torture under customary law.”<sup>283</sup> The Chamber also held that the purpose which is classically associated with torture ‘is inherent in situations of armed conflict’.<sup>284</sup>

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<sup>277</sup> S Balthazar Gender Crimes And The International Criminal Tribunals in (2006) 10 *Gonzaga Journal of International Law* 43; R Copelon Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law (2000-2001) 46 *McGill Journal* pp. 217-240, R Haffajee Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of the Joint Criminal Enterprise Theory (2006) 29 *Harvard Journal of Law & Gender* 201.

<sup>278</sup> The Prosecutor v. Akayesu (note 275) In the *Prosecutor v. Musema* Judgement of 27 January 2000, Case No. ICTR-96-13-I the Trial Chamber I affirmed the broad definition of rape asserted in *Akayesu*. Nonetheless the ICTY developed a different definition in *The Prosecutor v Furundžija* Judgement of December 1998, Case No. IT-95-17/1-T.

<sup>279</sup> ICTR Akayesu (note 275) para 598.

<sup>280</sup> *Ibid* para 686.

<sup>281</sup> The Prosecutor v. Dragoljub Kunarac, Radomir Kovać and Zoran Vuković, Appeal Chamber, Judgement 12 June 2002, Case No. IT-96-23 & IT-96-23/1-A

<sup>282</sup> Prosecutor v. Akayesu (note 275) para 687

<sup>283</sup> ICTY Prosecutor v. Delalić, Mucić, Delić and Landžo (Čelibići Camp) Judgement of 16 November 1998, case no. ICTY-96-21-T para 495

<sup>284</sup> *ibid* para 495



In its *Kunarac* decision the ICTY set out for the first time the elements of the crime of sexual slavery as a crime against humanity.<sup>285</sup> The Court emphasized the victim's right to protect their sexual autonomy and personal integrity. It followed the definition provided by the Slavery Convention<sup>286</sup> and didn't require an element of commercial transaction.

The ICTR has further recognized in the *Akayesu* case that rapes in Rwanda where perpetrated 'as an integral part of the process of destruction'<sup>287</sup> and therefore amount to genocide. The verdict marked the first time an international court found rape to be an act of genocide. The Chamber also found that rape and acts of sexual violence during genocide occur under circumstances that are naturally coercive.<sup>288</sup>

Apart from that the tribunals have also contributed to the process of widening the scope of IHL rules applicable to non-international armed conflicts, which can lead to more protection for potential victims of sexual violence and a better basis for prosecution of perpetrators.<sup>289</sup>

In the examination of the prosecution of sexual violence by international criminal tribunals many critiques have been argued.<sup>290</sup> It has been criticized that most of the decisions deal only with the crime of rape and rarely consider other crimes of sexual violence.<sup>291</sup> Before the ICTR an overwhelming 90 per cent of the judgements didn't contain rape convictions at all, only three conviction involving sexual violence charges have survived appeal until now.<sup>292</sup> In contrast the Prosecutor of the Special Court for Sierra Leone has issued thirteen indictments, in all these cases, except the three indictments against pro-

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<sup>285</sup> Prosecutor v. Kunarac, Kovać and Vuković, Trial Chamber II, Judgement of 22 February 2001, Case no. IT-96-23-T

<sup>286</sup> Convention to Suppress the Slave Trade and Slavery, adopted by the League of Nations, Geneva 25 September 1926, as amended by the Protocol amending the Slavery Convention adopted by the U.N. General Assembly, Res. 794 (VIII), 23 October 1953

<sup>287</sup> The ICTR found that the rape of Tutsi women was aimed to destroy the spirit, will to live, or will to procreate, of the Tutsi group. Prosecutor v. Akayesu (note 275) para 732

<sup>288</sup> The Prosecutor v. Muhimana, Judgement and Sentence, 28 April 2005, Case No. ICTR-95-1B-T

<sup>289</sup> See e.g. ICTY The Prosecutor v. Tadić Appeals Chamber (note 77) para 97: for a broader analyse see Gutierrez Posse, H. The relationship between international humanitarian law and international criminal tribunals in: 861 (2006) IRRC 65

<sup>290</sup> Askin Prosecuting Wartime Rape (note 8) at 288; Bedont and Hall Martinez (note 9) at 65

<sup>291</sup> *ibid* (Askin) at 288

<sup>292</sup> The prosecutors appear to lack evidence directly or closely linking high-level officials to crimes of sexual violence. See Haffajee, (note 277) at 266

government militia CDF, the original indictments include sexual violence like rape, sexual enslavement, abduction or forced labour and marriage.<sup>293</sup>

*The Rome Statute of the ICC and sexual violence*

An important step forward presents the explicit recognition of sexual violence as part of the mandate of the International Criminal Court (ICC). Women Rights Organisations see in the ICC a good chance to properly delineate, investigate, and prosecute wartime violence against women.<sup>294</sup> The decisions of the ICTR and ICTY are clearly key factors to the recognition of acts of sexual violence in the Statute.

Article 5 of the Statute, like the corresponding provisions of the Statutes of the ICTY and ICTR, specifies that the Court has jurisdiction over the crime of genocide, crimes against humanity and war crimes. The Rome Statute specifies several types of crimes against humanity (Article 7) and war crimes (Article 8) which are in the competence of the court, including subparagraphs listing a broad spectrum of gender-specific crimes.

Art. 7(1)(g) includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity and the Elements of Crimes set out the definitions of these crimes.<sup>295</sup> Therefore the Statute allows the prosecution of a wide range of acts of sexual violence.

During the negotiations around the Rome Statute the issue of forced pregnancy became the most contentious issue of all the gender provisions.<sup>296</sup> The Statute now prohibits forced pregnancy defined as a crime under art. 7(2)(f) as 'the unlawful confinement of a women forcibly made pregnant, with the intent to affecting the ethnic composition of any population or carrying out

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<sup>293</sup> Nowrojee Making the invisible war crime visible (note 23).

<sup>294</sup> Bedont and Hall Martinez (note 9).

<sup>295</sup> The Elements of Crimes clarify the definitions of crimes in Article 6, 7 and 8 of the Statute and shall assist the court as an interpretative tool for interpretation and application of Art. 6, 7 and 8 of the Statute.

<sup>296</sup> Bedont and Hall Martinez (note 9) at 80.

other grave violations of international law'. The Rome Statute is the first international treaty specifically listing this crime.<sup>297</sup>

Art. 8 (2) (b) of the Rome Statute allows the prosecution of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence constituting a grave breach of the Geneva Conventions as war crimes.

Art. 8 (2)(c)(i) and Art.8 (2)(c)(ii) of the Statute enable the Court to prosecute rape and other acts of sexual violence in non-international armed conflicts as well.

Sexual violence in connection to genocide can also be prosecuted before the ICC under art. 6 of the Statute.

International criminal law proves to be the most advanced part of international law to address sexual violence in armed conflicts in an appropriate way. Unfortunately its application on an international level is limited to cases within the jurisdiction of ad-hoc tribunals and the International Criminal Court.

## **5.2 The status and role of victims before international criminal tribunals**

In oral societies like Rwanda, victims of violence play an important role for the prosecution of perpetrators.<sup>298</sup> Due to the fact that there is no other evidence than the testimonial evidence<sup>299</sup>, the Prosecutor and the Defence in the ICTR rely predominantly upon the testimony of witnesses brought before the Chamber in order to establish their respective cases. Especially in regards to

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<sup>297</sup> The crime has been recognized as a fundamental humanitarian and human rights violation in the Vienna Conference's Programme of Action, the Beijing Conference's Platform for Action (note 38).

<sup>298</sup> The Trial Chamber of the ICTR found: 'Unlike the leaders of Nazi Germany, who meticulously documented their acts during World War II, the organisers and perpetrators of the massacres that occurred in Rwanda in 1994 left little documentation behind' see: Prosecutor v Kayishema and Ruzindana, ICTR Trial Chamber, Judgement 21 May 1999, case no ICTR-95-1-T, para 65.

<sup>299</sup> G Sluiter The ICTR and the Protection of Witnesses (2005)3-4 *Journal for International Criminal Justice* 962 at 963.

sexually violent acts other evidence such as sperm, fingerprints or bruises are rarely available in the aftermath of an armed conflict.<sup>300</sup>

Many female witnesses of sexual violence hesitate to testify because they think that their testimony would put them at risk that their identities would be revealed and that their families would suffer retaliation and stigma. This fear happened to be more than often the sad reality. Female rape victims who have testified before the ICTR in Arusha have reported returning home to Rwanda to find that their testimony including details of their rapes, are known by people in their home areas.<sup>301</sup> Other witnesses before the ICTR returned home to face anonymous threats and other harassment as a result of their testimonies on rape. After such incidents, some Rwandan NGOs threatened to boycott the ICTR and discourage women from testifying if the ICTR did not improve its mechanisms for protecting their identity and safety.<sup>302</sup>

The procedural law of the international criminal tribunals provides several layers of protection for witnesses and victims. Under the Rules of Procedure and Evidence (‘the Rules’) of the ICTY and ICTR a Judge or the Chamber can order appropriate measures to protect victims and witnesses, provided that they are consistent with the rights of the accused. Rules 75 and 107 stipulate that the Appeals Chamber may, at the request of either party, order appropriate measures to safeguard the privacy and security of victims and witnesses. Rules 69 and 107 stipulate that, in exceptional circumstances, either of the parties may apply to the Appeals Chamber to order the non-disclosure of the identity of witnesses who may be in danger or at risk.<sup>303</sup> For recommendations for the adoption of protective measures and the co-ordination of support and gender-sensitive measures for victims and witnesses all three tribunals have set up a Victims and Witnesses Support Unit.<sup>304</sup>

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<sup>300</sup> K Askin, Jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Some Survivors’ in H Durham and T Gurd (eds) *Listening to the Silences: Women and War* (2005) 125 at 132.

<sup>301</sup> Nowrojee Your justice is too slow (note 34) page 24.

<sup>302</sup> Human Rights Watch World Report 2004 *In War as in Peace: Sexual Violence and Women’s Status* By LaShawn R. Jefferson available under <http://hrw.org/wr2k4/>.

<sup>303</sup> see C Chinkin Women: The Forgotten Victims of Armed Conflict?’ In H Durham and T McCormack (eds.) *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (1999) 23 at 34.

<sup>304</sup> Rule 34 (3) ICTR Rules of Procedure and Evidence.

Several provisions of the Rome Statute refer to the rights and concerns of victims. Article 15(3) provides that, '[v]ictims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence' regarding the question of a reasonable basis to proceed with an investigation.<sup>305</sup> Under art. 19 victims may also make submissions in proceedings with respect to jurisdiction or admissibility. Article 65(4) states that a Trial Chamber may request additional evidence if this is required 'in the interest of the victims'.

Although mainly influenced by the Anglo-American system the ICC differs from the national adversarial systems where victims utterly lack *locus standi* and justice is only fought between the state and the defendant.<sup>306</sup> Before the ICC victims may take part in the trial proceedings, which was made possible for the first time in international criminal law. Article 68 (3) of the Rome Statute enables victims to set out in court their 'views' and 'concerns' on matters of fact and law by stating:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

Cassese has pointed out that this article 'marks a great advance in international criminal procedure'.<sup>307</sup>

Rule 90 of the Rules regulates the legal representation of victims. According to this rule Victims can act via their legal representative who they are free to choose and who must be equally qualified as the counsel for the defence. In respect to a large number of victims the Chamber may ask victims to choose a shared legal representative to ensure efficiency of proceedings.<sup>308</sup> The Victims' Participation and Reparation Section is responsible for assisting

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<sup>305</sup> See also ICC Decision on the Application for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Decision of 17 January 2006, Case No. ICC-01/04.

<sup>306</sup> In contrast, in continental civil law systems the concept of *partie civile* is well known and provides the victim with some rights of participation in court.

<sup>307</sup> A Cassese The Statute of the International Criminal Court: Some Preliminary Reflections 1999 *EJIL* 144 at 167.

<sup>308</sup> If the victims are unable to appoint one, the Chamber may ask the Registrar to appoint one or more shared legal representatives.

victims with the organisation of their legal representation before the Court. When a victim or a group of victims does not have the means to pay for a shared legal representative appointed by the Court, they may request financial aid from the Court.<sup>309</sup> The Victim's Counsel is allowed to assist the victim in the proceedings too.

### **5.3 The power of international criminal tribunals to grant reparation**

#### *Reparation and the ICTR and ICTY*

The President of the ICTY, Judge Claude Jorda has supported the view that the universal recognition and acceptance of the right to an effective remedy cannot but have a bearing on the interpretation of the international provisions on state responsibility for war crimes and other international crimes.<sup>310</sup>

Neither of the two ad-hoc tribunals ICTY and ICTR has the power to order compensation as part of a penalty imposed on a convicted person, but they can order some other kind of reparation. According to their Statutes the tribunals can order the restitution of property and proceeds acquired by criminal conduct. Articles 24(3) of the ICTY Statute and 23(3) of the ICTR Statute provide that 'in addition to imprisonment, the Trial Chamber may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Feminist commentators argue that women most likely don't profit from such provisions due to the fact that in many societies men are the owners of property.<sup>311</sup>

Although the statutes of the ICTY and ICTR remain silent about compensation the Rules of Procedure address the question of reparation including compensation. Rule 106 of the ICTY's and ICTR's Rules of Procedure and Evidence establishes a system of co-operation between the tribunal and national authorities. Rule 106(B) states: 'Pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation.'

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<sup>309</sup> Rule 90(5) of the Rules.

<sup>310</sup> in a letter to Secretary-General from 12 October 2000.

<sup>311</sup> Gardam and Jarvis (note 197) at 245.

According to Rule 106 (C) 'the judgement of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury. Therefore a finding of guilt by the tribunals enables a victim to institute proceedings under national law. Unfortunately this rule has not been of particular use to victims.<sup>312</sup> Moreover, stateless persons are excluded from that benefit from the beginning.

The reluctance of the Statutes of the ICTR and ICTY can be explained with the fear that the Tribunals would not be able to handle a high number of compensation claims. Unfortunately, the claims commission for victims which was considered as the better solution was never established.<sup>313</sup>

#### *Reparation and the ICC*

As mirrored in the Preamble of its Statute the ICC was created in response to the fact that 'during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'. Thus victims of these atrocities are 'central to the notion of international criminal justice'.<sup>314</sup>

The reparation regime for the ICC is laid down in articles 75 and 79 of the Rome Statute and in Rules 94 to 99 of the Rules of Evidence and Procedure (the Rules). Art. 75 as the main provision states:

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

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

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<sup>312</sup> C Ferstman The Reparation Regime of the International Criminal Court: Practical Considerations in (2002) 15 *Leiden Journal of International Law* 667 at 671.

<sup>313</sup> See UN S.C. Res. 827 (note 47). The SC later unfroze the assets of Serbia and Bosnian Serbs which ended the possibility of such commission for the victims in the Former Yugoslavia.

<sup>314</sup> Cassese The Statute of the International Criminal Court: Some Preliminary Reflections (note 300).

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

Therewith the Statute authorizes the Court to determine any damage, loss or injury to victims and order reparations to them. However, a footnote attached to the final report of the Working Group on Procedural Matters of the Rome Conference strongly indicates that the principles for reparation should be inspired by developing international standards on reparation, in particular the UN Principles on a Right to Remedy.<sup>315</sup> According to Rule 97 of the Rules the Court can appoint experts to assist it in determining the scope and extent of damages. The Court shall also invite victims and the convicted person to make observations. The power to actually grant reparation will be exercised in the full discretion of the Court.

According to Art.75 (2) the Court can make a reparation order against the convicted person directly. Such order of reparation against individuals is a novelty before international criminal courts and the future will show how the ICC will use its power.

The Rome Statute provides in art. 57 (3)(e) and 93 (1)( k) that the Court can ask states parties<sup>316</sup> to take protective measures in form of identifying, tracing, freezing and seizure of proceeds, property and assets for the purpose of eventual forfeiture. Provisional measures with regard to actual reparations in form of urgent financial or medical support have been suggested during the negotiations of the Statute but have not been approved.

The reparation paid by the convicted person should be given directly to the victim, but the Court can use the Trust Fund as an intermediary to transfer reparations to the beneficiary.<sup>317</sup> The Court can order that an award for

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<sup>315</sup> Footnote 5 to Art. 73 on reparation to victims in the Final report of the Working Group on Procedural Matters U.N. Doc. A/Conf.183/C.1/WGPM/L.2/Add.7, 13 July 1998.

<sup>316</sup> Assistance provided by states non parties to the Statute would depend on their national law relating to judicial assistance.

<sup>317</sup> see Rule 98(2) of Rules of Procedure and Evidence, see also T Ingadottir, The Trust Fund for Victims (Article 79 of the Rome Statute) in T Ingadottir (ed) *The International Criminal Court: Recommendations on Policy and Practice – Financing, Victims, Judges, and Immunities* (2005) at 122; see also Regulation 69.



reparation shall be deposited with the Trust Fund in case where it is ‘impossible or impracticable to make individual awards directly to each victim’.<sup>318</sup>

Rule 97 of the Rules states that the Court may award reparations on an individual basis or, where it deems it appropriate, on a collective basis. Regarding the actual cases before the ICC and the numbers of victims, collective awards will be the more appropriate measure.

According to Rule 94 of the Rules, victims can request reparation in writing, filed with the registrar. The ICC has developed respective application forms which are available at its website.

The manner in which States will enforce the reparation order of the ICC depends on the procedure of their national law.

#### *The Trust Fund for Victims*

The Trust Fund established under art. 79 of the Rome Statute, is one important contribution to the Rome Statute’s overall goal to restore peace by dispensing retributive justice to criminals and restorative justice to victims.

The fund may make payments directly to victims or their families or to other bodies, such as organisations. The funds can be allocated either to individuals or to a collective.<sup>319</sup>

The Fund is administered by the Registry but supervised by an independent Board of Directors, which members are elected by the Assembly of States.<sup>320</sup> The decision about how the fund should be used is left to this Board.<sup>321</sup> The Assembly of the States Parties has approved the Regulations of the Trust Fund for Victims establishing the rights and obligations of the Board.<sup>322</sup> Apart from that, the Court’s policies and operation will have an influence on how the Fund will be used.

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<sup>318</sup> Rule 98 (2) of the Rules

<sup>319</sup> Rule 98 (3) and (4) of the Rules

<sup>320</sup> The Board is composed of Her Majesty Queen Rania Al-Abdullah of Jordan, His Excellency Mr. Tadeusz Mazowiecki from Poland, Madam Minister Simone Veil from France, His Eminence Archbishop Emeritus Desmond Tutu from South Africa, and Mr. Arthur Napoleon Raymond Robinson of Trinidad and Tobago.

<sup>321</sup> Ingadottir, (note 317) at 111

<sup>322</sup> Resolution ICC-ASP/4/Res.3, adopted by consensus at the 4th plenary meeting on 3 December 2005.

The Trust Fund stands outside the basic budgetary framework of the ICC. Therefore the Court's funding<sup>323</sup> and the Fund's budget<sup>324</sup> are separate financial issues.

There are several sources to finance the Trust Fund. According to art. 79 of the Rome Statute fines and forfeiture can be transferred from the Court to the Fund. In addition to imprisonment the ICC can order under article 77 (2) of the Rome Statute fines and forfeiture of proceeds, property and asserts. The latter will be performed by state parties in accordance with their national law and those funds will be transferred to the Court (see art. 109). Once the Court has ordered fines and forfeiture it may or may not transfer it to the Trust Fund.<sup>325</sup> Other contributions shall come from external sources such as governments and international organisations. The Trust Fund shall also be funded by voluntary contributions which must first be approved by the Board of Directors.<sup>326</sup> The Assembly of State Parties can also decide to contribute to the Fund.

According to Rule 76 and 22 of the Regulation the Trust Fund is obliged to report annually to the Assembly of States Parties on its activities and projects and on all offered voluntary contributions. The Committee on Budget and Finance of the Assembly of States Parties is tasked with examining the budget of the Trust Fund on a yearly basis and making recommendations as to its best possible financial management.

The Fund can only incur obligations once it has the necessary budget. Considering the nature of the crimes within the Court's jurisdiction and the situations which it is investigating at the moment, the ICC will face an enormous scale of victims.<sup>327</sup>

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<sup>323</sup> see Art. 116 of the Rome Statute for voluntary funding.

<sup>324</sup> Situation of Contributions and Pledges to the Trust Fund for Victims as of 22 January 2007: Amount received: EURO 2.370.000,00 Amount pledged: EURO 0,00 source: website of the ICC <http://www.icc-cpi.int/vtf.html>.

<sup>325</sup> Art. 79(2) Rome Statute states: 'The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.'

<sup>326</sup> The Board shall refuse contributions which are not consistent with the goals and activities of the Trust Fund.

<sup>327</sup> The special UN Inquiry Commission led by Antonio Cassese has investigated violence in Darfur, Sudan and has found that the violence including sexual violence amounts to crimes against humanity with ethnic dimensions. (supra note 28)

## 6. The Basic Principles and Guidelines on the Right to Remedy

The UN Commission on Human Rights has appointed a Special Rapporteur on the right to reparations. In 1989 Theo van Boven was asked by the UN Commission on Human Rights to draft a *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*.<sup>328</sup> Through resolution 1998/43 M. Cherif Bassiouni was entrusted with continuing that work. In the course of its long journey through the bodies of the United Nations, the draft has undergone many changes. It was finally adopted in 2005 by the General Assembly.<sup>329</sup>

The “Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law” (hereinafter “UN Principles on the Right to a Remedy”) aims to provide victims of violations of human rights and IHL with a right to a remedy.

It combines both new developments in human rights law and international humanitarian law by defining that ‘[a] person is ‘a victim’ where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person’s fundamental legal rights.’<sup>330</sup>

According to § 11 of the UN Principles on the Right to a Remedy:

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law:

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.

Chapter IX of the UN Principles on the Right to a Remedy refers to reparation for harm suffered. It states that ‘[a]dequate, effective and prompt reparation is

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<sup>328</sup> Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, UN Doc. E/CN.4/2000/62

<sup>329</sup> UN General Assembly Resolution 60/147 (note 102).

<sup>330</sup> Principle 8 of UN Principles on the Right to a Remedy

intended to promote justice'. Reparation should be proportional to the gravity of the violations and the harm suffered.

According to the U.N. Principles full and effective reparation include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Restitution should, whenever possible, restore the victim to the original situation before the violations occurred. According to § 20 Compensation should be provided for:

[...] for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;

It regards to the question who shall provide reparation a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. For cases where a person, a legal person, or other entity is found liable such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim'.<sup>331</sup> It further encourages states to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.<sup>332</sup> It also refers to the duty of states to 'enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations.'<sup>333</sup>

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<sup>331</sup> Ibid para 15

<sup>332</sup> Ibid para 16

<sup>333</sup> Ibid para 17

## **Chapter IV**

### **Different approaches to seek reparation**

The individual right to reparation in international law can hardly be enforced on an international level. Violations of human rights law referred to human rights courts are often 'backfired' to national courts with the obligation to provide a domestic remedy. In cases of amnesty granted within the process of transitional justice the hope for prosecution of and reparation for human rights violations can get disappointed.

Perpetrators of violations of international humanitarian law face charges before an international court only if a respective court has been established by the international community or the ICC has jurisdiction and decides to investigate and prosecute the violations of the past. Individual victims have only little influence in these decisions.

Therefore many victims don't rely solely on international jurisprudence to seek reparation and will look for other ways and means of justice.

This chapter gives an overview of different approaches to seek reparation. It will focus on violations in form of sexual violence and their possible reparations mostly in form of compensation but it will also look at other forms of crimes.

These following examples from the practice might provide helpful precedents of how to deal with a large number of victims and claims, how to consider and explore violations of the past, how to handle sexual violence in a gender-sensitive way, and how to finance and implement reparation schemes. They too might show the lack of remedies and enforcement mechanisms in regards to the existing rights for victims in international law.

#### **1. Holocaust reparation: Germany's 'Wiedergutmachung'**

Nazi Germany committed massive and incomprehensible atrocities violating international humanitarian and human rights law. Violence and deprivation of

rights were committed against everybody who did not conform to the system. Much has been written about the Holocaust and massacres against civilians, but there has been little research<sup>334</sup> done about women and their experiences.<sup>335</sup>

In regards to reparation, West Germany recognized its obligations to provide compensation to Holocaust survivors shortly after the end of World War II.<sup>336</sup> The first and main step toward restitution and compensation was the Luxembourg Agreement between the Federal Republic of Germany and the State of Israel, and the Jewish Claims Conference in 1952.<sup>337</sup> Germany agreed to pay millions to the State of Israel to compensate it for the costs of reintegrating the refugees and to implement appropriate laws to ensure compensation to survivors of the Holocaust.

Within this context, West-Germany created rights for individuals to compensation, later arguing that it was based on the idea of having a moral but not a legal obligation to do so.<sup>338</sup> It enacted a Federal Compensation Law in 1956<sup>339</sup> which was intended to compensate individuals persecuted on account of their race, their religion or their political beliefs. Over 4 million claims have been submitted under this legislation. Individuals could present their claims before provincial reparation agencies.<sup>340</sup> Only people who were directly victimised were eligible for individual reparation called “*Wiedergutmachung*”.

The *Conference on Jewish Material Claims Against the former Germany* or *Claims Conference* still administers compensation funds, recovers

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<sup>334</sup> See: J Ringelheim *Women and the Holocaust: A Reconsideration of Research* in (1985) 10 *Signs* 741.

<sup>335</sup> The policy of Nazi Germany contained a large number of organized and planned violence against women. Women were targets of rape, public humiliation by the Gestapo, forced sterilization and compulsory abortion in ghettos and concentration camps. Nazi Germany enforced a sterilization law which was designed to *prevent lives unworthy of life*. Some women were unknowingly sterilized with toxic chemicals in their food, others were exposed to x-rays to burn and destroy a woman's ovaries. Due to stress, starvation, torture and slave labour women ceased menstruating and lost the ability to be pregnant. In some concentration camps, brothels were set up for soldiers and select prisoners, designed for organized rape.

<sup>336</sup> Although there has been much dispute and critic about the reparation issue in Germany.

<sup>337</sup> Agreement between the State of Israel and the Federal Republic of Germany (with Schedule, Annexes, Exchange of Letters and Protocols), Luxembourg, 10 September 1952

<sup>338</sup> Schwager Bank (note 156)

<sup>339</sup> Bundesentschädigungsgesetz in der Fassung des BEG-Schlussgesetzes, 14 September 1965, BGBl. 1965 I, 1315 available under: <http://bundesrecht.juris.de/beg/index.html>

<sup>340</sup> For more details see P de Greiff *Reparation Efforts in International Perspective: What Compensation Contributes to the Achievement of Imperfect Justice* in E. Doxtader and CC Villa-Vicencio *To Repair the Irreparable* (2004) 321 at 322 et seq.

unclaimed Jewish property, and allocates funds to institutions that provide social welfare services to Holocaust survivors.<sup>341</sup> Eligibility criteria for the funds, including limits on income, have been negotiated continually with Germany. In 1990 the re-unified Germany agreed to additional Fund arrangements.

The inter-state post-World War II German-Israeli reparation program is the largest, most comprehensive reparations program ever implemented. It still serves as a model for subsequent reparations programs.<sup>342</sup> Germany has paid out more than \$ 50 billion in form of reparation to the State of Israel and will have paid approximately \$20 billion more by 2030. It demonstrates that a State can handle immense numbers of victims and their claims. Moreover, the issue of reparation has both served as an important form of acknowledgement and apology to the victims and as visible memory for generations of Germans about what happened and should never happen again.

Unfortunately the focus always lay on reparation for persecution and on the restitution of property and the right to reparation was limited to German citizens, refugees and stateless persons. No special attention was ever granted to victims of sexual violence.

## **2. The Comfort Women Tribunal**

In the 1930s and 1940s women from different countries in Asia were transported to places occupied by the Japanese military and taken to facilities for sexual slavery, the so called comfort stations. Under the *jugun ianfu* (comfort women) system an estimated two hundred thousand women were held as sex slaves for the Japanese military.<sup>343</sup> Women and girls some only 12 years

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For example, 'Article 2 Fund' grants a small lifetime pension of approximately 270 Euro for certain persons who were incarcerated in concentration camps and ghettos.

<sup>342</sup> Roht-Arriaza (note 251) at 124.

<sup>343</sup> R Brooks Comfort Women What Form Redress? In R Brooks. *When Sorry Isn't Enough: The Controversy over Apologies and Reparation for Human Injustice* (1999) at 87. Rape in this context was not an instrument of war, it formed part of the military strategy that sexual enslavement of women was necessary to avoid rape committed by Japanese soldiers against their own population.

old were raped by soldiers and officers, some fifteen to thirty times a day.<sup>344</sup> They too suffered from torture, starvation, mutilation and murder.<sup>345</sup>

The International Military Tribunal for the Far East in the aftermath of the Second World War did not appropriately consider acts of rape and sexual enslavement and did not bring charges arising out of the detention of women for sexual services.<sup>346</sup>

In 1991 women survivors of military sexual slavery started to claim reparation in form of compensation and apology from the government of Japan.<sup>347</sup> They filed many suits against Japan before Japanese courts. They argued that individual victims have a right to claim compensation under international customary law and under Article 3 of the Hague Convention IV applicable at the time of World War II. In only one lawsuit in April 1998 a court awarded US \$ 2,300 in favour of each of the three plaintiffs from Korea.<sup>348</sup> This decision was overturned later by the Hiroshima High Court arguing that the decision on post-war compensation was a policy decision within the discretionary power of the legislature.<sup>349</sup>

The Special Rapporteur of the U.N. Commission on Human Rights on Violence against Women, Its Causes and Consequences recommended that:

[t]he Government of Japan should [...] [p]ay compensation to individual victims of Japanese military sexual slavery according to principles outlined by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms. A special administrative tribunal for this purpose should be set up with a limited time-frame since many of the victims are of a very advanced age.<sup>350</sup>

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<sup>344</sup> Ibid (brooks) page 87

<sup>345</sup> Ibid (brooks) page 87)

<sup>346</sup> See Meron Rape as a Crime under International Humanitarian Law (note 201) Rape was prosecuted before the International Military Tribunal but in very few cases.

<sup>347</sup> See Haenckerts/ and L. Doswald-Beck *Customary International Humanitarian Law Vol 2 (Practice)* (2005) at 3565.

<sup>348</sup> Ko Otsu Hei Incidents case Yamaguchi Lower Court Judgement of 27 April 1998, published in Hanrei Jiho, No. 1642, 21 August 1998, p. 24

<sup>349</sup> Hiroshima High Court Appeal of Ko Otsu Hei Incidents Judgement of 29 March 2001

<sup>350</sup> UN Commission on Human Rights, Special Rapporteur on Violence against Women, Its Causes and Consequences, Report on a mission to the North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, U.N. Doc. E/CN.4/1996/53/Add.1, 4 January 1996, para 137 (b).



It further stated in its report that North and South Korea may consider to request the ICJ to help to resolve the legal issues concerning Japanese responsibility and payment of compensation for the “comfort women”<sup>351</sup>

The lack of effective response or acknowledgement forced the survivors to seek out other ways and venues to articulate their demands.

In December 2000 the Women’s International War Crimes Tribunal 2000 sat in Tokyo, Japan. It was established to consider the criminal liability of high-ranking Japanese military and political officials and the responsibility of Japan for rape and sexual slavery as crimes against humanity committed in the context of the Second World War and colonization.<sup>352</sup>

Various women nongovernmental organizations across Asia were involved in the establishment of the tribunal. Violence Against Women in War Network, Japan instigated the work of the tribunal. Prosecution teams from ten countries presented indictments.<sup>353</sup> The prosecution showed the brutality of the “recruitment” of the women. They were forced to live in captivity under fear and terrible conditions. After Japan’s defeat they were abandoned or killed. Documents and expert evidence were presented to prove the link between the atrocities and the organs of the Japanese state and Emperor Hirohito.<sup>354</sup>

A Japanese lawyer’s association provided a draft outline of a ‘Law for Compensation for Victims of Wartime Forced Sex’ to provide a legal framework for Japan to address the issue of redress. The Japanese government was obviously not interested. Being invited to participate it did not even respond to this invitation.<sup>355</sup>

The Judges of the Tribunal rejected the definition of sexual slavery laid down in the Rome Statute and preferred the definition applied by the ICTR in

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<sup>351</sup> *ibid* para 139.

<sup>352</sup> Evidence showed that the comfort stations were systematically operated as a matter of military policy. C Chinkin Women’s International Tribunal on Japanese Military Sexual Slavery in (2001) 95 *AJIL* 335 at 335..

<sup>353</sup> North and South Korea, China, Japan, the Philippines, Indonesia, Taiwan, Malaysia, East Timor, and the Netherlands.

<sup>354</sup> Chinkin Women’s International Tribunal (supra note 352) at 337.

<sup>355</sup> *ibid* (Chinkin) at 338.

the *Kunarac* case.<sup>356</sup> It didn't agree with the element of commercial activity, arguing that it limits the crime too much and does not reflect international law.

The international judges<sup>357</sup> found Japan responsible under international law for violations of its treaty obligations and customary international law relating to slavery, forced labour, and rape, amounting to crimes against humanity and Emperor Hirohito guilty on the charges on the basis of command responsibility.<sup>358</sup> The Tribunal recommended a range of reparations.

The outcome of the Tribunal was obviously not legally binding but this wasn't the goal. The former comfort women and the organizers of the Tribunal achieved a more symbolic kind of justice '[...] not only for the survivors, but for those who have perished and for generations to come'.<sup>359</sup> Trials such as this one can give victims of atrocities the satisfaction of knowing that their grievances are at least being heard and documented.<sup>360</sup> Chinkin argues that it was 'a striking example of the developing role of civil society as an international actor'.<sup>361</sup> Furthermore she states 'when states fail to exercise their obligations to ensure justice, civil society can and should step in'.<sup>362</sup>

Moreover, the tribunal achieved to make the international community aware about what happened to the women and to seek an official apology from Japan.

### 3. Individual lawsuits before US-Courts

International tribunals outside the human rights courts do not provide a standing for individuals. Therefore individuals are limited in their procedural capacity to

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<sup>356</sup> Askin The jurisprudence of International War Crime Tribunals (note 300 ) at 134

<sup>357</sup> Gabriele Kirk McDonald, former president of the International Criminal Tribunal for the Former Yugoslavia; Carmen María Argibay, a criminal judge in Argentina and president of the International Association of Women Jurists; Dr. Willy Mutunga, a human rights lawyer from Kenya, and Christine M. Chinkin, Professor of International Law at the London School of Economics and Political Science and

<sup>358</sup> Prosecutors v. Hirohito Emperor Showa, The Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery Judgement 4 December 2001, PT-2000- 1-T (corr. Jan. 31, 2002)

<sup>359</sup> Summary of Findings of the Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, 12 December 2000, available under [http://www1.jca.apc.org/vaww-netjapan/e\\_new/judgement.html](http://www1.jca.apc.org/vaww-netjapan/e_new/judgement.html)

<sup>360</sup> One outcome of the Tribunal was the presentation of an exceptional amount of evidence.

<sup>361</sup> Chinkin Women's International Tribunal (note 352) at 338

<sup>362</sup> *ibid* at 339

seek reparation. National courts thus often provide the only stage for such claims. There the claimants may face various obstacles which may hamper effective implementation of the right to reparation, such as immunities, amnesties, and statutes of limitation. Nevertheless, a number of reparation lawsuits claiming compensation have been filed before domestic courts in the past two decades and some plaintiffs were successful with their proceedings for compensation.

Before domestic courts a compensation claim can be based on international law or domestic law, in particular on state liability or tort law, assuming domestic law remains applicable in the course of an armed conflict. Such claims can be filed against a state or an individual.

Following the idea that civil liability<sup>363</sup> is a natural consequence from the already acknowledged individual criminal responsibility under international law, many lawsuits before US courts claim compensation from the individual perpetrators. They are inspiring examples of civil law reacting to violations of international law.

In the United States some people succeeded with their claims under the Alien Torts Claims Act (ATCA).<sup>364</sup> This Act provides federal US-courts with jurisdiction for claims by persons, who are not citizens of the United States, which are based on violations of the law of nation. Some argue that the Act can also serve as a cause of action for such claims, but this has been denied by the Supreme Court.<sup>365</sup>

The Act received much attention in relation to the case *Filartiga v. Peña-Irala*.<sup>366</sup> The Court recognised that individuals can sue for reparation for human rights abuses committed against them by other individuals. *Filartiga* has since

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<sup>363</sup> see e.g. Tomuschat Reparation for Victims of Grave Human Rights Violations (note 239)

<sup>364</sup> 28 U.S.C. § 1350 (2000) The Act is part of the first judiciary act of the United States in 1789, providing that: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'

<sup>365</sup> See *Sosa v. Alvarez-Machain*, Supreme Court Judgement 29 June 2004 542 U.S. 692 (2004) 331 F.3d 604, reversed, Opinion of the Court Chapter III. Claims can be made under federal common law as it incorporates customary international law and international treaties. A 1996 amendment to the Foreign Sovereign Immunities Act, the Antiterrorism and Effective Death Penalty Act, created more provisions to base claims against foreign states on.

<sup>366</sup> *Filartiga v. Pena – Irala* 630 F.2d 876 (2d Cir. 1980).

inspired many cases - including class actions – either directly litigating ATCA claims, or at least mentioning them.

In September 2002, the United States Court of Appeals for the Ninth Circuit ruled that the Unocal Corporation can be sued under the Alien Tort Claims Act for alleged violations of the law of nations, including forced labour, rape, and murder.<sup>367</sup> Unocal, a private corporation, had hired the military to provide security for its project on gas exploitation, which was undertaken jointly with the government. The military forced villagers to work and committed alongside several other violations of human rights law.

As a consequence of the difficulties in pursuing state actors or disappointment about the transitional justice process, individual lawsuits against companies that profited from human rights violations has increased since. Apart from that, claims against companies promise something which individual perpetrators often cannot provide: the financial background.

It proved to threaten in particular those multinational companies which profited from human rights violations under Nazi Germany or Apartheid in South Africa. Being sued before courts of the United States can cost a considerable amount of money and can severely damage the reputation of the company. It also causes fear to become the ‘victim’ of an example for many more claims<sup>368</sup>. German companies rather developed a Fund to pay compensation for former Nazi Slaves than being confronted with many lawsuits filed in the United States against them.<sup>369</sup> Several companies and the German government contributed to the fund called „Erinnerung, Verantwortung und Zukunft“ (Memory, Responsibility, Future) established with a budget of DM10 billion.<sup>370</sup>

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<sup>367</sup> John Doe I v. Unocal Corp., 2002 WL 31063976 (9th Cir. 2002), *vacated and reh’g granted en banc*, 2003 WL 359787 (9th Cir. 2003).

<sup>368</sup> Multinational corporations state that such claims could have devastating effects on future investments and economic growth if they would be held liable for the actions of rogue regimes.

<sup>369</sup> The agreement about establishing a Fund is often called Princz Agreement after the case *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1176-85 (D.C. Cir. 1994).

<sup>370</sup> Germany passed legislation to bring the agreement and foundation into effect. It thereby terminated any other remedy under German law for the harms covered by the agreement.

In October 1996 a class action against Swiss banks was filed before the Federal District Court of Brooklyn, New York.<sup>371</sup> Survivors of the Holocaust sued Credit Suisse, Union Bank of Switzerland and Swiss Bank Corporation for reparation, claiming that the banks did not return assets deposited with them, they traded in looted assets and benefited by trading in goods made by slave labour.

Demands for reparations have been brought up by Herero and Namas people for gross violations of human rights committed by German colonialists at the turn of the 20<sup>th</sup> century.<sup>372</sup> The Herero Reparation Group (HRG) and the Hosea Kutako Foundation (HKF) initiated a multi-billion dollar court case in the United States on behalf of the Herero community.<sup>373</sup> The Hereros sued Deutsche Bank alleging its direct responsibility for and the commission of crimes against humanity perpetrated against the Hereros based on its financing of the German colonial administration and participation in the German colonial enterprise, and Woermann Line (now Deutsche Afrika-Linien GmbH & Co.) because it 'employed slave labour and operated [a] concentration camp'.<sup>374</sup> The plaintiffs did not specify any statute or precedent in support of a cause of action, but based their claim on principles of District of Columbia law, United States law, and international law, as well as principles of universal jurisdiction applicable to crimes against humanity, genocidal practices and human rights atrocities. The federal Court didn't accept those proposed provisions of law and dismissed the case due to no stated cause action.

Frustrated due to the lack of response by the South African government over individual reparation grants, the Khulumani organisation initiated a lawsuit before US courts against businesses that aided and abetted the apartheid regime in South Africa in furtherance of the commission of the crimes of apartheid, forced labour, genocide, extrajudicial killing, torture, sexual assault, unlawful

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<sup>371</sup> District Court for the Eastern District of New York, *In re Holocaust Victim Assets Litigation*, Judgement of 26 July 2000, published in Federal Supplement 105, 2000, p. 139

<sup>372</sup> Between 1907 and 1915, Germans were responsible for wide-scale political repression and violation of basic human rights.

<sup>373</sup> *Herero People's Reparations Corp. v. Deutsche Bank AG* (S.D.N.Y. filed 13 February 2003) The Federal District Court for the District of Columbia

<sup>374</sup> R Anderson *Redressing Colonial Genocide under International Law: The Herero's Cause of Action against Germany* in (2005) 93 *California Law Review* 1155 at 1155

detention, and cruel, inhuman and degrading treatment.<sup>375</sup> The plaintiffs claim compensatory and punitive damages based on tort committed in violation of customary international law (based on third party liability) and violation of the ATCA. The case is still pending. The government of South Africa has distanced itself from the claim.

Claims based on corporate liability of companies for human rights violations have been much criticized and in June 2004 the US Supreme Court concluded that corporations should not bear the same liability as governments do under international law.<sup>376</sup> In its decision the Court clarified the scope of the act, limiting it to the most serious human rights violations of universal jurisdiction.<sup>377</sup> It affirmed the application of the act to human rights violations but limited its scope in a drastic matter.

In regards to the US-American practice to award compensation in form of punitive damages based on the ATCA, Tomuschat argues that '[s]uch excesses, though, have little to do with international law because they appear to be driven by political motives. Such motives fail to take into account international practice outside the United States.'<sup>378</sup>

Not all attempts to seek compensation for violations of international law before domestic courts were successful. In fact most of them failed. Courts often argued that post-war treaties and compensation modalities or the doctrine of political question beard the plaintiffs of (further) claims.<sup>379</sup> Others required that a respective international treaty provision on reparation recognized as a self- executing norm, has been incorporated into domestic law. In *Leo Handel* the Court has denied art. 3 Hague Convention IV the character of a self-executing norm and therefore rejected the claim.<sup>380</sup>

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<sup>375</sup> *Kulumani and Others v. Barclays Bank and Others*, Legal Complaint, 11 November 2002, United States District Court, Eastern District of New York para 160.

<sup>376</sup> *Sosa v. Alvarez-Machain* (*supra* note 365)

<sup>377</sup> *ibid*

<sup>378</sup> In Reparation for victims of grave human rights violations (note 239) at 160

<sup>379</sup> see *Burger-Fischer et al. v. Degussa AG* 65 F.Supp.2d 248 (DNJ 1999)

<sup>380</sup> *Leo Handel et al. v. Andrija Artukovic on behalf of himself and as representative of the Independent Government of the State of Croatia*, US District Court of the Central District of California, Judgement of 31 January 1985 Case No. 84-1411 PAR (Kx), published in *International Law Reports* Vol. 79, 1989, p. 397

Many other claims brought before US courts ended in agreements between the parties.<sup>381</sup> Those were often the better solution because in many successful cases the plaintiffs never received the in court awarded compensation from the perpetrators.<sup>382</sup>

#### **4. Truth and Reconciliation Commissions**

Truth and Reconciliation Commissions serve as mechanisms to address several needs of a society in transition from conflict to peace. Their work often involves the issue of reparation. The question is if these Commissions are the appropriate mechanisms to deal with reparative justice.

Many people argue that these Commissions are able to provide a more sympathetic and supportive environment for victims to tell their ‘stories’ than criminal courts. Because the work of these commissions is not that incorporated in judicial procedures it provides more space to address the plight of the victims. Others are concerned that they are ‘weakening the prospects of bringing perpetrators to “justice”’.<sup>383</sup> This is mostly due to wide amnesty provisions and the phenomenon that many countries use Truth and Reconciliation Commissions to deal with their armed conflicts without proper resources and trained staff for the necessary institutions and proceedings.

##### **4.1 South Africa**

The Truth and Reconciliation Commission of South Africa didn’t deal with an armed conflict, however, apartheid presented many similar characteristics. It shall serve as an example of a recent attempt of political transition after years of human rights violations by an oppressive regime.

Violence against women in South Africa is part of ‘a continuum of gender-based violence and oppression that has shaped South Africa’s history and

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<sup>381</sup> E.g. *Altmann v. Austria U.S. Supreme Court 7. June 2004, 541 US 677*; The parties agreed to arbitration which ruled in favour of Altmann on 16 January 2006.

<sup>382</sup> E.g. in the *Filartiga v. Peña Irala* case (note 366 )

<sup>383</sup> G Robertson *Crimes against Humanity: The Struggle for Global Justice* (2000) 263.

present reality'.<sup>384</sup> During apartheid women activists and freedom fighters suffered gender-specific forms of torture used by the security forces such as assault and electric shocks on pregnant women; inadequate medical care leading to miscarriages, rape, flooding of fallopian tubes with water, sometimes leading to infertility; and many forms of psychological torture.<sup>385</sup> During violent ethnic and regional conflicts women were abducted and impregnated and there are numerous reports of rape of women by South African soldiers in the local population of neighbouring countries. There were also cases of rape, sexual harassment, and abuse of women in the ANC camps during the conflict.<sup>386</sup>

The Truth and Reconciliation Commission (TRC) for South Africa investigated human rights violations occurring in South Africa from 1963–1994 dealing with many different forms of violence committed under apartheid. It provided the only avenue for victims to claim redress in lieu of proceedings through the courts.

Recommendations were made by scholars and human rights organizations<sup>387</sup> on gender-sensitive mechanisms for human rights violations hearings, approaches to amnesty hearings, and gender and reparations. As a reaction to that the TRC held special hearings for women, but disregarded many of the ideas posed by the recommendations.<sup>388</sup> As a consequence most of the gender issues were only covered in a short chapter of the women's hearings. Gender activists also raised the idea to urge the media to give prominence to women's own suffering. The TRC responded by trying to encourage women to talk about their own suffering when giving testimony about what had happened to their loved ones.

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<sup>384</sup> B Goldblatt Evaluating the Gender Content of Reparations: Lessons from South Africa in: Ruth Rubio-Marín (ed.) *What Happened to the Women? Gender and Reparations for Human Rights Violations* (2006) at 50.

<sup>385</sup> *ibid* at 51.

<sup>386</sup> The TRC report refers to a statement by then Deputy President Thabo Mbeki, stating that men in the camps had committed "gender-specific offences" against their women comrades, in "Special Hearing on Women" in TRC, *Report*, vol. 4, ch. 10, 282-316, 295. General Andrew Masondo gave evidence to the TRC about the abuse of women in the camps.

<sup>387</sup> For example in 1996 a submission on the topic of gender and the TRC prepared by the Centre for Applied Legal Studies of the University of Witwatersrand was presented to the TRC.

<sup>388</sup> Goldblatt (*supra* note 384) at 53.



In its Final Report the TRC found that women suffered gross violations of human rights, many of which were gender specific in their exploitative and humiliating nature.<sup>389</sup>

Many women hesitated to confess before the TRC about their own experiences due to the difficulties of talking about sexual abuse and violence.<sup>390</sup> The TRC referred to incidences of rape in 140 cases but Beth Goldblatt estimates that it is highly likely that this reflects only a small number of the rapes that occurred in the period of the TRC's mandate<sup>391</sup>. According to Goldblatt "[t]he final report is, in the end, an inadequate reflection of women's experiences under apartheid. This was primarily a result of the lack of gender expertise in the research and IT team that would have enabled it to provide a "disaggregated and targeted analysis".<sup>392</sup>

Reparations were intended for those who had been named victims by the Human Rights Violation Committee or the Amnesty Committee. The Promotion of National Unity and Reconciliation Act<sup>393</sup> (Act 34 of 1995) defined "victims deserving of reparations" in the following way:

- (a) Persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights
  - (i) as a result of a gross violation of human rights; or
  - (ii) as a result of an act associated with a political objective for which amnesty has been granted;
- (b) Persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such person intervening to assist persons contemplated in paragraph (a) who were in distress or to prevent victimization of such persons; and
- (c) Such relatives or dependents of victims as may be prescribed.

Thus the notion of victim for the purposes of reparations was based on "gross violations of human rights" or an "associated act" emanating from conflicts of

<sup>389</sup> available under <http://www.info.gov.za/otherdocs/2003/trc/>.

<sup>390</sup> Women who gave evidence before the TRC were asked how the TRC could be of assistance to them, many of them requested psychological and financial support partly because they had lost a breadwinner, not because of their personal suffering.

<sup>391</sup> Goldblatt (note 384) at 54.

<sup>392</sup> *ibid*; see also R Manjoo The South African Truth and Reconciliation Commission— a Model for Gender Justice? Paper prepared for the United Nations Research Institute For Social Development, November 2004.

<sup>393</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 available under

the past and committed by a person acting with a political motive. ‘Gross violations of human rights’ were then defined as ‘the killing, abduction, torture or severe ill-treatment of any person’<sup>394</sup>.

The list of violations provided by the TRC doesn’t refer specifically to acts of sexual violence. Such violations fall under the definitions of torture and severe ill-treatment. Under torture<sup>395</sup>, the list mentions: ‘assault to genitals/breasts, beating if the victim is pregnant or miscarries, electric shocks to genitals/breasts, genital mutilation, and sexual torture including rape, sexual abuse, threats of rape, touching, nakedness, sexual comments or insults, sexual incitement and deprivation of sanitary facilities for menstruation’.

The fact that some crimes such as rape were listed as ‘severe ill-treatment’ and torture reflects a positive understanding by the TRC of the nature of sexual violence as wide ranging. Beth Goldblatt argues that ‘[i]t would have been politically valuable if rape or sexual violence had been separately listed as one of the “gross violations”’.<sup>396</sup> However, the awareness and inclusion of forms of sexual violence within the list presents an important step in a positive direction.

Chapter 5 of the Act dealt with reparation and rehabilitation of victims. It established a Reparation and Rehabilitation Committee and set the conditions for the procedure relating to reparations. The Human Rights Committee could refer names of victims to the Reparation and Rehabilitation Committee.

When the Amnesty Committee decided to grant amnesty and it found that a person is a victim it forwarded the victim’s name to the Reparation & Rehabilitation Committee to be considered. Where amnesty was refused but the Amnesty Committee was of the opinion that a gross violation of human rights had occurred and a person was a victim, it also referred his or her name to the Reparation & Rehabilitation Committee. Apart from that, the right to sue or prosecute the person whose amnesty was denied, remained intact, but the

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<sup>394</sup> Victims’ facts were established using a balance of probabilities test as opposed to the criminal test of beyond a reasonable doubt. Where possible, attempts were made to corroborate the stories.

<sup>395</sup> It didn’t matter whether these acts were committed under circumstances of imprisonment/ detention or not.

<sup>396</sup> Goldblatt (note 384) at 63.

problem of inadmissibility of the evidence given before the TRC may trigger the execution of this right to claim or sue.

Reparation within this context was a voluntary process.<sup>397</sup> People whose names were on the list could apply for compensation and only the persons who did so were considered.<sup>398</sup> According to the Act reparations could include any form of compensation, ex gratia payment, restitution, rehabilitation or recognition.<sup>399</sup> According to the TRC reparation for violations should range from the erection of headstones to programmes for better access to social services and community reconstruction, as well as financial compensation.<sup>400</sup>

Although the TRC was aware of violations in form of sexual violence and acknowledged them as gross violations of human rights, the results caused by such violence as loss of fertility, pregnancy following rape, widowhood, mutilation and loss of livelihood were not specifically taken into account in the design of reparations.

In regards to monetary compensation the Reparation & Rehabilitation Committee recommended to provide urgent interim reparations for victims who might need urgent medical treatment or other assistance, and final reparations. It further required the establishment of a President's Fund and an administrative agency in government to disburse payment to victims.

Like many post-conflict societies South Africa faces several problems to stabilize the country, to address the extreme inequality of the society and to repair the violations of the past. To overcome these problems it needs the appropriate financial background.<sup>401</sup> The TRC suggested incorporating the beneficiaries of apartheid and business in the process of redress for the past.<sup>402</sup>

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<sup>397</sup> Lax (note 52)

<sup>398</sup> Section 26 (1) of the Act states: *Any person who is of the opinion that he or she has suffered harm as a result of a gross violation of human rights may apply to the Committee for reparation in the prescribed form.*

<sup>399</sup> note 393

<sup>400</sup> Hamber and K Rasmussen Financing a Reparations Scheme for Victims of Political Violence in: From Rhetoric to Responsibility: Making reparations to the survivors of past political violence in South Africa, Centre for the Study of Violence and Reconciliation

<sup>401</sup> South Africa faces important issues like defence re-equipping, HIV-AIDS, the criminal justice system and early childhood education which must also be financed.

<sup>402</sup> The apartheid system created an 'economic environment conducive to White economic advancement' from which many local and international businesses benefited. See: Hamber and Rasmussen (supra note 400).

In fact it made a number of suggestions on how to fund the process and there have been several additional suggestions how to finance the reparation program.<sup>403</sup> One of them referred to the defence-budget, which was neither a new nor unusual idea. Guatemala, for example, has a specific clause in its reparation policy saying that resources should be allocated to reparations from cuts in military expenditures. Apart from that there have been several calls for donations.<sup>404</sup>

In June 1998 the TRC started with Urgent Interim Reparation (UIR) of R2500 – R7500, paid through the President's Fund, a fund operated through the Department of Justice.<sup>405</sup> Some victims of sexual violence profited from urgent medical treatment as part of the interim measures.<sup>406</sup> These urgent measures were intended to begin to restore a sense of dignity to victims of gross human rights violations, to relate to the loss suffered by victims, to relate to the socio-economic and culture context of victims, and to relate to the capacity of the government, attendant ministries and civil society to implement policy recommendations.

After Parliament adopted the government's recommendations on the TRC report<sup>407</sup>, regulations paved the way in November 2003 for the disbursement of once-off payment of R 30,000 to each person who was designated as "victim" of gross human rights violations by the TRC.

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<sup>403</sup> It suggested a wealth tax; a once-off levy on corporate and private income; each company listed on the Johannesburg Stock Exchange to make once-off donation of 1% of its market capitalisation; a retrospective surcharge on corporate profits extending back to a date to be suggested; the suspension of all taxes on land and other material donations to formerly disadvantaged communities; responsibility for the payment of the previous government's debt to be critically reconsidered, and the SASRIA Fund (contributed to by business as a safeguard against material loss during the latter part of the apartheid years) as a source of funds for reparation, reconstruction and development.

<sup>404</sup> Among them were calls for Whites to donate 1% of their annual income to a reparations fund on Reconciliation Day, 16 December.

<sup>405</sup> Approximately R44million was paid out to about 14,000 victims and family members.

<sup>406</sup> Only those victims referred by the Human Rights Violations Committee and/or the Amnesty Committee had access to UIR. Direct applications or referrals from other sources have not been considered. See for the Reparation policy: <http://www.doj.gov.za/trc/reparations/policy.htm>

<sup>407</sup>The government's position was addressed to the public in April 2003 by President Mbeki. Apart from reparation payments it also accept the TRC's recommendations for the "rehabilitation of communities" and systematic programmes to "project the symbolism and the ideal of freedom". These include erecting symbols and monuments that exalt the freedom struggle, including new geographic and place names.

Victims have raised complaints that both the TRC and the government have focused too much on placating perpetrators than on addressing the needs of victims.<sup>408</sup> The dealing of the reparation issue has been much criticized too. The government's acceptance of the TRC's recommendation and the actual payment happened in 2003, almost 10 years after the end of apartheid and 5 years after the TRC handed over its report. It was an important step which was more than overdue. The long delay of implementing the recommendations of the TRC had already caused some damages. A State's failure to put in place a credible and liable reparation mechanism could have undermined many of the achievements of the transitional justice process.<sup>409</sup>

#### 4.2 Sierra Leone

A Truth and Reconciliation Commission for Sierra Leone, partly modelled after the South African Commission, was established by the Lomé Accord and started working in July 2002.

According to the Truth and Reconciliation Commission Act<sup>410</sup> the Commission was authorized to make recommendations to help prevent the repetition of human rights violations, to respond to the needs of the victims and to promote healing and reconciliation. The Act itself did not establish a reparations mechanism, nor did it use the word "reparation."

Being aware of the lack of attention for women rights and reparation in Sierra Leone's society, women groups became very active in the peace process. They were represented in the TRC to ensure that gender-sensitive means were adopted to encourage women victims to testify. They urged the TRC to implement mechanisms such as protection for witnesses, counselling for victims, confidentiality, and the creation of a safe environment for women victims, to prevent re-victimization or re-traumatization.<sup>411</sup>

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<sup>408</sup> Buford and van der Merwe Reparations in Southern Africa in (2004) 44 *Cahiers d'études africaines* 20

<sup>409</sup> Lax (note 53) at 234.

<sup>410</sup> The Truth and Reconciliation Commission Act (2000), available under: [http://www.usip.org/library/tc/doc/charters/tc\\_sierra\\_leone\\_02102000.html](http://www.usip.org/library/tc/doc/charters/tc_sierra_leone_02102000.html).

<sup>411</sup> For detailed information about the participation of women in the peace process see J King Gender and Reparation in Sierra Leone: the Wounds of War Remain Open in Rubin-Marin (ed.) *What happened to the women? Gender and Reparation for Human Rights Violation* (2006) 248

The Truth and Reconciliation Commission took its responsibility to address gender crimes seriously. The sensitization and experience of the commissioners and their staff in regards to sexual violence and the work with victims varied widely.<sup>412</sup> Therefore they all underwent a two-day training facilitated by the U.N. Fund for Women (“UNIFEM”) and the Urgent Action Fund, which focused on, among other relevant topics, the international law pertaining to sexual violence, methodology for interviewing rape victims, and issues relating to the support and protection of female witnesses.<sup>413</sup>

In regards to necessary reparation for victims of sexual violence many women organization proclaimed an urgent need to support and assist victims and the children born as a result of these violations, with free and continuous medical facilities, education, and counselling.<sup>414</sup> Some women groups argued that providing housing facilities and similar measures should also be considered as part of reparation as they were necessary provisions to rebuild the social structures women depended on.

The final report<sup>415</sup> was presented to the government in October 2004 including recommendations for the implementation a reparations program to provide redress to the victims of human rights violations. These recommendations have not yet been implemented.<sup>416</sup> The report also contained a section on ‘Women and Armed Conflict’ setting out the violations against women and recommending how to address the needs of women.<sup>417</sup>

## **5. U.N. Claims Commission**

### **5.1 Iraq’s invasion and occupation of Kuwait**

The Security Council of the United Nations stated in §16 of Resolution 687 (1991) ‘that Iraq [...] is liable under international law for any direct loss,

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<sup>412</sup> Nowrojee Making the invisible war crime visible (note 23) at 93.

<sup>413</sup> *ibid* at 93

<sup>414</sup> King (note 411) at 255, Victims of sexual abuse also repeatedly requested medical and psychological assistance, housing, skills training and education for themselves and their children.

<sup>415</sup> TRC, Sierra Leone Truth and Reconciliation Commission Final Report (2004), an overview is available under: <http://www.trcsierraleone.org/drwebsite/publish/index.shtml>.

<sup>416</sup> King (note 411) at 248.

<sup>417</sup> see Nowrojee Making the invisible war crime visible (*supra* note 23) at 96.

damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait.<sup>418</sup>

In Section E § 18 of the Resolution the Security Council '[d]ecide[d] also to create a fund to pay compensation for claims that fall within paragraph 16 above and to establish a Commission that will administer the fund'.

The UN Claims Commission (UNCC) started to examine and coordinate compensation claims related to Iraq's invasion and occupation of Kuwait in 1992. It recognised some of the particular harms that women suffered during the invasion and occupation.<sup>419</sup>

Based on the violation of the prohibition of use of force by Iraq, the right to reparation resulted from the violation of the *ius ad bellum*. Claimants had to demonstrate that the loss or injury they had suffered was a direct result of Iraq's invasion of Kuwait. Furthermore it should be noted that the interest of the individual was given priority over that of businesses or even governments. Nationals of Iraq could not claim compensation.<sup>420</sup>

As an exception the Rules of Procedure provided one possibility where payment could also be made for a violation of international humanitarian law. Members of the Allied Coalition Armed Forces who were prisoners of war and had suffered mistreatment contrary to the rules of international humanitarian law were entitled to seek compensation.<sup>421</sup>

Individuals could not submit claims themselves. They had to rely on their states to mediate for them. Procedures were established for claims of stateless person who could not be represented by a government. Several thousand such claims were filed by various UN organisation on behalf of stateless persons.

The UNCC divided possible claims into six categories from category A to F. Under Category "B" individuals could submit claims in relation to serious

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<sup>418</sup> UN Security Council Resolution 692, 20 May 1991.

<sup>419</sup> Gardam and Jarvis (note 197) at 238

<sup>420</sup> Kamminga (note 271)

<sup>421</sup> UNCC Governing Council Decision 11: Eligibility for compensation of members of the Allied Coalition Armed Forces, 26 June 1992, U.N. Doc. S/AC.26/1992/11, 26 June 1992

personal injury or the loss of spouse, child or parent as a result of Iraq's invasion and occupation of Kuwait. Compensation for successful claims in this category was set at US\$2,500 for individuals and up to US\$10,000 for families. A plaintiff who had been sexually assaulted or tortured could receive up to USD 5,000 per incident, with a total claim not exceeding USD 30,000 per person.<sup>422</sup>

The Commission has received more than 2.6 million claims seeking a total of approximately US\$368 billion in compensation. It received approximately 6,000 category "B" claims submitted by forty-seven Governments and seven offices of three international organisations, seeking a total of approximately US\$21 million in compensation.<sup>423</sup> The Commission paid all the successful category "B" claims in full.

Resolution 778 (1992), adopted by Security Council in October 1992, called all States in which there were funds, petroleum and petroleum products owned by the Iraqi government, to transfer the funds or to purchase or arrange the sale of the petroleum and transfer the profit, to the escrow account.

Vandeginste finds that the UNCC "sets an important precedent" for setting up a system to process large number of individual claims and that it "offers inspiration" for use of standard procedures, fixed sums and the use of compensation ceilings.<sup>424</sup>

Tomuschat raises the idea that "[a]lthough, according to the present writer's view, individual compensation claims do not exist as a matter of customary international law, the Security Council is not prohibited from ordering a state to provide compensation to the victims of conduct in violation of fundamental human rights standards developed in international law".<sup>425</sup> He argues that the UN Charter can be interpreted in such way that "the Security Council is authorized, in the discharge of its mandate to maintain and restore

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<sup>422</sup> A M de Bouver *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005) page 413

<sup>423</sup> [http://www2.unog.ch/uncc/claims/b\\_claims.htm](http://www2.unog.ch/uncc/claims/b_claims.htm)

<sup>424</sup> S Vandeginst *Legal Norms, Moral Imperatives and Pragmatic Duties: Reparation as a Dilemma of Transitional Governance* in E Doxtader and C Villa- Vicencio (eds) *To Repair the Irreparable: Reparation and Reconstruction in South Africa* (2004) 88 at 95.

<sup>425</sup> Tomuschat *Darfur Compensation for Victims* (note 54).



international peace and security, to concern itself with grave human rights violations, irrespective of the impact of such violations on other countries'.<sup>426</sup>

## 5.2 Armed conflict in Darfur, Sudan

The Report of the International Commission of Inquiry on Darfur of 25 January 2005 addresses the issue of compensation to the victims of the atrocities committed by Sudanese governmental forces, by the Janjaweed militias and other rebel movements.<sup>427</sup>

The report suggests the establishment of four Chambers to deal with compensation for any international crime perpetrated in Darfur. It further proposes that:

[a] special fifth Chamber should deal specifically with compensation for victims of rape. Such chamber is necessary considering the widespread nature of this crime in Darfur and the different nature of the damage suffered by the victims. Compensation also takes a special meaning here considering that, for rape in particular, as stated above it is very difficult to find the actual perpetrators. Many victims will not benefit from seeing their aggressor held accountable by a court of law. Hence a special scheme may be advisable to ensure compensation (or, more generally, reparation) for the particularly inhumane consequences suffered by the numerous women raped in Darfur.<sup>428</sup>

In respect to the financing of compensation the Commission states that for compensation to victims of crimes committed by Government forces or de facto agents of the Government the Sudanese authorities should provide payment which shall then be requested by the U.N. Security Council to place the necessary sum into an escrow account. For the victims of crimes committed by rebels (whether or not the perpetrators have been identified and brought to trial) payment shall be provided through a Trust Fund financed by international voluntary contributions.<sup>429</sup>

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<sup>426</sup> *ibid*

<sup>427</sup> Report of the International Commission of Inquiry on Darfur (note 28).

<sup>428</sup> *ibid* para 601.

<sup>429</sup> *ibid* para 603.

## 6. Comparison

All mentioned examples show clearly that there is a need and wish to seek reparation from perpetrators of violations of international humanitarian law and human rights law. Thereby victims asked for different forms of reparation.

The Women's Tribunal for the Former Comfort Women and the many cases brought before US-Courts demonstrate that for many victims it is important to bring their case before a tribunal and into public light, avoiding therefore collective amnesia about past human rights violations. They want to have their day in court, even if the outcome of the trial doesn't provide them with monetary compensation. The establishment and acknowledgement of the truth played an important part in all cases.

The selected cases illustrate many alternatives to seek reparation. They demonstrate that individual lawsuits can successfully achieve what post-war justice didn't address. They show that TRC's can contribute to reparation schemes and that countries providing a mix of inter-state and individual reparation programs can be very successful. The massive effort made by Germany to make reparation for the crimes committed under the Nazi regime has contributed to the new positive perception of Germany in the international community.

The scarcity of resources has been the major obstacle in many cases of reparative attempts. The shining example of the U.N. Claims Commission in connection with Iraq's invasion and occupation of Kuwait might well be a good example for a workable mechanism dealing with a high number of victims and claims involving billions of dollars. Nevertheless one has to bear in mind that Iraq's oil resources made it much easier to backup the payment of compensation. A claims commission for Darfur would be dependent on fewer resources.

The experience of Truth and Reconciliation Commissions that transitional justice often lacks gender sensitivity and the appropriate awareness for victims of sexual violence and that it struggles with compensating all victims with appropriate sums of money. Nevertheless they still have the better means to address victims' needs, especially the wish to be heard and recognised.

The sensitive balance of reparative justice, prosecuting perpetrators and re-establishing a democratic society and the rule of law must be handled with care and need workable compromises. The example of the TRC in South Africa shows the complexity of reparation schemes and the reality of transitional justice with various actors and interests involved.

Individual claims before domestic courts still faces enormous limitations. Having in mind that even successful cases ended without actual payment by the individual perpetrators, it appears that the chance to actually receive reparation especially compensation is much higher if the decisions about victim's claims are effectively enforced by a competent international body. Institutions like TRCs are not only closer to and therefore more familiar with the conflict situation they are also more effective and approachable for victims.

The recent attempts of individual claims by victims of forced labour in Nazi Germany, by Hereros against Germany, victims of Apartheid against companies and former 'comfort women' against Japan make it clear that the ignorance of victims' rights by the responsible state leads open wounds and will always cause further legal steps to solve the open issues of reparation and apologies. Thus transitional justice without appropriate reparation for victims will always be incomplete.

As many scholars argue and the U.S. Supreme Court has indicated, the federal courts of the United States of America cannot be the solely place to adjudicate violations of international law, but the human rights litigation in the United States has contributed much to address victims' rights.

### **Conclusion**

In contemporary international law individuals are holders of rights and duties. Victims of sexual violence during armed conflicts are victims of severe violations of their rights in international law. Rape and other forms of sexual violence are clearly prohibited by human rights law and international humanitarian law committed or tolerated by any party to an international or non-international conflict.

Out of the primary rights established in these areas of international law a secondary right arises in the case of violations according to state responsibility. This right can be based on Art. 3 Hague Convention IV, or the general rule providing that the secondary right automatically arises out of the violation of the primary right, as confirmed recently by the ICJ. Reparation must be provided in form of wiping out all the consequences of the wrongful act.

As human rights law remains applicable to armed conflicts, victims of sexual violence also have the right to obtain compensation under the human rights regime.

Apart from that the right to reparation may also arise under domestic law.

In respect to the responsibility of individual perpetrators, victims have the right to claim compensation from the individual before domestic courts and to participate in the prosecution of individuals before the ICC.

In the light of these achieved rights under IHL and human rights law individuals can no longer be referred to their states to seek reparation for them and to rely on the state to distribute the funds.

International law already provides certain mechanisms for individuals to execute their right. Regional human rights courts and the International Criminal Court demonstrate clearly that international law has developed to provide individuals with rights to participate in the proceedings and to seek reparation. Especially in the field of international criminal law the provisions in respect of protection and participation of victims and witnesses before court have developed out of an urgent need to address the plights of victims. The step made by the ICC towards reparation for victims was a valuable and logical implication. The Trust Fund of the ICC is an innovative approach and the future will tell how the good intention will be put into practice.

International courts are most likely the only courts for victims to seek reparation. Especially for victims of sexual violence it is in many countries still very unlikely to seek reparation in form of compensation before domestic courts due to prevailing discrimination of women and lacking awareness of gender issues. Even in the case where victims are able to file suits against the

responsible state before another Court, they will be confronted with state immunity as one of the hardest procedural obstacles to overcome. Furthermore, only a certain 'elite' of victims is able to take such legal steps.

The system of mechanisms and the provided access to courts are still incomplete. International law still lacks the important enforcement power to ensure that victims actually receive reparation. It is still in the hands of states to ensure the enforcement of international court decisions in regards to reparation.

The number of positive examples for a workable conceptualization and development of reparation schemes in the context of transitional justice has increased. Various approaches have shown that reparative justice can be brought via different ways outside the ordinary court system. The examples of specialized compensation-claim tribunals, reparation schemes designed by Truth and Reconciliation Commissions, state designed reparation law and funds and foundations demonstrate the variety of possibilities to address the needs of victims. All these examples set encouraging precedents for countries which face similar situations.

Nevertheless women in particular often face normative and practical barriers which prevent them from accessing the benefits of reparation programs. Gender sensitivity and special awareness for victims of sexual violence must be included in transitional justice.

International law must provide women whose opportunities to achieve legal, social, political and economic equality in society are still very limited the protection and reparation their need to overcome their loss and suffering. Providing women with reparation, in particular compensation will contribute to achieve long-term goals for gender justice.

While it is obviously important to consider the state and its economic resources the focus should not shift away from the actual victims of massive violations of international law. Sexual violence is one of the most terrifying violations committed against civilians on a massive scale. It stands outside any tolerable military operation. The diverse and serious effects of sexual violence demonstrate clearly an urgent need to reparation in form of medical care, counseling and financial support. How can one build up a new peaceful society

when women who run the household, raise the children and form part of the society are being ignored and left alone with the effects of such violence? The international community and the national state must demonstrate clearly that they do not tolerate sexual violence and do support the victims.

Furthermore it is in the interest of criminal justice to address the needs of the victims. Their participation in the prosecution of perpetrators and in the revealing of the truth before tribunals and commissions is very important and often the only evidence for crimes of sexual violence. For many of them it is a very painful and difficult step; therefore they need support, encouragement and protection to provide their testimonies before the tribunals.

Having in mind the main goal of international law to re-establish peace and the rule of law and the new developments towards more attention to civilians and victims, it cannot be accepted that victims of grave violations of human rights and international humanitarian law suffer from a secondary victimization within the process of transitional and criminal justice.

By providing victims with enforceable rights one will deter them from taking justice in their own hands. Making it clear that the violation of international law does not only lead to prosecution but also to the duty to make reparation will contribute to a better compliance with international law and to prevent further violations.

In respect to the difficult question of resources to make reparation it cannot rest solely on the number of victims or extent of violations to decide whether reparation should be provided or not. The rights of victims should not be routinely overruled by potential cost factors. Economic decisions and legal obligation should be differentiated. States must show a strong commitment to address the needs of the victims and should the waging of war change from a worthwhile business into an expensive bold venture it may contribute to less violence. The prize to make reparation to victims is worth the effort to achieve reconciliation and a viable society to base a peaceful future on.

The recently adopted UN Principles of a Right to Remedy developed by Theo van Boven and Cherif Bassiouni which state clearly that all victims of serious violations of international law have a right to fair and adequate

reparations, which "shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations" are a very notable achievement and can serve as a useful guideline for the ICC and other tribunals even if their implementation both at the national and international levels still face many obstacles.

The high number of declarations and non-binding resolutions by UN bodies can only urge states to respect their obligation to ensure and prevent human rights violations. The complex process of transitional justice involves not only legal matters and is shaped by many actors and very different interests.

The reality of calls for reparative justice is confronted with an incomplete and very controversial international law on the individual right to reparation.

The recent discussion in academic circles about reparation and the practical examples show the development of international law and will dominate the future of international humanitarian law and human rights.

The struggle against the impunity of the perpetrators of violations of international law has made much progress in recent years it is time that reparative justice follows these footsteps and develops to an effective and recognized part of transitional justice.

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