Reparations for international crimes and the development of a civil dimension of international criminal justice

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CHAPTER 1: PUNISHMENT AND REPARATION: CONSTRUING THE LEGAL BASIS OF A DUTY TO REPAIR FOR INDIVIDUAL PERPETRATORS

This study starts with a theoretical inquiry into theories of justice, victim reparation and punishment. This chapter will lay the foundation for the study of reparations in international criminal justice. In this light, this chapter examines how justice theories – mainly retributive and restorative/reparative justice theories – have provided some bases for the architecture of international criminal law and justice[27].

The aim of this chapter is to provide an overview of justice theories relevant to the study of international criminal law, from its inception to its contemporary application. Additionally, the theoretical dichotomy of punishment and reparation will be considered in relation to the criminal and civil dimensions of international criminal justice.

This chapter also sets out some theoretical foundations that will guide the examination of central questions of this study. As such, this chapter attempts to answer the following research sub-questions:

- Which justice theories provide the theoretical framework for the civil dimension of international criminal justice?
- What is the legal basis of a legal duty of reparation on individual perpetrators?
- Is the individualized approach to reparation always better and more progressive than a State-based approach to reparation?

This chapter will start addressing the above questions by overviewing different theories of justice and how they can inform the civil dimension of international criminal justice. This chapter also traces the evolution of the development of the right to reparation under international law and different dichotomies in relation to the duty and the right to reparation: starting from a relationship between States, to State versus individual, to individual versus individual. This chapter also examines the development of the duty to repair for individual perpetrators alongside States' duty to repair. Furthermore, this chapter

[27] The purpose of this chapter is not to provide a thorough analysis of different theories of justice, but rather to trace the genesis and evolution of international criminal justice through the prism of how principles of different theories of justice shape international criminal justice.

also discusses the different dimensions of reparations and whether the adoption of an individualized approach to reparations (as opposed to a State-based approach) is desirable, and if so, whether there is a legal basis for such a duty.

This chapter starts by looking at punishment and reparation through an analysis of the interplay between retributive and restorative or reparative justice theories[28]. Importantly, these main justice theories bear relevance to the shaping of international criminal law, from its inception to its contemporary form. I then examine the different duties and rights in relation to reparation for international crimes: the State's duty to repair, the development of an individual right to reparation and the construction of an individual duty to repair.

I. A THEORETICAL INQUIRY INTO PUNISHMENT AND REPARATION: AN OVERVIEW OF RETRIBUTIVE AND RESTORATIVE JUSTICE THEORIES

In order to understand how punishment of the offender and reparations for victims of international crimes fit into the fabric of modern international criminal justice, and how the latter is shaped by different justice theories, one needs to first discuss justice theories that inform international criminal law.

As is widely known, the aftermath of international crimes can be dealt with in different forms of post-conflict justice, for example, with criminal trials, truth and reconciliation processes, amnesties, and peace accords (which often have a provision for State-based reparations)[29].

In contrast to other responses to mass atrocities, punishment and retributive justice theory have provided an important model for international criminal justice. Responding to

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[28] For an excellent account of these two theories in criminal law, see Lucia Zedner, "Reparation and Retribution: Are they Reconcilable?", *The Modern Law Review* 57 (1994), pp. 228-250.

[29] This important question goes beyond the scope of this chapter. See generally on this topic, Darryl Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal Court", *European Journal of International Law* 14 (2003), p. 3; Charles Villa-Vicencio, "Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet", *Emory Law Journal* 49 (2000), p. 205; Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*, Beacon Press, 1998.

criminal conduct with criminal prosecution represents a commitment to the rule of law and the recognition that alleged perpetrators should be held accountable for their crimes[30]. International criminal trials represent an opportunity to seek the truth, they generate a historical account of events, they produce retribution for criminal conduct, and they may provide deterrence[31]. Furthermore, punishment and international criminal trials may also be seen in the light of their expressive roles[32].

1. Crime and punishment

There are a few different rationales that underpin the idea of punishment as a response to criminal conduct. It is often claimed that punishment may deter future criminal conduct. Members of a given society, knowing that a certain conduct entails a given punishment, might abstain from pursuing that conduct. This idea finds support in the writings of authors throughout the centuries, among whom Plato, who stated that "…he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, may be deterred from doing wrong again. He punishes for the sake of prevention"[33]. As such, inflicting punishment in relation to a given criminal conduct can be regarded as a way to prevent future crimes. In modern international criminal justice, this deterrent role is often debatable as some scholars question whether international criminal law as applied by international courts actually has a deterrent role[34].

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[30] Martha Minow, *ibid.*, p. 25.

[31] But see Brianne N. McGonigle, "Two for the Price of One: Attempts by the Extraordinary Chambers in the Courts of Cambodia to Combine Retributive and Retorative Justice Principles", *Leiden Journal of International Law* 22 (2009), p. 129, who claims that there is no empirical evidence that criminal trials have a deterrent effect. See also generally, Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?" *American Journal of International Law* 95 (2001), p 12.

[32] See generally in this regard, Anthony Duff, "Authority and Responsibility in International Criminal Law" in *The Philosophy of International Law*, Samantha Besson & John Tasioulas, Oxford University Press, 2010; Bill Wringe, "Why Punish War Crimes? Victor's Justice and Expressive Justifications of Punishment", *Law and Philosophy* 25 (2006), p. 159.

[33] Plato, "Protagoras", in *Works of Plato*,Irwin Edman, The Modern Library,1956, pp. 193, 211, 12.

[34] David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", *Fordham International Law Journal* 23 (1999), p.12; Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", *American Journal of International Law* 95 (2001).

In the same vein, another theoretical justification for punishment as a response to criminal conduct is the rehabilitation of the criminal; the proponents of this justification focus on punishment for the *criminal,* as opposed to a focus on the *crime*[35]. The goal of punishment, so the theory goes, is to effect a change in the behaviour of the criminal so as to decrease the likelihood of the commission of a crime in the future[36]. In this sense, it is based on the premise that punishment can change behaviour. For Hart, "announcing certain standards of behavior and attaching penalties for deviating … [leaves] individuals to choose. This is a method of social control which maximizes individual freedom within the framework of the law"[37].

A further theoretical rationalization of punishment is retribution[38]. Responding to international crimes with criminal trials and punishment follows the model of retributive justice theory. In classical retributive justice theory, a crime is responded to by punishing the perpetrator in a way that is proportional to the crime committed. The focus in this kind of response is not on the individual victim(s); the crime is seen to have been committed against the State as a whole. A crime is first and foremost a violation of a law, a legal norm enacted by the State. The affected community and the victim are represented by the State.

Retributive theorists' view of punishment is that it produces a proper response to crime because it "cancels out" the crime, restoring the proper balance in society[39]. To Kant, punishment

> "can never be inflicted merely as a means to promote some other good for the criminal himself or for civil society. It must always be inflicted upon him only *because he has committed a crime.* For a human being can never be treated merely as a means to the purposes of another or be put among the objects of rights to things: his innate personality protects him from this, even though he can be condemned to lose his civil personality"[40].

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[35] Farooq Hassan, "The Theoretical Basis of Punishment in International Criminal Law", *Case Western Reserve Journal of International Law* 15 (1983), p. 49.

[36] George Whitecross Patton, *A Textbook of Jurisprudence*, George Whitecross Patton & David P. Derham (4th ed.), Clarendon Press, 1972, p. 360.

[37] H.L.A. Hart, *Punishment and Responsibility*, Clarendon Press, 1968, p. 23.

[38] Anthony Platt, "The Meaning of Punishment", *Issues in Criminology* 2 (1966), p.79.

[39] David Dolinko, "Punishment" in *The Oxford Handbook of Philosophy of Criminal Law,* John Deigh & David Dolinko, Oxford University Press, 2011, p. 406.

[40] Immanuel Kant, *The Metaphysics of Morals*, translation by Mary Gregor, Cambridge University Press, 1996, p. 105.

In this light, the focus of retributive justice theory is on finding guilt and imposing blame. The offender is seen as a danger to society as a whole. As such, the offender is believed to deserve punishment once guilt is found, and is often times taken out of society. This kind of justice is based on the premise that punishment is an effective response to a crime.

Retribution theory has a long history. Retributive justice is illustrated in the *lex talioni,* where reciprocity should equate the crime committed. In ancient history, the Code of Hamurabi recognized retributive justice. Retribution has been a form of justice for centuries ever since. As a consequence of the centralization of the State, sustained attention was given to the punishment of the offender and retribution, which brought about a proliferation of criminal codes and penalties[41]. The focus on retribution, and the marginalised role of victims in the administration of justice lasted until the end of the eighteenth century. It was at this time that victims began playing a more active role in the administration of justice[42].

Retribution, from the inception of international criminal law in the XXth century, has been a leading justification for punishment of offenders in international law[43]. As one author has put it "[r]etribution, …, though not historically a significant part of the evolutionary trends of international criminal law, was a definite component of at least the punishments awarded by the International Military Tribunal at Nuremberg"[44]. The idea of fighting impunity, which is symbolic of international criminal justice and the establishment of international and *ad hoc* criminal tribunals, speaks to the justification of punishment as a form of retribution.

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[41] Ilaria Bottigliero, Redress for Victims of Crimes under International Law, Nijhoff, 2004, p. 24.

[42] Lucia Zedner, "England", in *Reparation in Criminal Law: International Perspectives*, Albin Eser & Susanne Walther (vol. 1), Iuscrim, Max-Planck Institute Für Ausländisches und International Strafrecht, 1996, pp.109-227.

[43] For thorough review of the goals and functions of punishment in international criminal law, see Mark A. Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, 2007.

[44] Farooq Hassan, "The Theoretical Basis of Punishment in International Criminal Law", *Case Western Reserve Journal of International Law* 15 (1983), p. 55.

It can be argued that at a moment of global recovery following the horrors of the war, an international criminal trial pours the rule of law back again in the international legal order. Setting up an international tribunal to try and punish the alleged offenders re-establishes law and order in a world devastated by war. At the end of the Second World War, when the world became aware of the atrocities that were committed by Nazi forces, something needed to be done against those who perpetrated acts that shocked the conscience of humankind. One of the most famous statements emanating from the Nuremberg trials refers specifically to the idea that those crimes could not go unpunished due to the their nature and level of gravity: "… by punishing individuals who commit such crimes can the provisions of international law be enforced"[45].

Be that as it may, retribution is not the only justification for trying and punishing criminals. One of the claimed underlying rationales for punishment of offenders in international criminal law is deterrence[46]. If a criminal is punished, as the theory goes, others will know that act is wrongful under international law which entails consequences, thus deterring others from taking the same course of action. Deterrence and prevention of future crimes seem to have been justifications for inflicting punishment on those found responsible for the crimes committed by Nazi Germany[47]. This is illustrated by the famous statement of Justice Jackson: "It is high time that we act on the juridical principles that aggressive war-making is illegal and criminal … so as to make war less attractive to those who have governments and the destinies of people in their power"[48].

Punishment is said to aide in the maintenance of the international legal order[49]. One author has posited in regard to this justification for punishment that "[j]ust as the general welfare of citizens and the supreme need for maintaining the social order in the domestic

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[45] *Trial of Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945-1 October 1946 (Nuremberg: International Military Tribunal, 1947), p. 223.

[46] See generally, Farooq Hassan, "The Theoretical Basis of Punishment in International Criminal Law", *Case Western Reserve Journal of International Law* 15 (1983), pp. 48 et seq.

[47] *Ibid.* at p. 50.

[48] *Report to the President by Mr. Justice Jackson*, 6 June 1945, "International Conference on Military Trials", pp. 42, 52-53. See also, Robert Jackson, *The Case against the Nazi War Criminals*, Alfred A. Knopf, Inc., 1946.

[49] See generally, Cesare Beccaria cited in Elio Monachesi, "Pioneers in Criminology IX: Cesare Beccaria (1738-1794)", *Journal of Criminal Law, Criminology & Political Science* 46 (1955), p. 445.

scene are considered paramount, the need for ensuring the sanctity of the most fundamental values of the international community also demands that potential violators be forewarned from committing breaches of the international legal order"[50].

In the international legal order, where there are no central enforcing institutions or agencies, punishment could be seen as a manner in which international rules are enforced. This said, it is difficult to grasp precisely whether international criminal law and the punishment with which individual perpetrators are being sentenced actually fulfil the role of retribution or deterrence. There is a growing debate as to whether punishment of individuals actually contributes to the prevention of future crimes[51]. It is also premature at this point of international criminal justice to understand whether, and if so how, punishment can influence and modify individuals' conduct.

As international criminal law developed, however, retribution began to lose its importance as a justification for inflicting punishment on offenders[52]. Whether or not punishment can truly promote deterrence in relation to international crimes cannot yet be fully assessed. Many claim that international criminal law (and punishment) is not producing the magnificent effect that its proponents were hoping for[53].

Given the less important role of retribution as a justification for punishment in this context, it is understandable how victim redress could make its way into international criminal law. In a framework where reparation does not take the form of punitive damages, but rather comes from the concern with victims' justice, it is difficult to reconcile how reparation for victims would contribute to retributive justice theory[54]. Retribution provides

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[50] Farooq Hassan, "The Theoretical Basis of Punishment in International Criminal Law", *Case Western Reserve Journal of International Law* 15 (1983), p. 56.

[51] See generally, David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", *Fordham International Law Journal* 23 (1999), pp. 473, 488; Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", *American Journal of International Law* 95 (2001).

[52] See generally, Farooq Hassan, "The Theoretical Basis of Punishment in International Criminal Law", *Case Western Reserve Journal of International Law* 15 (1983), p. 56.

[53] David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", *Fordham International Law Journal* 23 (1999), pp. 473, 488.

[54] On the question of the dichotomy between reparation and retribution, see Charles F. Abel & Frank H. Marsh, *Punishment and Restitution: A Restitutionary Approach to Crime and the*

no justification for including reparation within the realm of international criminal law remedies. Reparations in international criminal law are not equated to punishment; they are not punitive in nature. This is confirmed, at least within the ICC framework, by the negotiating history of the Rome Statute and the reparation provisions within the Statute[55].

Beyond the issue of the driving rationale for including reparation within international criminal justice, an interesting question is whether reparation could contribute to the main goals with which trial and punishment are concerned, that is, prevention and deterrence, thus reinforcing its role in international criminal law[56].

The relationship between reparation and deterrence is closely linked with the forms of reparation that can be awarded within the realm of international criminal justice and the involvement of the offender in the reparation process. If reparation is pursued as compensation through a sum of money from the accused, this may provide a degree of deterrence similar to that of criminal liability - the possibility of having to face a criminal trial as well as having to pay compensation for the victims may deter individuals from committing a crime.

Perhaps, however, the most significant way in which reparation or victim redress may impact the prevention of future atrocities can be evaluated in a more holistic way. The integration of victims' concerns in the international criminal justice process may affect the way in which criminal conduct is dealt with. Including victims in the process, and

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Criminal, Greenwood Press, 1984; Ezzat A. Fattah, "From a Guilt Orientation to a Consequence Orientation: A Proposed New Paradigm for the Criminal Law in the 21st Century", in *Beitraege zur Rechtswissenschaft*, Wilfried Küper & Jürgen Welp, C.F. Mueller Juristischer Verlag, 1993, pp. 771- 792. See also, David Watson et al., "Reparation for Retributivists", in *Mediation and Criminal Justice: Victims, Offenders and Community*, Martin Wright & Burt Galaway, Sage Publications, 1989, cited in Lucia Zedner, "Reparation and Retribution: Are they Reconcilable?", *Modern Law Review 57* (1994), p. 228.

[55] See on this point, Conor McCarthy, "Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?", *Journal of International Criminal Justice* 10 (2012), pp. 361-362.

[56] In this chapter, I do not intend to dwell on the following questions: whether reparation for victims within international criminal proceedings, and at the ICC as its main example, is compatible with the traditional goals of international criminal justice, whether it is appropriate and how it should develop. These are questions that will be addressed in the following chapters of this study. The inquiry at this juncture fits within the broader discussion of theories of justification for punishment in international criminal justice.

implementing reparation-based awards (i.e. where the offender will have to face the victim and respond to his/her actions), as opposed to treating crime as a public matter, might contribute to the preventive effect that punishment is intended to have.

Thus, looking solely through the retributive justice lens, international criminal justice would have a purely criminal dimension, focusing mainly on the perpetrator, the crime, and the degree of punishment. A civil dimension, that is, a dimension which includes reparation for victims, does not fit within this paradigm. Thus, including a civil dimension in international criminal justice requires another theoretical underpinning.

2. Victims, reparation and restorative justice theory

Similar to retributive justice, restorative justice has been known to many civilizations. Since the Roman law period, there were possibilities for remedies for a wrongful conduct[57]. The shift to retribution as a way to respond to criminal conduct seems to have occurred between the 12th and 13th centuries. When a wrongful act was committed against the State, retribution demanded that the interests of society as a whole be emphasized above and beyond those of individual victims.

Restorative justice[58], to the contrary of retributive justice, focuses on the needs of victims and seeks to provide forms of redress. It is concerned with bringing victims and offenders together. The perpetrator is encouraged to make amends and repair the harm caused to the victim. Thus, restorative justice has a distinct forward-looking approach.

John Braithwaite, a leading author in restorative justice theory, has defined restorative justice as:

> "a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It

[57] Arlette Lebigre, Quelques Aspects de la Responsabilité Pénale en Droit Romain Classique, Presses Universitaires de France, 1967.

[58] See e.g. Conor McCarthy, "Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory", *International Journal of Transitional Justice* 3 (2009).

follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process"[59].

As far as reparations are concerned, it has been noted that "[restorative justice] places particular emphasis on the principles and aims of human dignity, strong relationships and morality [which] allows a more holistic approach to reparations", to the extent that "restorative justice provides a persuasive theoretical rationale for reparations"[60].

An important concern of restorative justice is whether the criminal justice process addresses the full complexity of the criminal conduct. Under this theory, criminal conduct is not a wrong committed against some abstract community but instead, should be dealt with as a dispute between the offender and the victim[61].

In this light, reparations to victims of international crimes are more in line with the premises of restorative justice. The question that remains is whether a blend of retributive and restorative justice theories makes sense in international criminal law. Similarly, the leading question of this study is whether a mixture of criminal and civil dimensions, and thus influences from diverse justice theories, is desirable in international criminal justice. These are the inquiries I turn to in the following sections.

II. THE GENESIS OF INTERNATIONAL CRIMINAL LAW AND THE SHIFT FROM STATE RESPONSIBILITY TO INDIVIDUAL ACCOUNTABILITY

To understand the theoretical framework that guided the development of the doctrinal foundations of international criminal law, one needs to place international criminal law within the broader context of international law at the time of its inception.

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[59] John Braithwaite, "Restorative Justice and De-Professionalization", *The Good Society* 13 (2004), pp. 28–31.

[60] Antonio Buti, "The Notion of Reparations as a Restorative Justice Measure", in One Country, Two Systems, Three Legal Orders – Perspectives of Evolution: Essays on Macau's Autonomy after the Resumption of Sovereignty by China, Jorge Costa Oliveira & Paulo Cardinal, Springer, 2009, p. 198.

[61] Conor McCarthy, "Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory", *International Journal of Transitional Justice* 3 (2009), p. 253.

Modern international criminal law developed as a response to the atrocities committed during the Second World War. In the aftermath of the war, it became clear that the international crimes committed during the war needed to be accounted for and that the punishment of individual perpetrators was crucial for the reestablishment of the international legal order. Making the State, an abstract entity, solely responsible, without reaching those who individually perpetrated mass atrocities was no longer desirable, acceptable, and was a disconnect with domestic criminal law systems. At the wake of the end of the Second World War, the framework for allocating responsibility in the international legal order was focused on the State. Importantly, the development of international criminal law represented a shift from a State-centred approach[62]. For many centuries, international law was concerned solely with inter-State matters, and the idea of individuals being a (passive) subject of international law, standing trial and being inflicted with punishment, would have been inconceivable within the traditional framework of international law[63].

In this sense, it can be said that the mere advent of international criminal law represents a turning point in the conceptual framework of international law. This paradigm is well illustrated by the famous statement of the International Military Tribunal at Nuremberg whereby "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced"[64]. This statement also demonstrates that, since its inception, international criminal law has focused on the trial and punishment of perpetrators as a means to enforce international law. It is perceived that individual accountability and punishment informed the formative stages of international criminal law. This can be explained by the need to hold individual perpetrators accountable for their crimes, thus making the shift from State-based responsibility for international wrongs to individual accountability for international crimes, which marks the modern development of

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[62] See generally, Hersch Lauterpacht, "The Law of Nations and the Punishment of War Crimes", *British Yearbook of International Law* 21 (1944), p. 58.

[63] See e.g. the 1912 edition of the Lassa Oppenheim treatise on international law, stating that "…the Law of Nations is a law between States, and … individuals cannot be subjects of this law", Lassa Oppenheim, *International Law: A Treatise*, Longmans, Green and Co., 2nd ed., 1912, p. 367, 368. The later edition was modified to take into account the growing position of individuals as subjects of international law.

[64] *Trial of Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945-1 October 1946 (Nuremberg: International Military Tribunal, 1947), p. 223.

international criminal law in parallel with the regime of State responsibility. This shift from a State-based framework was not however complete in dealing with the aftermath of conflicts. Although individual perpetrators were held criminally accountable, civil redress for victims of the crimes perpetrated during the War was left to be resolved by inter-State agreements[65].

Holding individual perpetrators accountable for international crimes, rather than the States for which they acted, has put the focus on prosecution and punishment of the offender, while moving away from victims and civil redress. International criminal law at its inception was concerned with addressing the limitations that the system based on State responsibility afforded. The idea of redress for victims of international crimes was thus not present at the developmental stage of international criminal law[66] and, as we shall see in later chapters, only gained relevance in the international criminal justice discourse more recently and more prominently with the advent of the ICC.

As such, international criminal law, in its first phase, solidified the foundation of a system based on individual accountability and punishment, as opposed to collective responsibility. This dichotomy was explained by Hans Kelsen in the following terms:

> "the difference between the punishment provided by national law and the specific sanctions of international law… consists of the fact that punishment in criminal law constitutes individual responsibility, whereas the specific sanctions of international law constitute collective responsibility"[67].

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[65] Indeed, according to Ariel Colonomos and Andrea Armstrong: "[t]raditionally, reparations were part of the framework of relations between nations following a conflict and obligated the losing State to compensate damages incurred by its opponents during the course of the war", Ariel Colonomos & Andrea Armstrong, "German Reparations to the Jews after World War II:A Turning Point in the History of Reparations", in *Handbook of Reparations*, Pablo de Greiff, Oxford University Press, 2006, p. 390. See also Pierre d'Argent, *Les Réparations de Guerre en Droit International Public*, LGDJ, 2002; Richard Lillich et al., *International Claims: Their Settlement by Lump-Sum Agreement*, University Press of Virginia, vol. 1, 1975.

[66] See Conor McCarthy, "Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?", *Journal of International Criminal Justice* 10 (2012), p. 359, where the author concludes that "international criminal law was conceptualized as a system of law little concerned with victims but rather one which was concerned with perpetrators and the enforcement of the rules of international law itself."

[67] Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals", *California Law Review* 31 (1943), p. 530.

The focus on the criminal accountability of individual perpetrators, as opposed to a framework that included criminal accountability and victim redress (or a mix of criminal and civil dimensions), in the shaping of the architecture of international criminal law at its formative stages can be understood in the context of the position of the individual as a subject of international law. The battle of that time was to pierce the veil of the State, in order to be able to put on trial the individuals responsible for the atrocities of the Second World War[68]. Thus, at its inception, international criminal justice was focused on a criminal dimension.

In that sense, Hersch Lauterpacht warned of the risks of continuing to hold a purely State-centred approach: "[t]here is little hope for international law if an individual, acting as an organ of the state, can in violation of international law, effectively shelter behind the abstract and artificial notion of the state"[69]. The idea that individuals should not be shielded by the State's responsibility for certain acts, which were ultimately performed by individuals, was the necessary rationale to shift from mere State responsibility to a system that includes individuals' accountability for international crimes, thus sometimes creating a system of concurrent State responsibility and individual criminal liability for certain international acts[70]. Thus, the focus on retribution and punishment of the perpetrator, in contrast with reparations, at this early stage of international criminal law can be explained

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[68] Even prior to the Second World War, John Westlake had stated that "the same tone of thought will again be evil if it allows us to forget that … the action of our State is that of ourselves", John Westlake, *The Collected Papers of John Westlake on Public International Law*, Lassa Oppenheim, Cambridge University Press, 1914, p. 411.

[69] Hersch Lauterpacht, "Règles générales du droit de la paix", *Recueil des Cours* 62 (1937), p. 351 (translation).

[70] In fact, there is relevant scholarship that discusses the concurrence between State responsibility and individual accountability for international crimes. For examples of when such concurrent responsibility may occur, see Andre Nollkaemper, "Concurrence Between Individual Responsibility and State Responsibility in International Law", *International and Comparative Law Quarterly* 52 (2003), pp. 615-640, who cites emerging work in this field: Pierre-Marie Dupuy, "International Criminal Responsibility of the Individual and International Responsibility of the State", in *The Rome Statute of the International Criminal Court: A Commentary*, Antonio Cassese et al., Oxford University Press, 2002, pp. 1085-1100; Hazel Fox, "The International Court of Justice's Treatment of Acts of the State and in Particular the Attribution of Acts of Individuals to States", in *Liber Amicorum Judge Shigeru Oda*, Nisuke Ando et al., Kluwer Law International, 2002, p. 147; Marina Spinedi, "State Responsibility *v* Individual Responsibility for International Crimes: *Tertium Non Datu"*, *European Journal of International Law* 13 (2002), p. 895; Malcolm Evans, "International Wrongs and National Jurisdiction", in *Remedies in International Law: The Institutional Dilemma*, Malcolm Evans, Hart Publishing, 1998, p. 173; Otto Triffterer, "Prosecution of States for Crimes of State", *Revue Internationalede Droit Penal* 67 (1996), p. 341.

by the idea that "[individual] punishment, in contrast to [interstate] reparation, satisfies … the need for guarantees against future infractions of the law"[71].

As it can be seen, the dogma of State sovereignty remained as far as reparations for victims were concerned: if there was any claim for reparation from an individual victim, it was for the sovereign State to "represent" their interests, and reparations for international crimes were to be sought from States; in other words, victim redress for international crimes was centred on a State-based approach[72].

In sum, with the advent of international criminal law, individuals could be criminally prosecuted on their personal capacity. This was a passive role for individuals in international law as they were the object of prosecutions; at this point in history (at the wake of the Second World War and the development of international criminal law in the XXth century) individuals could not yet play an active role, separate from their State of origin, to claim reparations for himself/herself in international law. As Connor McCarthy sums it up, "international criminal law was concerned primarily with perpetrators and the enforcement of the rules of international law itself"[73].

Thus, international criminal law, as it was originally developed, was concerned with a criminal dimension; the civil dimension, that is the dimension concerning reparation for victims, was not included. As it shall be further developed next, reparation for victims followed a State-based approach.

This paradigm that had been in effect since the conception of international law raises the questions: does a mixture of criminal and civil dimensions make sense at the international level? Is it working, is it a desirable model and if so, why? The following sections of this chapter, and following chapters, unpack these considerations.

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[71] Hersch Lauterpacht, "Règles générales du droit de la paix", *Recueil des Cours* 62(1937), p. 352, (translation).

[72] Ariel Colonomos and Andrea Armstrong, "German Reparations to the Jews after World War II:A Turning Point in the History of Reparations", in *Handbook of Reparations*, Pablo de Greiff , Oxford University Press, 2006, p. 390.

[73] Conor McCarthy, Reparations and Victim Support in the International Criminal Court, Cambridge University Press, 2012, p. 43.

III. PAVING THE WAY TO REPARATIONS FOR MASS CRIMES: OVERVIEW OF THE LEGAL DUTY OF REPARATIONS IN OTHER FIELDS OF INTERNATIONAL LAW

Reparations for victims of international crimes rely on two premises: the right of victims to obtain reparation and the legal duty to provide reparation. Two questions underpin this analysis: who bears the legal duty of reparation (i.e. the State, the individual, both?) and to whom is the reparation owed (i.e. to individuals and/or to the State)?

In relation to the latter, a question to be addressed is whether the individual (i.e. the victim) has a legal right to reparation under international law. And importantly, does this by implication create an international obligation on *individuals* rather than *States* concerning reparation? As it shall be further discussed, the individual's right to reparation developed under international law creating a legal duty on States to repair. Modern international criminal law, in some cases as shall be discussed, proposes an individualized approach to reparations, which creates a legal duty for individuals to provide reparation. Is this not a mismatch with the collective nature of international crimes? This study claims that it is not necessarily so. Just like in a criminal dimension, State responsibility and individual criminal accountability are not mutually exclusive, in a civil dimension, State responsibility and individual liability concerning reparations need not necessarily be either.

Alongside the development and solidification of international criminal law procedures, victim redress mechanisms have developed in other fields of international law, slowly giving rise to an individual *right* to reparation for international wrongs, including human rights violations and international crimes. In order to better understand the shift from a purely retribution-oriented international criminal justice to a system which has a more active role for victims[74], including the right to seek reparations within the international criminal proceedings, it is crucial to review the wider legal framework[75] and the development of a right to reparation under international law. There are two areas in

[74] The question of the inclusion of reparation within international criminal proceedings will be reviewed in a later chapter of this study.

[75] Theoretical questions pertain to the genesis of the right to reparation under the different fields of international law and the purpose of reparation to the victims. Normative questions relate to how civil redress should develop in areas of international law that pertain to the regulation of the conduct of individuals (international humanitarian law) or the unlawful consequences thereof (international criminal law). Practical questions relate to the enforcement of the right to reparation.

particular that are closely linked to international criminal law which relate to the duty of reparation imposed on the State rather than the individual): international human rights law and international humanitarian law. While this study is primarily concerned with the paradigm of the individual *vis-à-vis* the individual (i.e. individual victims seeking reparation from individual perpetrators), evaluating the State-based approach to reparations will inform the construction of a legal basis of a duty to repair imposed on the individual, and the contents of this duty.

In this prism, this section first dwells upon the broad and somewhat abstract question of the purpose of reparations, as well as the right to reparation in relation to a State's duty to provide reparations under international law. Then I briefly overview the right of reparation in fields of international law closely linked with international criminal law, to then finally engage in a theoretical discussion of the relationship between theories of punishment and reparation. This analysis will focus on a review of systems only in the *international* legal system since later in this study attention is given to the role of *national* courts in the award of redress for victims of international crimes (see chapter 5).

1. The purpose of reparations

It goes without saying that reparations may serve varied purposes and thus be based on different theoretical underpinnings[76]. A common purpose of reparations is that of remedial justice, in order to correct the wrong done and rectify injustice by restoring the *status quo ante*. As Professor Dinah Shelton puts it, this rationale "appears to be the basis for most international decisions on reparations, including the *Chorzów Factory* case"[77].

Reparations may also serve as a form of retribution, to punish the offender and deter the wrong conduct[78]. Under this theoretical explanation, the form and extent of reparations could bring about a deterrent factor in future wrongdoing. In this sense, reparations can include a form of punitive damages and in a way, could bridge criminal (sanctions) and

[76] This chapter is not aimed at examining or discussing the purpose of reparations specifically in international criminal law. This topic will be addressed in following chapters.

[77] See generally, Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", *American Journal of International Law* 96 (2002).

[78] See Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Nijhoff, 2010, p. 371.

civil (restoration) dimensions. Another purpose of reparation speaks to restoration of victims and affected communities. The goal in this perspective would be to reconcile and restore, as well as induce positive future behaviour[79].

Some aspects of this overview of theories and purposes of reparations are worth emphasizing. First, it may be noted that the system of reparations could be different depending on its context (i.e. the society where it is applied or the purpose it is devised to achieve). These questions shed light on the interconnectedness between victims and offenders, and the community in which they may belong. When a wrongful act is committed (e.g. a crime), various relationships are broken, values shattered and the situation that existed before the wrongful conduct is no longer in place.

Thus, the theoretical framework of the purpose of reparations evidences, in my view, the tight relationship between crimes (a wrongful conduct) and civil redress (reparation), offenders and victims, the past and the future. It also exposes the weaknesses of a nuclear treatment of international law, the compartmentalised study of different doctrines, in parallel, and with different aims, even though in essence they often pertain to the same conduct.

In the same line of reasoning, a broader question pertains to the consideration of international law and international justice: if different disciplines of international law do not interact and feed off of each other, in a synergetic communication, the ultimate goal of justice may not be fully achieved. As Judge Cançado Trindade puts it,

> "While an international tribunal of human rights (such as the European and Inter-American Courts, and more recently, the African Court) cannot determine the international criminal responsibility of the individual, and an international criminal tribunal (such as the ad hoc International Criminal Tribunals for the Former Yugoslavia [ICTFY] and for Rwanda [ICTR], and the ICC) cannot determine the responsibility of the State, impunity is

[79] See generally on theories of restorative justice: Daniel W. Van Ness & Karen Heetderks Strong, *Restoring Justice*, Routledge, 2nd ed., 2002; Nigel Bigger, *Burying The Past: Making Peace And Doing Justice After Civil Conflict*, Georgetown University Press, 2003; Heather Strang & John Braithwaite, *Restorative Justice And Civil Society*, Cambridge University Press, 2001; Gerry Johnstone, *Restorative Justice: Ideas, Values, Debates*, Willan, 2002.

> most likely bound to persist, being only partially sanctioned by one and the not other"[80].

In this section, the multifaceted purposes of reparation were only briefly overviewed in general terms in order to set the stage for the next chapters.

2. The multifaceted dimensions of reparation

Recently, the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Dr. Pablo de Greiff, prepared a report focusing on reparations for mass violations of human rights and international humanitarian law. His report focused on the challenges of reparation including implementation, exclusion of certain "categories of victims on the basis of political considerations … and the gender insensitivity of a majority of reparation programmes, which results in too few victims of gender-related violations receiving any reparation"[81].

Significantly for the purpose of this study, the Special Rapporteur discusses in his report discusses different dimensions of reparation awards. In particular, he warns against looking at reparations from a singular dimension and posits that:

> "to count as reparation and to be understood as a justice measure, it has to be accompanied by an acknowledgment of responsibility and needs to be linked with other justice initiatives such as efforts aimed at achieving truth, criminal prosecutions and guarantees of non-recurrence"[82].

In a similar vein, he adds that "[o]ffering reparations to victims should not be part of an effort, for example, to make impunity more acceptable"[83].

This discussion is crucial to the present study as it is argued, precisely as the Special Rapporteur does, that reparation is a complement to the criminal liability of perpetrators of international crimes. In other words, they are not mutually exclusive and

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[80] See Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Nijhoff, 2010, p. 371.

[81] United Nations, General Assembly, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence", A/69/518, 14 October 2014.

[82] *Ibid.*, para. 83.

[83] Ibid.

should work together as two facets of international criminal justice: the criminal and civil dimensions of international justice complement one another. The conclusion of the Special Rapporteur's report is thus a guiding chart throughout this study.

Finally, the report makes another important point concerning the different dimensions of reparation. It calls on those responsible, rightly so it is argued, to design

> "reparation programmes to consider the great advantages of distributing benefits of different kinds and to not reduce reparation to a single dimension, be it material or symbolic. The great harms that reparation is supposed to redress require a broad array of coherently organized measures"[84].

This report, and the guidelines provided therein, are useful for the development of a conception of a civil dimension for victims of international crimes and provide some insight for the analysis in the present study.

3. State responsibility and the duty of reparation in international law

The duty of reparation in relation to an internationally wrongful act is a well-established principle of international law[85]. While much has been written on the right of States to obtain reparation[86], the focus of this study rests on victims of international crimes and thus on reparation to the benefit of individuals.

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[84] *Ibid.,* para. 84.

[85] See e.g. on the duty to reparation for wrongful conduct under international law, Paul Fauchille, *Traité de Droit international public*, vol. I Part I, Paris, Libr. A. Rousseau Éd., 1922, p. 515; Ladislas Reitzer, *La réparation comme conséquence de l'acte illicite en Droit international*, Paris, Libr. Rec. Sirey, 1938, p. 30 ; Jean Personnaz, *La réparation du préjudice en Droit international public*, Paris, Libr. Rec. Sirey (1939), pp. 53-60; Hildebrando Accioly, "Principes généraux de la responsabilité internationale d'après la doctrine et la jurisprudence", *Recueil des Cours de l'Académie de Droit International de La Haye* 96 (1953), p. 415.

[86] See e.g., Christian Dominicé, *Observations sur les droits de l'Etat victime d'un fait internationalement illicite*, dans : Droit international 2, par C. Dominicé, Paris : Pedone, 1982, p. 1-70 ; Francisco V. García-Amador, *The changing law of international claims*, New York [etc.]: Oceana, 1984. Francisco V. García Amador, *Principios de derecho internacional que rigen la responsabilidad: análisis crítico de la concepción tradicional,* Madrid: Escuela de funcionarios internacionales, 1963.

The principle underlying the legal duty to make reparation is that every breach of an international obligation carries with it a duty to repair the harm caused by the breach[87]. This has been confirmed in a number of international instruments and jurisprudence of international and regional courts[88]. It has been crystallized in an often-cited passage by the Permanent Court of International Justice, in the *Charzów Factory* Judgment, wherein it is stated that:

> "The essential principle contained in the actual notion of an illegal act . . . is that reparation must, so far as possible, wipe-out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law"[89].

It is further stated in the same case that: "It is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation … Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself"[90].

This traditional conception of reparation has been applied in the jurisprudence of many international courts and tribunals such as the International Court of Justice[91], other

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[87] See Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility", *American Journal of International Law* 96 (2002), p. 835.

[88] This study examines the question of reparation from the perspective of the victims' right to obtain reparation and not the State or the offender's duty to provide reparation.

[89] *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, *P.C.I.J.*, Series A, no. 17, p. 29.

[90] *Ibid.*; see also PCIJ Statute, Article 36, which states that "the States Parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: … (d) the nature or extent of the reparation to be made for the breach of an international obligation". Article 36 of the ICJ Statute is written similarly.

[91] ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184; ICJ, Case concerning Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997, p. 81, para. 152; ICJ, Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004, p. 59, para. 119; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 198, para. 152; ICJ, Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v.

international courts[92], including regional human rights courts and other human rights bodies[93], arbitral tribunals[94] and claims tribunals and commissions[95].

The principle of a State's duty of reparation for international wrongful acts (including international crimes) has also been explicitly recognized in Article 31 of the 2001 International Law Commission Articles, which reads as follows: "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act"[96].

The State's duty of reparation for a wrongful act has also been explained in numerous works of learned jurists. As Anzilotti posed it : "La violation de l'ordre juridique

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Uganda), Judgment, I.C.J. Reports 2005, p. 257, para. 259; ICJ, Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, pp. 232-233, para. 460; Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 77, paras. 273-274; ICJ, Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010, p. 48, para. 161.

[92] See, for example, *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines* v. *Guinea)*, Judgment, I.T.L.O.S. Reports 1999, para. 170.

[93] See, for example, IACtHR, *Velásquez-Rodríguez* v. *Honduras*, Merits Judgment, 29 July 1988, para. 174; see also *Papamichalopoulos and Others* v. *Greece*, Application No. 14556/89, Judgment, 31 October 1995, E.Ct.H.R., Series A, No. 330-B, para. 36.

[94] See, for example, *LG&E Energy Corp., LG&E Capital Corp., LG&E International Inc*. v. *Argentine Republic*, Case No. ARB/02/1, Award of 25 July 2007, I.C.S.I.D., available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC786_En&caseId=C208 (accessed 15 February 2012), para. 31; *ADC Affiliate Limited and ADC & ADMC Management Limited* v. *Republic of Hungary*, Case No. ARB/03/16, Award of 2 October 2006, I.C.S.I.D., para. 484.

[95] See, for example, Final Award, *Eritrea's Damages Claims Between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 17 August 2009, Eritrea-Ethiopia Claims Commission, available athttp://www.pca-cpa.org/upload/files/ER%20Final%20Damages%20Award%20complete.pdf (accessed 12 January 2012), pp. 7-8, para. 24; Final Award, *Ethiopia's Damages Claims Between the State of Eritrea and the Federal Democratic Republic of Ethiopia*, 17 August 2009, Eritrea-Ethiopia Claims Commission,availableathttp://www.pca-cpa.org/upload/files/ET%20Final%20Damages%20Award%20complete.pdf (accessed 12 January 2012), p. 8, para. 24; *Amoco International Finance Corporation* v. *The Islamic Republic of Iran et al*., Partial Award No. 310-56-3 of 14 July 1987, 15 Iran-United States Claims Tribunal Reports 189, paras. 189-206.

[96] Paragraph 2 of Article 31 defines "injury" as: "any damage, whether material or moral, caused by the internationally wrongful act of a State".

international commise par un État soumis à cet ordre donne ainsi naissance à un devoir de réparation, qui consiste en général dans le rétablissement de l'ordre juridique troublé"[97].

In a similar vein, Fauchille explained that:

> "A quelles règles est soumise la responsabilité juridique internationale des Etats? Les règles auxquelles cette responsabilité est assujettie se résument dans l'idée de droit naturel que tout fait qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer. Cette idée est appliquée en droit privé dans les rapports des individus ; il n'y a pas de motifs pour ne pas l'appliquer aussi dans les relations que des collectivités ont entre elles-mêmes au avec des individus. Pour qu'il y ait lieu à la responsabilité juridique à la charge d'un Etat, il faut dès lors : 1o. qu'un dommage ait été causé par lui ; 2o. que ce dommage soit le résultat d'une action illicite de sa part ; 3o. qu'il lui soit imputable"[98].

The International Court of Justice clarified in the *Avena and Other Mexican Nationals* case that "[w]hat constitutes 'reparation in an adequate form' clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the 'reparation in an adequate form' that corresponds to the injury"[99].

4. International human rights law and the development of individual victims' redress

As we have seen above, the early stages of international criminal law in the XXth century was focused on prosecution and punishment. Other areas of international law developed alongside international criminal law which had some impact on the development of reparations for victims of conflicts. The most significant development in this area was the advent of international human rights law, which, through its mechanisms, empowered victims to seek and obtain reparations from their State for violations of their rights. In this perspective, international human rights law does not concern a criminal dimension (i.e. it is not directly focused on criminal prosecutions or punishment of

[97] Dionisio Anzilotti, "La responsabilité internationale des États a raison des dommages soufferts par des étrangers", *Revue générale de droit international public*, p. 13.

[98] Paul Fauchille, *Traité de Droit International Public*, Tome I, Rousseau & Cie. (eds.), p. 515.

[99] ICJ, Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004 (I), p. 59, para. 119; see also ICJ, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 20 April 2010, p. 77, para. 273.

individual perpetrators), but rather a civil dimension, in the sense of reparations for victims of human rights violations.

The advent of international human rights law has provided avenues for individuals to seek reparations for acts committed by their State of origin[100]. It has significantly expanded the possibility for individuals to seek and obtain redress. The trailblazing instrument was the Universal Declaration of Human Rights[101], which then prompted the adoption of many other similar instruments[102]. The right of victims to seek and obtain a remedy has been codified in human rights treaties and instruments. It has also been firmly reiterated and expanded upon by international jurisprudence[103]. The European Convention on Human Rights[104], the American Convention on Human Rights[105], and the Optional Protocol to the African Charter establishing an African Court of Human Rights[106], provide their Courts the possibility of awarding reparation for violations of a conventional right.

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[100] Riccardo Pisillo Mazzeschi, "International Obligations to Provide for Reparation Claims", in *State Responsibility and the Individual – Reparations in Instances of Grave Violations of Human Rights*, Albrecht Randelzhofer & Christian Tomuschat, Kluwer Law International, 1999, p. 149.

[101] Proclaimed by General Assembly Resolution 217A (III), 10 December 1948.

[102] See generally, e.g. Universal Declaration of Human Rights (Art. 8); the International Covenant on Civil and Political Rights (art. 2(3), 9(5) and 14(6)); the International Convention on the Elimination of All Forms of Racial Discrimination (art. 6); the Convention of the Rights of the Child (art. 39); the Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment (art. 14); the European Convention on Human Rights (art. 5(5), 13 and 41); the Inter-American Convention on Human Rights (art. 25, 68 and 63(1)); the African Charter of Human and Peoples' Rights (art. 21(2)).

[103] *See e.g.*, *Velásquez Rodríguez* Case, Inter-American Court of Human Rights, Serial C, No 4 (1989), par. 174 . *See also Papamichalopoulos* v. *Greece*, E.C.H.R. Serial A, No 330-B (1995), p. 36. *See e.g. Rodriquez* v. *Uruguay* (322/88), CCPR/C/51/D/322/1988 (1994); 2 IHRR 12 (1995); *Blancov* v. *Nicaragua* (328/88), CCPR/C/51/D/328/1988 (1994); 2 IHRR 123 (1995); and *Bautista de Arellana* v. *Columbia* (563/93), CCPR/C/55/D/563/1993 (1995); 3 IHRR 315 (1996). The most impressive and significant jurisprudence on reparations in international human rights law has been developed by the Inter-American Court of Human Rights. This jurisprudence will be studied in the next chapter in the context of a discussion of principles of reparation.

[104] *European convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, entry into force 3 September 1953, CETS No. 5, as amended by Protocol 11 CETS No. 155, 11 May 1994, entry into force 1 November 1998.

[105] American Convention on Human Rights, 22 November 1969, entry into force 18 July 1978, 114 UNTS 123.

[106] Protocol to the African Charter on Human and Peoples' rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, entry into force 25 January 2004, OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997).

The Inter-American Court of Human Rights has interpreted the individual's right to a remedy as stated in Article 25 of the American Convention on Human Rights as requiring States to provide reparation to individuals who have suffered a violation of the Convention. Importantly, the Court has held that a State which violates the Convention is under a "duty to make reparation and to have the consequences of the violation remedied"[107]. The European Court of Human Rights, for its part, has taken a more timid approach to reparations. In its jurisprudence, the Court repeatedly refers to the provision of compensation "where appropriate"[108]. The jurisprudence of both Courts, and especially that of the Inter-American Court of Human Rights, may provide insightful guidance as to the examination of reparations in other fields of international law, particularly in international criminal law. For this reason, the next chapter (chapter 2) focuses on the experience of the Inter-American Court to draw some lessons that can inform, while not directly applicable, the development of a civil dimension to international criminal justice context.

Beyond the jurisprudence of regional human rights Courts, there have been other important developments in this field in the form of *soft law*. Already in 1985, the United Nations adopted the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*[109], whereby the right of victims to obtain reparation was emphasised. The focus of this Declaration was on reparation for victims of domestic crimes[110]. Subsequently, another instrument was adopted by the United Nations General Assembly: the *Basic Principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and international humanitarian law*[111]. The right of victims of gross violations of international human rights law or serious violations of international humanitarian law to obtain reparation was enunciated in Article 15, pursuant to which:

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[107] IACtHR, *Baldeón-García* v. *Peru*, Merits, Reparations and Costs, 6 April 2006, Series C No. 147, para. 147.

[108] See ECtHR, *Aydin* v. *Turkey*, Merits, Grand Chamber, 25 September 1997, 25 EHRR 251, para. 103.

[109] GA Res. 40/34, 29 Nov 1985.

[110] Cherif Bassiouni, "International Recognition of Victims' Rights", *Human Rights Law Review* 6 (2006), pp. 203-279.

[111] GA Res. A/RES/60/147, 16 Dec 2005.

> "In accordance with its domestic laws and international legal obligations, 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."

Other recent documents have also affirmed victims' right to receive reparation. For example, the *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* concluded that, on the basis of human rights law,

> "the proposition is warranted that at present, whenever a gross breach of human rights is committed which also amounts to an international crime, customary international law not only provides for the criminal liability of the individuals who have committed that breach, but also imposes an obligation on States of which the perpetrators are nationals, or for which they acted as de jure or de facto organs, to make reparation (including compensation) for the damage made"[112].

This brief analysis demonstrates that reparation for victims of conflicts is a basic tenet of international human rights law[113]. The concept of individual redress for victims of armed conflict is not as alien as it used to be before the development of international human rights law.

Be that as it may, it remains that, in spite of the impressive number of instruments providing for the possibility of seeking a remedy, as discussed above, there remains a large gap whereby individuals might not obtain redress through international human rights mechanisms. International human rights law is built upon the premise of State responsibility for violations of rights. This explains two limitations of international human rights law for the award of reparations to individual victims of international wrongful acts. The first limitation concerns the fact that victims cannot, under international human rights mechanisms, obtain reparation from individual perpetrators, as a State must have been involved in the violation. As it is widely known, many international crimes are committed by armed opposition or rebel groups, and thus, because the State in question might not held

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[112] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, para. 598.

[113] Jurisprudence of regional human rights Courts provide examples of awards of reparation in relation to armed conflicts. In the European Court of Human Rights, e.g.: *Khatsiyeva et al.* v. *Russia*, Merits, 17 January 2008, unreported, Application No. 5108/02, para. 139; *Varnava et al*. v. *Turkey*, Merits, Grand Chamber, 18 September 2009, unreported, Application No. 16064/90.

accountable, the individual victim cannot use the mechanism of the international human rights system.

The second limitation which stems from this premise is that for a human rights Court (such as e.g. the European Court of Human Rights) to award reparation to victims, there needs to be a violation of the rights recognized in the basic human right instrument of that Court (i.e. the European Convention on Human Rights or the American Convention on Human Rights) and the State against whom reparation is sought must have acceded to the convention. Finally, the question of extraterritorial application of human rights might also restrict the possibility of victims of international armed conflicts to seek redress under international human rights law[114].

Thus, as it can be seen, international human rights law has provided an important avenue for victims who have experienced human rights violations (and victims of armed conflicts) to seek redress, albeit, it does not encompass all victims of violations. This is an interesting point to bear in mind for a later discussion of the appropriateness of a mechanism for individual redress within the realm of international criminal law.

5. International humanitarian law: reparation and its enforcement

In this section, the present chapter examines reparations for violations of international humanitarian law, within the same perspective of the broader framework of victim redress in different fields of international law. It also considers the possibilities and limitations of provisions of reparation under international humanitarian law.

Victims' individual right to reparation under international humanitarian law is a topic of much debate in legal doctrine[115]. It is submitted that there exists an obligation to make

[114] On this question, see generally, Marko Milanovic, "From Compromise to Principles: Clarifying the Concept of State Jurisdiction in Human Rights Treaties", *Human Rights Law Review* 8 (2008), p. 411.

[115] See e.g., Frits Kalshoven, "State Responsibility for Warlike Acts of the Armed forces", *International and Comparative Law Quarterly* 40 (1991), p. 827; Christopher Greenwood, "International Humanitarian Law (Laws of War)", in *The Centennial of the First International Peace Conference,* Frits Kalshoven, Kluwer Law International, 2000, p. 250.

reparation stemming from texts of international humanitarian law[116], as will be further expanded upon below. The controversy however hinges upon whether victims of international humanitarian law violations can claim reparation directly from the offender[117].

In relation to armed conflicts, both international human rights law and international humanitarian law may be applicable, the latter being the *lex specialis*[118]. In the present chapter, this study provides an overview of the question concerning the beneficiaries of reparation for international humanitarian law violations[119]. The present chapter does not aim at an extensive analysis of reparations under international humanitarian law[120].

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[116] Draft Articles on State Responsibility, Article 31; Second Protocol to the Hague Convention for the Protection of Cultural Property, Article 38; First Geneva Convention, Article 51; Second Geneva Convention, Article 52; Third Geneva Convention, Article 131; Fourth Geneva Convention, Article 148; cf., Rule 150 of the ICRC Rules on Customary International Humanitarian Law: "A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused." As to examples of treaty provisions in international humanitarian law that establish an obligation to provide reparation for breaches, Article 3 of the Hague Convention No. IV of 1907 states that: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." Similarly, Article 91 of Additional Protocol I of 1977 states that: "A party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

[117] See e.g., Conor McCarthy, "Victim Redress and International criminal Justice: Competing Paradigms, or Compatible Forms of Justice?", *Journal of International Criminal Justice* 10 (2012), p. 356.

[118] Cf. ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 136 (2004), p. 178.

[119] See Georges Abi-Saab, "The Specificities of Humanitarian Law", in *Studies and Essays of International Humanitarian Law and the Red Cross Principles in Honour of Jean Pictet*, Christophe Swinarski, Nijhoff , 1984, p. 269, where it is argued that international humanitarian law's objective goes "beyond the inter-state levels and [reaches] for the level of the real (or ultimate) beneficiaries of humanitarian protection, i.e. individuals and groups of individuals". See also, Theodor Meron, "The Humanization of Humanitarian Law", *American Journal of International Law* 94 (2000), pp. 239-278.

[120] See generally as to this question: Veronika Bílková, "Victims of War and Their Right to Reparation for Violations of International Humanitarian Law", *Mickolc Journal of International Law* 4 (2007), pp. 1-11.; Christian Tomuschat, "Reparation in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law", in *Promoting Justice, Human Rights and Conflict Resolution through International Law*, Marcelo G. Kohen, Nijhoff, 2007; Rainer Hofmann, "Victims of Violations of International Humanitarian Law: do they have an Individual Right to Reparation against States under International Law?", in *Common Values in International Law: Essays in Honour of Christian Tomuschat*, Pierre-Marie Dupuy et al., Kehl Engel, 2006; Emanuela-Chiarra Gillard, "Reparation for Violations of International Humanitarian

A study by the International Law Association addressing the question of reparations for victims of armed conflict devotes some attention to the conceptualisation of "victims"[121] for purposes of the application of the principles proclaimed therein:

> "1. For the purposes of this Declaration, the term 'victim' means natural or legal persons who have suffered harm as a result of a violation of the rules of international law applicable in armed conflict.
>
> 2. This provision is without prejudice to the right of other persons - in particular those in a family or civil law relationship to the victim - to submit a claim on behalf of victims provided that there is a legal interest therein. This may be the case where the victim is a minor child, incapacitated or otherwise unable to claim reparation."[122]

According to this conception of "victims", there must be (1) a violation of international law applicable in armed conflicts; (2) a harm must have been suffered; (3) there must be a link between the harm suffered and the violation of the international law applicable in armed conflict[123]. It has been argued that international humanitarian law ensures the protection and assistance to individuals that are victims of an armed conflict but when that same individual becomes a victim of a violation of international humanitarian law, the protection given by this field of international law does not seem sufficient[124].

Delving into the provisions that pertain to reparations for violations of international humanitarian law, as far as international armed conflicts are concerned, Article 3 of The Hague Convention IV provides that:

Law", *International Review of the Red Cross* 85 (2003), pp. 529-553.

[121] The word "victim" does not appear in all instruments of IHL. For example, the Geneva Conventions and other treaties do not mention the word "victim" in contrast with the Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977 and the Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.

[122] International Law Association, *Remedies for Victims of Armed Conflict*, 74 International Law Association Report Conference 291, 2010, Article 4, p. 302.

[123] See commentary to: International Law Association, *Remedies for Victims of Armed Conflict*, 74 International Law Association Report Conference 291, 2010, Article 4, p. 302.

[124] Liesbeth Zegveld, "Remedies for Victims of Violations of International Humanitarian Law", *International Review of the Red Cross* 85 (2003), pp. 497-526.

> "A belligerent party which violates the provisions of the [annexed] Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[125]

This same obligation appears in Article 91 of Additional Protocol I to the Geneva Conventions (concerning violations of the Additional Protocol or of the Geneva Conventions of 1949)[126]. The duty to make reparation for violations of international humanitarian law is also stated in Article 38 of the *Second Protocol to the Hague Convention for the Protection of Cultural Property*, and it is implied in the four *Geneva Conventions* of 1949, whereby States cannot absolve themselves for liability incurred in respect of grave breaches: First Geneva Convention, Article 51; Second Geneva Convention, Article 52; Third Geneva Convention, Article 131; Fourth Geneva Convention, Article 148[127].

As to non-international armed conflicts, Common Article 3 to the four Geneva Conventions of 1949, Provisions of Additional Protocol II relating to Non-International Armed Conflicts[128], Article 38 of the Second Protocol to the Hague Convention for the Protection of Cultural Property[129], (which expressly refers to the duty of States to provide

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[125] *Hague Convention (IV) Respecting the Laws and Customs of War on Land*, 18 October 1907, entry into force 26 January 1910, 9 UKTS (1910).

[126] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, entry into force 7 December 1978, 1125 UNTS (1979).

[127] ICRC, Customary International Humanitarian Law, Rule 150: Reparation. 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, entry into force 21 October 1950; 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, entry into force, 21 October 1950; 1949 Geneva Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, entry into force 21 October 1950; 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, entry into force 21 October 1950.

[128] Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, entry into force 7 December 1978, 1125 UNTS 609.

[129] Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, entry into force 9 March 2004, 38 ILM (1999).

reparation, and which applies in any armed conflict), as well as other rules of customary international law form the legal framework for reparation in such types of conflict[130].

6. Conclusion on the legal duty of reparations

From the discussion above, it seems clear that a legal duty exists for States to provide reparations for internationally wrongful conduct, including violation of human rights norms and international crimes. This stems from decisions of international courts, numerous conventions imposing the specific duty to repair, and the ILC Work of State Responsibility, some of which were reviewed above.

Having established this principle, two related questions are pertinent, both of which lay the foundation of one of the premises of this study: whether there is a legal duty for *individuals* who have committed international crimes to pay reparations to *individual victims*. The first concerns the beneficiaries of reparations – that is, only States, or also individual victims? The second question pertains to whether individuals, just as States, can have a legal duty of reparation. These two questions will be addressed next.

IV. THE BENEFICIARIES OF REPARATION UNDER INTERNATIONAL LAW

Having set out the positive legal duty of States to provide reparation for violations of international human rights law and international law, both in international and non-international armed conflicts, an important question to be examined is the beneficiary of such reparation (i.e. who has the right to reparations), and whether individual victims may claim reparations directly. In other words, who can claim reparations from States - the individual who suffered harm or solely other States?

The *Basic Principles* distinguish between the right to a remedy and reparation. The latter is the focus of this study, thus the right to a remedy generally will not be discussed in the present dissertation[131].

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[130] ICRC, *Customary International Humanitarian Law*, Rule 150: Reparation. The ICRC concludes in its study on customary international law that a State that has violated the laws of war in relation to a non-international armed conflict has a duty to make reparation.

[131] Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, in particular Sections VII and IX. See in particular Chapter 1, Section IV (1) of this study

Traditionally, the legal duty of States to repair was not owed directly to individuals, but rather to other States, due to the original architecture of international law as rights and duties among sovereign States. While legally a State's legal duty to repair can be owed to other States, there is also one fundamental question that should be considered.

When the harm is done solely and directly to individuals, is it morally acceptable that the State takes over all rights of reparation from the individual victim (presumably its national) without the consent of the victim, and without his/her participation in the reparation award, and to the exclusion of the any right of reparation the victim may eventually claim? The recent example of the agreement between Turkey and Israel concerning the killing of nine Turkish civilians by Israeli commandos on the Mavi Marmara flotilla set to Gaza Strip in May 2010 is telling. In this case, the State of the victims – Turkey – made an agreement with Israel which excludes any and all rights of individual victims (who actually suffered the harm) to claim reparation[132].

Importantly however if within the realm of international human rights law, individuals are able to claim reparations directly from the State. The entire system of international human rights litigation is based on the premise of individuals claiming reparations from the State. Thus, the traditional dichotomy of an international legal order that is solely on the basis of State vs. State (as having the legal duty and being the beneficiary of reparation) is no longer the only possibility when it comes to reparation.

As discussed above, the *Basic Principles,* provide that victims of gross violations of human rights and serious international humanitarian law violations should be provided with full and effective reparation. Article 18 provides that:

> "In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the

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concerning the right to a remedy and the right to reparations.

[132] See http://www.haaretz.com/israel-news/1.727369.

following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition"[133].

Furthermore, Article 33(2) of the International Law Commission Draft Articles on State Responsibility posits that Part II (which deals with "Content of the international responsibility of a State") "is without prejudice to any right, arising from the international responsibility of a State, which may accrue *directly to any person or entity other than a State*"[134]. Similarly, the commentary on Article 33 furthermore states that:

> "When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights."[135]

The International Committee of the Red Cross ("ICRC") in reviewing the state of customary law regarding reparation in international humanitarian law also asserts a trend enabling victims to seek reparations directly from the State. The ICRC Commentary on Customary International Humanitarian Law concerning Rule 150 (Reparations) cites various examples of individuals seeking reparations directly from States, including: (i) Reparation provided on the basis of inter-State and other agreements; (ii) Reparation provided on the basis of a unilateral State act; (iii) Reparation sought in national courts[136].

A few domestic courts have had to decide cases where individual victims sought reparation from a foreign State, outside the realm of international human rights law, for violations of international humanitarian law[137]. While there have been instances – in

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[133] Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

[134] Emphasis added.

[135] International Law Commission, Commentary on Article 33 of the Draft Articles on State Responsibility.

[136] ICRC, Customary IHL, available at: https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule150#refFn_2_28, accessed in April 2016.

[137] The question of whether or not States have an obligation to pay reparation to individual victims of international humanitarian law violations is intrinsically intertwined with questions of State immunity. See e.g.: Maria Gavouneli, "War Reparation Claims and State Immunity", *Revue Hellénique de droit international* 50 (1997); Brigitte Stern, "Vers une limitation de 'l'irresponsabilité souveraine' des Etats et chefs d'Etat en cas de crime de droit international?", in *Promoting Justice, Human Rights and Conflict Resolution through International Law*: *Liber*

Greece[138] and Italy[139] – where individuals were successful in seeking reparations against a State (for crimes against humanity and violations of international humanitarian law), there is also case law that stands against the possibility for individuals to claim reparation directly from a State[140].

Recently, this question was put to the International Court of Justice in the *Case concerning jurisdictional immunities of the State (Germany v. Italy; Greece intervening)*[141], in relation to the decisions of Greek and Italian Courts mentioned above, which awarded reparation to individual victims against a State (Germany) for violations that occurred during the Second World War. The question of whether or not individuals have a right to reparation (enforceable against a State) under international humanitarian law was debated during the proceedings[142]. Nevertheless, based on its decision that Germany enjoyed immunity under international law, the Court did not deem it necessary to dwell upon this question in the Judgment[143]. It follows that the question of State immunity is a limitation on the possibility of individual victims to obtain reparations from the responsible State.

Amicorum Lucius Caflisch, Marcelo Kohen, Nijhoff, 2007, pp. 511-548.

[138] *Prefecture Voiotia* v. *Federal Republic of Germany*, Hellenic Supreme Court, 4 May 2000, Case no. 11/2000. Note however, that the decision was not enforced due to a lack of authorization by the Minister of Justice of Greece. See also, at the European Court of Human Rights concerning a similar factual background, *Kalougeropoulou and Others* v. *Greece and Germany*, Admissibility, 12 December 2002, Application No. 59021/00.

[139] *Ferrini* v. *Federal Republic of Germany*, Corte di Cassazione (Sezioni Unite), 11 March 2004, 87 *Rivista di diritto internazionale* 539.

[140] See e.g. *Bridge of Varvarin case*, Landgericht (LG) Bonn, 1 O 361/02, NJW 2004, 525, HuV-I 2/2004, 111-113, confirmed by *Oberlandesgericht* (OLG) Köln, 7 U 8/04.

[141] Judgment of 3 February 2012 ("ICJ State Immunity Judgment").

[142] See e.g. *ibid.,* Counter-memorial of Italy, 22 December 2009, chapter V, Section II; Reply of Germany, 5 October 2010, chapter 4, sections 37-41.

[143] See para. 108 of the ICJ State Immunity Judgment. This Judgment has prompted many scholarly commentaries. Recent scholarship concerning this Judgment include: Benedetto Conforti, "The Judgment of the International Court of Justice on the Immunity of Foreign States: a Missed Opportunity", *Italian Yearbook of International Law* 21 (2011); Riccardo Pavoni, "An American Anomaly? On the ICJ's Selective Reading of United States Practice in Jurisdictional Immunities of the State", *Italian Yearbook of International Law* 21 (2011); Carlos Espósito, "Jus Cogens and Jurisdictional Immunities of States at the International Court of Justice: A Conflict Does Exist", *Italian Yearbook of International Law* 21 (2011); Mirko Sossai, "Are Italian Courts Directly Bound to Give Effect to the Jurisdictional Immunities Judgment?", *Italian Yearbook of International Law* 21 (2011).

Be that as it may, it is important to keep in mind that international law is constantly and tirelessly developing in this field. As was posited at the beginning of this century,

> "A decade ago, it would have been generally understood that only the classical approach, which considers war-related individual claims as being subsumed by the intergovernmental arrangements for peace, was consistent with international law as reflected in practice and doctrine. However, the 1990s have witnessed a remarkable, and in some respects revolutionary, attempt to restructure the classical approach to peacemaking and the resolution of matters relating to the international consequences of war. In what may be described as an attempt to replace the traditional exclusive government-to-government process of negotiating a comprehensive peace treaty, efforts were undertaken to adjudicate claims by individuals before regular courts of law."[144]

On the question of reparation to victims of violations of international humanitarian law, it has been stated that

> "[t]here is increasing acceptance that individuals do have a right to reparation for violations of international law of which they are victims. This is particularly well established with regard to human rights law. Not only do many of the specialized human rights tribunals have the right to award 'just satisfaction' or 'fair compensation', but a number of human rights treaties also expressly require States to establish a remedy for violations before national courts. … The courts of various States have considered claims by individual victims of violations of international humanitarian law on a number of occasions and the results of such cases have been far from uniform."[145]

In a similar vein, former President of the International Criminal Tribunal for the former Yugoslavia (ICTY), Judge Jorda, also stressed this development of international law for the benefit of individuals in saying 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. These provisions may now be construed to the effect that the obligations they enshrine are assumed by States not only towards other

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[144] Rudolf Dolzer, "The Settlement of War-related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945", *Berkeley Journal of International Law* 20 (2002), p. 296.

[145] Emanuela-Chiara Gillard, "Reparation for Violations of International Humanitarian Law", *International Review of the Red Cross* 85 (2003),, pp. 536-537.

> 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."[146]

History demonstrates, however, that reparation involving States has been generally settled by other means than an individual action against a responsible State: as for example, through claims processes and lump-sum agreements between States, especially relating to the Second World War, but also more recently[147]. Furthermore, claims commissions and arbitral tribunals have been set up to deal with reparation claims[148]; without purporting to be exhaustive, some examples of such institutions established to settle claims of redress arising out of international armed conflicts, include, in recent years, the Eritrea-Ethiopia Claims Commission[149], the Housing and Property Claims Commission (concerning the 1998-1999 conflict in Kosovo)[150], the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina[151].

Thus, it can be said that under certain circumstances, States as well as individuals may be the beneficiaries of reparations claimed directly from a State. It stems from the foregoing however that in many instances individual victims are left without reparation outside the international human rights system. This is because, *inter alia*, of the absence of arrangements for reparations or because the reparation received does not reach the individual victims. The analysis above demonstrates that it is not ideology that is driving

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[146] *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,* para. 597, citing a letter dated 12 October 2000 of Judge C. Jorda (the then President of the International Criminal Tribunal for the former Yugoslavia) to the United Nations Secretary General.

[147] See generally, Pierre d'Argent, *Les Réparations de Guerre en Droit International Public*, LGDJ, 2002; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules*, Cambridge University Press, 2005, pp. 539 et seq.

[148] See generally, Howard Holtzmann and Edda Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, Oxford University Press, 2007.

[149] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, 40 ILM 260 (2001). It does not grant individuals standing to submit claims.

[150] UNMIK Regulation No. 1999/23, 15 November 1999, UNMIK/REG/1999/23.

[151] Article 1, Annex 7, General Framework Agreement for Peace in Bosnia and Herzegovina, 35 ILM 75 (1996), "Dayton Agreement".

the development of reparation for violations of international law but rather the remnants of the historical conception of international law as inter-State relationships.

Be that as it may, the fact that individuals can now claim reparation under international law does not by implication create an international obligation on individuals rather than States to repair. Does such a legal duty exist under international law and if so, what is its content? These are the questions that the present study turns to next.

V. CONCEPTUALIZING A CIVIL DIMENSION OF INTERNATIONAL JUSTICE: A NEW PARADIGM AND THE DEVELOPMENT OF AN INDIVIDUAL LEGAL DUTY TO REPAIR

Having explored, on the one hand, some key concepts of two justice theories that may provide some theoretical foundations for international criminal law, and on the other, the development of the duty of States to pay reparation in other areas of international law, this section now discusses the development of the legal basis of the duty of reparation for individuals.

The paradigm of this study is individual versus individual (i.e. individuals claiming a right to reparation from other individuals). Thus, the fundamental questions relate to the legal foundation for this paradigm. The legal duty discussed above is the legal duty of a State to provide reparations. The crucial question is thus: what is the basis of the duty upon individuals?

Under domestic law, individuals that commit crimes may also face civil or tort liability towards their victims, through the system of tort responsibility or *responsabilité civile.* Can this civil dimension be transposed into the international law context? Should criminal and civil liability be blended at the international level when it comes to international crimes? In this study, this is presented as the civil dimension of international criminal justice, which attaches civil liability to the accused and the possibility of civil claims of reparation by victims.

At the international level, alongside a right to reparation that victims may claim under certain circumstances from States as discussed above, it is worth recalling that the United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation*

for Victims of Gross Violations of International Humanitarian Law confirms that both States and *individuals* have a legal *duty* to provide reparations for violations of human rights and international humanitarian law. According to the Principles: "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." Furthermore, where a *natural or a legal person* is found liable, "such party should provide reparation to the victim"[152]. Thus, under international law, according to the *Basic Principles*, a legal duty of reparation to victims exists for States as well as for individual perpetrators.

Under international criminal law, with the advent of the Rome Statute creating the ICC, individual perpetrators found guilty of crimes under the jurisdiction of the Court may have a legal duty of reparation. The individual right to reparation, and its accompanying duty imposed on individuals, have developed at a slower pace than international human rights law[153]. Indeed, a study on reparations in international criminal law explained that:

> "The idea that individuals are entitled to have international judicial fora deciding upon and awarding reparations is not new. First the European Court of Human Rights and then the Inter-American Court of Human Rights, have for decades been awarding victims reparations. As the first part of this study shows, the individual's right to reparation is a fundamental human right that is not only expressly guaranteed by global and regional human rights instruments but also routinely applied by international and national courts. Yet, it is only with article 75 of the Rome Statute that the idea of restorative justice against the individual perpetrators of violations has become a dimension of international criminal justice"[154].

Thus, it is not the fact that individuals can now claim a legal right to reparation under international law that created an international obligation (under international criminal law)

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[152] United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law, adopted by the UN General Assembly Resolution 60/147 of 16 December 2005, principle 15.

[153] Christine Evans, "Reparations for Victims in International Criminal Law", *Raoul Wallenberg Institute of Human Rights and Humanitarian Law*, (2012).

[154] Shepard Forman, "The International Criminal Court Reparations to Victims of Crimes (Article 75 of the Rome Statute) and the Trust Fund (Aritcle 79): Recommendations for the Court Rules of Procedure and Evidence", Prologue, prepared by the Center for International Cooperation, New York University, for the 26 July – 13 August 1999 Meeting of the Preparatory Commission for the International Criminal Court.

on individuals to repair. The basis of this duty to repair imposed on individuals rather than States comes from international criminal law itself, with the advent of the Rome Statute, which created a legal duty upon individuals. Article 75 of the Rome Statute, which will be examined in more detail in the following chapters, creates thus such duty:

> "1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation [...]
>
> 2. The Court may make an order directly against a convicted person specifying reparations [...] Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79".

This duty was confirmed by the Appeals Chamber of the ICC in the Court's first case that dealt with reparations (this case will be discussed in detail below). The Appeals Chamber unequivocally confirmed that there exists a legal duty of reparation upon individuals in international criminal law. The Chamber recognized a "principle of liability to remedy harm" and stated that such liability flows "from the individual criminal accountability of the perpetrator"[155] This is an important point: according to the Appeals Chamber, the duty to repair flows from the criminal responsibility of the accused, contrary to a pure civil model where the guilt or innocence of the accused generally does not matter. In the ICC context, the Appeals Chamber decided, the civil liability is a corollary of criminal liability of the individual perpetrator.

Importantly, the Appeals Chamber also affirmed that the individual perpetrator (who is found guilty of crimes within the jurisdiction of the ICC) bears the legal duty to repair, even if the payment is to be made through the TFV. In other words, the civil liability rests upon the *individual perpetrator*, regardless of his/her eventual indigence condition[156].

Thus, in international criminal law, the legal duty to provide reparations is imposed on individuals from a different source than the ones discussed earlier in this chapter – it is

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[155] ICC, Appeals Chamber, "Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations of 7 August 2012', 3 March 2015, ICC-01/04-01/06-3129, paras. 99 and 101.

[156] *Ibid.,* para. 105.

a creation of international law itself, and it is included in the formative texts of international criminal law. This legal basis is not limitless however. Reparation is not to be awarded to any and all victims of every international crime. There are some inherent limitations. First, reparation is to be awarded against a convicted person; thus, if an accused is not found guilty, then reparation cannot be awarded. Reparation is also for crimes within the jurisdiction of the Court, and not for all international crimes and/or human rights violations. These elements will be further evaluated in chapter 3 concerning the operationalization of the duty to repair in international criminal law at the international level. At this juncture, it is sufficient to simply introduce some of these limitations in order to draw the contours of the definition of the legal duty to repair imposed on individuals.

Furthermore, this duty on individuals for reparations in relation to international crimes is not in any way mutually exclusive of the responsibility of States. As Muttukumaru explains, the Rome Statute "does not diminish any responsibilities assumed by States under other treaties and will not – self-evidently – prevent the Court from making its attitude known through its judgements in respect of State complicity in a crime"[157]. State responsibility in regard to reparations to victims remains, as already discussed[158]. The legal duty imposed on individuals for reparations is additional to that of the State, just as the criminal responsibility of individuals did not do away with the responsibility of States, as discussed above.

This study does not claim that an individualized approach to reparation for international crimes (i.e. individual duty to repair) is more progressive or better than a State-based approach, which existed prior to this development in international criminal law. They are complementary; one is not to substitute the other, and they can co-exist. As it has been stated:

> "[R]esponsibility for reparations should maintain an element of state responsibility as those considered to have carried the greatest responsibility for serious violations may have exercised functions of state

[157] Christopher Muttukumaru, "Reparations to Victims", in *The International Criminal Court: the Making of the Rome Statute, Issues, Negotiations, Results*, Roy S. K. Lee, Kluwer Law International, 1999, pp. 262– 270.

[158] In fact, Article 25(4) of the Rome Statute asserts that: "no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law".

> authority. There are inherent dangers in shifting responsibility from states towards individuals as this may ultimately leave victims without redress. While the shift towards recognising victims and their right to reparations in international criminal law is welcome and positive, ideally this should operate alongside measures to establish potential state responsibility *vis-à-vis* victims"[159].

In this regard, there may be cases where maintaining a State-based approach to reparations for international crimes will be more suitable. For example, when States are involved and individual perpetrators are declared indigent and may not be able to provide reparation for victims. Furthermore, it is crucial to bear in mind one important aspect of international crimes: their collective nature. This can be seen as a mismatch with the idea of a duty on individuals to provide reparations due to the collective nature of international crimes. This is an important question that advocates in favour of a complementary approach to reparations for international crimes: individual reparations shall exist and further develop alongside States' duty to repair, which although not the main focus of this study, was briefly considered above[160].

Conversely, there may be instances where the State is not involved in international crimes, and thus, victims cannot claim State responsibility to ground reparations, as for example in cases of international crimes by rebel groups. Or, it may be that if reparations are not sought within international criminal justice processes, victims may find hurdles to obtaining reparations from the State[161]. Accordingly, this study argues that a complementary approach to reparations, both State-based and individualized, is the most appropriate manner to deal with the complexities of international mass crimes. In this prism, this study thus proposes to examine the paradigm of the individual *vis-à-vis* the individual, or in other words, the civil dimension of international criminal justice.

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[159] Christine Evans, "Reparations for Victims in International Criminal Law", *Raoul Wallenberg Institute of Human Rights and Humanitarian Law*, (2012).

[160] For further insightful analyses on States' duty to repair, see: Albrecht Randelzhofer, and Christian Tomuschat, *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights*, Nijhoff , 1999; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, 2002.

[161] See discussion above concerning State immunity and the decision of the ICJ in the case of *Germany v. Italy.*

Interestingly, this link complementarity between individual and State responsibility with regards to reparation is expressed in Articles 1 and 2 of the European Convention on Compensation of Victims of Crime:

> "1. When compensation is not fully available from other sources the State shall contribute to compensate:
> a those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;
> b the dependants of persons who have died as a result of such crime.
> 2. Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished"[162].

VI. CONCLUDING REMARKS

Some conclusions can be drawn from the discussion above. On a legal theory level, international criminal justice has been traditionally aligned with theories of punishment, retribution and deterrence. International criminal justice as conceived today applies a mix of theories, with elements of retributive and restorative or reparative justice theories.

Upon having considered the possibilities of reparation for victims in other domains of international law, it stems that, one way or another, there is some avenue of victim redress for violations of international law. This chapter has reviewed how international law has evolved to allow individuals (victims) to claim reparations for international crimes. It has also overviewed the legal duty of States, and the construction of a legal duty upon individuals to provide reparations for victims. This chapter has thus demonstrated the evolution of international law concerning reparations: from an earlier singular state-State based approach, international law has evolved to include a State vis-à-vis individuals model and, more recently, also individuals versus individuals.

It has also been argued that an individualized approach to reparations for mass international crimes is not always better or more appropriate than the traditional State-based approach; it simply offers an additional avenue for victims to obtain redress and complement the criminal dimension of international justice with a civil dimension.

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[162] European Convention on the Compensation of Victims of Violent Crimes, European Treaty Series, European Treaty Series No, 116, Strasbourg, 24.XI.1983.

The enforcement of reparations is a different matter however. The brief overview above of the wider legal framework of victim redress under international law demonstrates that while reparations claimed directly by individuals under international law (generally speaking) is possible under certain circumstances, it remains that in each field of international law, there are gaps pertaining to the possibility of obtaining redress.

Having laid this theoretical foundation on justice theories and justifications for punishment within international criminal law, and having construed the legal basis of the duty of reparation for individuals, the next chapter focuses on the contents of this legal duty and to what extent the content of the duty of reparation upon States can inform the latter. It does so by looking at one specific system of victim redress, reparations directly from the State for human rights violations via international human rights law and mechanisms. The next chapter thus examines this question through the lens of one specific case study, the jurisprudence of the Inter-American Court of Human Rights.