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Beyond retribution: Individual reparations for IHL violations as peace facilitators

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Abstract

Three decades after the United Nations Security Council invoked its Chapter VII powers to create the ad hoc *criminal tribunals, there can be little doubt that the prosecution of individuals responsible for serious violations of international humanitarian law (IHL) contributes to restoring and maintaining peace. While there is little doubt that the reparatory function of justice is just as crucial as retribution, under international law today, reparations for IHL violations remain harrowingly insufficient or borderline non-existent. In scholarship and strategic litigation, various attempts have been made to distil an individual right to*

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reparations from black-letter IHL. This article argues that such approaches are doomed to fail, as procedural aspects of international obligations rarely, if ever, emerge through the evolution of an existing customary international obligation, let alone via the crystallization of a new customary international norm. They are usually triggered by a political shift that makes States adopt novel regulations setting forth the jurisdictional ramifications of enforcing a pre-existing right or obligation. This article thus advances a two-fold argument. First, it asserts that States' increased compliance with the obligation to provide compensation for violations of IHL attributable to them would contribute to "the restoration and maintenance of peace" just as much as the prosecution of persons responsible for serious violations thereof. Second, it argues that the individual right to claim reparations for IHL violations can only be established through a political decision of States, and that the establishment of an international mechanism for Ukraine might be an important precedent for the evolution of the current international system.

Keywords: international humanitarian law, reparations, individuals, peace processes, compensation, recognition, reconciliation, reparation mechanisms.

Introduction

Armed conflict is an inherently harmful phenomenon. According to the available data, in 2022 alone, around 237,000 people died as a result of armed conflict;[1] the amount of material damages is often so immense that it is hard to estimate.[2] As the primary body of law governing the conduct of hostilities during armed conflict, international humanitarian law (IHL), aims to, as much as possible, strike a balance between the conduct of warfare and considerations of humanity.[3] While this role of IHL is widely recognized, its potential function of facilitating the transition to peace remains under-explored and under-conceptualized.

The present paper attempts to fill this gap by describing how ensuring accountability for IHL violations can contribute to the post-conflict peace process.[4] The strong link between criminal justice and peace has long been recognized; as the United Nations (UN) aptly reiterates, "[p]roperly pursued,

1 Bastian Herre, Lucas Rodés-Guirao, Max Roser, Joe Hasell and Bobbie Macdonald, "War and Peace", *Our World in Data*, 2023, available at: https://ourworldindata.org/war-and-peace (all internet references were accessed in April 2024).

2 The March 2023 joint estimate of the United Nations (UN), European Union and World Bank puts the costs of post-war reconstruction in Ukraine at $411 billion (the equivalent of €383 billion). World Bank, "Updated Ukraine Recovery and Reconstruction Needs Assessment", 23 March 2023, available at: www.worldbank.org/en/news/press-release/2023/03/23/updated-ukraine-recovery-and-reconstruction-needs-assessment.

3 Michael N. Schmitt, "Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance", *Virginia Journal of International Law*, Vol. 50, No. 4, 2011.

4 While there are several possible definitions and concepts of accountability, for the purpose of this article, the focus will be on elements of accountability that emphasize elements of redress, specifically compensation.

accountability for atrocity crimes can serve not only as a strong deterrent, it is also key to successful reconciliation processes and the consolidation of peace in post-conflict societies".[5] This paper will endeavour to demonstrate that the intimate relationship between justice and peace goes beyond criminal liability for atrocity crimes and extends to non-criminal responsibility for all violations of IHL. In fact, despite the criminal liability of individuals being in the spotlight since the post-Cold War proliferation of international criminal courts and tribunals, recent scholarship increasingly recalls that "[u]nder relevant IHL treaties, state responsibility provides the primary consequence in case of transgressions, while the individual criminal responsibility for war crimes supplements the former and is only mandatory for the so-called grave breaches".[6]

That said, non-criminal responsibility for IHL violations has so far been a largely theoretical exercise. As this article will set out in more detail below, States have been historically reluctant to provide reparations for war-related damages, and even those international criminal courts and tribunals which were given the mandate to prosecute individuals suspected of serious violations have been lambasted for failing to consider the harm of individual victims adequately.[7]

All of this paints a bleak picture for those victimized by violations of IHL. In an area that legal considerations should govern, reparations for individuals are often still very much dependent on *ad hoc* solutions and political goodwill rather than being an automatic consequence of legal processes. Instead of courts, States have seemingly favoured the use of *ad hoc*-founded institutions,[8] domestic programmes,[9] *ex gratia* payments[10] or, most damningly, the non-granting of any

5 UN, "Accountability for Atrocity Crimes", available at: www.un.org/en/genocideprevention/accountability.shtml.

6 Paola Gaeta and Abhimanyu George Jain, "Individualisation of IHL Rules through Criminal Responsibility for War Crimes and Some (Un)intended Consequences", in Jennifer Welsh, Dapo Akande and David Rodin (eds), *The Individualization of War*, Oxford University Press, Oxford, 2019, p. 2.

7 With perhaps the failure to consider the position of victims during the Nuremberg Trials as the most famous example: see Yael Danieli, "Reappraising the Nuremberg Trials and Their Legacy: The Role of Victims in International Law", *Cardozo Law Review*, Vol. 27, No. 4, 2005, p. 1641; Luke Moffett, *Justice for Victims before the International Criminal Court*, Routledge, London, 2016, p. 61. Likewise, the International Criminal Tribunal for the former Yugoslavia (ICTY) also did not make reference to reparations in its mandate: see Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge University Press, Cambridge, 2012, p. 91. For a critique of the International Criminal Court, see Luke Moffett and Clara Sandoval, "Tilting at Windmills: Reparations and the International Criminal Court", *Leiden Journal of International Law*, Vol. 34, No. 3, 2021, p. 752. Proceedings there have also been labelled as more "symbolic than real": see Elizabeth Salmón and Juan Pablo Pérez-León Acevedo, "Reparation for Victims of Serious Violations of International Humanitarian Law: New Developments", *International Review of the Red Cross*, Vol. 104, No. 919, 2022, p. 1341.

8 Such as the UN Claims Commission (UNCC) after the Iraqi invasion of Kuwait, which notably compensated for all damages resulting from the invasion. See Emanuela-Chiara Gillard, "Reparation for Violations of International Humanitarian Law", *International Review of the Red Cross*, Vol. 85, No 851, 2003, p. 551.

9 For an example of the practice in Colombia, see Julián Guerrero Orozco and Mariana Goetz, "Reparations For Victims in Colombia: Colombia's Law on Justice and Peace", in Carla Ferstman, Mariana Goetz and Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*, Brill Nijhoff, Leiden, 2009.

10 Which might impede future claims: see Steven van de Put, "Ex Gratia Payments and Reparations: A Missed Opportunity?", *Journal of International Humanitarian Legal Studies*, Vol. 14, No. 1, 2023.

form of redress,[11] and access to a permanent judicial institution with a mandate to adjudicate individual claims of IHL violations and grant reparations remains a utopia.[12] This situation provides a contrast with broader developments within international law – a lot of ink has by now been spilt on the "humanization" of international law and the ongoing processes towards recognizing individuals not only as objects but also as subjects of/under international law.[13] These developments have had some impact on the interpretation and application of IHL,[14] but so far they have not substantially influenced the modalities of enforcing accountability for IHL violations.[15]

Much of the ongoing debate regarding the right of individuals to claim reparations based on violations of IHL revolves around the question of whether or not such a right can be distilled from IHL as such.[16] The authors assert that this is an incorrect way of approaching the problem. Procedural aspects of international obligations rarely, if ever, emerge through the evolution of an existing customary international obligation, let alone via the crystallization of a new customary international norm. Rather, they are triggered by a political shift that makes States – whether through multilateral, regional initiatives or the organs of existing international organizations – adopt novel regulations setting forth the jurisdictional ramifications of enforcing a pre-existing right or obligation.

This article thus aims to provide an overview of two main arguments: first, that there is widespread support for the theory that States' increased compliance with the obligation to provide compensation for violations of IHL attributable to them would contribute to "the restoration and maintenance of peace"[17] just as

11 As seen in several of the examples cited in the following part of this paper.

12 Although academic arguments have been made for such a procedure: see Jann K. Kleffner, "Improving Compliance with International Humanitarian Law through the Establishment of an Individual Complaints Procedure", *Leiden Journal of International Law*, Vol. 15, No. 1, 2002.

13 See Theodor Meron, *The Humanization of International Law*, Brill, Leiden, 2006, p. 271; Tom Dannenbaum, "The Criminalization of Aggression and Soldiers' Rights", *European Journal of International Law*, Vol. 29, No. 3, 2018; Eliav Lieblich, "The Humanization of *Jus ad Bellum:* Prospects and Perils", *European Journal of International Law*, Vol. 32, No. 2, 2021.

14 See, in general, Lawrence Hill-Cawthorne, "Rights under International Humanitarian Law", *European Journal of International Law*, Vol. 28, No. 4, 2017.

15 On some of these issues, specifically in relation to IHL, see Noëlle Quénivet and Cátia Lopes, "Individuals as Subjects of International Humanitarian Law and Human Rights Law", in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger*, Brill, Leiden, 2008.

16 See, *inter alia*, Frits Kalshoven, "State Responsibility for Warlike Acts of the Armed Forces", *International and Comparative Law Quarterly*, Vol. 40, No. 4, 1991, p. 843; Liesbeth Zegveld, "Remedies for Victims of Violations of International Humanitarian Law", *International Review of the Red Cross*, Vol 85, No. 851, 2003, pp. 497–507; C. Evans, above note 7, p. 32: Paola Gaeta, "Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?", in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011; Shuichi Furuya, "The Right to Reparation for Victims of Armed Conflict", in Christian Marxsen (ed.), *Reparation for Victims of Armed Conflict*, Cambridge University Press, Cambridge, 2021, pp. 12–30 (Furuya does display an awareness that this is ultimately also a political problem; see p. 63).

17 In early 1990, when the UN Security Council created the *ad hoc* tribunals for the former Yugoslavia and Rwanda, it relied on the Chapter VII powers, "convinced that … the establishment of [the tribunals] would contribute to the restoration and maintenance of peace". See the preambles of UNSC Res. 827, 25 May 1993, and UNSC Res. 955, 8 November 1994.

much as the prosecution of persons responsible for serious violations thereof; and second, that the actual implementation of these reparations is currently lacking.[18] To wit, we consider that just as the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) in the mid-1990s marked a recognition that prosecution of serious violations of IHL facilitates the peace process,[19] the creation of an international mechanism for Ukraine could form an important precedent and contribute to the realization that individually provided reparations for the injury caused by IHL violations would result in the consolidation of peace in post-conflict societies.

This article is composed of four main parts and proceeds as follows. After providing a historical backdrop of post-wartime reparations and their uneasy evolution from a political tool to a legal obligation; the first part draws on broader theoretical literature to highlight the role that reparations play in helping societies transition from armed conflict to sustainable, durable peace. The second part outlines the contemporary legal framework regarding individual reparations for IHL violations and examines the relevant case law to demonstrate why the individual right to claim reparations, as an essentially procedural element, cannot evolve on the international plane without an international precedent or national implementation. The third part examines how an international mechanism for Ukraine, if successful, could provide further momentum for the implementation of individual reparations. The final part provides some concluding remarks.

Before proceeding with the analysis, some elements are worth highlighting. As noted in the opening paragraph of this introduction, warfighting in general and the conduct of hostilities in particular are inherently destructive. It is important to underline, however, that not every civilian damage or death automatically constitutes a violation of IHL for which one could claim reparation.[20] In particular, injury resulting from collateral damage, as long as such injury is not excessive, would not constitute an IHL violation. Furthermore, reparations here will be defined in a relatively narrow sense: although the evolving practice regarding reparations has led to a great number of modalities being recognized as reparations,[21] the emphasis in this paper will primarily be on the concept of compensation.[22]

18 Patryk I. Labuda, "Beyond Rhetoric: Interrogating the Eurocentric Critique of International Criminal Law's Selectivity in the Wake of the 2022 Ukraine Invasion", *Leiden Journal of International Law*, Vol. 36, No. 4, 2023.

19 Mark A. Drumbl, "Toward a Criminology of International Crime", *Ohio State Journal on Dispute Resolution*, Vol. 19, No. 1, 2003, p. 265.

20 For this notion and a critique of it, see Emily L. Camins, "Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law", *International Journal of Transitional Justice*, Vol. 10, No. 1, 2016, p. 145.

21 UNGA Res. 60/147, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", 15 December 2005.

22 This is mainly a result of compensation for violations of IHL currently being an area in which we have not yet seen that much willingness on the part of States to engage, unlike for example criminal prosecutions as a measure of satisfaction.

Fair, individual reparations as peace facilitators

Whereas individual reparations for violations of IHL are still a rarity, there is some historical practice of reparations after armed conflict and during peace processes. Before considering the potential role of reparations in peace processes, it is worth briefly sketching out how this concept has developed. Historically, post-war reparations were seen as simply another form of bounty that the victor could claim. Exemplary of this viewpoint is the work of Borchard, who wrote:

> If his country should be the conqueror, indemnities may be demanded from the defeated nation, but his pecuniary remedy then depends on the bounty of his own state … If the transgressor of the rules should be victor in the conflict, no legal means exists for compelling him to accord redress to injured alien enemies.[23]

Reparations here were thus not a result of any legal obligations but were simply a political means that the victor could use to extort extra gains from the armed conflict. Simply put, back in the Middle Ages, reparations were more of a political tool than a legal obligation. Reparations were often incomplete, especially in the sixteenth and seventeenth centuries, as States favoured peace over accountability. This led to a carefully crafted approach to post-war compensation schemes by the parties involved, as "reparation, explicitly allowed under these peace treaties, was decided with careful measure, pragmatism and, most characteristically, a politico-legal approach".[24]

An important change in this regard was marked by the First World War, in the aftermath of which reparations seem to have been provided out of guilt.[25] This ultimately led to a more legal-based reasoning approach towards reparations, allowing for liabilities to be decided on specific grounds and no longer simply being something the winner could claim.[26] This was first done in the form of specifically conducted bilateral treaties,[27] but as international law developed,[28] it became recognized that States do have a standing obligation to provide reparations for violations unless States Parties waive such a right.

As international law and practice have evolved, the value of individual reparations for war-related injuries has become broadly recognized.[29] To flesh out

23 Edwin M. Borchard, *Diplomatic Protection of Citizens Abroad or the Law of International Claims*, Banks Law Publishing, Cleveland, OH, 1919, p. 251.
24 Shavana Musa, *Victim Reparation under the Ius post Bellum: An Historical and Normative Perspective*, Cambridge University Press, Cambridge, 2019, p. 240.
25 Richard M. Buxbaum, "A Legal History of International Reparations", *Berkeley Journal of International Law*, Vol. 23, No. 2, 2005, p. 320.
26 Marcus M. Payk, "'What We Seek Is the Reign of Law': The Legalism of the Paris Peace Settlement after the Great War", *European Journal of International Law*, Vol. 29, No. 3, 2018, p. 817.
27 Erik V. Koppe, "Compensation for War Damage Resulting from Breaches of Jus ad Bellum", in Andrea de Guttry, Harry H. G. Post and Gabriella Venturini (eds), *The 1998–2000 Eritrea–Ethiopia War and Its Aftermath in International Legal Perspective: From the 2000 Algiers Agreements to the 2018 Peace Agreement*, T. M. C. Asser Press, The Hague, 2021, p. 521.
28 See the analysis presented in the following part of this paper.
29 For the potential positive effects of reparations, see Lisa Laplante, "Just Repair", *Cornell International Law Journal*, Vol 48, No. 3, 2015; Luke Moffett, *Reparations and War: Finding Balance in Repairing the Past*, Oxford University Press, Oxford, 2023, pp. 15–37.

various facets of this issue, this section will relate the above considerations to establishing a connection with a successful peace process and will discuss how recognizing individual reparations can contribute to such efforts. This is supported by reference to the range of roles that reparations can play, as either compensation for harm or recognition of a wrong.

Reparations as compensation for harm

The traditional perception of reparations is that of payments which serve to replace lost utility. The notion is here that the offender has "gained" in the sense that the victim has "lost" something, and that a transfer is needed between the parties to even out this transaction, representing the traditional perception of justice.[30] Under such an approach, compensation ensures that the victim has not lost something in the sense of net utility.[31] In a similar fashion, it aims to increase the cost for a potential offender in order to make it less likely that they will commit a violation.[32]

Yet, questions have been asked regarding the viability of this approach. It has been argued that, in many cases, reparations are not able to be reduced to simple gains and losses of utility. This has led to arguments that whereas a precise calculation might not be possible, reparations at least reflect the notion that some transfer should take place.[33] Others have further critiqued the concept, arguing that the notion risks commodifying certain undesirable behaviours by only putting a monetary price on the behaviour.[34] These considerations have led to a critique of such an approach to reparations, transforming the perception of how and what this process should look like. This is perhaps best phrased by Nussbaum, who argues that these economic approaches represent "[a] dogma of neoclassical economics, and of rational choice theory, [which holds] that we can deliberate rationally only about the instrumental means to ends, and not about the content of ends themselves".[35]

Likewise, such reasoning has been supported by a more general critique of utilitarian approaches towards rights.[36] Some concepts, such as human dignity, might ultimately outweigh any utilitarian grounding.[37]

In the present day and age, it would then also be a significant stretch to reduce reparation to mere compensation for utility lost. Whereas that is still a

30 Aristotle, "Nicomachean Ethics", trans. W. D. Ross, available at: http://classics.mit.edu/Aristotle/nicomachaen.mb.txt.
31 Robert Cooter and Thomas S. Ulen, *Law and Economics*, Pearson Education, London, 2014, p. 406.
32 Richard A. Posner, "An Economic Theory of the Criminal Law", *Columbia Law Review*, Vol. 85, No. 6, 1985, p. 1195.
33 Adrian Vermeule, "Reparations as Rough Justice", *Nomos*, Vol. 51, 2012, p. 158.
34 See, in general, Uri Gneezy and Aldo Rustichini, "A Fine Is a Price", *Journal of Legal Studies*, Vol. 29, No. 1, 2000.
35 Martha C. Nussbaum, "Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics", *University of Chicago Law Review*, Vol. 64, No. 4, 1997, p 1197.
36 David Lyons, "Utility as a Possible Ground of Rights", *Noûs*, Vol. 14, No. 1, 1980, p. 27.
37 See also the consideration on the nature of law in Martti Koskenniemi, "Imagining the Rule of Law: Rereading the Grotian 'Tradition'", *European Journal of International Law*, Vol. 30, No. 1, 2019, p. 50.

function of reparations, they are no longer limited to a pure utility transfer. Instead, broader consideration has also been given to the fact that reparations carry a particular normative element with them. That, in turn, implies a second function of reparations, crucial under the increasingly humanizing international law – a recognition of a wrong.

Reparations as recognitions of wrong

The second function of reparations, crucial in the context of armed conflict, is that they serve to highlight a notion of recognition. This represents the further notion that reparations express that a particular conduct was indeed unlawful and that the injury resulting from it should therefore be compensated. Exemplary of this reasoning has been the work of Honneth. The key here is that legal rights represent a form of legal autonomy, which is essential for all human beings to establish a sense of autonomy, equal treatment, and an egalitarian character.[38] In this sense, violations are an assault on such a social relationship and legal autonomy, which subsequently needs to be recognized through reparations.

So conceived, violations are more than a simple negative form of utility which needs to be compensated. They highlight the vulnerability of individuals, an aspect evident in the context of armed conflicts.[39] In this way, the approach centred on recognition aims to move away from the approach centred on calculating damages and serves as a starting point for "the potential that crime and conflict are approached as lived experiences of people first, rather than as abstract transgressions of a rationally constructed order".[40]

Undermining adequate reparations programmes, in this context, can lead to humiliation, representing "any sort of behaviour or condition that constitutes a sound reason for a person to consider his or her self-respect injured".[41] It seemingly portrays that the individual is not entitled to similar legal protections as other parties, as reparations are currently denied; the mutual recognition which is usually present then gets denied through non-engagement with the notion of a violation.[42] Reparations subsequently serve as more than utility and represent "public acknowledgements of victims' harm and symbolic redress to reaffirm their dignity".[43] In this way, justice and recognition are intimately tied

38 Axel Honneth, "Recognition and Justice: Outline of a Plural Theory of Justice", *Acta Sociologa*, Vol. 47, No. 4, 2004, p. 359.
39 Antony Pemberton and Rianne Letschert, "Victimology of Atrocity Crimes", in Barbora Holá, Hollie Nyseth Nzitatira and Maartje Weerdesteijn (eds), *The Oxford Handbook on Atrocity Crimes*, Oxford University Press, Oxford, 2022, p. 463.
40 Anthony Pemberton, "Time for a Rethink: Victims and Restorative Justice", *International Journal of Restorative Justice*, Vol. 2, No. 1, 2019, p. 13.
41 Avishai Margalit, *The Decent Society*, Harvard University Press, Cambridge, MA, 1996, p. 9.
42 A. Honneth, above note 38, p. 354.
43 Luke Moffett, "Transitional Justice and Reparations: Remedying the Past?", in Cheryl Lawther, Luke Moffett and Dov Jacobs (eds), *Research Handbook on Transitional Justice*, Edward Elgar, Cheltenham, 2019, p. 380.

together.[44] This relationship also gives a first indication of how a lack of reparation might lead to resentment, impeding potential peace negotiations.

Highlighting the recognition element inherent in reparations also allows us to consider their narrative impact. Reflecting on the narrative value of reparations is often essential, especially after periods of armed conflict. A famous example of this function is the case of the Madres de Plaza de Mayo (Mothers of Plaza de Mayo), where reparations were structured in such a way that they supported "the theory of the 'two devils' – which conferred moral equality between state and guerrilla terror".[45] Such a narrative was unacceptable to the Madres, as it failed to portray them as victims; instead, it more or less sketched an image of profiteers who aimed to gain monetarily from their situation.

In these two ways, we can see that reparations are currently accepted as representing an important mechanism enabling individuals to be redressed after violations have occurred. The question remains, however, how this can affect a potential peace process and what the role of reparations can be in this context. This will further set the scene for the consideration of the non-granting of an individual right of redress through a more theoretical lens.

The role of reparations in peace processes

Setting out these functions of reparations also highlights in a broader sense which roles reparations can play during a peace process. While we have seen the presence of reparations in some form throughout history, these have generally not been able to be claimed by individuals. Many of the positive effects that reparations could potentially have are, therefore, currently not explored.

Allowing for individual reparations could address some of the critiques of reparations being used to sketch narratives that suit other parties' interests. Examples here can be found in Colombia, where the situation is recognized as an armed conflict instead of a legitimate government struggle against armed groups. By allowing individual claims and an independent judicial actor to look at these claims, the argument would be that the risks of such practices should decrease.[46]

Likewise, through the denial of an individual right to reparations, we can see that in many cases, reparations are simply not available to individuals. To start with, this leads to victims being denied the possibility of using reparations to rebuild after violations, as at their core, individual reparations still represent an important tool for the victim to restart and overcome some of the adverse effects of the breach.[47] Reparations can play an important role in addressing some of the

44 Pablo de Greiff, "Justice and Reparations", in Pablo de Greiff (ed.), *The Handbook of Reparations*, Oxford University Press, Oxford, 2006, p. 460.

45 Claire Moon, "'Who'll Pay Reparations on My Soul?' Compensation, Social Control and Social Suffering", *Social and Legal Studies*, Vol. 21, No. 2, 2012, p. 194.

46 For a description of this reasoning, see Peter J. Dixon, "The Role of Reparations in the Transition from Violence to Peace", *Oxford Research Encyclopedia of Politics*, 27 July 2017, p. 7, available at: http://politics.oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-541.

47 Leila Ullrich, "The Blame Cascade: Justice for Victims at the ICC", *YouTube*, 8 December 2020, available at: www.youtube.com/watch?v=MAS-ulpNfdk.

economic damages that individuals have experienced, providing a first indicator of a role in a peace process, as economic factors have been shown to lead to a decrease in potential conflict.[48] Supporting this, distributive justice concerns addressed through reparations can also contribute further to resolving the issue of the financial "viability" of a civil war or civil unrest after armed conflict.[49]

In a broader context, reparations can also restore the government's position as the legitimate authority. Reparations can confer legitimacy on the government or other parties, highlighting how they look after the best interests of the local population.[50] The concept of accountability and the attached visible notions of reparations play an important role here.[51] In these ways, reparations can further contribute to peace processes, working towards a further generation of trust.[52] Such considerations could play a significant role in achieving sustainable peace after a non-international armed conflict.

Furthermore, reparations can contribute towards reconciliation.[53] They can focus on re-establishing a community and, therefore, can contribute to a more sustainable peace.[54] Such reasoning could be relevant for re-establishing normal relationships, as reparations can express a desire to address the wrongdoing and, as such, mark a transition to a functioning society where most of the severe grievances have at least been addressed, even if not fully remedied.[55] Reparations could also be a relevant way to express regret, bridging "a linguistic and psychological gap between the victim's need for acknowledgement and the perpetrator's desire to reclaim his humanity".[56] Using reparations in such a way can take away lingering ill-feeling towards the perpetrators, decreasing the likelihood of conflict breaking out again.

To facilitate all these elements, it has been emphasized that the participation of victims constitutes an important element.[57] The current approach

48 Paul Collier, "On Economic Causes of Civil War", *Oxford Economic Papers*, Vol. 50, No. 4, 1998.

49 Rodrigo Uprimny Yepes, "Transformative Reparations of Massive Gross Human Rights Violations: Between Corrective and Distributive Justice", *Netherlands Quarterly of Human Rights*, Vol. 27, No. 4, 2009.

50 In fact, reparations have been seen as a main factor for the considerations of the legitimacy of non-State actors: see Luke Moffett, "Violence and Repair: The Practice and Challenges of Non-State Armed Groups Engaging in Reparations", *International Review of the Red Cross*, Vol. 102, No. 915, 2020, p. 1071; L. Moffett, above note 29, p. 201.

51 Julia Black, "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes", *Regulation and Governance*, Vol. 2, No. 2, 2008, p. 149.

52 Devika Hovell, "UNaccountable: A Reply to Rosa Freedman", *European Journal of International Law*, Vol. 28, No. 3, 2018, p. 992.

53 Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing*, Cambridge University Press, Cambridge, 2006, p. 196.

54 William J. Long and Peter Brecke, *War and Reconciliation: Reason and Emotion in Conflict Resolution*, MIT Press, Cambridge, MA, 2003, p. 20.

55 Charles L. Griswold, *Forgiveness: A Philosophical Exploration*, Cambridge University Press, Cambridge, 2007, p. 40.

56 Nicholas Tavuchis, cited in Elazar Barkan and Alexander Karn, "An Ethical Imperative: Group Apology and the Practice of Justice", in Elazar Barkan and Alexander Karn (eds), *Taking Wrongs Seriously: Apologies and Reconciliation*, Stanford University Press, Palo Alto, CA, 2006, p. 5.

57 Elke Evrard, Gretel Mejía Bonifazi and Tine Destrooper, "The Meaning of Participation in Transitional Justice: A Conceptual Proposal for Empirical Analysis", *International Journal of Transitional Justice*, Vol. 15, No. 2, 2021, p. 430.

seems unable to encourage such participation, leading to an ineffective role of potential reparations in peace processes. Examples of this would include the broad categories we currently see in many peace treaties, seemingly negating specific characteristics of individuals.[58] It has been argued that during many justice-based initiatives in peace processes, the emphasis has been too much on top-down approaches, and insufficient attention has been paid to the actual plight of individuals.[59] By only allowing States to claim reparations, the current approach to reparations actively seems to support that situation.

Ultimately, such an approach leads to a situation in which many of the positive elements that could be achieved are not adequately employed. Allowing victims to individually claim reparations would allow for many of the positive aspects to flow through to victims. This would be by virtue of the established court system already representing many of the crucial elements that would be conducive to the positive effects of participation: effective representation, available information in two directions, and meaningful impact.[60] It can counter many of the negative effects of IHL violations, contributing to a more sustainable peace. As noted in the UN's recent transitional justice report,

> [m]ajor gaps continue to exist between the robust normative foundation of the right to remedy and reparation and practical reality. The lack of attention to victims' claims and the precariousness of their situation exacerbate their vulnerability and sense of injustice, further entrenching victims' grievances and weakening their trust in the State. It destabilises communities and undermines the prospects for sustainable peace.[61]

Arguably, allowing for an individual right based on IHL would allow for many of these negative considerations to be addressed more adequately. This might ultimately offer more solace in trying to remedy the experience of victims in this context.[62] In support of such a consideration, emphasizing the role of IHL and the granting of reparations to either redress harm or recognize wrongs both contribute to the overall goal of IHL,[63] and can help to emphasize considerations of humanity in this context.[64]

58 See, in general, Astrid Jamar, "The Exclusivity of Inclusion: Global Construction of Vulnerable and Apolitical Victimhood in Peace Agreements", *International Journal of Transitional Justice*, Vol. 15, No. 2, 2021, p. 284.

59 Patricia Lundy and Mark McGovern, "Whose Justice? Rethinking Transitional Justice from the Bottom Up", *Journal of Law and Society*, Vol. 35, No. 2, 2008.

60 Cristián Correa, Julie Guillerot and Lisa Magarrell, "Reparations and Victim Participation: Experiences with the Design and Implementation of Domestic Reparations Programmes", in C. Ferstman, M. Goetz and A. Stephens (eds), above note 9.

61 UN Secretary-General, *Transitional Justice: A Strategic Tool for People, Prevention and Peace: Guidance Note of the Secretary General*, New York, 11 October 2023, p. 18.

62 A. Pemberton and R. Letschert, above note 39.

63 E. L. Camins, above note 20, p. 137.

64 For this argument in more philosophical terms, see Steven van de Put, "In Search of Humanity: The Moral and Legal Discrepancy in the Redress of Violations in International Humanitarian Law", *Israel Law Review*, Vol. 56, No. 2, 2023.

Having set out the role that individual reparations can play in peace processes, the article will now develop this idea in more practical terms. Starting from the current situation, in which domestic courts seem to play a significant role, a move will be made towards the practice of special tribunals and how the push we see for reparations related to the conflict in Ukraine can potentially form a "watershed" moment for the recognition of such claims.

Contemporary legal framework (and case law)

From a legal point of view, a turning point in the legal status of reparations for violations of the laws of war came in the early 1900s. First came Hague Convention IV of 1907, Article 3 of which provided:

> A belligerent party which violates the provisions of [the Hague Regulations, annexed to the Convention] 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.[65]

While the provision at hand elevated reparations from a political tool to a legal obligation, it was still a relatively lenient one due to the blurred reference to "if the case demands". That condition was arguably lifted two decades later, when the Permanent Court of International Justice, in the dictum of the *Chorzów Factory* case, unequivocally asserted that "any breach of an engagement involves an obligation to make reparation in an adequate form".[66] Yet, the text of the 1907 Hague Regulations was repeated verbatim in Additional Protocol I to the Geneva Conventions (AP I), and by now, the rule that "[a] State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused"[67] is widely considered to be customary in nature.

Importantly, however, the right, as it stands today, remains limited to inter-State relations; none of the provisions listed above specifically mention that this is a right that is also afforded to individuals. Instead, reference is seemingly made to a general obligation to compensate damages that are the result of violations.[68] The Commentary to AP I attempts to clarify this by stating that "since 1945, a

65 Hague Convention (IV) respecting the Laws and Customs of War on Land and Its Annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (entered into force 26 January 1910) (Hague Convention IV), Art. 3. See also Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978), Art. 91.

66 Permanent Court of International Justice, *Case Concerning the Factory at Chorzów*, Judgment, PCIJ Series A, No. 17, 1928, p. 29.

67 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 150, available at: https://ihl-databases.icrc.org/en/customary-ihl/rules.

68 In both articles, the party to which this obligation is owed is not further specified. See AP I, Art. 91: "A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces"; Hague Convention IV, Art. 3: "A belligerent party which violates the provisions

tendency has emerged to recognise the exercise of rights by individuals".[69] In a similar fashion, both Kalshoven and Pictet have argued that these rights should be interpreted as granting the right of redress to individuals.[70] On the other hand, commentators have also noted that, in general, practice does not seem to support such a position.[71] The much-awaited Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,[72] adopted in 2005 by the UN General Assembly, have also struggled to influence practice and lead to a general recognition of this individual right.

Practice then also demonstrates that there are some general difficulties in claiming that IHL would contain an individual right to reparation. As a starting point, it is difficult to refer to a central authority. Unlike systems such as the regional and thematic human rights bodies, IHL lacks a central court.[73] In practice, this means that individuals do not have a ready-made forum for their claims and are therefore limited in the avenues through which they can claim this right of reparations.[74] Currently, victims are dependent on two main avenues: they can either claim a right to reparations through domestic court proceedings, or they can potentially claim a right through a special mechanism established by the international community. Examining these proceedings, the present authors think it doubtful that practice here can support the notion that we can distil an individual right to reparations from IHL.

When we consider the practice of domestic courts, victims have faced many difficulties when attempting to gain reparations for violations of IHL. Courts have generally argued for restrictive interpretations, and more general notions than the consideration of whether IHL contains an individual right to reparations have already limited many potential claims that victims have put forward. Examples here are the notion that the choice of means and methods of warfare would be an act of the State outside the scope of the court,[75] or immunities impeding potential claims.[76] Although such concepts are not specifically linked to IHL, we have seen that they have practically limited many victims' attempts to gain redress.

of [the Hague Regulations, annexed to the Convention] 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."

69 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, para. 3657.

70 Jean Pictet, "The Principles of International Humanitarian Law", *International Review of the Red Cross*, Vol. 9, No. 66, 1966, p. 455: F. Kalshoven, above note 16, p. 843.

71 Marten Zwanenburg, "The Van Boven/Bassiouni Principles: An Appraisal", *Netherlands Quarterly of Human Rights*, Vol. 24, No. 4, 2006, p. 659: N. Quénivet and C. Lopes, above note 15, p. 216.

72 See above note 21.

73 J. K. Kleffner, above note 12, p. 238.

74 N. Quénivet and C. Lopes, above note 15, p. 205.

75 Micaela Frulli, "When Are States Liable Towards Individuals for Serious Violations of Humanitarian Law? The *Marković* Case", *Journal of International Criminal Justice*, Vol. 1, No. 2, 2003, p. 409.

76 Elisabeth Handl, "Introductory Note to the German Supreme Court: Judgment in the Distomo Massacre Case", *International Legal Materials*, Vol. 42, No. 5, 2003, p. 1028.

However, even when courts have been able to get around these general obstacles and consider the individual right to reparation, in general they have not supported the notion that IHL would be able to directly translate to such a right. In the *Tel-Oren* case, it was stated that "the [Hague] Conventions are best regarded as addressed to the interests and honour of belligerent nations, not as raising the threat of judicially awarded damages at war's end. The Hague Conventions are not self-executing."[77] In a similar fashion, in the *Goldstar* case, the US Court of Appeals decided that "[i]nternational treaties are not presumed to create rights that are privately enforceable".[78] This represents a general trend of these rights being seen as not being granted directly as a result of reliance on IHL.[79]

Alternative attempts have also been unsuccessful, such as claims submitted based on a violation of IHL in tandem with the Articles on the Responsibility of States for Internationally Wrongful Acts.[80] Victims attempted this in Germany in the Kunduz case concerning a German air strike in Afghanistan. Here, the court first stated that Article 3 of Hague Convention IV did not provide for individual reparations[81] and subsequently denied that such a general rule of international law could be used to claim individual reparations.[82] All in all, this makes it difficult to conclude that under international law, an international right to claim reparation for IHL violations is available to individuals.

It ought to be mentioned, however, that in some domestic jurisdictions, individuals may claim reparations for an IHL violation that they have been victims of, but such a claim needs to be based on domestic tort law. Yet, relying upon such domestic implementation to cover the reparations gap within IHL poses its own unique set of challenges. Worth noting here is that, in many cases, reparations represent a whole range of potential logistical pitfalls. Due to the principle of State immunity, individuals would be forced to start proceedings in a foreign jurisdiction, with all the challenges that come with it.[83] Likewise, in contemporary operations, we quite often see that operations take place in some form of coalition, making it more difficult for victims to rely upon domestic legislation, which might differ between partners.[84]

77 US Court of Appeals District of Columbia Circuit, *Tel-Oren et al. v. Libyan Arab Republic*, Case Nos 81-1870, 81-1871, Judgment, 1984, p. 40.
78 US Court of Appeals Fourth Circuit, *Goldstar (Panama) SA et al. v. United States*, Case No. 91-2229, Judgment, 1992, p. 968.
79 See also US Court of Appeals District of Columbia Circuit, *Princz v. Germany*, Case Nos 92-7247, 93-7006, Judgment, 1994.
80 *Report of the International Law Commission*, UN Doc. A/56/10, 2001, pp. 26–143.
81 Bundesgerichtshof, III ZR 140/15, Judgment, 6 October 2016, 2016, para. 17.
82 *Ibid.*, para. 16.
83 Rianne Letschert and Theo Van Boven, "Providing Reparation in Situations of Mass Victimization: Key Challenges Involved", in Rianne Letschert *et al.* (eds), *Victimological Approaches of International Crimes*, Intersentia, Antwerpen, 2011, p. 154.
84 And in fact, some States have notoriously also limited the claims that victims can put forward in domestic legislation. Reference can be made here to the Combat Exclusion Act of the United States or Israel. See Jordan Wallerstein, "Coping with Combat Claims: An Analysis of the Foreign Claims Act's Combat Exclusion", *Cardoza Journal of Conflict Resolution*, Vol. 11, No. 1, 2009; Haim Abraham, "Tort Liability for Belligerent Wrongs", *Oxford Journal of Legal Studies*, Vol. 39, No. 4, 2019, p. 831.

Setting aside these difficulties, some States have allowed for the granting of reparations based on broad definitions found in their civil law systems. An example of this approach would be the Dutch system, in which the broad definition of a wrongful act allows the court to consider violations of IHL for individual compensation.[85] However, it would be difficult to argue that these are truly individual reparations based on IHL, as they seem to follow the structure of Dutch civil law instead of that found in the structure of IHL. All of this ultimately leads to the conclusion that courts have not, so far, recognized an individual right to reparations.

Arguably, these issues could be resolved by States interpreting the relevant obligations to include an individual right to reparation. So far, however, we have seen little regarding the interpretation of these obligations by States in this context. This reflects a more general trend in which customary law formation seems to have been cornered by international organizations and courts.[86] In the specific context of reparations, this is also supplemented by a very active academic community.[87] Yet, we have still mostly seen silence whenever we consider the opinion of States. Arguably this represents a gap, as States have not taken on the role traditionally conferred to them in international law, leading to the issuance of reparations being a mostly theoretical construct.

In practice, then, we have so far only really seen reparations through further national legislation. Such legislation can be standing, as in the case of the Netherlands, or be more *ad hoc*-based. When implementation takes place in a more *ad hoc* fashion, practice has demonstrated that this has often been more in the shape of administrative programmes.[88] While such programmes often face difficulties regarding funding, they do represent one of the more realistic options for victims to put forward their own claims towards a responsible State.[89]

Similarly, while it might be the case that "an injured state's actions on the international plane cannot extinguish its nationals' rights to reparations, which have

85 Marten Zwanenburg, "Dutch Judgment on IHL Compliance in Chora District, Afghanistan", *Articles of War*, 19 December 2022, available at: https://lieber.westpoint.edu/dutch-judgment-ihl-compliance-chora-district-afghanistan.

86 Magda Pacholska, "The Legal Fiction of the Two-Element Approach: The Role of International Organizations in Customary IHL Identification", *EJIL: Talk!*, 30 August 2023, available at: www.ejiltalk.org/the-legal-fiction-of-the-two-element-approach-the-role-of-international-organizations-in-customary-ihl-identification.

87 F. Kalshoven, above note 16; J. K. Kleffner, above note 12; M. Zwanenburg, above note 71; P. Gaeta, above note 16; C. Evans, above note 7; Gabriela Echevarria, "The UN Principles and Guidelines on Reparation: Is There an Enforceable Right to Reparation for Victims of Human Rights and International Humanitarian Law Violations?", PhD thesis, University of Essex, 2017; Carla Ferstman, "The Relationship between Inter-State Reparations and Individual Entitlements to Reparation: Some Reflections", *Heidelberg Journal of International Law*, Vol. 78, 2018; E. Salmón and J. P. Pérez-León Acevedo, above note 7.

88 P. J. Dixon, above note 47, p. 4. On the relationships between these programmes and future claims, at least under the case law of the Inter-American Court of Human Rights, see Clara Sandoval, "Two Steps Forward, One Step Back: Reflections on the Jurisprudential Turn of the Inter-American Court of Human Rights on Domestic Reparation Programmes", *International Journal of Human Rights*, Vol. 22, No. 9, 2018.

89 As an example, see Colleen Duggan, Claudia Paz y Paz Bailey and Julie Guillerot, "Reparations for Sexual and Reproductive Violence: Prospects for Achieving Gender Justice in Guatemala and Peru", *International Journal of Transitional Justice*, Vol. 2, No. 2, 2008, p. 206.

an independent existence",[90] this argument ultimately still relies on the consideration that there is such an individual right. That position was reiterated by the International Court of Justice (ICJ) in the *Germany v. Italy* case, in which the Court unequivocally asserted:

> Against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump-sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.[91]

In sum, under IHL as it stands today, an individual right to reparations for IHL violations cannot be distilled from Article 91 of AP I or any other treaty provisions – States have often been inactive regarding these claims or have certainly not argued for full reparations, and individuals do not have legal recourse to reparations. Yet, it is not only through courts that reparations have been awarded. The context of armed conflicts has also seen the establishment of special mechanisms focused on redressing the harm caused to persons affected by those conflicts. The following part casts more light on supranational efforts to compensate injury resulting from armed conflicts.

The international mechanism for Ukraine: A watershed moment for individual reparations for IHL violations?

As hinted at in the preceding analysis, States have always been reluctant to submit their wartime conduct to international scrutiny. In fact, all binding international treaties regulating States' obligations during an armed conflict have one thing in common: regardless of the time of their adoption, they are equally toothless.[92] Indicative in this regard are the much-celebrated 1949 Geneva Conventions,[93]

90 C. Ferstman, above note 87, p. 563.

91 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, *ICJ Reports 2012*, para. 94.

92 Admittedly, the Rome Statute of the International Criminal Court mitigates some of the enforceability shortcomings of IHL treaty law, but it remains limited only to selected transgressions intentionally committed by individuals, and none of its provisions "shall affect the responsibility of States under international law". See Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entered into force 1 July 2002), Art. 25(4).

93 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

which, unlike other treaties adopted around that same time, such as the 1948 Genocide Convention,[94] do not include a clause providing the ICJ with jurisdiction over disputes concerning the "implementation or application" of their provisions.[95] As a result, many obligations regarding the enforcement of IHL remain aspirational.

This does not mean, however, that IHL is never enforced, or – to be more precise – that processes pertaining to broadly conceived IHL enforcement are at a standstill. On the contrary, practice is evolving, albeit, admittedly, in a non-linear manner. A bird's-eye view of accountability for IHL violations suggests that major breakthroughs are usually triggered by particularly gruesome conflicts, provided they take place in a climate conducive to a supranational response. Symptomatic in this regard are the *ad hoc* criminal tribunals – the ICTY and the ICTR. While a position that individuals are criminally responsible under international law for war crimes they commit is entirely defensible in 2024, Rule 151 of the ICRC Customary Law study recognizes that no IHL treaty provision says so explicitly.[96] What treaty law provides for *verbatim* is merely the States' obligation to "[u]ndertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches".[97]

It was the horror of the ethnic conflicts in the former Yugoslavia and Rwanda that made the UN Security Council classify these respective situations as threats to international peace and security and decide that the establishment of the ICTY and ICTR "would contribute to the restoration and maintenance of peace".[98] While three decades later, no one doubts that individuals are internationally responsible for serious violations of IHL (the list of which by now far exceeds those explicitly listed in the Geneva Conventions and their Additional Protocols), it took an essentially political decision of the Security Council for this norm to emerge. To wit, before the early 1990s, based on black-letter law and State practice, it would arguably be impossible to distil individual responsibility for serious IHL breaches under international law, just as it is hard to argue that IHL as such provides for an individual right to reparations. If, however, the Security Council could trigger such a major developmental leap from a rather limited State obligation to enact legislation to domestically penalize war crimes and cooperate in their punishment, surely there is enough in the already existing inter-State obligation to compensate IHL violations to deduce an individual right to reparations. In other words, what has historically been lacking is the political will and appetite for such a development.

94 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, 9 December 1948 (entered into force 12 January 1951).

95 On the limited role of the ICJ in the development of IHL, see Christopher Greenwood, "The International Court of Justice and the Development of International Humanitarian Law", *International Review of the Red Cross*, Vol. 104, No. 920, 2022.

96 ICRC Customary Law Study, above note 67, Rule 151.

97 GC I, Art. 49; GC II, Art. 50, GC III, Art. 129, GC IV, Art. 146.

98 See the preambles of UNSC Res. 827, 25 May 1993, and UNSC Res. 955, 8 November 1994.

In fact, States have been reluctant to provide the ICJ with *ad hoc* jurisdiction over their *in bello* obligations,[99] as they are disinclined to set up arbitration tribunals with the power to do so. There is, however, some lingering practice in this regard. An interesting example, albeit conceptually anchored more in the early twentieth century's concept of guilt rather than enforcement of international legal obligations, is the UN Claims Commission (UNCC). The UNCC was established in 1991 with a mandate to "process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait in 1990–1991", irrespective of the legality of such losses and damage under IHL.[100] A similar approach has been followed in the UN Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory, which was given a mandate "[t]o serve as a record, in documentary form, of the damage caused to all natural and legal persons concerned as a result of the construction of the [W]all by Israel … in the Occupied Palestinian Territory, including in and around East Jerusalem", again regardless of the legality of the damage under IHL.[101] This does not mean that there is no practice of inter-State reparations for IHL violations – in the Algiers Agreement of 2000, Ethiopia and Eritrea agreed to create a Claims Commission with the broad mandate to decide all claims "by one Government against the other" resulting from "violations of [IHL]".[102]

Two decades later, Russia's 2022 invasion of and subsequent war in Ukraine triggered a new development, which appears to be an amalgam of the two types of (quasi-)judicial bodies mentioned above. In November 2022, the UN General Assembly passed a resolution on "Furtherance of Remedy and Reparation for Aggression against Ukraine", which pivots on State responsibility.[103] The two core paragraphs of the resolution

> [recognize] that the *Russian Federation must be held to account* for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations, as well as *any violations of international humanitarian law* and international human rights law, and that it must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts;

99 Article 36(2) of the ICJ Statute, including the so-called "Optional Clause," provides the Court with jurisdiction over contentious cases in situations when both parties make the requisite declarations under it. Statute of the International Court of Justice, 33 UNTS 933, 26 June 1945 (entered into force 24 October 1945). This was the jurisdictional basis of the only case in which the Court adjudicated alleged violations of conduct of hostilities rules. See ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)*, Judgment, *ICJ Reports 2006*, para. 1.

100 See the UNCC website, available at: https://uncc.ch/; UNSC Res. 687, 3 April 1991, para. 16.

101 UNGA Res. ES-10/17, 15 December 2006, para. 3(a).

102 Agreement on Cessation of Hostilities between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 2138 UNTS I-37273, 18 June 2000 (entered into force 18 August 2000), Art. 5(1).

103 UNGA Res. A/ES-11/L.6, 7 November 2022, para. 7.

> [and recognize] the need for the establishment, in cooperation with Ukraine, of an *international mechanism for reparation for damage, loss or injury, and arising from the internationally wrongful acts of the Russian Federation* in or against Ukraine.[104]

As of early 2024, the mechanism is still in the early phases of being established.[105] While only time will tell whether its jurisprudence contributes to the crystallization of the individual right to reparations for IHL violations, it certainly has been given enough powers to do so.

While, as with the ICTY and ICTR, the precedent from the conflict in Ukraine and the resulting aftermath is undoubtedly political, these political processes have also led to changes in interpretations of international law. As the ICTY and ICTR did for criminal prosecutions, the potential reparation mechanisms for the conflict in Ukraine can bring about an equally significant evolution of the international accountability mechanisms. In other words, should the mechanism prove successful, it might lead to a political realization that reparations offer a valuable contribution to a sustainable peace and offer a precedent highlighting the failures of the current system. In such a way, the mechanism could also potentially provide a first step towards a more comprehensive approach in which States display a growing realization of the valuable role that reparations can play in peace processes.[106]

Conclusions

As noted throughout this contribution, the existing State practice regarding the provision of reparations for IHL violations is too scattered and inconsistent to claim that an individual's right to reparations exists. Neither the practice of national courts nor other State practices seem to support the notion that individuals would have such a right; thus, support for this claim has been scarce. Reparations have mostly either been granted to States in the form of a lump-sum payment, or they have been the result of administrative programmes.

Yet, the tide might be turning – while it is too soon to deduce a major shift in States' position on the issue at hand, the mechanism being established for Ukraine, with a mandate distinctively different from those of its predecessors, is a uniquely conducive forum for an individual right to reparations to emerge. As this contribution has aimed to demonstrate, there seems to be widespread agreement that individually provided, fair reparations are peace facilitators; what is missing under international law as it stands today is a normative link between

104 Ibid., paras 2–3 (emphasis added).

105 See Council of Europe Res. CM/Res(2023)3, 16 May 2023, para. 3. For more on the efforts to establish the mechanism, see Chiara Giorgetti and Patrick Pearsall, "A Significant New Step in the Creation of an International Compensation Mechanism for Ukraine", *Just Security*, 27 July 2023, available at: www.justsecurity.org/87395/significant-step-in-creation-of-international-compensation-mechanism-for-ukraine/.

106 See also the consideration that without political implementation, any discussion regarding reparations is to remain a "pie in the sky": S. Furuya, above note 16, p. 63.

the two. Just like the *ad hoc* criminal tribunals paved the way for recognizing that prosecuting individuals for war crimes contributes to the restoration and maintenance of peace, the mechanism for Ukraine might provide a much-needed movement towards the recognition of the individual right to reparations for IHL violations.