INTERNATIONAL COURT OF JUSTICE

APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

THE GAMBIA
v.
MYANMAR

MEMORIAL OF THE GAMBIA

VOLUME VIII

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‘Numbers in 200 Tongues’ (London 1811) 535 Classical Journal

A CHART OF TEN NUMERALS IN TWO HUNDRED TONGUES.

Ordo.	Genus.	Species.	Religion.
Noah's three sons.			
1. Assyrians.	Assyrians. *Arabians.* *South Persians.* *Egyptians.*	*Chaldee,* *Hebrew,* etc.	All are Moslems.
2. Khathai-Scythians	*North Persians.* Scythians intra et extra Imaum, &c.	Armenians, The Goths of Europe, the Massagetæ.	—Christians. Ditto. —extinct.
3. *Sarmatæ.* Sar-madai. Sarmatæ.	Medes. Parthians. *Samaritans.*	Vendi Heruli Lettes. *Livonians.*	Poles. *Russians.* Kossacs.	*Georgians.* *Circassians.*	All are Christians.
4. Seres Indi.	*Siamese.* of the Balic tongue, &c. *Hindoos.*	The Northern and Southern East-Indians.	Few indeed are Christians.
5. Sinæ	*Chinese* *Japanese.*	A few are converted.	

Barbaric Nations from the North to the South, according to their degrees of barbarism.

6. *Samoieds*	Ostiacs, Yurals &c.		
7. *Yakuts*	*Yukagirs.*	Expelled Tartars.	Nearly all are Greek Christians.
8. *Koriacs*	*Tchukchi.*		
9. *Kampchadals*	*Kurilians*	resemble the Japanese.	
Prince William's Sound.			
10. *Mandshours, Manchews,* or *Tonguses*	*Lamuts.*	The ruling people in China.	A few are Christians.
11. *Monguls.*	Calmucs	Soongars Tonguts. *Burats.*	Ditto of the Russian church.

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12.	Tatars, or Huns.	*Turks.* Khosars. Uzes, or Siberians.	Nogays. Bashkirs. *Kirguises,* or Kaizaks. Teleuts.
13.	*Finns.*	Finlanders. Esthonians. *Laplanders.* *Hungarians.*	Permians, or Biarms. *Livonians.* Votiacs, and Chermisses. Voguls, and Ostiacs.
14.	*Kadiac-Island.*	*Eskimaux.*	*Norton-Sound.*

By this route the New World was peopled.

THE MOTHER-TONGUES. THE DIALECTS.

	Hebrew.	*Chaldee.*	*Arabic.*	*Arab of Morocco.*	*2d specimen in French pronunciation.*
1	Ahd	hd	wegd	wahud	ouaed
2	snim	tnin	hn	thaneine	tnein
3	slus	tlitai	hlth	thalata	tleta
4	arbo	rbioai	rhbo	arba	arba
5	hmse	hmisai	chems	kumsa	kemsa
6	ss	stitai	sheds	setta	setta
7	sboie	sbioae	hlsebo	sebba	saba
8	smine	tmnia	mhnh	timinia	temenia
9	tse	tsoa	tshgh	taseud	tsaeud
10	osr	oshra	oshr	ashra	ashara
100	mat	mat	mhbh	mia	———
1000	alp	alpha	———	elf	———

	Brebes, and Shilhi.	*the same.*	*the same.*	*Punic, or Maltese.*	*The Modern Ethiopic, or the Abyssinian. Christians.*	*The dead Sanscrit.*
1	yean	ian	yeat	huchet	ehud	sam
2	seen	sin	snet	tnei	sanui	pari
3	crat	querad	crat	llieta	salus	ida
4	koost	quoz	arba	herbha	rebua	idvat
5	summost	cemouf	kemsa	chamsa	kamus	——
6	suth—east	seddise	east	sitta	areb	——
7	sad	sa	saba	sebo	sanbat	——
8	tempt	tem	tempt	tmiena	———	——
9	tzau	tza	tzau	disha	———	——
10	murrow	maraoh	ashora	hashra	———	——
100	———	———	———	———	———	——
1000	woappodon	———	———	———	———	——

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	Persian.	*the same.*	*Afghan in the German pronunciation.*	*Welsh.*	*2d specimen.*	*Irish.*	*Biscayan.*
1	Yek	yeck	jau	un	yn	aon	bat
2	du	dew	dua	dau	doy	do	bi
3	seh	se	dre	trair	tri	teora	iru
4	chehar	char	satur	pedair	peduar	kethra	lau
5	penge	panch	pinsa	pump	pymp	kuig	bost
6	shesh	shesh	spay	chwech	xuex	seishear	sey
7	heft	haft	ue	saith	———	sheaxd	shaspi
8	hesht	hasht	ate	wyth	———	ocht	shorci
9	nuh	no	nehe	naw	———	niji	vedracy
10	deh	dah	las	deg	———	deix	amar
	ashoora	———	———	———	———	———	———
100	sad	———	sil	———	———	———	———

	Sanscrit.	*Moors, Gipsey, or Hindustani.*	*Malabar, or Tamul.* latitude 10.°	*the same.*	300,000 Christians in *Ceylon, or Cingalese.* latitude 8.°
1	Ec	ek	onn-u	unnu, undu.	ek-kai
2	dwau	duy	rend-u	rendu, rindu.	de-kai
3	traya	tin	mun-u	mundu	tun-ai
4	chatur	tzar	nal-u	nalu	hatar-ai
5	pancha	penge	anj-u	anji, anju.	pah-ai
6	shat	tzo	aar-u.	aru	high-ai
7	sapta	tatee	ail-u	elu	hatt-ai
8	ashta	aatsa	ett-u	ettu, ittu.	attai
9	nova	nouy	on-	om-	namma-
			padd-u	bedu	yai
10	dasa	dass	patt-u	pattu	daha-
20			irru	irue-	yai
			———	du	ivees-sai
			———	———	———
100			paddu		

Three in the Burmah Empire.	*Rooinga.*	*Rossawn.*	*Banga.*	*Myammau, or Burmah.*	A few Christians in *Siam, or Tainay.*	*Taiyay.*	*Tailong.*
1	awg	aik	ak	teet	noong	noo	aning
2	doo	doo	de	hueet	so	sang	soung
3	teen	teen	teen	thoum	sam	sam	sam
4	tchair	tsar	sa-ree	lay	see	shee	shee
5	pan-so-ee	paus	pas	ngaw	haw	haaw	haw
6	saw	tso	tsoe	kiaouk	hoc	houk	hook
7	sat	sat	hat	kuhneet	kyaet	sayt	seet
8	aw-toa	as-to	awt	sheet	payt	payt	paet
9	no-naw	no	no	ko	ka-wo	kaw	kau
10	dus-so-a	dos	dos	tazay	seet	sheet	ship
20							
100							

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FOUR DIALECTS OF ONE TONGUE.

	Moitay.	*Koloun.*	*Passooko.*	*Maploo.*	*Play.* 1.	*Play.* 2.	*Moan.*
1	a-maw	moo	tay-doe	ra-doe	lay-doe	lay--doe	mooi
2	a-nee	palmee	kee-doe	ree-doe	nee-doe	nee-doe	bau
3	a-hoom	pa-toon	so-doe	song-doe	soung-doe	soung-doe	pooi
4	ma-ree	poon-hee	loo-ee-doe	lee-du	lee-doe	lee-doe	pou
5	man-gaw	poon-ho	yay-doe	yay-doe	yay-doe	yay-doe	soon
6	to-rok	poo-souk	hoo-doe	hoo-doe	koo-doe	koo-doe	te-raw
7	ta-rayt	poo-aes-ac	noo-ee-doe	may-doe	noae-doe	noae-du	ka-po
8	nee-paw	poo-oesay	hoo-doe	ho-doe	ko-doe-	ko-doe	tat-sam
9	ma-pil	poon-go	koo-ee-doe	koo-ee-doe	koo-ee-doe	koo-ee-doe	kas-see
10	tar-raw	poo-haw	tat-chee.	tait-chee	tas-see	tayt-see	tso

	Few Christians in *Siam.*	*the same.*	*North of Bengal is Kookist, or Lunkits.*	*On the North of Thibet is Tancut.*	lat. 15°. *Cochin-China.* its converts.	*China* ditto.	lat. 30.° in its centre! two other specimens.		lat.35.° *Japan.* its converts.
1	aey	cheic	kat-ka	dgi	mot	y	i.	cheed	sjo-guats
2	gie, or dzi	gnea	nee-ka	nee	hai	eul	lan	no	ni
3	saem	soom	toom-ka	sum	teng	san	san	sanh	san
4	sie	zea	lee-ka	che	ben	ssee	si	see	si
5	ha	gna	runga-ka	gno	lang	ou	u	go	go
6	hcok	tru	rook-a	duk	lak	lou	leo	lacq	rok
7	tset	toon	seree-ka	dunn	bai	tsi	tzi	shit	sits
8	pet	ghe	rict-ka	dja	tang	pa	pa	pech	fats
9	cau	goo	koa-ka	gu	chin	kieou	tziu	caow	ku
10	sieb	chutum-bha	soom-ka	dju-tamba	taap	che	shi	chap	sju
11	sieb-eet	chu-chiec					shiy	che-pé	sjuits sjunits

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	Half are Christians, and nearly half are Mahometans, in these three.			All are Christians of			All are Christians in *Circassia* or *Tscherkassian*,	
	Ghazi-Kumuk. lat. 45.°	*Akuschae.* lat. 45.°	*Kartel,* lat. 45.°	*Mingrelia, and Georgia.* lat. 45.°	*Kisti.* lat. 45.°	*Zechetschen* lat. 45.°	lat. 45.°	*Osses.*
1	zava	za-zaual	er-ti	ar-ti	za	zah	ssi	giu
2	kiva	quial-kial	o-ri	shi-ri	si	schey	teu	duwa
3	scham-ba	abal-haeval	sa-mi	su-mi	ko	kglo	shoee	erte
4	muk-va.	ohval	ots-chi	ant-schi	tie	pey	d'lle	schpar
5	che-va	chu-jal	chu-ti	chu-ti	pghie	pghy	tglu	founts
6	rech-va	wree-kal	e-ku-si	amschi	ghaigh	taelaegh	gosche	aschsches
7	e-rul-va	ur-u-zal	schue-di	skoiti	uor	wourgh	h'lle	aaft
8	mai-va	mai-zal	rva	rua	par	parr	ige	ascht
9	u-rut-schva	urbtschanal	zchra	tschchora	iss	iss	mghu	ferast
10	atz-ba	jae-zal	d-ti	vi-ti	id	idde	pschoe	dess

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The 17 *or* 20 *Dialects of Australia, or the South Sea.*

	Acheen.	*Java.* in l. 8°. 5.'	*Madagas-ker.* inl.20°.5'	*Mongeraye.* in l. °	*Macassar.* in l. °	*Savu.* in l. °
1	sah	see-jee	e-raike	ee-sa-koo	say-dee	us-se
2	dua	ro-ro	dooe	lo-la-ye	dooa	rooe
3	tloo	tul-loo	te-loo	loo-lee-too	tul-loo	tul-loo
4	paat	pa-pat	e-phat	lo-pah	pa-me	uppa
5	lumung	lee-mo	lee-moo	lee-mo	lee-ma	lu-mee
6	'nam	na-nam	enena	da-ho	a-nan	un-na
7	too-joo	pee-too	phee-too	phee-too	pee-too	pe-too
8	d'lap-pan	o-loo	va-loo	a-pho	ar-roo-a	a-roo
9	sa-koo-rang	sanga	see-vee	see-wa	as-sar-ra	saio
10	sap-loo	sa-poo-loo	phoo-loo	too-roo	sa-poo-loo	sin-goo-roo

Or S.S. *Islanders, or of the Polynesia in Pinkerton's Geography.*

Neeas	*Lampoon*	*Rejang*	*Batta*	*Otaheite*	*Malay.*	*Owhyhee.*
sem-booa	sye.	do	sa-dah	at-a.hay	satoo	tihi
dembooa	rowah	dooy	duo	e-roo-a	duo	earna
tu-loo	tul-loo	tel-lou	toloo	torhoo	teego	toro
oo-pha	am-pah	'm pat	o-pat	at-taa	ampat	hah
lee-ma	lee-mah	le-mo	lee-mah	e-ree-ma	lumo	areema
oonoo	an-nam	noom	onam	a-ono	anam	ahono
phee-too	pee-too	too-joo-a	pai-too	ahee-too	toojoo	aheto
ooalloo	ooal-loo	de-la-poon	ooal-loo	awar-roo	slappan	heeva
see-wa	see-wah	sembilan	see-ah	a-ee va	sambilan	hoome
phoo-loo	poo-loo	de-poo-loo	sa-poo-loo	ahoo-roo	sapooloo	

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	Magindanao. in l. 7.° N.	*Ceram, or Malucca.*	*New Zealand.* in l. 40°. S.	*Chinese.*	*Sumatra.* in l. 1. °	*Pelew Isles.* lat. 7. °	*Poggy Isles.*	*Washitah, by a French Voyager.*	*Papua, and Waygiou.* lat. 3. °	*The Sydney, or New S. Wales.*	*New Caledonia.*
1	Isa	oeenta	kati-hi	cheed	chit	tong	sarah	tahi	oser		
2	dana	ólooa	ka-	gno	nung	oroo	dua	houah	serou		
3	tulu	ototoo	dooa	sanh	sa	othey	telloo	to-hou	kior	brewy	-tguien
4	apat	opatoo	ka-	see	see	oang	apat	fah	tiak		-tbait
5	lima	oleema	tadoo	go	ingo	aeem	ieemah	hima	rim		-nmaim
6	anom	oloma	ka-	lacq	la	ma-	anam	hono	onim		-naim-
7	petoo	opeeto	deema	shit	chee	long	peelo	fitou	tik		guick
8	walu	oaloo	ka-	peeh	poe	oweth	balloo	vahou	war		-naim-
9	seaow	oteeo	wadoo	caow	ca	etew	seewa	hiva	siou		guein
10	san-poolu	opooloo	ka-	chap	tsap	mac-koth-adart	pooloo	ono-hoohou	samfoor	wo-gul boola	wa-nait -dou,-don	-naim- -naim- bait -doua- lhie

	Danish.	*Swedish.*	*German.*	*Anglo-Saxon.*	*Mæso-Gothic.* lat. 45.	*Latin.*	*Greek.*
1	een	en	ein	an		unus	heis
2	to	two	zwey	tva		duo	duo
3	tre	tre	drey	threo		tres	treis
4	fire	fyra	vier	feover	fidvor	quatuor	tesseres
5	fem	fem	funf	fif		quinque	pente
6	sex	sex	sechs	six	saihs	sex	hex
7	syv	sju	sieven	seofon	sibun	septem	hepta
8	aatte	otta	acht	eahta		octo	octo
9	ni	nie	neun	nigen		novem	ennea
10	ti	tie	zehen	theo	taihun	decem	deka
100	et hundrede	ett hundrade	hundert			centum	hekaton
1000	en tusend	ett tusende	tausend				

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	Slavonic.	*Russ.*	*Bohemian* lat. 50.°	*Livonian.* lat. 56.°	*Lithuanian.* lat. 57.°	*Italian.*	*Portuguese.*	*Spanish.*	*French.*
1	Yeden	iedin	geden	weens	wienu	un	hum	uno	un
2	dva	dva	dwa	diwi	dwi	due	dous	dos	deux
3	tri	tri	tri	tribs	trys	tre	tres	tres	trois
4	czvoro	tchetire.	ctyry	diwid-esmits	dwid-essimts	quattro	quatro	quatro	quatre
5	piench	pett	pet	peezi	penki	cinque	cinco	cinco	cinq
6	shest	schest	sest	seschi	sessi	sei	seis	seys	six
7	sem	semme	sedum	septinas	septinis	sette	sete	siete	sept
8	vossemm	osm	osm	astonas	asstonos	otto	oito	ocho	huit
9	nevett	dewet	dewet	dewini	dewyni	nove	nove	nueve	neuf
10	deciat	dessett	deset	dess-mits	dessimtis	dieci	dez	diez	dix
100	sto					cento		ciento	cent

	The Christian *Finns in* Hackl.Col.v.1	*Finns.*	*Hungar.*	*Turkish.*	The converted *Yakuts, oldest Turkmans.* lat. 65.°
1	ofte	yxi	e-gy	beer	bir
2	noumpte	kaxi	ket-to	e-kee	ikke
3	colme	kol-me	ha-rom	ewch	ews
4	nellye	nel-jae	ne-gy	dewrt	tirt
5	vitte	wiide	ot	beash	bes
6	cowte	kuude	hat	al-tee	alta
7	keydeem	seit-ze-mae	het	yed-te	setti
8	kaffts	kaeh-dex-ae	ny-oitz	se-kez	ogos
9	owghchte	yhdexae	kil-entz	doc-koz	taoos
10	locke	kym-me-ne	tiz	one	on
100				rezacha	

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	Mongouls, or Kalmuks, or Kalkas, or Uirat Œlets Eleuth, or Kalpaks. latitude 45 °.		*Burats.* °.	*Lamouts, or Tonguse.* lat. 57°.	*Manshow, or Manchew.* lat. 44°.
1	nege	nege	nege	oumionn	emu
2	chour	chojur	koir	djiour	dio
3	gurba	gurba	gurban	elann	ilan
4	durba	darbo	derbyn	digonn	tuin
5	tabu	tabu	tabun	tonngonn	suindja
6	dsurga	surga	dsergon	nioungann	nynguin
7	dolo	dolo	dolon	nadann	naadan
8	naima	naima	najaman	djepkann	iaachun
9	jussu	jessu	jihun	ouiounnv	une
10	arban	arba	arban	mer	ioan
100	dso	dzo	dson		

Probably parts of Bible in these six; and the Bible entire in the above three.

	Yukagir.	*Kamshatha.* lat. 60°.	*Jesso and Kurile Islands* lat. 45°.	*Aleutian in Saver's* lat. 53°.	*Oonalaska.* lat. 54°.	*The same.*
1	irken	kemmis	tchine	attakon	taradac	attousek
2	antachlon	nittanoo	tou	alluk	alac	arlak
3	ialon	tshusquat	tché	kankoon	kanoogn	pingajuah
4	ielahlon	tskascha	yne	shitshin	sechn	sissamet
5	enganlon	koomdas	aschné	tshang	chang	tellimat
6	malghialon	kiikoas	yhampé	attoon	atoo	
7	purchion	ittach-tenu	araou-ampé	olung	ooloo	
8	malgia-lachlon.	tshok-tenu	toubi schampe	kamtshing	kamching	
9	chuniirki-ellendzshien	tshaktanak	tchineli-schampé	sitching	seching	
10	kuniella	komtook	hou-ampé	hasuk	hasc	

N. B. America was peopled by this rout clearly.

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Annex 206

As one plain indication of the multitude of tongues into which the Holy Bible has not yet been translated, this Chart of Numerals has been collected by me, and is dedicated to the SUBSCRIBERS and the COMMITTEE of the BIBLE SOCIETY, to DR. VALPY, to GRANVILLE SHARP, ESQ. as a laborious proof of the Author's high respect for the Society, and his wishes for its success.

Probably a Bible in these three, translated by Russian Priests. Two roving tribes in Siberia.

Four in *Polar America*. A Bible in the *Greenland*, and the Christian *Esquimaux*.

	Koriak.	*Tchoutki.*	*Kadiak Island.*	*Norton-Sound.*	*Greenland,*	*Esquimaux.*
1	enlann	inieenn	alcheluk	adowjak	attousek	attouset
2	niiekh	nireakh	malogh	aiba	ariak	mardluk
3	niioukh	nrioukh	pingaien	pingashook	pingajuah	pingassut
4	niiakh	urakh	stamen	shetamik	sissamat	sissamat
5	mouillanguinn	mouiliguenn	taliman	dallamik	tellimat	tellimat
6	ennann-mouillanguinn	innann-mouiliguienn	agovin-ligin			arbanget attausek
7	niiakh-mouilanguinn	nirakh-mouiliguenn	malchongun			arbanget-mardlik
8	niioukh-mouillanguinn	annvrotkinn	inglulgin			kollin-illoet
9	khonnai-tchinkinn	khonat-chinki	kollem-guien			seching
10	mouinegutkinn	mouinguikinn	kollen			kollit
100	mouilanguinn-khalik	mouit liguieng-khlip guitkinn				

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The following six tribes of Pagans and of Schamanists lie on the Polar Shore of Western America.

	Kadiak 1. and *Cooke's River.*	Three specimens of the *Nootka-Sound* tongue. lat. 49.°			*Naudowessie.* lat. 44.°	*Queen Charlotte's Island.* lat. 51.°
1	asthlenach	sorwok	tsawak	sahuac	wonchaw	saonchon
2	malch-nach	athlac	akkla	atla	noompaw	stonck
3	pinglulin	catsa	katsitsa	catza	yawmo-nee	sloones
4	staach-man	moo	moo	nu	toboh	stanchon
5	talch-man	soutcha	sockath	sutcha	sawbut-tee	cletz
6	inglulin	noctpoo	nofpo	nupu	shawco	clounetch
7		athlapoo	atslepoo	atlipu	shawco-pee	sguat
8		athlaquell	atlaquolthl	atlcual	shahin-dohin	staschan-ha
9		sarvacquell	tsawaquulthl	tzahuacuatl	nebochung-anong.	quens-chans-chtou
10	coollin	highhoo	haeeoo	ayo	wegochung-anong	clash

	Port Des Français. lat. 59.° or 58.	*Prince William's Sound.* lat. 60.°	lat. 58.°	*Norfolk Sound.* lat. 54.°	*The same.*	*Same.*
1	keirrk	chilke	clake	clerrg	kajk-e	tlaasch
2	theirh	tai-ha	taike	terrk	terg	taasch
3	neisk	tok-ke	nusk	notchk	netx	noosch
4	ta-ak-houn	chu-ke-lo	takoon	takoun	tacoung	tackoon
5	keit-schine	koe-heene	kacheene	kitchin	keitchine	keichin
6	klei-tou-chou	ta-ku-lai	claytoo-shoe	kle-touschou	kei-touchou	ctletus-chush
7	taka-tou-chou	kei-chil-ho	tacka-too-shoe	takrra-touschou	tra-touchou	takatus-chush
8	netskatou-chou	kliew	nuska-too-shoe	netska-touschou	neixca-touchou	nooscha-tus-chush
9	koue-hok		coo-shuk	kous-chok	kouchak-kou	koos-chush
10	tchinecate		cheene-caught	tchinkart	tchinekate	chincart
100	chinecaterha					

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Annex 206

Eight tribes who rove in Canada, or in the North-West: probably a Bible in each of these tongues, as these tribes, formerly Pagans and Schamanists, have been in part converted during the past 200 years.

Knistenaux.	*Bible, or the Natik.* Elliot's	*Esteckenines.*	*Chippewyan*	*Huron.*	*Algonquin*	*the same*	*the same.*	*Delawares,* lat. 39.°	*Mahakuass.*
1 pey-ac	ne-quut	bech-kon	slachy	eskate	pa-shik	peeheik	pegik	ci-ut-te	on-skat
2 nish-eu	nee-see	nich	nagher	teni	ninch	nige	ninch	nis-sa	tig-gene
3 nish-tou	shwe	nach	tagh-y	hachin	nis-sou	niswois	nissowe	naha	ache
4 new-ay	ya-ou	iau	dengk-y	dac	neau	neau	neou	nace-vo	va-jene
5 ni-an-nan	na-pan-na-tashit	prencht	sason-lachee	onyche	na-ran	naman	naunou	pa-reen-ach	wisck
6 ne-gou-ta-woe-sic	ne-qutta-tashit	cha-chit	alki-tar-hy-y	honhahea	nin-gout-was-sou	nigouta-waswois	ningout-waswois	ci-at-tas	ja-jack
7 nish-woi-sic	nes-aus-uk-tashit	con-ta-chit	wanting-hy-y	sotaret	nin-cho-was-sou	nigi-waswois	ninch-ouassou	nis-sas	tza-dack
8 jan-na-new	schwo-suk-tashit	erooignen	alki-deing-y	ateret	nis-so-was-sou	she-wassois	niss-ouassou	ha-as	tic-keron
9 shack	pasako-ogun	pencho-quem	cakina-hanoth-na	nechon	shon-gas-sou	shang-wassois	chang-ouassou	paes-chun	wa-de-rom
10 mi-ta-tat		pe-roch	ca-noth-na	assam	mit-taus-sou	mit-wassois	mit-assou	thae-raen	wa-sha

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Probably parts of the Bible in these three.			Probably part of the Bible in these two.			All the Bible in these two.			
Cherokee. lat. 34.°	*Chikkasah, or Chactaw.* lat. 32.°	*Muskohge, or Creek.* lat. 32.°		*Ecclemach.* lat. 37.°	*the same, by a German.*	*Mexican.* lat. 20.°	*Inca, or Quichua.*	*Peru.*	*Rumsen.* lat. 34.°	*Achastlians, about* lat. 37.°
1 so quo	chephpha	hommai	1	pek	pek	ce	huc	quine	enjala	moukala
2 tahre	tooga-lo	hokko-le	2	ou-lach	ulhai	ome	yscay	epu	ultis	outis
3 choch	tootchena	toot chena	3	oullef	julep	jei	quimça	quila	kappes	capes
4 nank-ke	oosta	oh sta	4	amna hou	jamajus	nahui	tahua	meli	ultitzim	outiti
5 ishke	tathlabe	chakape	5	pemaka	pamajala	macu-illi	chumpi-picheca	kechu	haliizu	is
6 soo-ta-re	hannah-le	eepahge	6	pe-koulana	pegualanai	chi-cuace	cocta	cayu	hali-shakem	etesake
7 kareko-ge	un-too-ga-lo	holoaphge	7	houlakoala	jula-jualanai	chi-come	canchis	selge	kapkama-shakem	kaleis
8 suh-nay-ra	un-tootchena	cheene-pa	8	koulefala	julep-jualanai	chi-cuei	puçac		ultumai-shakem	oulous-marakhen
9 soh-nay-ra	chak-ka-le	ohstape	9	kamakoual	jamajus-jualanai	chiucnalui	yscon-chunac		pakke	pak
10 skoch	po-koo-le	poko-le	10	tomoila	tomoila	matlactli		mari	tamchaigt	tonta
			100				pachac	pataca		
			1000				huaranca	huaranca		

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Annex 206

All, or parts of these twelve tribes, have been perverted by, and some are now hearing, Mahometan preachers.

	Bornou. lat. 20.°	*Cashna.* lat. 18.°	*Feloops.* lat. 13.°
1	lakka	deiyah	enory
2	endee	beeyou	sickaba, or cookaba
3	nieskoo	*okoo*	sisajee
4	dekoo	foodoo	sibakeer
5	*okoo*	beat	footuck
6	araskoo	sheedah	footuck-enory
7	hushoo	bookai	footuck-cookaba
8	tallore	takoos	footuck-sisajee
9	lilkar	tarrah	footuck-sibakeer
10	meiko	goumah	siban-konyen

	Jaloffs. lat. 15.°	*the same.*	*Manna. Jallomkadoo. or Sosoo.* Alone Christians. lat. 90°.	*Serawoollies. Kasson, Kaarta. Ludamar, near Bombara.* lat. 13.°	*Bombara and Mandingoes.* lat. 11.°	*River Gambia.* lat. 12.°
1	wean	an or ben	kidding	bani	killin	killing
2	yar	yar	fidding	fillo	foola	foola
3	yat	niet	sarra	sicco	sabba	saba
4	yan-et	nianet	nani	narrato	nani	nane
5	jud-om	gur-um	soolo	karrago	loolo	looloo
6	N. B. add		seni	toomo	woro	
7	judom or 5		soolo-ma-fidding	nero	oronglo	
8	to wean, yar,		soola-ma-sarra	sego	sie	sae
9	yat, yanet;		soola-ma-nani	kabbo	conunta	conuntee
10	fook		nuff	tamo	tang	tang
11	fook-aug-wean					

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	The Mahometan *Foolahs.* lat. 17.°	*the same.*	A Bible in the *Soo-soo.* lat. 9.°	Parts in the *Bullom* and *Timmanee, near to Sierra Leona. or* lat. 9.°	
1	kalen	go	ki-ring	nim-bul	pin
2	fula	deddee	fi-ring	nin-ting	prung
3	seba	tettee	shu-kung	nin-raa	pisa-as
4	nani	nee	naani	nin-hy-ul	pa-an-lee
5	lulu	jouee	shoo-li	nin-men	to-mat
6	uruh	jego	she-ni	men-bul	rokin
7	urnklu	je-	shu-li-fi-ring	men-ting	day-ring
8	saee	deedee je-	shu-li-ma-shu-kung	men-raa	day-sa-as
9	kanuntee	tettee je-nee	shu-li-ma-na-a-ni	men-hy-ul	day-ngaanlee
10	dan	sappo	foo	wa-a-ang	to-fot
11			foo-nungki-ring		

	Pagan *Tibboo.* lat. 23.°	Pagan *Runga.*	A Bible in the *Hottentot.* lat. 32.°	*the same.*	Pagan tribe in *Lagoa Bay.* lat. 34.°	A Bible in the *Caffer.* lat. 25.°
1	trono	kadenda	koi-se	quæ	chin-gea	eenye
2		em-birr	kam-se	kam	seberey	zimbe-anie
3	agesso	atfik	aru-se	gona	trirarou	zin-tatee
4	fusso	mendih	gna-to-i	hakæ	moonaw	zeen-ne
5	fo		me-tuka	gose	thanou	zin-cano
6		su-bo ti-keda	kru bi		thanou-na-chenge-va	zin-tantaat
7		ow	gna-tig-na		thanou-na-trebeze	zin-none
8		sebateis	gnin-ka		thanou-tri-rar-ou	zin-toam-na-eae
9		atih	tu-mink-ma		thanou-na-maun-aw	tuam-numye
10	markum	buff	gomat-se		koumau	leeshung

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Annex 207

J.S. Vateri, *Linguarum Totius Orbis* (1815)

ROOINGA. ROSSAWN.

In Ost-Indien diesseits des Ganges in Arakan sind diese zwey Sprachen Mischungen der benachbarten, Rooinga oder Ruinga von Hindi, Rukheng (s. Arrakan) und Arabischen, gesprochen von den dortigen Muhamedanern, Rossawn oder Rusán vom verdorbenen Sanskritt, Bengalischen und Rukheng, gesprochen von den dortigen Hindu, Anhängern der Brahmanischen Religion.

In Indiae transgangetanae regione Arakan duae hae linguae mixtis finitimis ortae sunt, Ruinga, qua Muhamedani utuntur, ex Hindostanica, Rukheng et Arabica, Rusán ex vocabulis Sanscridamicis iisque corruptis, Bengalicis et Rukheng, qua utuntur sectatores religionis Brahmanicae illic viventes.

Wörter von beyden s. in Asiatical researches T. V. pag. 238 sq.

Vocabula utrorumque

Annex 208

Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944)

BnF Gallica

Axis rule in occupied Europe , laws of occupation, analysis of government, proposals for redress, by Raphaël Lemkin

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PREFACE

The present book grew out of a desire to give an analysis, based upon objective information and evidence, of the rule imposed upon the occupied countries of Europe by the Axis Powers—Germany, Italy, Hungary, Bulgaria, and Rumania. This régime is totalitarian in its method and spirit. Every phase of life, even the most intimate, is covered by a network of laws and regulations which create the instrumentalities of a most complete administrative control and coercion. Therefore these laws of occupation are an extremely valuable source of information regarding such government and its practices. For the outside world they provide undeniable and objective evidence regarding the treatment of the subjugated peoples of Europe by the Axis Powers. The author feels that such evidence is especially necessary for the Anglo-Saxon reader, who, with his innate respect for human rights and human personality, may be inclined to believe that the Axis régime could not possibly be as cruel and ruthless as it has been hitherto described. These laws imposed upon the populations of occupied Europe are very revealing. The occupant has not refrained from formulating as law, dictates which are in fact very grave outrages against humanity and international law, against human rights, morality, and religion. One finds in them, for example, evidence in the form of provisions for confiscations of private property based upon a presumption of future guilt, and for the prohibition of the use of their own language by the population of an occupied country, and such evidence of moral debasement as clauses providing for subsidies to women of subjugated peoples for having illegitimate children by members of the Wehrmacht. The author therefore believed that a collection of occupation laws was essential to supplement an analysis of the Axis régime.

The collection was made by selecting the more representative laws and decrees for each country and for each phase of life. These laws of occupation were promulgated not only by the Axis partners themselves but also by puppet régimes and puppet states, which were established in Norway, Serbia, Croatia, Slovakia, the Protectorate of Bohemia and Moravia, and to a certain extent in Vichy France, as well as by the Secretaries General of the Ministries in Belgium and the Netherlands. The collection forms the third part of the book, while Part I seeks to present a rational synthesis of the techniques of occupation, and Part II analyzes the régime in each occupied country. It has been necessary to adopt such a method of presentation because of the great complexity of the problems involved and also because it was deemed essential to stress local peculiarities in the various countries. Since the German Axis partner is the leader and the main organizer of the system, the first part deals exclusively with German techniques of occupa-

tion, whereas the techniques of occupation followed by other Axis partners are dealt with in the framework of the analysis of the régime in the respective countries.

The first part is divided into chapters treating different aspects of government. The chapter on Administration (Chapter I) shows how the Germans have, in violation of international law, incorporated into the Reich large areas of the occupied countries, and how the administration of the incorporated areas differs from the administration of the non-incorporated areas. With their traditional predilection for theories, the Germans have applied the racial theory in effecting these incorporations on the assumption that the incorporated areas are inhabited by Germans, whereas for the non-incorporated areas they have applied the *Lebensraum* theory. The multiple administrative divisions of the occupied countries (Yugoslavia has been divided into ten units, France into five, Poland five, Greece five, and so on) serve the purpose of weakening and crushing the resistance of the captive nations by dividing and enclosing them in separate territorial units, hermetically sealed one from another. The chapter on Police (Chapter II) is an attempt to make clear the especially important rôle and functions of the Gestapo and the S.S. (*Schutzstaffeln*) in Germany and in the occupied countries, and in particular to show that the crimes ascribed to them are not simply a result of the ill-will of individual members but are mainly an essential part of the program of their activities and even of their world outlook. The chapter on Law (Chapter III) presents evidence of the fact that German law imposed upon the occupied countries is bereft of moral content and of respect for human rights. It is not conceived as human justice but it invokes legal techniques simply as a means of administrative coercion. Indeed it appears obvious that the occupant does not respect the limitations imposed by the Hague Convention. He has adopted a unilaterally utilitarian conception of law—law is that which is useful to the German nation; and in this respect the present rulers of Germany are using essentially the same conception of law which was used by Bethmann-Hollweg in 1914, when he declared that necessity knows no law. The organization of the courts (Chapter IV) reminds one vividly of the *Fehme* tribunals of the Middle Ages. The chapter on Property (Chapter V) bears witness to the fact that the occupant has enriched not only the Reich but also individual Germans, and that by permitting only politically desirable persons to possess property, the occupant has converted the institution of property into a powerful political weapon. As for Finance (Chapter VI), it is administered in such a way as to make the occupied countries pay not only the costs of occupation (to an unjustified extent) but also a large part of the costs of the war, thus shifting much of the financial burden from the shoulders of German citizens to those of the people of each occupied country. An elaborate financial system, functioning through instrumentalities of inflated

currency and forced borrowing by clearing, helps Germany to seize the economic substance of the occupied lands in such a shrewd way that in some countries there is even created an atmosphere of false business prosperity similar to the hazy state of mind of intoxicated persons. The economy of the subjugated countries has been put in a straitjacket of regulations, controlling its every stage from the production and procurement of raw materials up to their distribution and shipment to Germany and the consumption of finished goods. Mediæval guilds have been revived in the form of compulsory-membership groups controlling trades and occupations. The right to engage in a trade or profession is made subject to the permission of the authorities, the granting of such permission being dependent upon such factors as the citizenship and political reliability of the applicant. As regards Labor generally (Chapter VII), it is clear that conscription and deportations to Germany are squeezing the manpower of occupied Europe, disrupting families, and undermining permanently the health of the workers. The extremely inhuman treatment of Jews (Chapter VIII) serves as a propaganda device for the promotion of the anti-Christian idea of the inequality of human beings and of German racial superiority.

The picture of coordinated German techniques of occupation must lead to the conclusion that the German occupant has embarked upon a gigantic scheme to change, in favor of Germany, the balance of biological forces between it and the captive nations for many years to come. The objective of this scheme is to destroy or to cripple the subjugated peoples in their development so that, even in the case of Germany's military defeat, it will be in a position to deal with other European nations from the vantage point of numerical, physical, and economic superiority. Despite the bombings of Germany, this German superiority will be fully evident after hostilities have ceased and for many years to follow, when, due to the present disastrous state of nourishment and health in the occupied countries, we shall see in such countries a stunted post-war generation, survivors of the ill-fed children of these war years.

The practice of extermination of nations and ethnic groups as carried out by the invaders is called by the author "genocide," a term deriving from the Greek word *genos* (tribe, race) and the Latin *cide* (by way of analogy, see homocide, fratricide) and is treated in a chapter under the same name (Chapter IX). Genocide is effected through a synchronized attack on different aspects of life of the captive peoples: in the political field (by destroying institutions of self-government and imposing a German pattern of administration, and through colonization by Germans); in the social field (by disrupting the social cohesion of the nation involved and killing or removing elements such as the intelligentsia, which provide spiritual leadership—according to Hitler's statement in *Mein Kampf*, "the greatest of spirits can be liquidated if its bearer is beaten to death with a rubber truncheon"); in

CHAPTER IX

GENOCIDE

I. Genocide—A New Term and New Conception for Destruction of Nations

New conceptions require new terms. By "genocide" we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing), thus corresponding in its formation to such words as tyrannicide, homocide, infanticide, etc.[1] Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.

The following illustration will suffice. The confiscation of property of nationals of an occupied area on the ground that they have left the country may be considered simply as a deprivation of their individual property rights. However, if the confiscations are ordered against individuals solely because they are Poles, Jews, or Czechs, then the same confiscations tend in effect to weaken the national entities of which those persons are members.

Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and the colonization of the area by the oppressor's own nationals. Denationalization was the word used in the past to describe the destruction of a national pattern.[1a] The author believes, however, that this

[1] Another term could be used for the same idea, namely, *ethnocide*, consisting of the Greek word "ethnos"—nation—and the Latin word "cide."

[1a] See *Violation of the Laws and Customs of War: Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919*, Carnegie Endowment for International Peace, Division of International Law, Pamphlet No. 32 (Oxford: Clarendon Press, 1919), p. 39.

word is inadequate because: (1) it does not connote the destruction of the biological structure; (2) in connoting the destruction of one national pattern, it does not connote the imposition of the national pattern of the oppressor; and (3) denationalization is used by some authors to mean only deprivation of citizenship.[2]

Many authors, instead of using a generic term, use currently terms connoting only some functional aspect of the main generic notion of genocide. Thus, the terms "Germanization," "Magyarization," "Italianization," for example, are used to connote the imposition by one stronger nation (Germany, Hungary, Italy) of its national pattern upon a national group controlled by it. The author believes that these terms are also inadequate because they do not convey the common elements of one generic notion and they treat mainly the cultural, economic, and social aspects of genocide, leaving out the biological aspect, such as causing the physical decline and even destruction of the population involved. If one uses the term "Germanization" of the Poles, for example, in this connotation, it means that the Poles, as human beings, are preserved and that only the national pattern of the Germans is imposed upon them. Such a term is much too restricted to apply to a process in which the population is attacked, in a physical sense, and is removed and supplanted by populations of the oppressor nations.

Genocide is the antithesis of the Rousseau-Portalis Doctrine, which may be regarded as implicit in the Hague Regulations. This doctrine holds that war is directed against sovereigns and armies, not against subjects and civilians. In its modern application in civilized society, the doctrine means that war is conducted against states and armed forces and not against populations. It required a long period of evolution in civilized society to mark the way from wars of extermination,[3] which occurred in ancient times and in the Middle Ages, to the conception of wars as being essentially limited to activities against armies and states. In the present war, however, genocide is widely practiced by the German occupant. Germany could not accept the Rousseau-Portalis Doctrine: first, because Germany is waging a total war; and secondly, because, according to the doctrine of National Socialism, the nation, not the state, is the predominant factor.[4] In this German conception the nation provides the biological element for the state. Consequently, in enforcing the New Order, the Germans prepared, waged, and continued a war

[2] See Garner, *op. cit.*, Vol. I, p. 77.

[3] As classical examples of wars of extermination in which nations and groups of the population were completely or almost completely destroyed, the following may be cited: the destruction of Carthage in 146 B.C.; the destruction of Jerusalem by Titus in 72 A.D.; the religious wars of Islam and the Crusades; the massacres of the Albigenses and the Waldenses; and the siege of Magdeburg in the Thirty Years' War. Special wholesale massacres occurred in the wars waged by Genghis Khan and by Tamerlane.

[4] "Since the State in itself is for us only a form, while what is essential is its content, the nation, the people, it is clear that everything else must subordinate itself to its sovereign interests."—Adolf Hitler, *Mein Kampf* (New York: Reynal & Hitchcock, 1939), p. 842.

not merely against states and their armies [5] but against peoples. For the German occupying authorities war thus appears to offer the most appropriate occasion for carrying out their policy of genocide. Their reasoning seems to be the following:

The enemy nation within the control of Germany must be destroyed, disintegrated, or weakened in different degrees for decades to come. Thus the German people in the post-war period will be in a position to deal with other European peoples from the vantage point of biological superiority. Because the imposition of this policy of genocide is more destructive for a people than injuries suffered in actual fighting,[6] the German people will be stronger than the subjugated peoples after the war even if the German army is defeated. In this respect genocide is a new technique of occupation aimed at winning the peace even though the war itself is lost.

For this purpose the occupant has elaborated a system designed to destroy nations according to a previously prepared plan. Even before the war Hitler envisaged genocide as a means of changing the biological interrelations in Europe in favor of Germany.[7] Hitler's conception of genocide is based not upon cultural but upon biological patterns. He believes that "*Germanization* can only be carried out with the *soil* and never with *men*." [8]

When Germany occupied the various European countries, Hitler considered their administration so important that he ordered the Reich Commissioners and governors to be responsible directly to him.[9] The plan of genocide had to be adapted to political considerations in different countries. It could not be implemented in full force in all the conquered states, and hence the plan varies as to subject, modalities, and degree of intensity in each occupied country. Some groups—such as the Jews—are to be destroyed completely.[10] A distinction is made between peoples considered to

[5] See Alfred Rosenberg, *Der Mythus des 20. Jahrhunderts* (München: Hoheneichenverlag, 1935), pp. 1–2: "History and the mission of the future no longer mean the struggle of class against class, the struggle of Church dogma against dogma, but the clash between blood and blood, race and race, people and people."

[6] The German genocide philosophy was conceived and put into action before the Germans received even a foretaste of the considerable dimensions of Allied aerial bombings of German territory.

[7] See Hitler's statement to Rauschning, from *The Voice of Destruction*, by Hermann Rauschning (New York, 1940), p. 138, by courtesy of G. P. Putnam's Sons:

". . . The French complained after the war that there were twenty million Germans too many. We accept the criticism. We favor the planned control of population movements. But our friends will have to excuse us if we subtract the twenty millions elsewhere. After all these centuries of whining about the protection of the poor and lowly, it is about time we decided to protect the strong against the inferior. It will be one of the chief tasks of German statesmanship for all time to prevent, by every means in our power, the further increase of the Slav races. Natural instincts bid all living beings not merely conquer their enemies, but also destroy them. In former days, it was the victor's prerogative to destroy entire tribes, entire peoples. By doing this gradually and without bloodshed, we demonstrate our humanity. We should remember, too, that we are merely doing unto others as they would have done to us."

[8] *Mein Kampf*, p. 588.

[9] See "Administration," above, pp. 9–10.

[10] *Mein Kampf*, p. 931: ". . . the National Socialist movement has its mightiest tasks to fulfill: . . . it must condemn to general wrath the evil enemy of humanity [Jews] as the true creator of all suffering."

be related by blood to the German people (such as Dutchmen, Norwegians, Flemings, Luxemburgers), and peoples not thus related by blood (such as the Poles, Slovenes, Serbs). The populations of the first group are deemed worthy of being Germanized. With respect to the Poles particularly, Hitler expressed the view that it is their soil alone which *can and should be profitably Germanized.*[11]

II. Techniques of Genocide in Various Fields

The techniques of genocide, which the German occupant has developed in the various occupied countries, represent a concentrated and coordinated attack upon all elements of nationhood. Accordingly, genocide is being carried out in the following fields:

POLITICAL

In the incorporated areas, such as western Poland, Eupen, Malmédy and Moresnet, Luxemburg, and Alsace-Lorraine, local institutions of self-government were destroyed and a German pattern of administration imposed. Every reminder of former national character was obliterated. Even commercial signs and inscriptions on buildings, roads, and streets, as well as names of communities and of localities, were changed to a German form.[12] Nationals of Luxemburg having foreign or non-German first names are required to assume in lieu thereof the corresponding German first names; or, if that is impossible, they must select German first names. As to their family names, if they were of German origin and their names have been changed to a non-German form, they must be changed again to the original German. Persons who have not complied with these requirements within the prescribed period are liable to a penalty, and in addition German names may be imposed on them.[13] Analogous provisions as to changing of names were made for Lorraine.[14]

Special Commissioners for the Strengthening of Germanism are attached to the administration, and their task consists in coordinating all actions promoting Germanism in a given area. An especially active rôle in this respect is played by inhabitants of German origin who were living in the occupied

[11] *Ibid.*, p. 590, n. ". . . The Polish policy in the sense of a Germanization of the East, demanded by so many, rooted unfortunately almost always in the same wrong conclusion. Here too one believed that one could bring about a Germanization of the Polish element by a purely linguistic integration into the German nationality. Here too the result would have been an unfortunate one: people of an alien race, expressing its alien thoughts in the German language, compromising the height and the dignity of our own nationality by its own inferiority."

As to the depopulation policy in occupied Yugoslavia, see, in general, Louis Adamic, *My Native Land* (New York: Harper & Brothers, 1943).

[12] For Luxemburg, see order of August 6, 1940, below, p. 440.

[13] See order concerning the change of first and family names in Luxemburg, of January 31, 1941, below, p. 441.

[14] *Verordnungsblatt*, 1940, p. 60.

In other countries, especially in Alsace-Lorraine and Luxemburg, genocide in the economic field was carried out in a different manner. As the Luxemburgers are considered to be of related blood, opportunity is given them to recognize the Germanic elements in themselves, and to work for the strengthening of Germanism. If they do not take advantage of this "opportunity," their properties are taken from them and given to others who are eager to promote Germanism.[27]

Participation in economic life is thus made dependent upon one's being German or being devoted to the cause of Germanism. Consequently, promoting a national ideology other than German is made difficult and dangerous.

BIOLOGICAL

In the occupied countries of "people of non-related blood," a policy of depopulation is pursued. Foremost among the methods employed for this purpose is the adoption of measures calculated to decrease the birthrate of the national groups of non-related blood, while at the same time steps are taken to encourage the birthrate of the *Volksdeutsche* living in these countries. Thus in incorporated Poland marriages between Poles are forbidden without the special permission of the Governor (*Reichsstatthalter*) of the district; and the latter, as a matter of principle, does not permit marriages between Poles.[28]

The birthrate of the undesired group is being further decreased as a result of the separation of males from females [29] by deporting them for forced labor elsewhere. Moreover, the undernourishment of the parents, because of discrimination in rationing, brings about not only a lowering of the birthrate, but a lowering of the survival capacity of children born of underfed parents.

As mentioned above, the occupant is endeavoring to encourage the birthrate of the Germans. Different methods are adopted to that end. Special subsidies are provided in Poland for German families having at least three minor children.[30] Because the Dutch and Norwegians are considered of

[27] See "Property," above, p. 38.

[28] See Report of Primate of Poznań to Pius XII, *The Black Book of Poland* (New York: G. P. Putnam's Sons, 1942), p. 383.

[29] That the separation of males from females was preconceived by Hitler as an element of genocide is obvious from his statement:

"'*We are obliged to depopulate*,' he went on emphatically, 'as part of our mission of preserving the German population. We shall have to develop a technique of depopulation. If you ask me what I mean by depopulation, I mean the removal of entire racial units. And that is what I intend to carry out—that, roughly, is my task. Nature is cruel, therefore we, too, may be cruel. If I can send the flower of the German nation into the hell of war without the smallest pity for the spilling of precious German blood, then surely I have the right to remove millions of an inferior race that breeds like vermin! And by "remove" I don't necessarily mean destroy; I shall simply take systematic measures to dam their great natural fertility. For example, I shall keep their men and women separated for years. Do you remember the falling birthrate of the world war? Why should we not do quite consciously and through a number of years what was at that time merely the inevitable consequence of the long war? There are many ways, systematical and comparatively painless, or at any rate bloodless, of causing undesirable races to die out.'"—Rauschning, *op. cit.*, pp. 137–38, by courtesy of G. P. Putnam's Sons.

[30] See order concerning the granting of child subsidies to Germans in the Government General, of March 10, 1942, below, p. 553.

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Nehemiah Robinson, *The Genocide Convention - A Commentary* (Institute of Jewish Affairs 1960)

THE GENOCIDE CONVENTION

A Commentary

By

NEHEMIAH ROBINSON

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JAN 22 1961

INSTITUTE OF JEWISH AFFAIRS
WORLD JEWISH CONGRESS
15 EAST 84TH STREET
NEW YORK 28, N. Y.

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a group of people on a subsistence diet, reducing required medical services below a minimum, withholding sufficient living accomodations, etc., provided that these restrictions are imposed with intent to destroy the group in whole or in part. Subparagraph (d) may in practice give rise to the problem of whether the prevention of births within the whole group or only in a part was intended. Although this subparagraph speaks not of restriction but prevention, it may be granted that the intent of partial prevention suffices, since the requirement of total prevention would conflict with the definition of Genocide as relating not only to a whole group but also to a part of it.

The measure imposed need not be the classic action of sterilization; separation of the sexes, prohibition of marriages and the like are measures equally restrictive and produce the same results. As stated above, the actual extent of prevention may not be decisive once it is established that is was imposed on members of any of the protected groups as a method and with the intent of destruction only.[25] This applies also to sub-paragraph (e).

(f) As indicated above, only the five acts specifically enumerated in Article II were to be considered as Genocide, provided they were committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. As noted above, the Convention did not take over Article III of the draft of the Ad Hoc Committee dealing with "cultural Genocide." Instead it included, on a Greek motion,[26] point (e) dealing with forced transfer of children (as was envisaged in the Secretariat's draft) as one of the acts of cultural Genocide. The omission of Article III of the Ad Hoc Committee's draft was considered to represent a departure from the wording of the General Assembly's Resolution 96 (I), which spoke of cultural contributions lost as a result of acts of Genocide.[27] The deletion of this article was decided upon by a vote of

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[25] The apprehension of Frank R. Holman ("Liberty under Law," *Cleveland Bar Association Journal*, 1949 pp. 107 ff.) that organizations advocating birth control may fall under the Convention is unfounded because the basic requirement (intent to destroy a special group) is missing.

[26] A/C.6/242.

[27] Shaista Sv. Inkramullah ("United Nations Discussion on Human Rights and Genocide," *Pakistan Horizon*, December, 1948) considers that by the deletion of cultural genocide the opponents "destroyed the very letter and spirit of the Resolution of December, 1946, because it effectively deprived the world of the cultural contributions of small groups of people" (p. 234).

25 to 16, with 4 abstentions, 13 delegations being absent during the vote.[28] The main arguments given for the exclusion were that "cultural" Genocide was too indefinite a concept to be included in a Convention; that the difference between mass murder and the closing of libraries, for instance, was too great; that cultural Genocide legitimately falls within the sphere of protection of minorities. Thus the U.S. delegation, for instance, contended that acts directed at the destruction of the institutions of groups to be protected by the Convention should be dealt with in a treaty for the protection of minorities.[29]

(g) The Sixth Committee extended the scope of the provisions of the Ad Hoc Committee's draft by replacing the words "impairing the physical integrity of members of the group" with "causing serious bodily or mental harm to members of the group." This was done on a U.K. proposal which considered the wording of the Ad Hoc Committee too vague,[30] and Chinese-Indian amendments[31] to cover acts committed through the use of narcotics.[32]

(h) The Convention does not define the term "children." It must be accepted in the general sense of a "child" as distinguished from an "adult." Who is a "child" and who an "adult" depends on the law of the country, establishing the age when a person may legally dispose of himself. The Israel law[33] defines a "child" by exact age.

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[28] A/C.6/SR.83, p. 22.

[29] The majority felt that to extend the Genocide Convention to cover such crimes as the destruction of churches, schools, or libraries would weaken the purpose for which it was designed, namely, to prevent and punish physical destruction of entire human groups. See, *i.a.*, *These Rights and Freedoms*, p. 128, E/623. Cf. also the consenting statements by France (*ibid.*), India (A/PV 178, p. 61), and Gt. Britain (A/PV 179, p. 22). For the opposing statements by the USSR, Venezuela, and Pakistan, see, *i.a.*, A/PV 178, pp. 15-16, 23-36.

[30] A/C.6/222 and corr. 1.

[31] A/C.6/232 and A/C.6/242.

[32] The understanding of the (then) Canadian Minister of Foreign Affairs, Lester B. Pearson, was that "mental harm" could not mean anything but physical injury to the mental faculties of the members of the group. (*House of Commons Debates: Official Report*, p. 2442.) The apprehension by Frank R. Holman (*op. cit.*) that segregation of Negroes may be conceived as inflicting mental harm on the members of a racial group and therefore be classified as Genocide is thus unfounded.

[33] See comments to Art. V, below.

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W.M. Reisman, 'Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination' (1971) 1(1) Denver Journal of International Law & Policy 29

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Responses to Crimes of Discrimination and Genocide: An Appraisal of the Convention on the Elimination of Racial Discrimination

W. M. Reisman

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RESPONSES TO CRIMES OF DISCRIMINATION AND GENOCIDE: AN APPRAISAL OF THE CONVENTION ON THE ELIMINATION OF RACIAL DISCRIMINATION

W. M. REISMAN*

It is only in the most astigmatic of definitions that international law is considered as the law between states.[1] Viewed comprehensively and realistically it is the process of authoritative decision for events which transcend discrete groups, involving the intense interaction of members of more than one of them.[2] These transgroup events may entail the deprivations which the municipal lawyer would characterize as criminal delicts were they to occur *within* the group parameters to which he has been conditioned. If the disengaged observer is inclined to use the conventional characterizations of criminal law, he might well label these events as intergroup or international crimes insofar as their commission threatened either the continuing minimum value interchange between the groups or contravened common or coordinated policies of the groups concerned.

From the observer's perspective, a basic indicator of transgroup integration would be the extent to which members of different groups (1) concur over time in the characterization of certain intergroup or intragroup deprivations as crimes;

* Associate Professor, Yale Law School. Drafts of this article were read critically by Professor Myres S. McDougal, and Dr. Lung-chu Chen of the Yale Law School, by Dr. Egon Schwelb of the United Nations Secretariat and by Professor Michael Libonati of the University of Alabama School of Law. A number of their suggestions have been incorporated, but they share no responsibility for the views put forward here. Copyright is retained by the author.

[1] For a general survey of views, *see* H. BRIGGS, THE LAW OF NATIONS 93-98 (2d ed. 1952). Some quasi-official movement away from the classical definition is found in 1 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 1 (1963).

[2] For an initial systematic investigation of the rich range of participants in international decision, see McDougal, Lasswell and Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253, 263-67 (1967). To my knowledge no comparable model has been developed in regard to the international criminal process, in particular, the role of transnational gangs remains comparatively unexamined.

and (2) share an intensity of demand for the imposition of sanctions beyond the mere characterization of these events as criminal. If these patterns of concurrence were arranged on a world map, they would delineate many interlocking communities in dimensional schemes considerably more complex than the conventional political boundaries by which the globe is believed to be divided. Indeed, the premises of political boundaries would be thrown into doubt by such an exercise.[3]

Consider three wholly mundane examples of events: in the southern Sudan, on the south side of Chicago and in the City, in London. In the Sudan, a Nuer youth steals two cows from a Dinka tribesman. Although the Nilotic political cultures of Dinka and Nuer both have detailed notions of crime,[4] neither would characterize this event as criminal. It is more an act of "war" or intergroup conflict, *i.e.*, an unexceptional event in a relation of continuing but limited hostility, for which certain traditional strategies are customarily employed.[5] Yet the same

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[3] Cartography is popularly viewed as an exercise in tracing political boundaries on the face of the globe; in fact, it is used as a graphic technique for describing or prescribing any number of value activities for which the spatial dimension is significant or critical. Its "[P]rime function is to make possible the analysis of the elements of spatial variation inherent in the distributional qualities of the data under consideration. . . ." Robinson, *Cartography*, 2 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 325, 328 (1968). Unfortunately, relatively few maps have described boundaries or parameters of functional communities, for example, markets, ethnic groups, affection groups, mass audiences which take on the character of communities and so on, without regard to formal political lines. This failure is regrettable for it reinforces misconceptions and fails to exploit a dramatic means of communication for rationalizing and/or changing perspectives. For a provocative exception, see Connor, *Ethnology and the Peace of South Asia*, 22 WORLD POL. 51 (1969).

[4] For a brief treatment, *see* E. EVANS-PRITCHARD, THE NUER 162-72 (1940). Cross cultural comparisons through space and through time require, of course, a search not for analogies but for functional and contextual equivalents. A primitive treatment of crime often emphasizes compensation rather than punitive components; in western civilization the priorities are reversed, implying, as it were, that it is not the victim who has suffered but rather the "community" or its abstract set of principles. In this respect, Malinowski is more than vindicated; primitive society is far more "individualistic" than is the *soi disant* "developed" political culture of the West: B. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 28-32, 39-62 (1926). Malinowski did not direct his attention to the origins of this difference. In some cases, it seems to have derived from a pattern of elite exploitation; by identifying the community as the major "victim" in cases of delict, specific elites as representatives of the community accepted compensation on behalf of the collectivity. There may also be psychosocial causes; *see generally* S. RANULF, MORAL INDIGNATION AND MIDDLE CLASS PSYCHOLOGY (1964).

[5] "The Dinka people are the immemorial enemies of the Nuer. . . . Almost always the Nuer have been the aggressors, and raiding of the Dinka is conceived by them to be a normal state of affairs and a duty, for they have a myth, like that of Esau and Jacob, which explains and justifies it." E. EVANS-PRITCHARD, *supra* note 5, at 125. Intergroup conflict may often be an accepted feature of life, supported rather than condemned by group norms. Anthropological literature is rich in documenting this phenomenon. But one need go no further than any contemporary pluralistic community to perceive the often bizarre coexistence of doctrines of "peace" and

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event occurring between only Nuer (or only Dinka) would be characterized as the crime of theft for which specific customary sanctions would be invoked.

If, however, a northern, let us say Moslem, Sudanese, an official of the government in Khartoum who was charged with the administration of a region in which both Dinka and Nuer live, were informed of the event, he would characterize it as a "crime" and invoke the criminal process to which he has been conditioned. A police or para-military force would return the cows to the Dinka herdsman and the Nuer youth would be tried and perhaps imprisoned for a period of time. The Khartoum officials who are responsible for imposing this heteronomic criminal code on the customary conflict between Dinka and Nuer are well aware of the fact that neither of the Nilotic subgroups views the incident as "criminal." The goal of the Khartoum official is to create a new, integrated pattern in which, in this case, respect for property will be transtribal as well as intratribal. It is highly probable that the strategy of trial and imprisonment of offenders will not succeed.[6]

The theft of a bicycle by an Irish youth from an Italian youth, or by a black youth from a white youth on the South side of Chicago, may occasion identical official responses, even though the taker and the victim may not be viewing the events

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doctrines of tolerable and limited conflict with members of other groups. Because each community is itself heterogeneous, such conflict may continue even when it engenders net losses because the palpable losses fall only on *certain* members of the community. Where, for example, intergroup conflict is an avenue through which poor but enterprising youths may acquire property, wives, or prestige and power within the tribe, they may insist on the continuation of group conflict, even though older, enfranchised tribal members who will be the targets of inevitable reprisals stand to lose in continuing conflict. The point is discussed in detail in J. EWERS, THE BLACKFEET, ch. 7 (1958). Specialists in violence have a similar interest in the continuation of those conditions which make their skills indispensable to the group which they serve or wish to serve. Examples such as these emphasize that group conflict is often an integral cultural trait and that the limitation or eradication of group strife will require radical social changes in many cultural sectors.

[6] A comparable phenomenon is found in white gangs. *See* Mueller, *White Gangs* in MODERN CRIMINALS 45, 60-62 (J. D. SHORT ed. 1970). *See also* D. MAURER, WHIZ MOB: A CORRELATION OF THE TECHNICAL ARGOT OF PICKPOCKETS WITH THEIR BEHAVIOR PATTERN 9-18 (1964). Maurer's observations relate to professional criminals whose subculture perspective holds imprisonment as an occupational hazard rather than as the imposed shame which the dominant culture would like to see it viewed. These observations apply *a fortiori* to members of different groups which view themselves as discrete and either coarchical or superarchical with other groups; whereas these groups share few or no perspectives with adversary or victim groups, the professional criminal's self-perception is, as Maurer notes, more complex. He shares perspectives with the "suckers" and in certain circumstances or on certain levels of consciousness may identify or wish to be identified with them. The point to be emphasized is that the dominant culture which applies a range of criminal sanctions invariably views the projected effects of these sanctions as if they were applied to individuals who share their own perspectives.

as "crimes." In the American context, as in the African context, there is evidence suggesting that the strategy of the criminal sanction may not succeed in expanding the identifications of the parties and integrating the contending groups to which they belong.[7] In certain circumstances the application of sanctions may have important if not primary functions as catharsis for the sanctioning group itself; it may vindicate the appropriateness of the exercise of authority by that specific exercise of authority itself.

A third example involves embezzlement by an English executive who thereafter flees to the United States. The peculation took place entirely in England, the company whose funds were taken was entirely English owned, and it was, in turn, insured entirely by an English company. It is obvious that American authorities will aid in the ensuing apprehension and request for extradition of the embezzler. The wholly expected patterns of *de facto* cooperation and *de jure* extradition indicate an intensely shared demand by the governmental elites of both the United States and the United Kingdom regarding the public protection of certain types of property and preferred practices as well as an intense concurrence in the characterization of deviations from those demanded standards as "crimes".[8] In terms of the multidimensional world criminal law map, there may be a much more intense and effective community between certain socio-economic and even ethnic strata in the United States and the United Kingdom than there is between different socio-economic strata in a single sector of Chicago.

These examples point up a number of features. First, some, and in certain circumstances, much of what is conventionally called criminal behavior is simply intergroup conflict in an arena which an ascendant group wishes to view as homogenous. Second, calling such behavior "crime" may reinforce the exclusivist and parochial tendencies in each group; these tenden-

[7] It has been asserted that the inhabitants of America's penal systems do not view themselves as convicts, but rather as prisoners of war. E. CLEAVER, SOUL ON ICE 58 (1968). Insofar as this is true, application of the penal sanction will reinforce rather than weaken the sense of disidentification. Other integrative sanction programs should be formulated. It is probable that Cleaver's statement describes only one identificatory trend; coexisting with it may be tendencies of identification of varying intensity, with groups in the dominant culture and consequent autopunitive responses within the personality system. The plurality of tendencies takes different forms according to circumstance, and suggests different techniques for personality change. We are not, it should be emphasized, addressing ourselves here to the question of whether and toward what value set personalities should be formed or changed.

[8] The point is discussed and illustrated in Nayak, Act of State: Exclusion of Penal and Revenue Law, 1967 (unpublished doctoral dissertation, Yale Law School).

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cies themselves may be the substratum of intergroup conflict. Third, applying the conventional criminal sanctions to such behavior may further reinforce it.

One challenge to the policy-oriented lawyer is the identification of those areas which should be viewed as intergroup crimes and the formulation of community responses which integrate rather than separate groups and individuals.[9] The integration of individuals and of groups requires a minimum concurrence in the characterization of "criminal behavior." Indeed one uses the incipient sanction of characterizing as "crime" in order to achieve some degree of social integration. (As has been pointed out, the result is often dysfunctional.) This minimum must include a toleration of the right of existence of the other group and its members. Where this minimum is promulgated in some authoritative form, we encounter the authoritative characterization of crimes of genocide and discrimination. Insofar as policy calls for a continuing balance between integration and the maintenance of discrete group identity, "peace," between groups and between individuals of different groups becomes a process of controlled tension.[10]

Training individuals to live in such a system of peace requires that they be equipped with the capacity to identify and recognize this tension in themselves and others without diminishing their own personality systems. It is the sense of self of the individual personality in such a system which is the potential core of group discrimination and genocide. There are numerous examples of international prescriptions—customary and conventional—which insist upon the self-policing of precisely this sort of tension. The demands for minimum standards of humanity during warfare, for example, obviously increase the physical risks of belligerents;[11] nonetheless, they are peremptory norms in international law.

[9] *See,* in this regard H. SILVING, CONSTITUENT ELMENTS OF CRIME 29-31 (1967).

[10] As long as intergroup peace remains a verbal quest undertaken sporadically for symbolic purposes it can, without harm or benefit, continue to be treated as a fantasy unpoliced by reality. For those, however, who are deeply concerned with minimizing intergroup conflict, it is urgent that the implications of peace be clearly understood. Intergroup peace is not a static situation which, once achieved, continues ad infinitum. It is a process which is sustained by human beings regularly making policy choices. And it is a process which may well involve enormous tensions. The psycho-personal implications of peace were probably never more pithily stated than in the 15th century Gayaneshagowa or Great Law of the Iroquois Confederacy. It admonished its officers to develop a skin "seven spans thick" so that they could withstand criticism and control anger. Cited in F. COHEN, THE LEGAL CONSCIENCE 222 (1960).

[11] A discussion of this aspect of the laws of war is found in M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 521-30 (1961). *See also* M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 313-16 (1959).

Criminal Characterization as a Response to Undesirable Behavior

There is a broad spectrum of techniques by which organized groups characterize and respond to patterns of behavior deemed incompatible with social life. The spectrum runs from mild civic order sanctions, such as social disapprobation of "manners" or "etiquette," to intense public order sanctions of behavior characterized as criminal.[12] Many factors enter into the choice of the characterization of undesired behavior, for characterization depends not only on the degree of damage which the undesired behavior causes the community, but also on the extent to which the type of characterization chosen itself contributes to deterrence and even rehabilitation.

On the symbolic level, the characterization "crime" should convey maximum deterrence. Hence it is no surprise that the word "crime" is reserved for that pattern of behavior which is considered either the greatest challenge to elite objectives or most deleterious to group life. Characterizations also depend upon the extent of organized power for dealing with certain behavior patterns. The characterization "crime" implies a public power to deal with it. Where the characterization is made without a power buttress, the potential deterrent power of the symbol is depreciated.[13] This is not the place to trace the intricate interchanges between symbols and the material bases of effective power. It will suffice to note that there is such an interchange and that, when exploited with a full appreciation of the context, effective power is economically augmented. The point to emphasize is that characterization is itself a potentially effective technique for the control of deviant behavior. Characterizations involve and commit power. If applied with contextual accuracy, they increase community power; if applied poorly, they expend it.

Because of the emotive power of symbols, there is always a tendency to use words such as "crime" as a rhetorical device in private and quasi-official political discourse. But since 1945, there has been increasing international official resort to the strategy of characterizing certain types of transnational behavior as criminal. In particular, the word is now used officially

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[12] *See generally* H. Lasswell & R. Arens, In Defense of Public Order (1961); W. M. Reisman, Nullity and Revision: The Review and Enforcement of International Judgments and Awards 252-58 (1971) [hereinafter cited as Nullity and Revision].

[13] Nullity and Revision, *supra* note 12, at 637.

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in regard to aggression[14] and to human rights matters.[15] This trend seems to be caused both by a "spill-over" from national communities as well as by certain dynamics in transnational interaction. The student of international law is almost constantly confronted with a spill-over phenomenon: implicit political models which are normally associated with a national community are gradually projected onto the international plane as the norm toward which international law is expected to strive. Popular thinking tends to be analogical rather than functional and contextual; as one's attention span broadens, it seems almost natural to project what has worked in the past into new and as

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[14] Articles 227 and 228 of the Versailles Treaty provided for the trial of the Kaiser but were not implemented. The Statute of the Nuremberg Tribunal Article 6(a) included crimes against the peace—"[T]he planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties. . ."; "Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis" 13 DEP'T STATE BULL. 222, 224 (1945). These were, of course, implemented. In 1947, the General Assembly referred codification of the Nuremberg principles to the International Law Commission: Res. 177 (II). The result, a Draft Code of Offenses against the Peace and Security of Mankind, is at Ch. IV, 6 U.N. GAOR, Supp. 9, at 10-14, U.N. Doc. A/1858 (1951). Some critics have argued that this innovation in international law was frustrated by the cold war, in that all sides regularly accused each other of crimes against the peace. In fact, the intensity and frequency of the invocation of these symbols may well indicate how deeply they have struck roots in the vocabulary of contemporary politics. On the other hand, this development may be dysfunctional in a number of contexts. It was promulgated on the assumption that there was sufficient global integration to support a universal characterization of a crime and that deviations would be rare enough to reinforce this conviction. In fact, group conflict, as will be seen, continues and is often facilitated by a variety of cultural processes. Where war is regularly characterized as a moral and legal defection, it is harder to secure accommodations and integrative solutions between belligerents.

[15] The third substantive ground of jurisdiction of the Nuremberg Charter concerned "Crimes against Humanity." They were "... [M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." 13 DEP'T STATE BULL. 224 (1945). *See generally*, Schwelb, *Crimes Against Humanity*, 23 BRIT. Y. B. INT'L. L. 178, 212 (1946). The prescription was reconfirmed in Article I of the Genocide Convention: "[G]enocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish"; The Convention on the Prevention and Punishment of the Crime of Genocide, Art. 3(1) U.N. GAOR 21 Sept. 12-Dec. 1948, at 174, U.N. Doc. A/810 (1948). This provision may, I believe, be considered universal customary international law, because of the General Assembly's Resolution 96 (I) of December 11, 1946; YEARBOOK OF THE U.N., 1946-47, at 255. In the discussions of the International Law Commission regarding *jus cogens*, Dr. Shabtai Rosenne argued that the crime of genocide had been rendered an international *jus cogens* in the *Reservations to the Genocide Convention* Opinion of the International Court, 1963 I.C.C. Yearbook (I) 74, cited in Schwelb, *Some Aspects of International Jus Cogens as formulated by the International Law Commission*, 61 AM. J. INT'L L. 946, 954-55.

yet unexplored sectors of experience. Hence a spill-over of domestic patterns into international law.

A. *Historical Perspective on the Concept of Human Dignity*

There have been periods of human history in which the dignity of the individual was a fundamental cultural postulate,[16] but it was not until the Enlightenment that the essentially Renaissance formulations of the inherent dignity of all human beings became firmly embedded in legitimate social and political myth.[17] Thereafter, whatever content an internal public order system might actually have, the symbols of human dignity were a *sine qua non* of ruling elites. There is, little incongruity in the fact that the despotism fashioned by Bismarck boasted of the most advanced social welfare program of its times. He, as one of the shrewdest elite figures of Europe, clearly perceived that power was most effective in a satisfied polity in which all component members were committed to the order.

But the spill-over of bourgeois demands for human dignity into international law was retarded by a number of factors. Foremost, of course, was the continuing parochialism of European myth systems. The relatively low level of interaction with the non-Western world encouraged the European to think of civilization in terms of white Christendom. This was a pervasive aspect of European order and even Marx and Engels, while attacking colonial capitalism, revealed the strong imprint of racial and ethnic bias characteristic of the world in which they lived.

A second contributing factor was the economics of colonialism. Europe was rapidly transforming itself into bourgeois nation-states, in which the middle classes believed themselves to be the primary beneficiaries of a colonial trade monopoly and of the now enhanced opportunities to acquire elite privileges through the colonial bureaucracies. The prospects of great economic and social gains which they entertained tended to retard their consideration of non-Europeans in terms of human dignity.

A third retarding factor was the continuing notion of the separation of foreign and domestic policy. While a specific issue

[16] See for example, W. WAGAR, THE CITY OF MAN (1940) for a survey of visions of a world culture. *See also* McDougal, Lasswell and Reisman, *Theories about International Law*, 8 VA. J. INT'L L. 188, 215 (1968).

[17] *See* H. C. BAKER, THE IMAGE OF MAN: A STUDY OF THE IDEA OF HUMAN DIGNITY IN CLASSICAL ANTIQUITY, THE MIDDLE AGES, AND THE RENAISSANCE (1947); E. KAHLER, MAN, THE MEASURE (1943).

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might become a transient *cause célèbre*, the burghers of Western Europe were content, for the most part, to view foreign affairs and the prescription and application of international law as a relatively aristocratic game in which they had no interest. With foreign affairs powers in the hands of an elite and mid-elite group which rather disdained the bourgeois democracy of its own polity, it was not surprising that anachronistic notions of sovereignty and absolute domestic jurisdiction continued.

Of striking significance, however, is the fact that the practioners of *realpolitik* so frequently appreciated the relation of peace and human rights. The Peace of Westphalia and the numerous humanitarian interventions of the 19th century were based on the premise that in many circumstances, stability could only be purchased by international guarantees of human rights. The leading example of this recurring phenomenon was the collective intervention in Greece resulting in the formation of an independent Greek state.[18]

The breakdown of this old order, insulating international affairs and domestic jurisdiction, was hastened by a number of factors. One of the more dramatic and prominent was the emergence of the "Peace Movement." In the latter half of the 19th century, a variety of pacifistic pressure groups in Europe and the United States began agitating for a more stable system of international peace. Motivated in part by high ideals and in part by a crisis mentality, these groups, directing pressure at their respective governments, demanded international prescriptions in favor of peace and human rights.[19] A further impetus was provided by the entrance of the United States, from its relative hemispheric isolation, into the arena of world affairs. American political myth had been strongly characterized by notions of human dignity and individual liberty and these symbols were forged into American foreign policy. The idiosyncratically American rhetoric of Root, Bryan and Wilson became common parlance in international law.

The increase of economic interdependence hastened the process. As economic colonialism ceased to pay, its committed as well as tacit supporters began to reconsider the entire phe-

[18] The documents of this intervention are found in 14 BRITISH AND FOREIGN STATE PAPERS 633 (1826-27). For a detailed study of this and other 19th century interventions, *see* M. GANJI, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1962). A survey of 20th century interventions is found in Reisman, *Memorandum upon Humanitarian Intervention to Protect the Ibos* (1968).

[19] Historical studies of the peace movement may be found in C. DAVIS, THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE (1962), and D. FLEMING, THE UNITED STATES AND THE WORLD COURT, 1920-1966 (rev. 1968).

nomenon.[20] Western trade union movements began to appreciate that low pay and low workers' standards in other countries could drag their own hard-earned standards down. Entrepreneurial groups understood the implications of sharp competition precipitated by radically uneven commercial environments. Finally, the Russian Revolution, itself a result of and a further impetus to this process, challenged the old order by promising "the workers of the world" the dignity which the oppressed sought and which, Lenin alleged, they could never receive in a liberal democracy. The Russian challenge, in turn, impelled the democracies of the West to hasten to the position towards which they had slowly been moving.

The convergence of these many factors after the First World War contributed to the creation of the League of Nations and the formulation of policies supporting minority rights.[21] The League spanned a twilight period, in which notions of state sovereignty were still forwarded, but in which increasing demand was made in the name of international protection of human rights. The League was particularly active in attempting to control slavery, prostitution, and drugs, and the International Labor Organization laid the groundwork of a process for policing international standards for labor.[22]

The multivalue deprivatory conditions which spawned the bizarre political creations leading to the Second World War were the ultimate demonstration of the nexus between peace and an international system of human rights. In response, the United Nations Charter, in its Preamble, stated with clarity the interdependence of peace and human rights[23] and imposed obligations upon all member-states to act jointly and severally

[20] The illusory economic benefits of colcnialism to the metropolitan power were emphasized, of course, long before the 20th century. In 1793, for example, Jeremy Bentham in his address to the National Convention of France said "Emancipate your Colonies... because you get nothing by governing them, because you cannot keep them, because the expense of trying to keep them would be ruinous...." 4 WORKS OF JEREMY BENTHAM 417 (J. Bowring ed. 1843). The major contemporary impetus came from such works as N. ANGELL, THE GREAT ILLUSION (1908).

[21] *See generally,* J. STONE, INTERNATIONAL GUARANTEES OF MINORITY RIGHTS: PROCEDURE OF THE COUNCIL OF THE LEAGUE OF NATIONS IN THEORY AND PRACTICE (1932); Feinberg, *La Jurisdiction et la jurisprudence de la cour permanente de justice en matiere de mandat et de minorities,* 59 R.A.D.I. 587 (1931); J. Robinson *et al,* WERE THE MINORITIES TREATIES A FAILURE? (1943).

[22] E. HAAS, BEYOND THE NATION-STATE (1964); E. LANDY, THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION: THIRTY YEARS OF ILO EXPERIENCE (1966).

[23] Thus, the first preambular paragraph states a determination "[T]o save succeeding generations from the scourge of war . . ." and then follows with the determination "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . ."

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to achieve realization of those rights as integral to the common pursuit of minimum world order.[24] The point was made again in the Preamble to the Universal Declaration of Human Rights[25] and is implicit in the Genocide Convention. Nor is the "domestic jurisdiction" clause of the Charter a bar preventing the Organization from effecting its mandate in human rights,[26] for the Charter conception is premised on a link between peace and minimum security and human rights. A persistent deprivation of human rights is a threat to the peace and hence a matter of international concern transcending domestic jurisdiction.[27] Thus, in the Rhodesian case, the Security Council specified the nexus between the violation of minimum human rights and a threat to the peace.[28]

B. *Nexus Between Human Rights and Peace*

There is, then, a profound logic in the prominence which has been given to the international protection of human rights in the contemporary international organizational structure. The United Nations is primarily a security organization, committed to maintaining minimum world public order. But the maintenance of order in an economic and sustained manner is not a police operation; it involves rather the structuring of a system of public order which promises its individual citizens the protection and development of their most intense personal demands and, as a result, arouses a spontaneous loyalty. A civilized community maintains itself by the commitment of its citizens to it, and not by policing and terror and, as we shall see, the promise of basic human rights is crucial to the security of any pluralistic community.

Early commentators of the Charter criticized that instrument as a confusing hybrid, which indiscriminately mixed essential security matters with provisions guaranteeing human and economic and social rights. They were in error. Peace,

[24] *See* U.N. CHARTER arts. 55 and 56.

[25] The first preambular paragraph of the Universal Declaration (General Assembly Resolution 217A (III), December 10, 1948) provides that ". . . [R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . "; YEARBOOK OF THE U.N., 1948-49, at 535.

[26] U.N. CHARTER art. 2(7).

[27] Thus, the late Judge Lauterpacht: ". . . [H]uman rights and freedoms having become the subject of a solemn international obligation and of one of the fundamental purposes of the Charter, are no longer a matter which is essentially within the domestic jurisdiction of the Members of the United Nations. . . ." H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 178 (1950); *see also* footnote 33 *infra*.

[28] Security Council Resolution 217 (1965), Nov. 20, 1965: Resolutions and Decisions of the Security Council, 20 U.N. SCOR, 1265th meeting 8 (1965).

in the sense of continuing expectations shared by all peoples that public order will be maintained by noncoercive means and that the structures of public order will be responsive to the legitimate demands of human beings, necessarily rests on a coordinate expectation: that public order structures seek the inherent worth and dignity of all men and are animated to secure the realization of these values. The conditions of peace require a lofty conception of civilized comportment. This comportment can be forthcoming only if the processes to which individuals are asked to commit themselves are unequivocally devoted to a comparably high conception of humanity. Human rights are the necessary condition of peace.

There is an equally profound if considerably more subtle nexus between human rights deprivations and international crimes: *delicta juris gentium*. The conception of "crimes against humanity" as international crimes, established by the framers of the London Charter,[29] was more logical than the framers themselves may have realized. In any group, elites will characterize certain types of behavior as delictual or criminal and, hence, subject to community supervision or sanction, insofar as they believe that such characterizations maximize their own aims. Many such characterizations may have some coherence and logic in terms of the cultural calculus of that system. But objectively, the only characterizations of crime which are rational are those which do, in fact, sustain order and improve group life.[30] Because of the inseverable link between the establishment of human rights and the maintenance of minimum world order, it is now much more urgent to characterize human rights deprivations as international crimes than, for example, piracy as a *delictum juris gentium*.

C. *Racial Discrimination and Genocide*

The first human rights declaration after the framing of the Charter was the General Assembly's Resolution 96(I) of 1946[31] on genocide. The resolution was stimulated by the Nazi holocaust; significantly it was the recrudescense of antisemitism in the winter of 1959 in Europe and especially Latin America which moved the General Assembly to an urgent consideration of the international prevention of racial discrimination. The Genocide Resolution is of crucial importance to an understanding of the

[29] The Statute of the Nuremberg Tribunal, Article 6(c), 13 DEP'T STATE BULL. 224 (1945). For historical parallels see 1 DROST, THE CRIME OF STATE 223 (1959).

[30] H. SILVING, *supra* note 3, at 6.

[31] G.A. Res. 96, YEARBOOK OF THE U.N., 1946-47 at 255 (1947).

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Convention on the Elimination of All Forms of Racial Discrimination, for genocide is not only the ultimate denial of human rights, it is, in the deepest sense, the logical outcome of discrimination. As such the United Nations' authoritative condemnation of genocide forms the subliminal basis and essential authority for the Convention on Discrimination. The 1946 Resolution stated in part that

> Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations. . . . The punishment of the crime of genocide is a matter of international concern.[32]

Genocide does not just happen. It is the destructive outcome of a process which may have begun in seemingly innocent and mundane attitudes and behavior. Part of it is normal personality development in which the individual ego distinguishes itself from the "other." This process is facilitated by ritualized community indications of the legitimate "other." But once the "other," an alien group, is identified, the precondition of genocide has been fulfilled; for genocide cannot even be conceived without a cultural definition of the target group.[33] One of the more terrifying revelations of the most cursory examination of the problem of genocide is how frequently this precondition is fulfilled.

> When we examine the world historical scene, we may note that many times, in many countries, bureaucracies have

[32] *Id.*

[33] A predominantly sociological rather than psychosocial explanation of the etiology of intolerance is found in E. RAAB & S. LIPSET, PREJUDICE AND SOCIETY 28 (1959). Lipset seems to incline to the view that patterns of prejudice are simply learned from social models, without any crucial regard to the psychological development of the individual. A different approach may be found in T. ADORNO, FRANKEL *et al*, THE AUTHORITARIAN PERSONALITY (1950) and B. BETTELHEIM & JANOWITZ, DYNAMICS OF PREJDICE: A PSYCHOLOGICAL AND SOCIOLOGICAL STUDY OF VETERANS (1950). A useful comparative survey of theories of the nature of prejudice is found in G. ALLPORT, THE NATURE OF PREJUDICE (1954). His conclusions of the etiology of prejudice are generously tolerant, for he views prejudice as a complex phenomenon which is caused by different stimuli in different contexts. Hence all theories—sociocultural, situational, psychodyamic and phenomenological—are right some of the time. The view developed here is that these diverse theories relate to exacerbating events rather than to the cause or, perhaps more accurately, to the capacity for prejudicial discrimination. Discrimination is a malignancy of that process which our culture is pleased to call normal personality development. Insofar as we continue to demand this form of personality development, we will produce individuals who are prejudice-prone. Short of reevaluating preferred personality models, there is no "cure" for prejudice, but only a stabilization through self-understanding. This analysis reveals a number of implications about the treatment of prejudice as a crime.

> launched the opening phases of a destruction process. . . . Very often, seemingly harmless bureaucratic activities—such as the definition of a particular group and the exclusion of its members from office—contain the seeds of administrative continuity. Potentially, these measures are stepping stones to a killing operation, but as a rule insurmountable barriers from without and within arrest and disrupt the destructive development. Externally, the opposition of the victims may bring the process to a halt; internally, administrative and psychological obstacles may bar the way. The discriminatory systems of many countries are the leftovers of such disrupted destruction processes.[34]

Where the genocide process stops short of group destruction, we encounter discrimination, a form of intense human deprivation. It does not necessarily follow from this that the normal processes of ego formation must be suppressed. It does mean that any pluralistic community must set bounds of legitimacy to the identification and cultural characterization of other groups. And not only when the juggernaut is spinning to conclusion, when the threat of genocide against a specific group has materialized, but as an integral part of the legal toleration of cultural differentiation.

Striking a balance between a sense of discrete individuality and the sense of integral identity with increasingly inclusive groups and ultimately with a single ecosocial process is, of course, an ongoing problem in organized group life and a continuing concern for the policy scientist. Our species characterizes itself by the inculcation of a tendency toward self-awareness which we currently style "ego"; our civilization is quite inconceivable without such conditioning. Yet when self-awareness extends to a sense of discreteness, the individual may act in such a way as to precipitate grievous damage on others and on the biosphere without appreciating the very real self-destruction which is involved. While specific historical cases of racial discrimination may be a response to a variety of unique stimuli, the latent capacity for such discrimination is a part of personality growth — at least, as we currently nurture it. Like most recurrent crime, the international crimes of racial discrimination and genocide must be treated, not in retrospective sequences of punishment, but in prospective sequences of identification and prevention. Like most recurrent crime, this, in turn, involves a careful appraisal of ourselves and our own value-institutions, the very coordinate points by which we characterize the behavior of others as deviant and delictual.

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[34] R. HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 639 (1961).

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The reasons for the characterization of racial discrimination as a form of deviance from an international norm can thus be seen as both the culmination of historical trends and, equally, as a rather logical response to the needs of an organizing global community. Historically, a variety of metaphysical and divine-transempirical ethical systems in almost all cultures and civilizations have posited the fundamental human dignity of the individual. As a matter of logical response to environmental conditions, it has become increasingly clear that an interdependent global community cannot sustain itself tolerably once it has acquired the technological capacity to destroy itself, if the coin of common exchange is genocide and discrimination. Hence the unequivocal statements of international principle outlawing genocide and discrimination. A question for the policy scientist is whether the techniques adopted in the Convention, to date, are the optimum approach to this type of social control problem. For the answer, we must consider the pending international response to racial discrimination.

The International Convention on the Elimination of all Forms of Racial Discrimination

The history of the Convention can be recounted briefly. In January of 1960, the Subcommission on Prevention of Discrimination and Protection of Minorities condemned renewed manifestations of antisemitism in Europe and Latin America and delegated the collection of factual information on the etiology of racial discrimination.[35] On the basis of this information, the Subcommission recommended that the General Assembly prepare an international convention.[36] At the 17th session of the General Assembly in 1962, plans for much broader conventions were formulated; one on racial discrimination, which was to be given priority, and one on religious intolerance. The Declaration on the Elimination of All Forms of Racial Discrimination was adopted in November, 1963[37] and the Economic

[35] A detailed history of the background of the convention and *travaux* is found in Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 Int'l & Comp. L. Q. 996 (1966). For a survey of the work of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, see Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 Am. J. Int'l L. 869 (1968).

[36] Report of the 12th Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights, U.N. Doc. E/CN.4/800, para. 163 (1960).

[37] Report of the 13th Session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to the Commission on Human Rights, U.N. Doc. E/CN.4/815, para. 176 (1961).

and Social Council's Commission on Human Rights began the formulation of a convention. The draft was completed in 1964, was considered by the Third Committee of the General Assembly in 1965, and was adopted, on December 21 by the plenary General Assembly.[38] The Convention has been acceded to by five states and ratified by 44 states as of April 30, 1971.[39] It went into effect on March 31, 1969.[40] The United States has signed but has not ratified the Convention.

The convention is structured in three parts: substantive, procedural and technical, and jurisdictional matters. Let us review each of these parts briefly, relating them to the totality conceived by the drafters. Practice may fall short of this comprehensive picture, for states may adhere to the Convention but make reservations in regard to specific sections.[41] Article 20 obliges the Secretary General of the United Nations to circulate reservations at the time of accession or ratification. Any state which has already adhered may inform the Secretary General that it does not accept the reservation. Article 20(2) provides that

> A reservation incompatible with the object and purpose of this Convention shall not be permitted nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it.

On its face, this provision seems to import that no reservation to the enforcement procedures of Part II of the Convention will be tolerated, with the exception of the secondary jurisdiction of the International Court of Justice. Reservations may, however, be made to the substantive provisions of Part I, if they are not incompatible with the object and purpose of the Convention and if less than two-thirds of the other parties object.[42]

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[38] G.A. Res. 1904 (XVIII), 18 U.N. GAOR Supp. 15, at 35-37, U.N. Doc. A/5515 (1964).

[39] G.A. Res. 2106A (XX), 20 U.N. GAOR Supp. 14, at 47, U.N. Doc. A/6014 (1966).

[40] The Convention was in force as of January 4, 1969, thirty days after deposit of the 27th ratification. But because a number of states had attached reservations to their accessions or ratifications, a ninety-day protest period had to elapse during which other signatories might object to the reservations which had been submitted. When this article was written, the procedures of implementation called for by the Convention had been formulated, but not yet promulgated.

[41] International Convention on the Elimination of All Forms of Racial Discrimination, Art. 20, para. 2, 1965, YEARBOOK OF THE U.N., at 440, 445-46.

[42] The basic principles regarding reservations are found in the International Court's *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. [1951] I.C.J. Report 15. The principles have been codified in Articles 19-23 of the Vienna Convention on the Law of Treaties, A/Conf. 39/27, 23 May 1969.

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A. *The Substantive Provisions*

Article 1(1) of the Convention defines "racial discrimination" as

> . . . any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

The range of this seemingly broad provision points up immediately a conceptual defect of the Convention. The threat to minimum global order and the challenge to an emerging world community is not *racial* discrimination, but discrimination in general. Discrimination on the basis of criteria such as class, sex, interest or skill group affiliation, personality, mode of sexual expression, or physical or psychic "abnormality" may, in some contexts, be as threatening to world order and just as contrary to human dignity as is racial discrimination. Because the empirical reference of "race" is so ambiguous, many instances of social discrimination which are generally referred to as racial in character have actually entailed discrimination on the basis of many of these other factors. The erroneous assumption that racial discrimination is *de maximis* and urgently requires political consideration runs, unfortunately, throughout the Convention.[43]

Even within the self-determined purview of Article 1, there are some peculiar and politically significant gaps. The specific rights guaranteed and protected by the Convention are set out in detail in Article 5. The basic policy of Article 1 applies to noncitizens with ambiguity (paragraph 2), nor does it affect domestic provisions of nationality, citizenship, or naturalization as long as they do not discriminate aaginst a particular nationality (paragraph 3).

Article 1(4), an extremely significant provision, reads:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not

[43] As noted earlier, the framers of the Convention purposely shifted the focus from religious to racial discrimination, assuming that other forms of discrimination would be treated in other instruments. The problem of religious discrimination is on the General Assembly's agenda; the Declaration on the Elimination of Discrimination against Women was adopted by the General Assembly in Res. 2263 (XXII). This writer discerns a trend in international organizational affairs to give these other discriminatory practices less attention and less innovative procedural routes for implementation.

> be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

This developmental exclusion, which is reiterated in Article 2(1) (e), Article 2(2), and Article 7, is a crucial and realistic part of the program; it seeks to go beyond the outward manifestations of racial discrimination and to create a society of genuine equality for all individuals. It is one of the most important and problematical parts of the Convention and will be treated in greater detail below.

When Article 1(1) is balanced with Article 1(4), the predominant conception of racial discrimination continues to be one of severe repression of the vigorous demands of a subjugated group. Discrimination may start in this manner, but at some point it becomes a reciprocal process. The great wound of continuing discrimination is its internalization in the target; the discriminated person who has, after years and perhaps genenations of alien acculturation, begun to adopt the image the discriminators hold of him and to doubt his own and his group's worth will always lack sufficient self-awareness and self-confidence to avail himself of the formal rights and prerogatives which the law purports to offer him.[44] One of the most arduous and delicate challenges of the elimination of racial discrimination will be the elimination of internalized or self-discrimination. This process may well involve violence to established structures and cultural values within the discriminated group, for the elite of a discriminated group has often reached an accommodation with the surrounding society of discrimination and may view any change as a threat to its own, limited ascendancy.[45] The various claims which will inevitably be

[44] The apparently suicidal doctrines of violence of a number of minority groups which are attempting to emancipate themselves from self-discrimination can only be understood in this framework. Fanon's counsel of violence and Gandhi's counsel of non-violence (and violence!) are essentially strategies by which members of suppressed groups challenge the encompassing authority perspectives which they have internalized within themselves and which they must necessarily repudiate on the psycho-personal level in order to achieve a greater degree of freedom. "In rebel groups not strong enough to overthrow a state, terrorism may be a technique—in some cases a ritual—which is part of their strategy to repudiate and remain independent of the authority system." E. WALTER, TERROR AND RESISTANCE: A STUDY OF POLITICAL VIOLENCE 7 (1969). *See also* B. CROZIER, THE REBELS: A STUDY OF POST-WAR INSURRECTIONS (1960).

[45] Consider, for example, the apparent enthusiasm with which tribal chieftains in Rhodesia have supported the Smith regime despite its gross racist character. In these circumstances, the active political awakening of tribal members will involve destruction of traditional tribal structures of authority. If models of social alternatives are not readily available, grave personal disintegration may ensue. Comparable struggles may be ob-

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raised in a program of elimination of racial discrimination under international auspices will be much more realistically handled if those authorized to apply the Convention operate with a grasp of the enormity and complexity of the problems confronting them.

There are other more specific drafting and policy problems. The language of Article 1(2) opens the way for discrimination against noncitizens, which in some contexts may constitute *de facto* racial discrimination. If the noncitizens are stateless and without hope of diplomatic protection, they are the most helpless creatures in international law. Much of East African racial discrimination against Indians is probably not covered by the Convention. On the other hand, Article 1(3), which excludes from the convention domestic provisions of nationality, citizenship, or naturalization as long as they do not discriminate against a particular nationality, may be formulated too broadly. A significant number of ethnic states practice preferential immigration and naturalization as a means of maintaining their existence, and it is not clear whether the intention of paragraph 3 was to challenge the lawfulness of this practice.[46]

Articles 2 to 7 of the Convention set out the substantive obligations of contracting parties. This section is not tightly organized and close examination reveals some redundancy. Three basic undertakings which are scattered through the five articles emerge. These are, first, a governmental obligation to

served in the American Negro community between militants and conservatives. It is urgent that social planners accept the fact of the intense integration of socially dysfunctional and even suicidal behavioral patterns and appreciate, as a result, that change will require more than the promulgation of a single law or resort to a single type of strategy. Dr. Karsten observes on the suicidal warfare among the Jibaro Indians: "The wars, the blood feuds within the tribes, and the wars of extermination between the different tribes are continuous, being nourished by their superstitious belief in witchcraft. These wars are the greatest curse of the Jibaros and are felt to be so even by themselves, at least so far as the feuds within the tribes are concerned. On the other hand, the wars are to such a degree one with their whole life and essence that only powerful pressure from outside or radical change of their whole character and moral views could make them abstain from them." Karsten, *Blood Revenge and War Among the Jibaro Indians of Eastern Ecuador* in P. BOHANNAN, WAR AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT 304 (1967).

[46] One paradox of the contemporary program for the extension of the international protection of human rights is that it is carried out under the auspices of nation-states; yet a plenary international regime of human rights imports a drastic diminution of the power of state elites. Full human rights, for example, involve the freedom of the individual to identify with as many territorial communities as he wishes; on the macrogroup level, it involves the free movement of people, without political impediment, to those global sectors in which they can maximize the values which they pursue. Many of the ambivalences which are observable in human rights conventions can be traced to elite desires (or accession to the desires of others) to acquire control over the symbols of human rights, but not to grant so many that they thereby attenuate or obliterate their own political power.

eliminate, within official processes, all racial discrimination; second, a governmental obligation to eliminate discrimination by individuals and organizations within the state; and, finally, an obligation to undertake a developmental program. Let us consider each of them briefly.

The first undertaking is a formal obligation of parties to the Convention to prohibit discrimination by public authorities and institutions at all levels of government. It is introduced in Article 2(1)(a). In implementation, parties are obliged to bring domestic legislation into line with the international standards of the Convention.

> Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.

The so-called "federal clause" doctrine of treaty laws is clearly excluded from these undertakings.[47] If a federated state adheres to the convention and one of the public authorities or institutions of its component states or provinces does not enforce the basic rights guaranteed by the convention, the central or federal government is responsible to the deprived citizen *under international law*. Thus, when the United States ratifies the Convention, if the courts or executives of Mississippi or Alabama persist in practicing segregation (a complex of human rights deprivations), Negroes in these states could petition the federal government for remedies. The federal government would be obliged under international law to supply them, for Article 6 of the Convention states that

> States parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 4 sets out the ramifications of the protection and remedies available:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of,

[47] *See* Vienna Convention on the Law of Treaties, art. 27; A/conf. 39/27, May 23, 1969.

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> such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention. . . . .

The Article proceeds to spell out these obligations in three subsections of which the first and second are most important. States Parties

> (a) Shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.
>
> (b) Shall declare illegal and prohibit organizations and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law.

U.S. Apprehensions

The specter of a conflict of these provisions with U.S. constitutional liberties has been raised in certain quarters. The words "with due regard to the principles embodied in the Universal Declaration of Human Rights" in the opening paragraph of Article 4 were inserted in order to permit an accommodation of the obligations of the Convention with the constitutional principle of freedom of expression.[48] There may be a very serious evasion involved here. One can read Articles 2 and 4 as obliging states to do everything permitted within their constitutional structures to combat discrimination. But this interpretation tends to suppress the fact that in many cases the elimination may require elemental constitutional changes. Or one can read these provisions as obliging states to change their constitutional structures in order to achieve a more effective balance between the freedom of expression and the freedom to live in a society without racial discrimination.

The U.S. Government has tried to balance the competing policies in ratifying other treaties. In some of the peace treaties after the Second World War, the U.S. inserted provisions guaranteeing freedom of expression, but outlawing fascist or neo-fascist groups.[49] On the other hand, when the world has looked toward the U.S. in regard to violently racist organizations, we have pleaded constitutional incapacity.

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[48] Schwelb, *supra* note 35, at 1024.

[49] See for example, Peace Treaty with Hungary, Feb. 10, 1947, arts. 2, 4, 41 U.N.T.S. 168, 172, 174; for other treaties, with comparable provisions, *see* Schwelb *supra* note 35, at 1022.

Without slighting the worth of free speech nor gainsaying the fragility of the doctrine, our constitutional lawyers must face the problem squarely. Liberty of speech is no more dear a freedom than the liberty to be a member of a group without shame and without constant insecurity. And this is especially so in a society composed of many diverse groups.[50] This is not to suggest the spasmodic enactment of statutes automatically outlawing verbal racism. No policy should be applied without considering the manifold effects its implementation may precipitate in present and projected contexts. Indeed, ill-considered application of such statutes in the past seems to have done little more than provide a platform and opportunity for increased dissemination of racism.[51]

The thrust of the Convention seems to require the re-establishment of a balance between the liberty of expression and responsibility for the effects of that expression. This balance in turn will involve a new evaluation of the normative distinction between expression and action, on which the judicial development of the First Amendment seems to have been premised.[52] When the United States ratifies the Convention, a number of institutional changes will follow. This should not cause consternation. In urging ratification of the Genocide Convention, Chief Justice Warren said: ". . . men and their institutions do not stand still in the face of great changes. We are not so uncertain of ourselves and our future that we cannot make our institutions conform to our needs as a progressive people."[53] Libertarian movements in the West have frequently ranged themselves against official governmental processes; this recurring adversarial posture has led many to identify official power *per se* as a threat to liberty. The real question is, however, who uses power, for what purposes and with what effects. Power can be used to establish the conditions of freedom. Clearly the reduction of discrimination and the attendant threat to mini-

[50] A candid and illuminating discussion of these problems is found in Ferguson, *The United Nations Convention on Racial Discrimination: Civil Rights by Treaty*, I LAW IN TRANSITION Q. 61 (1964). Working with an earlier draft of the Convention, Dean Ferguson concludes that incitement to racial discrimination which might lead to overt acts could possibly fall under the classic Holmesian doctrines and be lawfully proscribed in conformity with Justice Holmes' notion of the First Amendment. The article is extremely useful in pointing up the difficulties involved in applying the Convention in the American constitutional context.

[51] *See generally* Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942).

[52] T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 16 (1966).

[53] Address by Chief Justice Earl Warren, Conference on Continuing Action for Human Rights, Dec. 4, 1963, Washington, D.C. at 5.

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mum and optimum public order will require the judicious use of power.

The second undertaking obliges each adherent "not to sponsor, defend or support racial discrimination by any persons or organizations." Coordinate with this undertaking is the obligation set out in Article 2(1)(d) to "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization." Article 4, which we have considered, spells this out in greater detail.

What comprises "sponsorship, defense or support"? In its narrowest reading, the provision prohibits governmental sponsorship of an S.S. or S.A. type of organization, but this phenomenon would be covered by Article 2(1)(a) and it is more reasonable to suppose that the words refer to a broader range of governmental support and succor. The granting of tax exempt status to an organization which preached or practiced discrimination would, to my mind, be prohibited by this section of the Convention. One might, for example, enjoin IRS from allowing tax exemption to a Church or nonprofit school or camp which practiced discrimination or the Department of Agriculture from giving such organizations food and so on. In short, Article 2 conceals a broad sanction potential, whose effective realization will depend upon accommodation of the provision with other domestic constitutional policies.

B. *The Developmental Program*

The third major undertaking of Part I of the Convention is what we have referred to as the developmental program. The elimination of discrimination is not an end in itself, but is a means to an end. That end — the establishment of a world public order of human dignity — is emphasized in the preambular statement of the Convention, as well as in numerous places in the Charter. Racial discrimination is a major bar to the achievement of such a world system. Discrimination, as we have noted, does not just happen; it is the product of a complex process in which discriminator and discriminatee are affected. Specific programs to combat discrimination must ultimately conform to a preferred conception of the total human being, or, in the conventional legal formulation, to a comprehensive conception of human rights.

The term "human rights" manifests the circularity so characteristic of legal formulation. It imports that certain privileges attach as of right to human beings, but does not indicate

their notional content, procedures for their ascertainment, procedures for their application, or the type of context which must be fostered if they are to flourish. It is necessary to clarify the goal image of the human being which we wish to develop as the optimum realization of his own potential and the individual most capable of participating in and sustaining world peace and the strategies by which this can be accomplished.[54]

Given a conception of the inherent worth and dignity of every individual, a feasible configurative approach to the problem of international human rights requires an extended temporal conception of man from birth through his various life cycles, interacting in a variety of groups from the most inclusive to the nuclear, and an extended value conception of man as a creature pursuing all values in all institutional processes. There can be, then, no artificial starting point for the law of human rights. It begins with birth and possibly even with the prenatal conditions necessary for the development of a healthy fetus, includes the critical "socialization" procedures of the infant and the child, includes education of the young, inculcation of the capacity to adapt to new environmental demands as man passes through his congeries of life cycles, and concludes with the social protection of the old.

The temporal span of human rights must be emphasized, for it is insufficiently appreciated. The most elaborate system of human rights protection cannot avail fetal man in Biafra, Bengal or Appalachia whose undernourished mother produces a physically or psychologically damaged child. The most elaborate system of human rights protection cannot avail the respect-deprived child in Mississippi or Rhodesia who will never develop sufficient ego to make demands in his own name as an autonomous human being. The most elaborate system of human rights protection will not avail the child in the urban slums reproduced throughout the globe who grows in a distintegrating family circle and who emerges as an irreparable cripple in the process of giving and receiving affection. The most elaborate system of human rights cannot avail the youth who has never acquired sufficient enlightenment and skill to participate fully in power, wealth, and other value processes. The most elaborate system of human rights protection will neither avail nor command the loyalty of the worker who, in a changing environment,

[54] A brilliant programmatic outline of such a conception may be found in McDougal, Lasswell and Lung-chu Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 Am. J. Int'l L. 237 (1969). *See also* M. Moskowitz, The Politics and Dynamics of Human Rights 98-100 (1968).

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knows that he will be abandoned once his hard-acquired skills and his health have obsolesced. In short, the conception of human rights, if it is to be effective, must be coterminous with the life of man.

Similarly, an effective system of human rights protection must extend to every value process. Living within a peace rather than a war system requires a totally integrated personality capable of resolving personal and inter-personal conflicts without the easy recourse to rage and violence. A human rights system able to create and sustain such individuals must be one which, through its noncoercive structures, promises and effectively secures the conditions of unimpeded self-realization in every institutional process. Human rights, then, must be understood in terms of full participation in the shaping and sharing of power, wealth, enlightenment, skill, well-being, affection, respect and rectitude. The persistent deprivation of any of these values for any group or any individual cannot only be recorded as an infringement of human rights: by generating the frustrations that drive men to violence, it is a direct threat to global peace.

The Convention on the Elimination of Discrimination is quite clearly committed to this comprehensive conception of human rights. Articles 1(4), 2(1)(e) and 2(2) make detailed references to an ongoing program aimed at the elimination of discrimination. These provisions could not, of course, specify content. The implementation of the development program will be a complex task, carried out for the most part on the municipal and local level and varying enormously from state to state and even from region to region and city to city within one state. It will incorporate what have traditionally been considered criminal and civil techniques. Influenced as it will be by local conditions, one can, nevertheless, indicate certain general patterns. First, programs must be directed at both the discriminated and the discriminators. Article 7 is directed primarily to the latter group.

> States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture, and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

Discrimination is not, of course, a one-way flow. Where stereotypic racial identifications are culturally tolerated, it is a recip-

rocal process. Many of the Chinese minority in Indonesia despise the Indonesian majority with an intensity equal to that directed at them, as do many Indians in East Africa and Negroes in America. Racism is emotionally maiming, under any circumstances, but the urgent target for education in each case is the majority.

The success of a campaign to eliminate racial discrimination will turn ultimately upon programs for those groups which have traditionally been deprived. Selective preferences aimed at giving these groups opportunities of which they have been deprived are not considered discriminatory under the Convention. They are an express obligation. Articles 2(2) provides

> States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Programs under this provision must not aim at the mere elimination or assimilation of races or groups, but rather at countering the conditions which have held individuals in subjection and have ultimately eroded their own ego systems. Assimilation is a patronizing term, negating the legitimacy of minority groups and minority cultures and implying an inferiority in the cultural potential of a group. It is a term which reflects a discriminatory cast of mind and its application can only engender more discrimination. Majority groups must grasp, as Camus would put it, the essential equality of all human experience[55] and must supply the opportunities for members of discriminated groups to clarify, value and appreciate, without apology, the uniqueness of their own cultural experience. What is involved is not guidelines, but the environmental conditions which have been the natural birthright of many a majority group child. In the final analysis, there is no emancipation other than autoemancipation; the possibility for genuine integration exists only among emancipated individuals.

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[55] If social pluralism is a recurring feature of interaction, its acceptance as policy preference does not involve a value neutralism. Those committed to a pluralistic order may readily concede that all available models of social order are choices, yet insist that orders which seriously affect them take account of their own preferences. The existential insight which is at the core of a pluralistic conception must, thus, continue to animate it at every moment.

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C. *Jurisdictional Possibilities*

Because of the enormous variations in the conditions and types of discrimination throughout the world, the primary instance of implementation of the Convention, is at the state and the national level. Problems such as implementing legislation, insofar as it is necessary, policy choices of how to deal with particular problems and especially to what extent to allocate jurisdiction to public or civic order processes will be dealt with initially on a national basis. Presumably, the principle of exhaustion of local remedies will apply.[56] Persistent deviations on the national level will, however, be susceptible to invocation in a series of organized international processes.

The Convention incorporates five potential jurisdictions, only one of which is a new creation. It does not expressly incorporate private organizations. The new creation, a Committee on the Elimination of Racial Discrimination, may prove to be a remarkably flexible instrument, not only for eliminating discrimination, but also as an impetus for adherence to the Convention and formal recognition of its standards. Because of the complexity of the Committee's composition and procedure, it will be considered last, after a brief survey of the existing decision processes which have been incorporated.

1. The Security Council. Insofar as a persistent deprivation of human rights constitutes a threat to the peace, the plenary jurisdiction and sanctioning powers of the Security Council are activated. The Rhodesian case is a sound precedent for the principle that racial discrimination may, under certain circumstances, constitute a threat to the peace and bring the enforcement powers of Charter Chapter VII into operation.[57] Hence persistent deviations from the standards set in the Convention on the Elimination of Racial Discrimination as well as peremptory rights assured in other international documents may permit invocation of the Security Council. In the light of the Rhodesian case, note should be taken of the fact that the offending state need not be a member of the United Nations nor party to the Convention in question in order to perfect the jurisdiction of the Council.

2. The General Assembly. Under the Uniting for Peace Resolution,[58] the Assembly has a secondary, contingent juris-

[56] For a detailed discussion, see NULLITY AND REVISION, *supra* note 12, at 359-75.

[57] For a detailed discussion of this point and a consideration of doctrinal views, *see* McDougal and Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern,* 62 AM. J. INT'L L. 1 (1968).

[58] G.A. Res. 337 (V); 5 U.N. GAOR Supp. 20, at 10-12, U.N. Doc. A/1775 (1950).

diction for security matters: it comes into operation when the Security Council is unable to function because of its unique and often paralyzing decision dynamics. Additionally, the Assembly enjoys a primary jurisdiction in regard to many matters covered by the Convention on the Elimination of Discrimination. Charter Article 11(2) provides in part that

> The General Assembly may discuss any questions relating to the maintenance of international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a Member and [with some restrictions] . . . may make recommendations with regard to any such questions to the state or states concerned . . . .

Article 13 authorizes the Assembly to initiate studies and make recommendations for the purpose of

> promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 14 authorizes the Assembly, if the Security Council is not seized of the matter, to

> . . . recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.

Although the Assembly may encounter budgetary problems in mounting a large-scale program, it has nonetheless authorized concrete actions and they have, at times, been significant determinants in international relations. Each of these jurisdictional bases of the Assembly has direct application to the substantive provisions of the Convention on the Elimination of Discrimination.

3. The International Court. The Council, the Assembly, and any other agency which has been accorded a general right pursuant to Article 96(2) of the Charter may request an advisory opinion of the Court on a matter pertaining to the Convention on the Elimination of Discrimination, if the requesting agency itself enjoys a jurisdiction over the matter.[59] As early as the Eastern Carelia case,[60] the Permanent Court of International Justice made it clear that it would not entertain under its advisory jurisdiction cases which were actually contentious. Yet it is tactically possible to abstract a claim of nonapplication of standards set in the Convention and to request an advisory opinion, thereby adding to the compulsion of a general

[59] Current advisory jurisdiction is set out in [1966-1967] I.C.J.Y.B. 39.
[60] Status of Eastern Carelia [1921-1926] P.C.I.J. ser. B, No. 5 at 7 (1923).

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international decision the authority of the International Court. In addition to this pervasive ground of jurisdiction, the Court may also acquire full contentious jurisdiction in regard to a matter covered by the Convention, if the defendant and the claimant state have adhered to Article 36 of the Statute of the Court *without regard to any formal incorporation of the Convention in their general adherence.* Since activation of the implementative machinery of the Convention may be an *actio popularis,* the crucial question will often actually be whether the defendant has adhered; any other party to the Convention may bring the case. Much of the effectiveness of this strategy will depend upon how the Court interprets "interest" in Article 62 of its Statute. In the *South West Africa Cases,*[61] the Court deprived itself of jurisdiction by innovating an extremely narrow definition of this term.

In addition to the Court's jurisdiction which derives from general international law, the Convention also creates a second ground of jurisdiction in Article 22.

> Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Ordinarily, one would expect reservations to drain a jurisdictional clause such as this of all relevance. But in the case of the Convention on the Elimination of Racial Discrimination, other factors may counteract the persistent reluctance of states to submit themselves to the jurisdiction of the International Court of Justice. The diversity of jurisdictions offered by the Convention, each of which manifests a different decision structure in which different groups and ideologies may be paramount, opens the way for forum shopping. For many states, the International Court, structured as it is, may be preferred over the Committee on the Elimination of Racial Discrimination. Although the doctrine of *lis alibi pendens* is still somewhat ambiguous in international law, adherence to the Statute of the Court may allow states the option of moving a claim under the Convention directly to The Hague.[62]

[61] Southwest African cases, [1966] I.C.J. *See also,* N.Y. Times, June 28, 1971, at 1, col. 6.

[62] Insofar as the Connally Amendment is interpreted as extending across the board to all U.S. general adherences to the Court (Declaration of 14 August 1946; deposited 26 August 1946), the United States is precluded from participating in this strategy. The point underscores the real defect of the United States' reservation: insofar as the reservation operates, it

4. A number of other United Nations organs and agencies may exercise a jurisdiction which assimilates the standards of the Convention on the Elimination of Racial Discrimination to the web of instruments composing their own jurisdictional base. The Economic and Social Council and, in particular, the Commission on Human Rights, have a general jurisdiction in this area, even without the substantive particularizations of the Discrimination Convention; the norms of highest generality from which the Convention's provisions are drawn are stated in the United Nations' Charter and, at a lower level of generality, in the specification of the Charter's principles found in the Universal Declaration of Human Rights.[63] The human rights programs of the International Labor Organization may overlap the Convention in certain circumstances.[64] In addition to these instances, the Discrimination Convention, in Article 15, explicitly incorporates the United Nations processes available to the peoples of colonial countries which have not yet achieved independence. Conversely, the Committee on the Elimination of Racial Discrimination established by the Convention may refer data which it has collected to other bodies of the United Nations which may have a firmer jurisdiction or readier access to the relevant parties.

5. The unique creation of the Convention is the Committee on the Elimination of Racial Discrimination; its composition and procedure are detailed in Part II of the Convention, in Articles 8 to 16. The Committee is to be composed of 18 members, representing a broad international diversity, nominated and elected by the parties to the Convention; the members are to serve four-year terms. The complex schizophrenic character of these members follows the usual international pattern; they are obliged to be impartial, yet they are state members in the sense that if a member should resign or die his state appoints a succeeding member. The Committee will adopt its own rules

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prevents the United States from resorting to a potentially effective diplomatic instrument.

[63] In this regard, mention must be made of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, a subcommission of the Commission on Human Rights of the Economic and Social Council. *See* Claude, *The Nature and Status of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* 5 INT'L ORG. 300 (1951); Hiscocks, *The Work of the United Nations for the Prevention of Discrimination*, DIE MODERNE DEMOKRATIE UND IHR RECHT 713 (1966); Humphrey, *The United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities*, 62 AM. J. INT'L L. 869 (1968).

[64] For one rather clear example, *see* International Labor Organization Governing Body, Report of the Committee on Discrimination, GB 154/4/29 (1963) at p. 3. *See also* E. HAAS, *supra* note 22, at 353-55.

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of procedure,[65] elect its own officers and meet at the United Nations headquarters. The Secretary-General will provide Secretariat personnel for the Committee, a procedure which may raise some operational difficulties. The communication of administrative and legislative details, which is mandatory upon parties to the Convention, is made through the Secretary-General.

The first function of the Committee is continuous appraisal of "the legislative, judicial, administrative or other measures" which have been adopted within states to give effect to the Convention. Each party is obliged to render a biannual report and the Committee is authorized to request further information if necessary. The Committee's reports, conclusions and recommendations are transmitted to the Secretary-General who reports them to the General Assembly annually. This Committee function of appraisal and recommendation should not be underestimated. If it is carried forward impartially, a total public picture of trends in regard to the elimination of racial discrimination will be available. Trouble spots will be highlighted and publicized and priorities and tactics for action can be determined by official and private international organizations operating beyond the formal confines of the Committee. The threat of international exposure may stimulate some states to take more active measures to combat racial discrimination. Much, of course, will depend upon the composition of the Committee and the independence of its members. If there is political horse-trading within the Committee and the Committee itself manifests a racial bias or a selective geographical blindness, its purpose will be frustrated.

The second function of the Committee involves decision (in its broadest sense) in regard to a claim brought by one state party that another state is not giving effect to the provisions of the Convention. Article 11 authorizes *any* state party to do this. When the claim has been lodged, the Committee transmits it to the "defendant" state, which must submit, within three months, written explanations clarifying the matter and the remedy (if any) taken. If the matter has not been satisfactorily adjusted within six months, either state may refer the matter to the Committee once again. The Committee then perfects its jurisdiction by ascertaining either exhaustion of domestic reme-

[65] A proposed draft of rules for the Committee on the Elimination of Racial Discrimination has been prepared at the Boalt Hall School of Law. *See*, *Rules of Procedure for the New Tribunal: A Proposed Draft*, 56 CALIF. L. REV. 1569 (1968). Since this article was written, rules of procedure have been put into effect.

dies or the inapplicability of the rule. It may also request further information. The actual procedure of the Committee will depend upon the formulation of its own rules. But Article 11, in providing for agents, suggests the possibility that an adjudicative or quasi-adjudicative procedure may evolve.

Once the information is collected, the Chairman of the Committee appoints an *ad hoc* Conciliation Commission of five members. Its personnel need not be members of the Committee, but they must receive the unanimous consent of the parties to the dispute and, deviating from arbitral procedure, they may not be nationals of the disputants. If the parties are unable to choose five members for the Commission, the Committee will elect them by secret ballot. Through its good offices, the Commission is to seek to secure an amicable solution of the dispute in conformity with the standards of the Convention. The expenses of the Commission will ultimately rest upon the disputants, but while the matter is pending, the Commission members will be paid by the Secretary-General.

If the Commission is unable to arrange an amicable solution, it transmits its factual conclusions and recommendations to the Committee. The chairman then communicates the report to the disputants. Within three months, the disputants must report whether or not they accept the conclusion. Finally the chairman notifies all parties to the Convention of the final outcome of the matter.

There are many obvious weaknesses and defects in this involved procedure. But given the contemporary international context, the magnitude of the achievement must be appreciated. The nucleus of an enforcement system has been created, and it has been done in a way which may extend realization of the Convention. Because a decision organ of some authority has been created and because it will play a decisive role in the clarification of the general substantive provisions of the Convention, there is an impetus to states to adhere to the Convention in order to play some role in the illumination of international standards of racial equality through the process of customary prescription. When the bare minimum of 27 states adhered to the Convention, international law regarding discrimination for every state in the world began to be prescribed by these 27 states.[66]

The *actio popularis* character of Article 11 is susceptible to abuse. Given the prevalence of racial discrimination and the

[66] *See*, in this regard, Newman, *The New International Tribunal*, 56 CALIF. L. REV. 1559 (1968).

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possibilities for retaliatory invocation of the Convention, there may be a strong motive to "judge not that ye be not judged" Invocation of the Committee may also be used as a diplomatic instrument to secure other ends. The creation of a United Nations Commissioner on Human Rights and his integration within the Convention's implementive machinery may resolve this problem. On the other hand, we need not fear "escalation", if it involves bringing more and more cases of discrimination before international jurisdictions.

The fact that neither the Committee nor the Commission are authorized to take "binding decisions" is a relatively minor point. The compulsive consequences of any decision do not rest upon a piece of paper but upon the conjunction of authority and control upon which the decision process in question operates. Authority and control are matters which must be manipulated by the Committee with full regard to the context of each case which comes before it.[67]

Article 14 of the Convention provides a final optional jurisdictional ground. A party to the Convention may declare that it recognizes the competence of the Committee to hear petitions from individuals within its jurisdiction who claim to be victims of discrimination as set forth in the Convention. It may also create a special instance within its jurisdiction to hear claims which have gone through the conventional domestic processes, before the claim moves to the international level. The Committee will then bring these claims anonymously to the attention of the State in question. The state must reply within three months and indicate what remedy, if any, it has taken. The Committee's competence to entertain individual petitions will come into effect only when 10 states have made voluntary declarations.

6. Private Organizations: Traditional theories of international law have tended to overlook the very real participation of non-official and non-state entities in authoritative transnational decisions. Private entities have been particularly critical participants in the international protection of human rights and insofar as the peculiar structuring of the global power arena continues, the effectiveness of international human rights, particularly in crisis, may well depend on them. At a number of points, the United Nations structure permits the participation of non-state entities. It is particularly unfortunate that the Convention on the Elimination of Racial Discrimination has not

[67] For discussion of this point, *see* Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT'L L. 1 (1969).

followed that precedent and made express provision for direct non-official participation in the Convention's regime.

D. *Evaluation of Jurisdictional Diversity*

From the municipal criminal law standpoint, the array of available and in many cases coarchical instances for supervision of the Convention and for policing infractions of it may seem perplexing and problematical. On the municipal level, competing jurisdictions are usually associated with conflicts of law and keen forum shopping; preferred jurisdiction in conventional textbook terms, is exclusive and effective. In fact, the range of instances for the Convention is probably beneficial from the standpoint of the integration of the global community. There are, moreover, contextual equivalencies for this sort of spectrum of application agencies in municipal systems.

In any complex territorial community, the problems of securing conformity with social norms and policing deviation are seldom the province of a single agency. The courts and the implementing machinery which they initiate and supervise loom largest in the perspective of the lawyer. In fact, the family, the school, the church, the employer or trade union, the army are involved, at different stages, in inculcating predispositions to comply and in policing them. In many instances, court enforcement integrates these other social institutions. A parole or conditional release may integrate school authorities, parents or siblings, employers and so on. In other instances, authoritative agencies of the community enforce the criminal law by a complete bypass of the courts. Charges will not be pressed if X "leaves town" or joins the army and so on. Thus the systematic presentation of international instances for the control of discrimination indicates no qualitative difference between international and national law.

The availability of diverse instances of coarchical jurisdiction means that choices are available and are often necessary. While guiding principles for jurisdictional choices have been developed in detail elsewhere,[68] a number of guidelines can be made specific in this context. (1) Effectiveness: the choice of an international arena should be based on considerations of the maximum effectiveness of the projected decision. Since no single arena can be maximally effective for all cases, instantial choice will always require detailed contextual analysis including contextual projections of alternate responses to desired decisions. (2) Maximal Authority: where effectiveness is assured,

[68] Nullity and Revision, *supra* note 12, at 241-62, 277.

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choose arenas which represent the maximal authority for all participants concerned. (3) Optimal Participation: give preference to arenas which are structured to allow for widest participation. (4) Integration: where possible, forge instantial combinations which themselves represent prescriptions for the international protection of human rights.

Conclusions

Recent history has emphasized that no nation, no region, no city can flourish, perhaps even survive, unless it fashions an equitable solution to racial conflict and, more generally, to discrimination. Because the technological revolution has shrunk the world, the entire community of man is presented with the same challenge. Discrimination is a matter of international concern; its elimination is intertwined with the prospects of international survival. New creations in international law are often invested with an extreme promise which they cannot fulfill. It is important to emphasize the magnitude of the problem with which we are faced. The tendencies toward racism or ethnicism or any other form of social choice predicated on identifiation with a particular group run deep in the socializing procedures of the young and they are reinforced by a continuing sense of global crisis.

Until we are willing to undertake radical revision of the preferred conception of the human person and personality, and are willing to socialize our young to a perception of their equal integrality with, rather than superior discreteness from, the environment, the learned technique of disidentifying with others in order to increase self-identification will continously pave the way for variant forms of discrimination. For extended periods there may be no examples of discrimination but the tendencies will be activated by crises in which the integrality of the extended or nuclear self is perceived as threatend. The cultural artifact as opposed to the biological reference of race which was originally used to create a certain type of personality system and a group political system is then reinvoked to secure its continuation.

Because tacitly authorized discrimination is such a powerful instrument of personal and group organization, those power elites who are the primary beneficiaries of this organization can be expected to be somewhat ambivalent about its eradication. There is no reason to affect surprise over the Convention's equation of discrimination with racial discrimination or over the fine legal exclusions of certain national practices which

were traded, balanced and carefully written into the Convention. For most of the elite groups involved in framing the Convention, a public stand in terms of these symbols promised the greatest political dividend. The phenomenon of elites concerning themselves first with matters of their own special interest is, of course, an inseparable aspect of elite systems. The dynamics of this system are such that an intense myth of human dignity can be extended and exploited without being put into effective and sustained practice. This may be the fate of the Convention on the Elimination of Racial Discrimination.

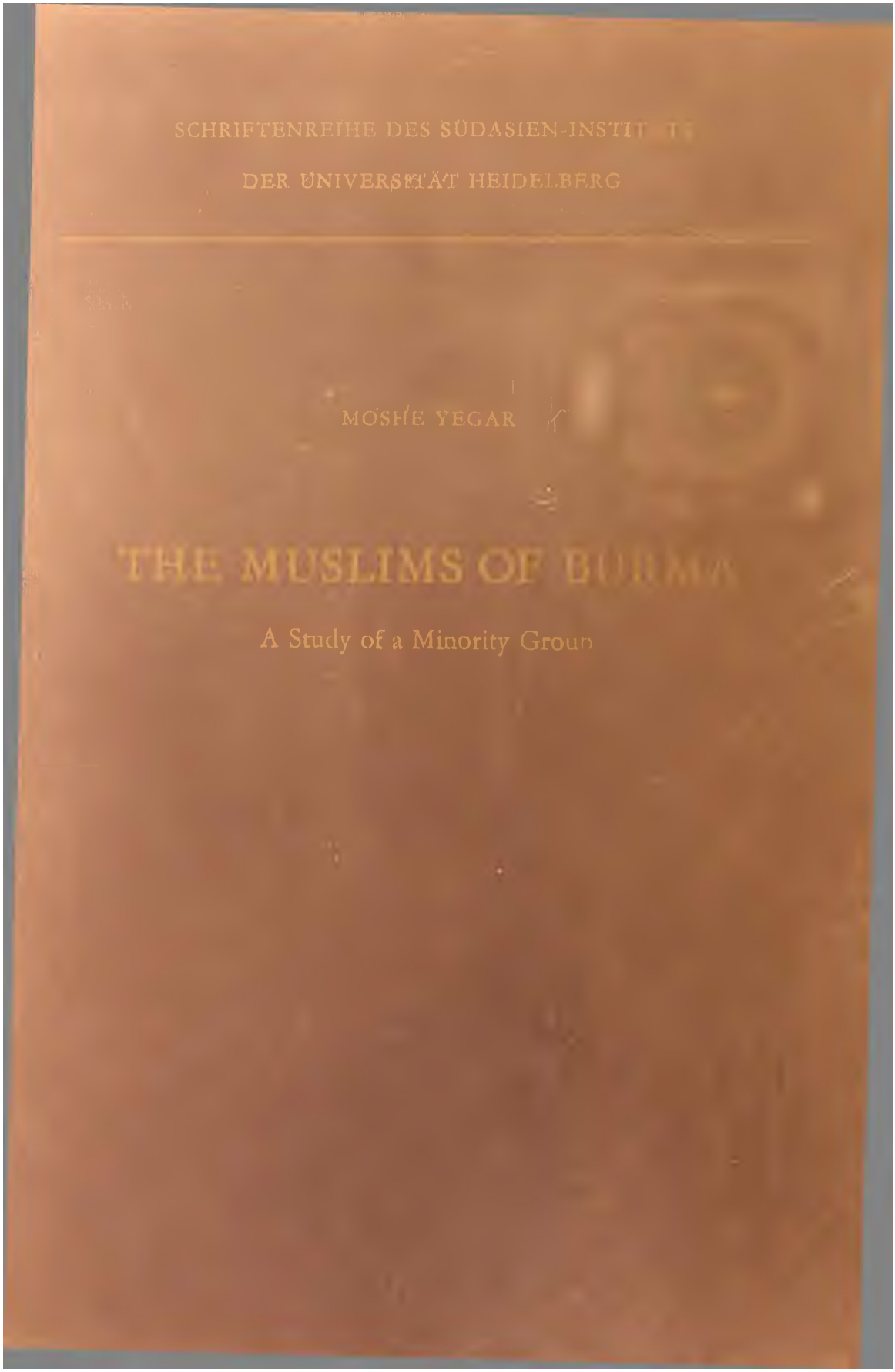
It requires no stretch of the imagination to conceive of a global or near global system in which contending territorial elites stabilize their common public order at "tolerable" levels of oppression. Each elite allows the other a relatively unimpeded prerogative of discrimination over certain internal groups. Claims of unlawful discrimination on the international level are ritualized in rhetoric, serving a stabilizing function *within* domestic public order systems by distracting local attention from abuses at home and, at the same time, sustaining an expectation of global crisis which justifies in the public mind an otherwise intolerable level of discrimination and oppression.

The Convention on the Elimination of Racial Discrimination makes no attempt to attack discrimination at its roots and, indeed, the thrust of the entire Convention is toward the symptoms rather than the etiology of racism. Symptomatic treatment can be beneficial in alerting members of the world community to the prevalence of racism, to its incompatibility with a common conception of humanity and, ultimately, to its threat to world security.

The express identification and denigration of racism can aid the target group of racism in a number of ways. It communicates to the object of racism that his lowered position is not the result of his own inferiority, as he himself often comes to believe, but to external influences which are imposed on him; with this realization, the first step toward combatting the pathological condition is possible. The aggregating effect of these different trends may facilitate a radical reappraisal of some of our most basic cultural postulates, but the machinery proposed by the Convention is hardly capable of itself undertaking such a massive intellectually challenging and emotionally volatile program. The conditions for crimes of discrimination and genocide will unfortunately continue; with the Convention, the opportunities for anticipating the crimes and preventing or limiting them may increase.

Annex 211

Moshe Yegar, *The Muslims of Burma: A Study of a Minority Group* (Otto Harrassowitz 1972)


SCHRIFTENREIHE DES SÜDASIEN-INSTITUTS
DER UNIVERSITÄT HEIDELBERG
MOSHE YEGAR
THE MUSLIMS OF BURMA
A Study of a Minority Group

Muslim Settlement in Arakan

The Arakan District, extending some 350 miles along the eastern shores of the Bay of Bengal, is cut off from Burma by a range of near impassable mountains which were an obstacle against permanent Muslim conquest but permitted occasional inroads and contacts between Bengal and Burma. The northern part of Arakan, today called the "Mayu District", was the point of contact with East Bengal. These geographical facts explain the separate historical development of that area – both generally and in terms of its Muslim population – until it was conquered by the Burmese Kingdom at the close of the eighteenth century.

In addition, from the very beginning of Muslim commercial shipping activity in the Bay of Bengal, the Muslim trading ships reached the ports of Arakan just as they did the ports of Burma proper. And as in Burma so, too, in Arakan is there a long tradition of old Indian settlement.

Bengal became Muslim in 1203, but this was the extreme eastern limit of Islamic overland expansion (although the Malay peninsula and the Indonesian archipelago were Islamized much later by missionaries and merchants who came by sea). In northern Arakan close overland ties were formed with East Bengal. The resulting cultural and political Muslim influence was of great significance in the history of Arakan[1]. Actually, Arakan served to a large extent as a bridgehead for Muslim penetration to other parts of Burma, although the Muslims never attained the same degree of importance elsewhere as they did in Arakan.

The influence of Bengal on Arakan was negligible up to 1430. This independent kingdom turned westward, toward Bengal, as a result of the growing power of the Burmese Court of Ava. In 1404, the King of Arakan, Narameikhla (1404–1434), was forced to flee the Burmese to Gaur, capital of the Bengal Sultanate, which 86 years earlier had already become independent of the Mogul Emperor in Delhi. Aḥmad Shāh, Sultan of Gaur, welcomed the refugee. Narameikhla remained at the court of Gaur, where he served as an officer in Aḥmad Shāh's army and fought in his wars. In 1430, Ahmad Shāh's successor, Nādir Shāh, granted Narameikhla's request and gave him an army under the command of a general named Velī Khān, in order to regain his throne. This general betrayed him, but some time after that Narameikhla succeeded in reconquering Arakan with the help of a second army supplied by Nādir Shāh. Upon his return, Narameikhla founded a new city, Mrohaung (also called Mrauk-U), which remained the capital until 1785 when Arakan was conquered by Burma. Narameikhla's Muslim soldiers who came with him from Bengal, settled in a village near Mrohaung and built the Sandikhan mosque, which still exists today. Muslim influence in Arakan, then, may be said to date from 1430, the year of Narameikhla's return. As a result of the close land and sea ties between

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[1] D. G. E. Hall, *A History of South-East Asia* (London: Macmillan, 1958), p. 328.

the two countries which continued to exist for a long time thereafter, the Muslims played a decisive role in the history of the Arakan Kingdom[1].

Narameikhla ceded certain territory to the Sultan of Bengal and recognized his sovereignty. As proof of his vassalage and despite being Buddhist, he and his heirs took Muslim titles in addition to the Arakanese titles. He also introduced Nādir Shāh's system of coins bearing the *kalima* as used in Bengal since the Muslim conquest of 1203. Later on he struck his own coins which had the name of the king in Burmese letters on one side and his Muslim title in Persian on the other[2]. Arakan was thus subject to Bengal until 1531[3]. Her kings received their Muslim titles from Bengal sultans. Nine vassal kings received Muslim titles[4]. Even after becoming independent of the Bengal sultans, the Arakan kings continued the custom of using the Muslim title in addition to the Burmese or Pali title. This was because they not only wished to be thought of as sultans in their own right, in imitation of the Moguls, but also because there were Muslims in ever-larger numbers among their subjects[5]. Court ceremonies and administrative methods followed the customs of the Gaur and Delhi sultanates. There were eunuchs, harems, slaves and hangmen; and many expressions in use at court were Mogul. Muslims also held eminent posts despite the fact that the kingdom remained Buddhist[6].

The Arakan Kingdom was closely connected with the Muslim territories to the west in other ways as well. After the death of Narameikhla, Arakan started expanding northward and there were regular Arakan forays and raids on Bengal[7]. Early in the seventeenth century the Portuguese reached the shores of Bengal and Arakan. At that time, too, the raiding Arakanese ships reached the source of the Ganges. They came into contact with the Portuguese and permitted them to establish bases for

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[1] R. C. Majumdar, *Hindu Colonies in the Far East* (Calcutta: General Printers and Publishers, 1944), pp. 202, 205–206.

[2] M. S. Collis and San Shwe Bu, "Arakan's Place in the Civilization of the Bay", *JBRS*, XV, no. 1 (1925), 39–43; Harvey, *History of Burma*, pp. 138–139; Siddiq Khan, *op. cit.*, XI (April, 1937), 248–249; Hall, *op. cit.*, pp. 329–330; Ba Shin, "Coming of Islam to Burma".

[3] Hall, *op. cit.*, p. 330; Ba Shin, *op. cit.*; Harvey, *op. cit.*, p. 140; Siddiq Khan, *op. cit.*, p. 250.

[4] (1) Min Khari (1434–1459), Ali Khan; (2) Basawpyu (1459–1482), Kalamasya (Kalima Shah); (3) Dawlya (1482–1492), Mokhusya (Mahammad Shah); (4) Basawnyo (1492–1494), Mahamosya (Muhammad Shah); (5) Yanaung (1494), Norisya (Nuri Shah); (6) Salingathu (1494–1501), Sakkokdolasya (Sheik Abdulla Shah); (7) Minyaza (1501–1523), Illisya (Ilias Shah); (8) Minsaw-o (1525), Jalasya (Jalal Shah); (9) Thatasa (1525–1531), Ilisya (Ali Shah) (Ba Shin, *op. cit.*).

[5] The independent Arakan rulers who still used Muslim titles were Minbin (1531–1553), Zabauk Shah; Minapalaung (1571–1593), Sikander Shah; Minyazapyi (1593–1612), Selim Shah; Thirithudama (1622–1638), Selim Shah II (Sir Arthur P. Phayre, *History of Burma ... British India* [London: Trübner, 1883], pp. 77–78, 173; Ba Shin, *op. cit.*; Siddiq Khan, *op. cit.*, pp. 248–249; Collis and San Shwe Bu, *op. cit.*, p. 43; Harvey, *op. cit.*, p. 140; Hall, *op. cit.*, p. 330; Sebastian Manrique, *Travels of Fray ..., 1629–1643*, Vol. I, *Arakan* [Oxford: Hakluyt Society, 1927], p. xxii).

[6] Ba Shin, *op. cit.*; Siddiq Khan, *op. cit.*, p. 250; Collis and San Shwe Bu, *op. cit.*, p. 42; U Myo Min, *op. cit.*, pp. 73–74.

[7] Majumdar, *The Delhi Sultanate*, pp. 203, 211–212.

Annex 212

Mohammed Yunus, *A History of Arakan: Past and Present* (University of Chittagong 1994)

A HISTORY OF ARAKAN

PAST

&

PRESENT

Dr. Mohammed Yunus

There are, in total, 17 townships in Arakan. Akyab, situated at the mounth of Kaladan river in the northern Arakan, is the capital city which also serves as the main seaport of Arakan. Communication within Arakan is done mainly by water routes. The inland road communication is very poorly developed. There is no railway. Communication with proper Burma is done mainly by air and by sea. There are also Three overland connections with proper Burma through mountain passes across Arakan hill range. The Ann and Tongup pases are now in a much better position than before when it could be used only in dry season. The climate is moderate. There are three distinct seasons: winter, summer and rainy with annual rainfall of approximately 200 inches.

Etymology of Arakan

The term Arakan is definitely of Arabic or Persian origin having the same meaning in both these languages. It is the corruption of the world Arakan plural of the word Rukn meaning a pillar. The fundamental tenets of Islam are called 'five pillars of Islam'. Thus the word Arakan signifies the land of Islam or peace. It is difficult to as certain since when the application of this term to the region now known as Arakan began. But almost certain is the fact that the name Arakan became popular after the Muslim conquest of the country in 1430 C.E. Since Persian was the court language of the then independent Bengal Sultans who conquered Arakan and which continued to be the official language of Arakan up to 1845, the Arakan kings who maintained excellent relation with the Bengal Sultans might have given it its name of Arakan. The Arakan kings were well versed in Persian. "It took a hundred years for the kings (Arakan kings) to learn the doctrine of Islam. When it was well understood they founded what was known as the Arakanese Empire".[1]

The authors of the Ain-i-Akbar, Baharistan-i-Ghaibi and Siyar-ul-Mutakherin write it as Arkhang, which appears also with a slight change in Alamgirnama and Fathya-i-ibria is close to the name Arakan. Medieval Portuguese and other European travellers mentioned

it Arracan, Arracoo, Orrakan, Arrakan and Van Liscoten writes it Arakan which is nearest to the modern name.[2]

One of the coins found in Arakan and preserved in the Indian Museum, Culcutta, minted by Sultan Bahadur Shah dated 965 A.H. (1557-58 C.E.) is inscribed in Persian with Kalimah on the obverse side and mint name Arakan on the reverse side. Similar coins minted by his predecessor Sultan Muhammad Shah 962 A.H. (1554-55 C.E.) with inscriptions of mint name Arakan was preserved in Indian Museum, Calcutta. Muhammad Shah's coins with the same reading are also found to be preserved in the British Museum. A historian commented: "It is true that in Persian source books the name is written as Arkhank and its slight variations. It might be that the term either as Europeanised form or as pluralised form of Arabic term -piller was more familiar to the mint master than any other forms of name of the country and in this form he probably engraved the word as mint name".[3]

From the above inscriptions of the coins it can be concluded that the name Arakan was in use since at least mid 16th century.

The name Arakan did not appear as a solidary instance in the above languages. Different important places, rivers and mountains in Arakan also bear names of Persian or Arabic origin. For example: the name of the capital city of Arakan is Akyab (Ek-ab) meaning land of one water in Persian like Punjab (panj-ab) meaning land of five waters. The names of rivers: Kaladan (intellectual), Naf (nerve), Kulapanj (fifty learned men) are also of either Persian or Arabic origin testifying to the fact of Islamic sway over the region now know as Arakan. Thus the terms Arakan and Arakanese are attributed to Muslims. Unfortunately some historians, quite misleadingly, use the term Arakanese synonymous with Magh (Rakhaing) alone although in general sense all the people of Arakan, Muslims as well as Buddhists, should be called Arakanese. The Magh Buddhists of Arakan who call themselves Rakhaings translate the term Arankanese as Rakhaing in Burmese language giving the impression that Rakhaing and Arakanese are synonymous excluding Muslims from the term Arakanese since Muslims are not Rakhaings. But the fact has

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Gregory Stanton, 'The Seven Stages of Genocide' (1998) 12 Yale Center for International and Area Studies Working Paper Series

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The Seven Stages of Genocide

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The Seven Stages of Genocide

Dr. Gregory H. Stanton
U.S. Department of State

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THE SEVEN STAGES OF GENOCIDE

by Gregory H. Stanton

The International Convention for the Prevention and Punishment of the Crime of Genocide defines "genocide."

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group."

The Convention declares the following acts punishable:

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide."

The Genocide Convention is sometimes misinterpreted as requiring the intent to destroy a whole national, ethnical, racial or religious group, as such. Some genocides have fit that description, notably the Holocaust and Rwanda. But most do not. Most are intended to destroy only part of a group. The Genocide Convention specifically includes the intentional killing of part of a group as genocide. It reaffirms this definition when it includes as among the acts that constitute genocide "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part". Those who shrink from applying the term "genocide" usually ignore the "in part". Thus, intent to destroy a part of an ethnic group coupled with killing members of the group constitutes an act of genocide.

Intent

Criminal law distinguishes intent from motive. A murderer may have many motives - gaining property or eliminating a rival for power. But his intent is determined by the purpose of his act: Did he purposely kill the victim? Genocidal intent is determined by the purpose of the act: Did the killer purposely kill the victim because the victim was part of an ethnic group the killer intends to destroy, at least in part?

This article expresses the views of the author, and not necessarily those of the Department of State.

The motive of the killer to take the victim's property or to politically dominate the victim's group does not remove genocidal intent if the victim is chosen because of his ethnic, national, racial, or religious group.

Genocidal intent does not require an overall plan. An act of genocide may arise in a culture that considers members of another group less than human, where killing members of that group is not considered murder. This is the culture of impunity characteristic of genocidal societies. In Burundi, Tutsis who kill Hutus have seldom been convicted or even arrested. Massacres are ethnic, intended to destroy parts of the other ethnic group.

The intent of the act of genocide does not have to be part of a plan to kill a whole group. If a killing is part of a genocidal massacre, where victims are killed because of their ethnic identity, it is an act of genocide even if only a part of a group (the intellectuals, officers, leaders) is targetted.

Acts of genocide

The crime of genocide is defined by the Genocide Convention as "acts of genocide." It does not exist apart from those acts. A pattern of acts of genocide is frequently called "genocide" and evidence of such a pattern of ethnic, racial, or religious massacres is strong evidence of genocidal intent.

THE GENOCIDAL PROCESS

Prevention of genocide requires a structural understanding of the genocidal process. Genocide has seven stages or operational processes. The first stages precede later stages, but continue to operate throughout the genocidal process. Each stage reinforces the others. A strategy to prevent genocide should attack each stage, each process. The seven stages of genocide are classification, symbolization, dehumanization, organization, polarization, identification, and extermination.

Classification

All languages and cultures require classification -- division of the natural and social world into categories. We distinguish and classify objects and people. All cultures have categories to distinguish between us and them, between members of our group and others. We treat different categories of people differently. Racial and ethnic classification may be defined by absurdly detailed laws -- the Nazi Nuremberg laws, the "one drop" laws of segregation in America, or apartheid racial classification laws in South Africa. Racist societies often prohibit mixed categories and outlaw miscegenation. Bipolar societies are the most likely to have genocide. In Rwanda and Burundi, children are the ethnicity of their father,

either Tutsi or Hutu. No one is mixed. Mixed marriages do not result in mixed children.

Symbolization

We use symbols to name and signify our classifications. We name some people Hutu and others Tutsi, or Jewish or Gypsy. Sometimes physical characteristics -- skin color or nose shape -- become symbols for classifications. Other symbols, like customary dress or facial scars, are socially imposed by groups on their own members. Genocidal governments often require members of a targetted group to wear an identifying symbol or distinctive clothing -- e.g. the yellow star. The Khmer Rouge forced people from the Eastern Zone to wear a blue-checked scarf, marking them for forced relocation and elimination. Without symbols for our classifications, they would become literally insignificant. Yellow stars became insignificant in Denmark because non-Jewish Danes also chose to wear them, rejecting the Nazi's classification system.

Dehumanization

Classification and symbolization are fundamental operations in all cultures. They become steps of genocide only when combined with dehumanization. Denial of the humanity of others is the step that permits killing with impunity. The universal human abhorrence of murder of members of one's own group is overcome by treating the victims as less than human. In incitements to genocide, the target groups are called disgusting animal names -- Nazi propaganda called Jews "rats" or "vermin"; Rwandan Hutu hate radio referred to Tutsis as "cockroaches." Bodies of genocide victims are often mutilated to express this denial of humanity. Such atrocities then become the justification for revenge killings, because they are evidence that the killers must be monsters, not human beings themselves.

Organization

Genocide is always collective because it derives its impetus from group identification. It is always organized, often by states but also by militias and hate groups. Planning need not be elaborate: Hindu mobs may hunt down Sikhs or Muslims, led by local leaders. Methods of killing need not be complex -- Tutsis in Rwanda died from machetes; Muslim Chams in Cambodia from hoe-blades to the back of the neck ("Bullets must not be wasted," was the rule at Cambodian extermination prisons, expressing the dehumanization of the victims.) The social organization of genocide varies by culture. It reached its most mechanized, bureaucratic form in the Nazi death camps. But it is always organized, whether by the Nazi SS or the Rwandan Interahamwe. Death squads may be trained for mass murder, as in Rwanda, and then force everyone to participate, spreading hysteria and overcoming individual resistance.

Polarization

Genocide proceeds in a downward cycle of killings until, like a whirlpool, it reaches the vortex of mass murder. Killings by one group may provoke revenge killings by the other. Such massacres are aimed at polarization, the systematic elimination of moderates who would slow the cycle. The first to be killed in a genocide are moderates from the killing group who oppose the extremists: the Hutu Supreme Court Chief Justice and Prime Minister in Rwanda, the Tutsi Archbishop in Burundi. Extremists target moderate leaders and their families. The center cannot hold. The most extreme take over, polarizing the conflict until negotiated settlement is impossible.

Identification

Lists of victims are drawn up. Houses are marked. Maps are made. Individuals are forced to carry cards identifying their ethnic or religious group because identification greatly speeds the slaughter. In Germany, the identification of Jews, defined by law, was performed by a methodical bureaucracy. In Rwanda, identity cards showed each person's ethnicity. Tutsis were pulled from cars at roadblocks and murdered. Throwing away the cards did not help, because anyone who could not prove he was Hutu, was presumed to be Tutsi. Hutu militiamen conducted crude mouth exams to test claims to Hutu identity.

Extermination

The final step, the final solution, is extermination. It is considered extermination, rather than murder, because the victims are not considered human. They are vermin, rats, or cockroaches. Killing is described by euphemisms of purification: "ethnic cleansing" in Bosnia, "ratonade (rat extermination)" in Algeria. All members of the alien group are killed, including children. Because they are not considered persons, their bodies are buried in mass graves or burnt like garbage.

PREVENTION

A full strategy for preventing genocide should include attack on each of genocide's operational processes.

Classification may be attacked either through devaluation of the distinctive features used to classify (e.g. amalgamation of regional dialects and accents by exposure to mass media or standardized education,) or through use of transcendent categories, such as common nationality or common humanity. Promotion of mixed categories, such as the financial incentives for inter-caste marriages in Tamil Nadu, India, may help break down group endogamy, but do not combat genocide in bipolar societies where mixed categories have no recognition. In bipolar societies, transcendent institutions like the Catholic Church should actively campaign against ethnic classifications. Special effort should be made to keep such institutions from being captured and divided by the

same forces that divide the society, e.g. through hierarchical discipline from Rome for the Roman Catholic Church.

Symbolization can be attacked by legally forbidding use of hate symbols (e.g. swastikas) or ethnic classification words. "Nigger" or "kaffir" as racial expletives may be outlawed as "hate speech." Group marking like tribal scarring may be outlawed, like gang clothing. The problem is that legal limitations on hate speech will fail if unsupported by popular cultural enforcement. Though Hutu and Tutsi were forbidden words in Burundi until the 1980's, the prohibition had little effect, since other euphemisms and code-words replaced them. Prohibition may even become counter-productive, as part of an ideology of denial, that prevents people from naming, discussing and overcoming deep cultural divisions.

Dehumanization should be opposed openly whenever it shows its ugly face. Genocidal societies lack constitutional protection for countervailing speech, and should be treated differently than democracies. Hate radio stations should be shut down, and hate propaganda banned. Although restrictions on free speech are not necessary in a healthy polity, even in democracies hate speech should be actively exposed and opposed. Direct incitements to genocide should be outlawed. Incitement to genocide is not protected speech. Hate crimes and atrocities should be promptly punished. Impunity breeds contempt for law, and emboldens genocidists, who can literally get away with murder.

Organizations that commit acts of genocide should be banned, and membership in them made a crime. Freedom of association in a democratic society should not be misconstrued as protecting membership in criminal organizations. At Nuremburg, membership in the SS was itself prosecuted. Similarly, the Interahamwe, Sans Echec, and other genocidal hate groups should be outlawed, and their members arrested and tried for conspiracy to commit genocide. The UN should impose arms embargos on governments or militias that commit genocide. Because arms embargos are difficult to enforce, for Rwanda, the UN established an international commission to investigate and document violations of the arms embargo. The UN may also require member states to freeze the assets of persons who organize and finance genocidal groups.

Polarization can be fought by providing financial and technical aid to the moderate center. It may mean security protection for moderate leaders, or assistance to human rights groups. Assets of extremists may be seized, and visas for international travel denied to them. Coups d'etat by extremists should be immediately opposed by international sanctions.

Identification of victims considerably speeds genocide. When ID cards identify victims' ethnic or religious group, or when victims are forced to wear yellow stars, the killing is made efficient. When death lists are drawn up, the international community should recognize that genocide is imminent, and mobilize for armed intervention. Those identified should be given asylum, and assistance in fleeing their persecutors. Had the U.S. or Britain in Palestine accepted all Jewish immigrants, millions of lives might have been saved from the Holocaust.

Extermination, whether carried out by governments or by patterned mob violence, can only be stopped by force. Armed intervention must be rapid and overwhelming. Safe areas should be established with real military protection. An intervention force without robust rules of engagement, such as UNAMIR in Rwanda in April, 1994 or UNPROFOR in Bosnia, is worse than useless because it gives genocide victims false hope of security in churches or unsafe "safe areas", delaying their organization for self-defense. In bipolar societies, separation into self-defense zones is the best protection for both groups, particularly if international troops create a buffer zone between them.

Experience with UN peacekeeping has shown that humanitarian intervention should be carried out by a multilateral force authorized by the UN, but led by UN members, rather than by the UN itself. The Military Staff Committee envisioned in Article 47 of the UN Charter has never been organized, and the UN does not have a standing army. The strongest member states must therefore shoulder this responsibility in conjunction with other UN members. The U.S. is now promoting the organization of an African Crisis Response Initiative composed of African military units coordinated and financed by the U.S., Europeans, and other powers.

PUNISHMENT

When Adolf Hitler was asked if his planned invasion of Poland was a violation of international law, he scoffed, "Who ever heard of the extermination of the Armenians?"

Impunity -- literally getting away with murder -- is the weakest link in the chains that restrain genocide. In Rwanda, Hutus were never arrested and brought to trial for massacres of Tutsis that began months before the April, 1994 genocide. In Burundi, Tutsi youth gangs have never been tried for killing Hutus. Burundi judges are nearly all Tutsis, as are the army and police. They seldom, if ever, convict their own.

Social order abhors a legal vacuum. When courts do not dispense justice, the victims have no recourse but revenge. In societies with histories of ethnic violence, the cycle of killing will eventually spiral downward into the vortex of genocide.

In such societies, the international community should fill the legal vacuum by creating tribunals to prosecute and try genocide. That has been done for the former Yugoslavia and Rwanda. We need to create a Permanent International Criminal Tribunal that will have world-wide jurisdiction to try genocide, war crimes, and crimes against humanity. The Tribunal must be supported by effective institutions to arrest and imprison those indicted and convicted by the Tribunal. Only such a permanent court will provide the deterrent effect necessary to give pause to those planning future genocides.

A permanent international criminal court, coupled with effective organizations to arrest and punish the perpetrators of genocide, could be the greatest step forward in mankind's long battle against genocide. The strongest antidote to genocide is justice.

Annex 214

Francis Buchanan, 'A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire' (2003) 1(1) SOAS Bulletin of Burma Research

SOAS Bulletin of Burma Research, Vol. 1, No., 1, Spring 2003, ISSN 1479-8484

Early Article Reprint 1

Francis Buchanan published his "A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire" in 1799, in the fifth volume of Asiatic Researches. This piece provides one of the first major Western surveys of the languages of Burma. But the article goes beyond this and provides important data on the ethno-cultural identities and identifications of the various population groups in the first half of Bò-daw-hpayà's reign (1782-1819). For these reasons, the article is republished here.

The article is reproduced in its entirety, with slight modifications as follows. The letter "ſ" used for the contemporary "s" in such words as "Chineſe" follows contemporary usage (thus, "Chinese"). At several points in the article, the original publisher did not include all the necessary characters (and sometimes lopped off the ends of sentences). In such cases, the lost letter or likely word has been included within brackets. Split words, using a dash at the end of a sentence have been reunified (hence, "wo-man", is now "woman"). Finally, the article has been repaginated to fit within the overall scheme of this issue of the SBBR. Beyond these points, no changes have been made and all footnotes are derived from the original article.

The original citation for the article is as follows:

Francis Buchanan. "A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire." *Asiatic Researches* 5 (1799): 219-240.

M. W. C.

A Comparative Vocabulary of Some of the Languages Spoken in the Burma Empire

Francis Buchanan, M. D.

TO judge from external appearance, that is to say, from shape, size, and feature, there is one very extensive nation that inhabits the east of *Asia.* It includes the Eastern and Western *Tartars* of the *Chinese* authors, the *Calmucs* the *Chinese,* the Japponese, the *Malays* and other tribes inhabiting what is called the Peninsula of *India* beyond the *Ganges:* and the islands to the south and east of this, as far at least as *New Guinea*. This, however, is speaking in a very general sense, and many foreign races being intermixed with the nation, and, perhaps, many tribes belonging to it, being featured beyond the limits I have mentioned.

These six are all the languages of this great *eastern* nation, of which, during my stay in the *Burma* Empire, I was able to procure vocables sufficient for my purpose. Although they appear very different at first sight, and the language of one race is totally unintelligible to the others, yet I can perceive in them all some coincidences ; and a knowledge of the languages, with their obsolete words, their phrases, their inflections of words, and elisions, *cuphoniæ causa*, would, perhaps, shew many more. Those that have the greatest affinity are in Tab. I. IV. And V. Mr. GILCHRIST, whose knowledge of the common dialects in use on the banks of the *Ganges* is, I believe, exceeded by that of no *European*, was so obliging as to look over these vocabularies ; but he could not trace the smallest relation between the languages.

I shall now add three dialects, spoken in the *Burma* Empire, but evidently derived from the language of the *Hindu* nation.

The first is that spoken by the *Mohammedans*, who have long settled in *Arakan*, and who call themselves *Rooinga*, or natives of *Arakan*.

The second dialect is that spoken by the *Hindus* of *Arakan*. I procured it from a *Brahmen* and his attendants, who had been brought to *Amarapura* by the king's edlest son, on his return from the conquest of *Arakan*. They call themselves Rossawn, and, for what reason I do not know, wanted to persuade me that theirs was the common language of *Arakan*. Both these tribes, by the real natives of *Arakan*, are called *Kulaw Yakain*, or stranger *Arakan*.

The last dialect of the *Hindustanee* which I shall mention, is that of a people called, by the *Burmas*, *Aykobat*, many of them are slaves at *Amarapura*. By one of them I was informed, that they had called themselves *Banga* ; that formerly they had kings of their own ; but that, in his father's time, their kingdom had been overturned by the king of *Munnypura*, who carried away a great part of the inhabitants to his residence.

When that was taken last by the *Burmas*, which was about fifteen years ago, this man was one of the many captives who were brought to *Ava*. He said also, that *Banga* was seven days' journey south-west from *Munnypura* : it must, therefore, be on the frontiers of *Bengal*, and may, perhaps, be the country called in our maps *Cashar*.

Mr. GILCHRIST has been so good as to examine particularly these two dialects, and to mark thus (*) those words which come nearest the Hindustanee spoken on the Ganges ; and thus (†) those not so evidently in connection with the same, but which shew resemblance by analogy.

English.	***Rooinga.***	***Rossawn.***	***Banga.***
1 Sun	Bel	*Sooja	Bayllee
2 Moon	Sawn	Sundsa	Satkan
3 Stars	Tara	*Nokyoto	*Tara
4 Earth	Kool	Murtika	*Matee
5 Water	Pannæ	*Dsol	*Pannæ
6 Fire	Auin	*Aaganee	Zee
7 Stone	Sheel	*Sheel	*Heel

Annex 215

U Shw Zan & Dr. Aye Chan, *Influx Viruses: The Illegal Muslims in Arakan*
(Arakanese in United States 2005)

Download the original attachment

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The Illegal Muslims in Arakan

By U Shw zan and Dr. Aye Chan

Published by Arakanes in United States

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(၁၁) ကျမ်းကားစာရင်း---------- ၉၉

Forward

There is a new trend concerning the so-called Rohingya. This trend, fashioned by some Islamic radicals after Burma's independence, his been problematic, and a grave concern for (a) the Arakanese, (b) the people of Burma and (c) historians and scholars. A proper understanding of the importance and nature of illegal Muslim immigrant flow is crucial to comprehensively address the imperative issue of development contest. Rohingya movements have been accompanied by certain dangers and challenges, particularly for the Arakan State and beyond. In response to this problematic challenge, this book was written by leading historians who focused on the central importance of origin, growth and historical development of and the unproductive adventures of, illegal Bengali Muslims who desperately needed to be recognized as having a racial distinct identity in Burma.

These collective contributions resulted in a comprehensive analysis of illegal Muslim immigrant issues within the development contest. With contributions from two leading Arakanese intellectuals, this work provides readers not only with exclusive historical facts but also coherent conclusions. Their presentations adequately cover the interlocking themes of illegal Muslim immigrants who irreverently claim themselves as Rohingyas in Burma, and that claim's impact in the region. Also covered is how these claims affect historical write-ups by governments, international organizations, academics, researchers, and practitioners, write-ups, which often go awry.

U Shwe Zan, who published a member of books on Arakan, has extensive experiences in immigrant issues as a result of his long-term service as immigration officer in Arakan State. He examines the historical facts with an insightful and innovative analysis about Muslim infiltration into Arakan State. With ample background documentation, Professor Dr. Aye Chan provides an all-inclusive analysis of illegal Bengali problems by re-examining the ethnicity of the so-called Rohingyas, and tracing their history back to the earliest presence of their ancestors in Arakan. Both of their clued-up ventures offers a wealth of information, data, advice, and issues to consider, along with a means to address them, based on experiences and historical analysis relating to unlawful migration flows in Arakan. Their extensive works leave no stoned unturned in their efforts to give comprehensive historical analysis of illegal Bengali Muslims who cogently drum up popular support in advancing the demand for legitimacy of their racial identity in Burma.

I hope this collective contribution will give both a broader understanding of so-called Rohingya issues and practical measures to address challenges of the future. I extend my heartfelt gratitude to both contributors whose scholastic works are credibly expected to give appropriate answers to all, particularly to moderate Muslim who cherish peaceful co-existence in Burma.

Dr. Ashin Nayaka
Visiting Scholar
Department of History
Columbia University, New York

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Pierre d'Argent, 'Le droit de la responsabilité internationale complété ? Examen des *Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire*' (2005) 51 Annuaire français de droit international 27

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Le droit de la responsabilité internationale complété ? Examen des *Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire*

Pierre D'Argent

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ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL
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LE DROIT DE LA RESPONSABILITÉ INTERNATIONALE COMPLÉTÉ ? EXAMEN DES *PRINCIPES FONDAMENTAUX ET DIRECTIVES CONCERNANT LE DROIT À UN RECOURS ET À RÉPARATION DES VICTIMES DE VIOLATIONS FLAGRANTES DU DROIT INTERNATIONAL DES DROITS DE L'HOMME ET DE VIOLATIONS GRAVES DU DROIT INTERNATIONAL HUMANITAIRE*

PIERRE D'ARGENT

Persée creative commons

Le 16 décembre 2005, l'Assemblée générale des Nations Unies a adopté une résolution intitulée « *Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire* » [1]. Cette résolution, attendue par de nombreuses organisations de défense des droits de l'homme [2] et paraissant constituer un complément au droit de la responsabilité de l'État pour fait internationalement illicite récemment codifié [3], est l'aboutissement d'un long travail mené au sein de la Commission des droits de l'homme. Après une présentation générale de l'origine de cette résolution, de son contenu et de sa portée normative (I), un examen critique du droit à un recours et à réparation qui y est affirmé permettra d'en appréhender le fondement juridique, le régime et la conception élargie, ainsi que de s'intéresser brièvement aux difficultés qui ne sont pas abordées par cette résolution (II).

(*) Pierre D'ARGENT, professeur à l'Université catholique de Louvain.

1. A/RES/60/147.

2. Voy. la déclaration écrite conjointe du 11 février 2005 adressé à la Commission des droits de l'homme par une coalition d'ONG : Amnesty International (AI) ; Argentine Forensic Anthropology Team (EAAF) ; Human Rights Advocates ; ICAR Foundation ; Asian Human Rights Commission ; Association for the Prevention of Torture (APT) ; International Centre for Criminal Law Reform and Criminal Justice Policy ; Commission internationale des juristes (CIJ) ; Fédération internationale des Ligues des droits de l'homme (FIDH) ; International Rehabilitation Council for Torture Victims (IRCT) ; International Service for Human Rights ; International Society for Traumatic Stress Studies (ISTSS) ; Medical Foundation for the Care of Victims of Torture ; Redress Trust (REDRESS) ; Organisation mondiale contre la torture (OMCT).

3. A/RES/56/83, *Responsabilité de l'État pour fait internationalement illicite*, art. 33, § 2 : « La présente partie est sans préjudice de tout droit que la responsabilité internationale de l'État peut faire naître directement au profit d'une personne ou d'une entité autre qu'un État ». On y reviendra (*infra*, II, A).

I. – PRÉSENTATION GÉNÉRALE

A. *Origine et travaux préparatoires*

La résolution du 16 décembre 2005 est l'aboutissement d'un processus s'étant étalé sur un peu plus de quinze années. On tâchera de le retracer brièvement.

Ce processus ne peut se comprendre isolément de la vague de fond que constitue, depuis le tournant des années 1990, l'attention portée aux victimes dans le discours des droits de l'homme. Après un moment d'affirmation de ces droits et de leur contenu, le souci de leur protection effective appelle à se pencher sur le sort des personnes qui ont été illicitement privées de la jouissance de ces droits fondamentaux. Perçu comme un droit froid et cynique, fait de rapports entre chancelleries se tenant bien à distance des malheurs des individus, le droit international classique paraît avoir oublié de se soucier des victimes concrètes de ses violations. Le mécanisme de la protection diplomatique et la fiction qui le fonde sont symptomatiques de cette volonté de déconsidérer la subjectivité juridique de la victime, personne physique, pour ce qu'elle est réellement. La négation radicale de la qualité de sujet de droit international de l'individu n'est assurément plus de mise aujourd'hui, puisque la création de droits à son profit ou d'obligations à sa charge suppose qu'il soit titulaire d'une certaine forme de personnalité juridique dans l'ordre juridique consacrant ces droits ou obligations. La question n'est donc plus de savoir si les individus sont sujets de l'ordre juridique international ; elle est plutôt de déterminer quels sont leurs droits, en droit international, lorsqu'ils sont victimes de la violation de règles qui les protègent. Cette question met en jeu la légitimité du droit international sous l'angle de sa « justice », de son caractère équitable, mais aussi sa crédibilité, en ce qu'elle pose ultimement le problème de son effectivité. Est-il un droit purement incantatoire, ou peut-on au contraire réellement fonder sur lui l'espoir si naturel d'un monde plus juste ? Est-il purement langagier ou ses violations ont-elles des conséquences concrètes ? C'est cet espoir d'un droit international réel, effectif, et cette élémentaire exigence de justice, qui ont soutenu l'empathie générale envers les victimes. Il faut reconnaître que, en Bosnie, au Rwanda ou ailleurs, les tribulations de l'histoire récente en ont produit un grand nombre, de manière très visible et sans que l'on puisse continuer à se réfugier derrière la confortable barrière idéologique de la guerre froide, laquelle permettait de s'approprier certaines souffrances et d'en ignorer d'autres. Les mêmes changements historiques ont en outre permis à de vieilles blessures de la seconde guerre mondiale, jamais refermées depuis, de s'exprimer enfin, alors qu'elles avaient été occultées par l'affrontement est-ouest. Tout au long de ces quinze années, cette vague de fond a été portée par certaines innovations institutionnelles spectaculaires [4], des prononcés jurisprudentiels remarquables [5],

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4. Il suffit de songer par exemple à la création du Tribunal pénal international pour l'ex-Yougoslavie, du Tribunal pénal international pour le Rwanda, de la Cour pénale internationale, de la Commission d'indemnisation des Nations Unies, de la Fondation « *Erinnerung, Verantwortung und Zukunft* » afin d'indemniser les travailleurs forcés emprisonnés par l'Allemagne nazie (*NS-Zwangsarbeiter*).

5. Voy. p. ex. la jurisprudence de la Cour interaméricaine des droits de l'homme, notamment dans les affaires *Velásquez-Rodríguez vs. Honduras, Compensatory damages*, Judgment of 21 July 1989, Series C, N° 7 ; *Myrna Mack-Chang vs. Guatemala*, Judgement of 25 November 2003, Series C, n° 101 ; *Plan de Sánchez Massacre vs. Guatemala*, Reparations, Judgement of 19 November 2004, n° 116. Pour une analyse des quelque 47 arrêts ayant une dimension réparatrice prononcés par la Cour interaméricaine jusqu'en 2004, voy. D. CASSEL, « The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights », *in* K. DE FEYTER, S. PARMENTIER, M. BOSSUYT & P. LEMMENS (Éds.), *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*, Intersentia, Antwerpen-Oxford, 2005, pp. 191-223 ; voy. aussi H. TIGROUDJA

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d'abondantes études doctrinales [6], d'autres travaux de la Commission des droits de l'homme [7] et un activisme foisonnant de la part d'organisations non gouvernementales [8]. Il est impossible de rapporter ici l'enchevêtrement de ces nombreux développements. La résolution commentée en constitue en quelque sorte le point d'aboutissement officiel le plus visible. C'est la raison pour laquelle on se limitera à en retracer la genèse, sans oublier pour autant la toile de fond qui servit de contexte général à son élaboration.

En 1989, la sous-commission de la lutte contre les mesures discriminatoires et de la protection des minorités (devenue en 1999 la sous-commission de la promotion et de la protection des droits de l'homme) a chargé [9] M. Theo van Boven « d'entreprendre une étude concernant le droit à restitution, à indemnisation et à réadaptation des victimes de violations flagrantes des droits de l'homme et des libertés fondamentales, compte tenu des normes internationales existantes en matière d'indemnisation dans le domaine des droits de l'homme et des décisions et opinions pertinentes d'organismes internationaux qui s'occupent de droits de l'homme, afin d'examiner la possibilité de mettre au point certains principes et directives fondamentaux à cet égard » [10]. Cette décision fut prise un an après que des membres de la sous-commission aient été sensibilisés à cette problématique suite à une conférence s'étant réunie au Canada et portant sur les

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Suite de la note 5.

& I. K. PANOUSSIS, *La Cour interaméricaine des droits de l'homme, Analyse de la jurisprudence consultative et contentieuse*, Bruylant, 2003, chapitre VI, pp. 280-302 ; V. MADRIGAL-BORLOZ, « Damage and Redress in the Jurisprudence of the Inter-American Court of Human Rights (1979-2001), *in* G. ULRICH & L. KRABBE BOSERUP (ed.), *Reparations : Redressing Past Wrongs*, Human Rights in Development Yearbook 2001, Kluwer, 2003, pp. 211-274.

Voy. aussi, *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, avis consultatif du 9 juillet 2004, *CIJ Recueil 2004*, p. 136 (*infra*, II, A).

6. Voy. not. : A. RANDELZHOFFER & Chr. TOMUSCHAT (Éds.), *State Responsibility and the Individual. Reparation in Instances of Grave Violations of Human Rights*, Martinus Nijhoff, 1999 ; H. FUJITA, I. SUZUKI & K. NAGANO (Éds.), *War and the Rights of Individuals, Renaissance of individual compensation*, Nippon Hyoron-sha Co., 1999 ; D. SHELTON, *Remedies in International Human Rights Law*, OUP, 2000 (nouvelle édition 2006) ; I. BOTTIGLIERO, *Redress for Victims of Crimes Under International Law*, Martinus Nijhoff, 2004 ; K. DE FEYTER, S. PARMENTIER, M. BOSSUYT & P. LEMMENS (Éds.), *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations*, Intersentia, Antwerpen-Oxford, 2005 ; M. NOWAK, « The Right to Reparation of Victims of Gross Human Rights Violations », *in* G. ULRICH & L. KRABBE BOSERUP (ed.), *op. cit.*, pp. 275-308 ; P. D'ARGENT, « Des règlements collectifs aux règlements individuels (collectivisés) ? La question des réparations en cas de violation massive des droits de l'homme », *International Law FORUM du droit international*, 2003, pp. 10-26 ; A. A. AN-NA'IM, « Toward a Universal Doctrine of Reparation for Violations of International Human Rights and Humanitarian Law », *ibid.*, pp. 27-35 ; E.-C. GILLARD, « Reparation for violations of international humanitarian law », *RICR*, 2003, pp. 529-553 ; R. PISILLO MAZZESCHI, « Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights : An Overview », *JICJ*, 2003, pp. 339-347 ; Chr. TOMUSCHAT, *Current Issues of Responsibility under International Law*, CEBDI, vol. IV (2000), (Chapter IV : Individual Reparation Claims under International Law ?), pp. 515-599.

7. Voy. not. les propositions de directives soumises par M. Louis JOINET, rapporteur spécial de la sous-commission sur la question de l'impunité des auteurs de violations des droits de l'homme (droits civils et politiques), E/CN.4/Sub.2/1997/20 du 26 juin 1997 et E/CN.4/Sub.2/1997/20/Rev.1 du 2 octobre 1997. D'autres travaux menés sous les auspices de la Commission des droits de l'homme ont touché à cette question du droit des victimes à la réparation, p. ex. R. COOMARASWAMY, *Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime*, E/CN.4/1996/53/Add.1.

8. Toutes les grandes ONG actives dans le secteur des droits de l'homme (Amnesty International, FIDH, Human Rights Watch, Commission internationale des juristes...) ont été particulièrement attentives à cette question et leurs positions convergent largement. Il est tout à fait remarquable qu'une ONG, dénommée *Redress* (www.redress.org), a pour objet principal l'assistance aux victimes d'actes de torture (et autres violations graves) afin de réclamer des réparations.

9. Résolution 1989/13.

10. *Étude concernant le droit à restitution, à indemnisation et à réadaptation des victimes de violations flagrantes des droits de l'homme et des libertés fondamentales, Rapport final présenté par M. Theo van Boven, Rapporteur spécial*, E/CN.4/Sub.2/1993/8, § 1.

réclamations dirigées par d'anciens prisonniers aux mains du gouvernement impérial japonais durant la seconde guerre mondiale [11]. À la suite de sa désignation, M. van Boven présenta un rapport préliminaire [12] et deux rapports intermédiaires [13] avant de soumettre un rapport final [14] tenant compte des débats suscités par ses premières études. Ce rapport final contenait une étude détaillée de la pratique proche et lointaine relative au sujet traité, sa neuvième et dernière partie proposant une « série de principes et de directives concernant le droit à réparation des victimes de violations graves des droits de l'homme » [15]. Ceux-ci étaient divisés en « Principes généraux », « Formes de réparation » et « Procédures et mécanismes ». De l'aveu même du rapporteur spécial, ces principes et directives étaient largement inspirés par les travaux d'une conférence réunie à l'université de Maastricht en mars 1992 [16].

Les discussions qui suivirent la présentation de ce rapport permirent au rapporteur spécial d'élaborer un ensemble de principes révisés concernant « le droit à réparation des victimes de violations *flagrantes* des droits de l'homme *et du droit humanitaire* » [17], lesquels étaient à nouveau le résultat de travaux académiques réalisés dans le cadre d'un séminaire conjoint du centre des droits de l'homme de l'université de Maastricht et de la Commission internationale des juristes. Le rapporteur spécial amenda encore marginalement ces principes suite aux commentaires et aux observations qui lui avaient été adressés. Les principes n'étaient plus seulement applicables aux violations flagrantes des droits de l'homme, mais apparemment à toutes les violations de ces normes ; par contre, ils étaient applicables aux violations du droit *international* humanitaire [18].

En 1998, la Commission des droits de l'homme désigna M. Chérif Bassiouni en qualité d'expert indépendant [19], les fonctions de rapporteur spécial de M. van Boven ayant pris fin. Compte tenu des commentaires et observations soumis par les États, organisations internationales et non gouvernementales, et de différentes réunions de consultation tenues à Genève, M. Bassiouni transmit à la commission un premier rapport en 1999 [20]. Y étaient notamment étudiés les différences entre les projets successifs de M. van Boven et les liens avec les propositions de directives soumises parallèlement par M. Louis Joinet, rapporteur spécial de la sous-commission sur la question de l'impunité des auteurs de violations des droits de l'homme (droits civils et politiques) [21]. L'expert indépendant

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11. D. SHELTON, « The United Nations Principles and Guidelines on Reparations : Context and Contents », *in* K. DE FEYTER, S. PARMENTIER, M. BOSSUYT & P. LEMMENS (Éds.), *op. cit.*, p. 14, n. 10. Aux Pays-Bas, dont M. van Boven est ressortissant, voy. les actions entreprises par la « *Stichting Japanse Ereschulden* » (Fondation pour les dettes d'honneur japonaises : www.jesinfo.org) qui représente d'anciens prisonniers et internés de guerre néerlandais.

12. E/CN.4/Sub.2/1990/10.

13. E/CN.4/Sub.2/1991/7 et E/CN.4/Sub.2/1992/8.

14. E/CN.4/Sub.2/1993/8, *supra* note 10.

15. *Ibid.*, § 137.

16. *Netherlands Quarterly of Human Rights*, SIM spécial, n° 12, 1992.

17. *Ensemble révisé de principes fondamentaux et de directives concernant le droit à réparation des victimes de violations flagrantes des droits de l'homme et du droit humanitaire, établi par M. Theo Van Boven en application de la décision 1995/117 de la Sous-commission*, E/CN.4/Sub.2/1996/17.

18. *Note établie par l'ancien Rapporteur spécial de la Sous-commission, M. Theo van Boven, en application du paragraphe 2 de la résolution 1996/28 de la Sous-commission*, E/CN.4/1997/104 Annexe. Selon l'expert indépendant Bassiouni, cette dernière précision s'explique par le fait que « l'expression "droit humanitaire" ne peut être employée que dans un contexte international » : *Rapport de l'expert indépendant, M. Chérif Bassiouni, sur le droit à restitution, à indemnisation et à réadaptation des victimes de graves violations des droits de l'homme et des libertés fondamentales présenté en application de la résolution 1998/43 de la Commission des droits de l'homme*, E/CN.4/1999/65, p. 11, § 28.

19. Résolution 1998/43.

20. E/CN.4/1999/65, *supra* note 18.

21. *Supra* note 7.

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Bassiouni, devenu rapporteur spécial, conclut ses travaux en 2000 par une nouvelle version révisée de « Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire » [22].

À la demande de la Commission des droits de l'homme [23], le haut-commissariat des Nations Unies aux droits de l'homme distribua ce dernier projet pour commentaires à tous les États membres de l'ONU, ainsi qu'aux organisations intergouvernementales et aux ONG intéressées. Les mêmes parties furent invitées [24] à participer à trois réunions consultatives menées en 2002 [25], 2003 [26] et 2004 [27] sous les auspices du haut-commissariat en coopération avec le gouvernement du Chili. Ces réunions furent présidées par l'ambassadeur chilien, M. Alejandro Salinas, lequel était assisté par MM. van Boven et Bassiouni. Au cours de ces réunions, l'intitulé des principes à adopter fit l'objet d'hésitations, les notions de « violations flagrantes des droits de l'homme » et de « violations graves du droit international humanitaire » suscitant quelques réserves vu leur imprécision. Par ailleurs, vu l'opposition de l'Allemagne à mentionner le droit international humanitaire, le président-rapporteur proposa de définir la notion de « violation flagrante » et de retenir une formule plus inclusive, visant seulement les « violations flagrantes du droit international » [28]. Ceci ne fut pas retenu puisque la dernière version des principes fondamentaux et directives, arrêtée le 1er octobre 2004 suite à la troisième réunion de consultation, était intitulée « *Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international relatif aux droits de l'homme et de violations graves du droit international humanitaire* » [29]. Ce projet de résolution [30] fut adopté le 19 avril 2005 [31] par quarante voix contre zéro, avec treize abstentions, par la Commission des droits de l'homme [32]. Le 25 juillet 2005, le Comité économique et social recommanda [33] son adoption par l'Assemblée générale par quarante-trois voix contre zéro et cinq abstentions [34]. Le 10 novembre 2005, le troisième comité de l'Assemblée générale

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22. *Le droit à restitution, indemnisation et réadaptation des victimes de violations flagrantes des droits de l'homme et des libertés fondamentales, Rapport final du Rapporteur spécial, M. Chérif Bassiouni, présenté en application de la résolution 1999/33 de la Commission*, E/CN.4/2000/62 Annexe.

23. E/CN.4/RES/2000/41.

24. E/CN.4/RES/2002/44, E/CN.4/RES/2003/34 et E/CN.4/2004/34.

25. *Rapport de la réunion de consultation sur les projets de principes fondamentaux et de directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire, Président-Rapporteur : M. Alejandro Salinas (Chili), Ambassadeur*, E/CN.4/2003/63.

26. *Rapport de la deuxième réunion de consultation sur les principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire (Genève, 20, 21 et 23 octobre 2003), Président-Rapporteur : M. Alejandro Salinas (Chili)*, E/CN.4/2004/57.

27. *Rapport de la troisième réunion de consultation sur les principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire (Genève, 29 septembre-1er octobre 2004), Président-Rapporteur : M. Alejandro Salinas (Chili)*, E/CN.4/2005/59.

28. E/CN.4/2004/57, Appendice II, p. 30, *supra* note 26. Voy. encore *infra*, I, C.

29. E/CN.4/2005/59, Annexe I, p. 14, *supra* note 27.

30. E/CN.4/2005/L.48.

31. E/CN.4/RES/2005/35.

32. E/CN.4/2005/SR.56. Les pays s'étant abstenus sont : Allemagne, Arabie saoudite, Australie, Égypte, Érythrée, États-Unis d'Amérique, Éthiopie, Inde, Mauritanie, Népal, Qatar, Soudan, Togo.

33. E/2005/30.

34. E/2005/SR.38. Les pays s'étant abstenus sont : Allemagne, Australie, États-Unis d'Amérique, Inde, Nigeria. On notera que parmi les pays s'étant abstenus à la Commission des droits de l'homme et faisant partie de l'ECOSOC, l'Arabie saoudite vota pour les principes lors de leur examen par l'ECOSOC.

adopta le même texte [35] sans vote, par consensus [36]. Cinq semaines plus tard, le 16 décembre 2005, l'Assemblée générale fit de même [37].

Le mode d'élaboration de cette résolution fut donc bien différent de celui qui présida, par exemple, à la résolution 56/83 du 28 janvier 2002 sur la responsabilité de l'État pour fait internationalement illicite. On est loin des débats conceptuels de la Commission du droit international, organe collégial de codification et de développement progressif du droit international nourri par une abondante doctrine regardant une pratique parfois fort ancienne. Ici, le travail de fond a été entrepris par un seul homme, M. van Boven, mandaté par la sous-commission de la Commission des droits de l'homme, puis perfectionné par un autre expert, M. Bassiouni. La finalisation du texte fut le fait de l'ambassadeur Salinas, au terme d'un processus de consultation associant très largement les organisations représentant la société civile. Le poids de ces dernières dans l'élaboration de ces principes fondamentaux et directives fut déterminant. Depuis le début, leur ambition était d'aboutir à un texte permettant de faire changer concrètement les choses pour les victimes. Sans les ONG de défense des droits de l'homme, ce projet n'aurait sans doute pas abouti, tel qu'il a abouti et aussi rapidement. Véritables aiguillons, les ONG suivirent ce projet plus attentivement que la plupart des gouvernements impliqués ; elles développèrent une expertise et adoptèrent des positions juridiques que peu d'entre eux osèrent se risquer à contester.

Sous réserve de l'analyse de la portée normative de ce texte (*infra*, I, C), cet exemple devrait inciter la doctrine à tempérer, ou du moins à mettre en perspective, certaines théories des sources du droit international encore mythiquement accrochées au volontarisme étatique. Il n'y a pas lieu de contester que les États demeurent, formellement, les maîtres et créateurs de l'ordre juridique international. Ainsi qu'il ressort des déclarations gouvernementales analysées plus loin, tout le processus d'adoption formelle de cette résolution témoigne de la pérennité de cette emprise étatique. Là n'est toutefois pas la question. Il s'agit plutôt de constater que les États ne sont plus que très modestement les inspirateurs du développement du droit international des droits de l'homme, l'appareil conceptuel ainsi que le discours rendant celui-ci acceptable leur échappant en grande partie. L'opposition classique entre source formelle et source matérielle du droit est en l'occurrence déplacée, ou plutôt insuffisante, car l'activisme des ONG n'est pas réductible à une source matérielle, condition idéologique ou sociale de l'émergence du « droit » formulé. C'est bien plus fondamentalement l'idée même qu'il faut du droit, qu'il faut tel droit, qui n'est plus entre les mains des États, ceux-ci accusant un déficit d'imaginaire les reléguant au rôle peu enviable de « notaires » ou d'accompagnateurs des évolutions de ce secteur du droit des gens. En d'autres termes, la puissance d'inspiration de la norme, puissance qui en détermine le contenu et la légitimité, est en l'occurrence devenu le fait de ceux qui ne seront pas responsables de son application, mais qui seront les observateurs critiques de son respect.

B. *Contenu*

Les principes fondamentaux et directives sont annexés à la résolution 60/147. Le contenu de cette résolution, en tant que telle, est assez sommaire : après un

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35. L'intitulé du texte fut légèrement modifié entre son examen par l'ECOSOC et par le troisième comité : les mots « violations flagrantes du droit international *relatif aux* droits de l'homme » furent simplifiés par « violations flagrantes du droit international *des* droits de l'homme ».

36. A/C.3/60/L.24 et A/C.3/60/SR.39.

37. A/RES/60/147 et A/60/PV.64, p. 11.

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préambule dans lequel l'Assemblée générale affirme « qu'il importe de traiter de manière systématique et approfondie sur les plans national et international la question du droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire » et considère « qu'en honorant le droit des victimes à un recours et à réparation, la communauté internationale tient ses engagements en ce qui concerne la détresse des victimes, des survivants et des générations futures, et réaffirme le droit international dans ce domaine », le dispositif de la résolution adopte les principes fondamentaux et directives (§ 1), recommande aux États d'en tenir compte et d'en promouvoir le respect (§ 2) et prie le Secrétaire général d'en assurer la plus large diffusion possible et de l'inclure dans la publication des Nations Unies intitulée « Droits de l'homme : recueil d'instruments internationaux » (§ 3).

L'annexe à la résolution, rédigée « du point de vue de la victime et sous l'angle de ses besoins et droits »[38], comporte un long préambule sur lequel il faudra revenir lors de l'examen de la portée normative des principes (*infra*, I, C) et du fondement juridique du droit à un recours et à réparation (*infra*, II, A). Le préambule est suivi par vingt-sept paragraphes regroupés en treize points essentiels qui constituent autant de « chapitres » selon le président-rapporteur Salinas. Le tout n'est pas exempt de répétitions, mais sera néanmoins rapidement présenté dans l'ordre des « chapitres ».

Le premier chapitre porte sur l'« obligation de respecter, de faire respecter et d'appliquer le droit international des droits de l'homme et le droit international humanitaire ». Le second chapitre est relatif à la « portée de [cette] obligation ». En substance, il est rappelé que les États ont l'obligation de mettre leur droit interne en conformité avec leurs obligations internationales en la matière, afin que les victimes des violations des droits de l'homme et du droit international humanitaire puissent bénéficier d'« un accès effectif à la justice, dans des conditions d'égalité » (§ 3, c) et de « recours suffisants, utiles, rapides et appropriés, y compris la réparation » (§ 2, c ; voy. aussi § 3, d). Le niveau de protection des victimes ne peut pas être inférieur à celui qui est exigé par les obligations internationales des États concernés (§ 2, d). Au titre de l'obligation de respecter, faire respecter et appliquer le droit international des droits de l'homme et le droit international humanitaire, ces derniers doivent encore « enquêter de manière efficace, rapide, exhaustive et impartiale sur les violations et [...] prendre, le cas échéant, des mesures contre les personnes qui en seraient responsables, conformément au droit interne et au droit international » (§ 3, b).

Cette obligation d'enquêter, de « traduire en justice la personne présumée responsable »[39], de « punir la personne déclarée coupable » (§ 4) et de coopérer internationalement à cette fin est encore soulignée par les paragraphes 4 et 5, regroupés dans le chapitre III consacré aux « violations flagrantes du droit international des droits de l'homme et violations graves du droit international humanitaire qui constituent des crimes de droit international ». Toutes les violations flagrantes des droits de l'homme ou toutes les violations graves du droit interna-

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38. *Rapport de la troisième réunion de consultation*, E/CN.4/2005/59, p. 5, § 9, *supra* note 27.

39. On ne manquera pas d'être saisi par cette formule, tant la présomption d'innocence, et non de responsabilité (culpabilité), est un principe fondamental du droit pénal... Dans le paragraphe 3, b), la résolution mentionne avec plus de prudence, au sujet de toutes les violations des droits de l'homme et du droit international humanitaire, « les personnes qui en seraient responsables ». Passer du conditionnel à une présomption de responsabilité lorsque l'on passe de la simple violation à la violation constitutive d'un crime de droit international est assurément singulier, mais néanmoins symptomatique de cette approche tout axée sur la victime et la répression des crimes graves.

tional humanitaire ne constituent donc pas « systématiquement » [40] des crimes de droit international. Pour autant, la résolution n'indique pas quelles violations flagrantes ou graves n'en seraient pas, même si son préambule affirme que, « en raison de leur gravité », ces violations « constituent un affront à la dignité humaine » [41]. Selon le paragraphe 5, « lorsqu'un traité applicable ou une autre obligation internationale le prévoit », un des moyens d'assurer la répression pénale des crimes de droit international est d'instaurer en droit interne la compétence universelle, non autrement définie mais erronément traduite en français par « juridiction universelle » (*universal jurisdiction* dans la version originale rédigée en anglais).

Les paragraphes 6 et 7 sont consacrés à la « prescription ». L'imprescriptibilité des violations du droit international visées par la résolution et constituant des crimes de droit international est prudemment affirmée : « Lorsqu'un traité applicable ou une autre obligation internationale le prévoit, la prescription ne s'applique pas aux violations flagrantes du droit international des droits de l'homme et aux violations graves du droit international humanitaire qui constituent des crimes de droit international ». La prescription de droit interne applicable aux autres violations de ces normes ne constituant pas des crimes de droit international, en ce compris la prescription des actions civiles qui y sont liées, « ne devrait pas être indûment restrictive ». L'usage du conditionnel dans la résolution dénote le caractère *de lege ferenda* de la disposition, « un libellé contraignant n'a[yant] été utilisé que lorsque l'obligation internationale existait déjà » [42].

Le chapitre V définit la notion de « victimes » pour les besoins de la résolution. Cette définition est large puisque sont considérées comme « "victimes" les personnes qui, individuellement ou collectivement, ont subi un préjudice, notamment une atteinte à leur intégrité physique ou mentale, une souffrance morale, une perte matérielle ou une atteinte grave à leurs droits fondamentaux, en raison d'actes ou d'omissions constituant des violations flagrantes du droit international des droits de l'homme ou des violations graves du droit international humanitaire » (§ 8). Les membres de la famille proche ou les personnes à charge directe de la victime, ainsi que les personnes étant venues à leur aide et secours, et ayant subi de ce fait un préjudice, peuvent en outre « le cas échéant, et conformément au droit interne », être considérés comme « victimes ». Ce statut de « victime » est indépendant de l'identification, de la poursuite ou de la condamnation de l'auteur des violations. Le lien de parenté de ce dernier avec la victime est tout autant indifférent (§ 9).

Les principes généraux applicables au « traitement des victimes » sont précisés dans le paragraphe 10, lequel constitue le chapitre VI. Il mérite d'être intégralement reproduit, tant il manifeste l'approche centrée sur la victime retenue par les auteurs de la résolution :

> « Les victimes devraient être traitées avec humanité ainsi que dans le respect de leur dignité et de leurs droits humains, et des mesures appropriées devraient être prises pour assurer leur sécurité, leur bien-être physique et psychologique et la protection de leur vie privée, de même que ceux de leur famille. L'État devrait veiller à ce que sa législation interne, dans la mesure du possible, permette aux victimes de violences ou de traumatismes de bénéficier d'une sollicitude et de soins particuliers, afin de leur éviter de nouveaux traumatismes au cours des procédures judiciaires et administratives destinées à assurer justice et réparation. »

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40. *Rapport de la troisième réunion de consultation*, E/CN.4/2005/59, p. 7, § 25, *supra* note 27.
41. A/RES/60/147, Annexe, Préambule, § 6.
42. *Rapport de la troisième réunion de consultation*, E/CN.4/2005/59, p. 5, § 11, *supra* note 27.

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À nouveau, le recours au conditionnel s'explique par l'absence d'obligation internationale à cet égard. Ce que le droit n'impose pas peut toutefois être commandé par quelques principes moraux élémentaires, aussi le traitement digne des victimes devrait-il être, en ce sens et malgré les conjugaisons employées, « inconditionnel ». Cela étant, ce n'est pas le partage qu'il faut faire dans cette disposition entre le droit et la morale qui est intéressant ; c'est bien plutôt le statut social de la victime qui s'en dégage : recevant une considération nouvelle et toute particulière, les victimes de violations flagrantes ou graves sont appelées, par le traitement qu'on leur réserve, à transformer la société où elles vivent (*infra*, II, B, 2).

Le « droit des victimes aux recours » (*victim's right to remedies* dans la version originale en anglais, ce qui est plus parlant [43]) est énoncé par le chapitre VII (§ 11). Selon la résolution, ce droit « compren[d] (...) [les] garanties suivantes, prévues par le droit international » :

> « a) Accès effectif à la justice, dans des conditions d'égalité ;
> b) Réparation adéquate, effective et rapide du préjudice subi ;
> c) Accès aux informations utiles concernant les violations et les mécanismes de réparation ».

La suite de la résolution précise le contenu de ces différents « recours » (*remedies*) considérés comme faisant partie du droit des victimes. L'« accès à la justice » forme le chapitre VIII (§§ 12-14) et la « réparation du préjudice subi » le chapitre IX (§§ 15-23), tandis que le chapitre X est relatif à l'« accès aux informations utiles concernant les violations et les mécanismes de réparation » (§ 24). On y reviendra (*infra*, II, B).

La résolution se termine par trois paragraphes, constituant chacun un chapitre. Ils sont tous relatifs aux liens entre les principes fondamentaux et directives et les autres règles du droit international. Selon le paragraphe 25 (chapitre XI : « non-discrimination »), il faut « sans exception » appliquer et interpréter les principes et directives de manière compatible avec le droit international des droits de l'homme et le droit international humanitaire, « sans discrimination aucune pour quelque motif que ce soit ». Le chapitre XII pose un principe de « non-dérogation » : les principes et directives « ne peuvent en aucune façon être interprétés comme restreignant les droits ou obligations découlant *du droit interne et du droit international*, ou comme dérogeant à ces droits ou obligations » [44], singulièrement s'agissant du droit au recours et à réparation. En outre, les principes et directives « sont sans préjudice des règles particulières de droit international », ce qui signifie qu'ils s'insèrent dans le corpus juridique international sans aucunement le modifier. Il ne saurait dès lors être affirmé que le droit au recours emporterait une mise à l'écart des règles relatives aux immunités, ou que le droit à la réparation permettrait de remettre en cause la validité d'accords indemnitaires (*infra*, II, C). Enfin, le chapitre XIII (« droit des tiers », § 27) stipule que les « droits reconnus à des tiers aux niveaux international ou national, en particulier le droit de l'accusé de bénéficier des garanties d'une procédure régulière » ne sont pas affectés par les principes énoncés.

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43. De même que d'autres parties de la résolution, toute la traduction de cette disposition, laisse quelque peu à désirer. Les mots « *Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law* : [...] » ont en effet été traduits par « Le recours contre les violations flagrantes du droit international des droits de l'homme et les violations graves du droit international humanitaire comprennent le droit de la victime aux *garanties* suivantes, prévues par le droit international : [...] » (nous soulignons).

44. Nous soulignons.

C. *Portée normative et champ d'application*

L'unanimité qui présida à l'adoption de la résolution ne doit pas tromper. L'absence d'opposition formelle et la disparition progressive des abstentions qui s'étaient exprimées à la Commission des droits de l'homme et à l'ECOSOC constituent assurément un gage d'acceptabilité politique de son contenu. Elles ne suffisent bien entendu pas pour asseoir sa portée obligatoire. Il en va de cette résolution de l'Assemblée générale comme de toutes les autres, de telle manière qu'à l'heure actuelle sa portée normative ne peut résider que dans l'éventuel caractère déclaratif de droit coutumier de certaines de ses dispositions. À cet égard, et ainsi qu'on l'a déjà mentionné, les auteurs de la résolution ont entendu faire le partage entre le droit existant, exprimé en recourant à un « libellé contraignant »[45] utilisant l'indicatif présent (*shall* dans la version anglaise), et des affirmations *de lege ferenda* formulées au conditionnel (*should*)[46]. Bien qu'il faille encore le vérifier au sujet du contenu précis du « droit des victimes aux recours » (*infra*, II, B), ce partage entre ce qui est déjà du droit et ce qui ne l'est pas (encore) permet d'affirmer dans le préambule que :

> « les Principes fondamentaux et directives n'entraînent pas de nouvelles obligations en droit international ou interne, mais définissent des mécanismes, modalités, procédures et méthodes pour l'exécution d'obligations juridiques qui existent déjà en vertu du droit international des droits de l'homme et du droit international humanitaire, qui sont complémentaires bien que différents dans leurs normes »[47].

En d'autres termes, la résolution n'établit pas de nouvelle règle de droit international, mais a pour objet « de compiler et de préciser les obligations existantes » ; elle reflèterait « les normes minimales du droit international » et ne saurait « en aucun cas constituer un recul par rapport aux normes internationales existantes »[48] – ce que confirme le principe de « non-dérogation » (chapitre XII, § 26) exposé ci-dessus. L'intérêt des principes et directives serait dès lors de constituer un « outil extrêmement précieux pour [les États] dans le cadre de l'élaboration de leur politique en matière de recours et de réparation »[49] – le mot « *guidelines* » (directives) prenant ainsi tout son sens[50]. S'exprimant à la troisième commission de l'Assemblée générale, les États intervenants ont, sans aucune ambiguïté, souligné de concert le caractère non contraignant des principes et directives, en ce sens qu'ils ne contiennent ni ne créent aucune nouvelle

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45. *Rapport de la troisième réunion de consultation*, E/CN.4/2005/59, p. 5, § 11, *supra* note 27.

46. Voy. aussi *Rapport final Bassiouni*, E/CN.4/2000/62, p. 3, § 8, *supra* note 22.

47. A/RES/60/147, Annexe, Préambule, § 7.

Voy. encore *Rapport de la deuxième réunion de consultation*, E/CN.4/2004/57, p. 26, *supra* note 26, sous le titre « Nature des Principes et directives » : « Les Principes et directives ne créent pas de nouvelles obligations juridiques internationales ou internes ayant un caractère de fond. Ils prévoient des mécanismes, modalités, procédures et méthodes pour l'exécution d'obligations juridiques qui existent déjà en droit des droits de l'homme et en droit international humanitaire. En même temps, ils visent à rationaliser, par une approche cohérente, les moyens et les méthodes qui peuvent être adoptés à l'égard des droits des victimes, de manière à maximiser les résultats positifs et à réduire au minimum la diversité des approches, qui risque d'entraîner des disparités dans la mise en œuvre de ces droits. Il convient donc de noter que, bien que le texte énumère de manière précise et détaillée les droits des victimes et les recours qui leur sont ouverts, ils ne créent pas de nouvelles obligations juridiques de fond. »

48. *Rapport de la troisième réunion de consultation*, E/CN.4/2005/59, p. 5, § 10, *supra* note 27.

49. Commission des droits de l'homme, Compte-rendu analytique de la 56e séance, 19 avril 2005, E/CN.4/2005/SR.56, *per* M. Thorne (Royaume-Uni).

50. Il y a lieu de noter que « de manière générale, il n'y [a] pas de véritable distinction entre le mot "principes" et le mot "directives" [...] cette distinction n'entraîn[e] [...] aucun effet juridique » : *Rapport de la deuxième réunion de consultation*, E/CN.4/2004/57, p. 5, § 14, *supra* note 26.

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obligation internationale, et qu'ils sont « suffisamment souples pour laisser une grande latitude aux États au niveau de leur application » [51].

Si ce texte est à ce point anodin en droit, les abstentions exprimées lors de son adoption par la Commission des droits de l'homme et par l'ECOSOC peuvent paraître étranges. En réalité, seuls les États-Unis et l'Allemagne s'en sont clairement expliqués. La position américaine tient au fait que le cinquième paragraphe du préambule fait référence au statut de la Cour pénale internationale, alors que le gouvernement des États-Unis aurait préféré un « texte plus neutre » faisant apparaître que les États « qui ne sont pas parties au traité créant la Cour n'ont aucune obligation à ce sujet, à moins que le Conseil de sécurité n'en décide autrement » [52]. L'abstention de l'Allemagne est quant à elle justifiée par une position de fond beaucoup plus substantielle selon laquelle le texte en projet n'aurait pas suffisamment distingué entre les réclamations fondées sur le droit international des droits de l'homme et celles fondées sur le droit international humanitaire. Tout en reconnaissant que certains instruments protecteurs des droits de l'homme permettent la présentation de réclamations individuelles, le gouvernement allemand a soutenu avec force que rien de semblable n'existe en cas de violation du droit international humanitaire et que les affirmations selon lesquelles un droit individuel à obtenir réparation serait consacré par la quatrième convention de La Haye de 1907, ou par la premier protocole de 1977 additionnel aux conventions de Genève de 1949, sont dépourvues de tout fondement [53]. Cette position

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51. Assemblée générale, troisième commission, compte rendu analytique de la 39e séance, 10 novembre 2005, A/C.3/60/SR.39, *per* M. Muñoz (Chili), intervenant au nom des auteurs initiaux. Voy. encore : M. Bertoux (France), soulignant que les principes et directives « ne vont pas au-delà des obligations de chaque État qui découlent des traités librement ratifiés et laissent aux États une grande latitude pour réaliser les objectifs fixés » ; M. Artucio (Uruguay), selon lequel les principes et directives « ne créent pas de nouvelles obligations » mais « permettent aux États membres de préciser l'étendue du droit des victimes à réparation et d'identifier les mécanismes pouvant faciliter la mise en œuvre de leurs obligations internationales actuelles » ; Mme Hart (Canada) : « Sans créer de nouvelles obligations juridiques internationales ou nationales, ils offrent aux États un guide fort utile des modalités actuelles relatives à la mise en œuvre des obligations juridiques contractées [...] » ; Mme Zack (États-Unis d'Amérique) : Les principes et directives « ne créent aucune obligation juridique et [...] sont formulés de manière à offrir aux États une grande souplesse quant aux modalités et aux mécanismes de mise en œuvre des obligations juridiques internationales applicables à chaque État » ; Mme Dempster (Nouvelle-Zélande) : Les principes et directives « ne créent aucune nouvelle obligation juridique internationale ou nationale, sont non contraignants et n'établiront aucune nouvelle norme de droit international », constituant toutefois « une référence précieuse pour les États » ; Mme Mortenson (Royaume-Uni) souligne que l'interprétation du président-rapporteur selon laquelle les principes et directives n'établissent pas de nouvelles normes de droit international « est manifestement juste ; [ils] ne sont pas juridiquement contraignants et ne créent aucune nouvelle obligation pour les États en matière de droit international » mais « seront un outil extrêmement utile aux États lorsqu'ils élaboreront des politiques relatives au recours et à la réparation ». On notera encore que la représentante de la Suisse, Mme Kohli, a dit que les principes et directives « marquent une avancée dans le domaine des droits de l'homme et qu'ils représentent l'aboutissement de travaux longs et difficiles ». La franchise de la déléguée helvétique quant aux conditions d'élaboration de ce texte permet de relativiser l'éventuelle portée juridique de l'« avancée » qu'elle souligne de manière sibylline.

52. ECOSOC, session de fond de 2005, compte-rendu analytique provisoire de la 38e session, 25 juillet 2005, E/2005/SR.38, p. 2, *per* Mme Zack (États-Unis d'Amérique), reprenant en substance la position déjà exprimée devant la Commission des droits de l'homme (compte-rendu analytique de la 56e séance, 19 avril 2005, E/CN.4/2005/SR.56, p. 19, *per* Mme Bartoni (États-Unis d'Amérique)) et réitérée, sans pour autant aboutir à exprimer une abstention, lors du débat à la troisième commission (Compte rendu analytique de la 39e séance, 10 novembre 2005, A/C.3/60/SR.39, *per* Mme Zack, p. 3).

53. Commission on Human Rights, 61st session, Summary records of the 57th meeting, 19 April 2005, E/CN.4/2005/SR.57, p. 9, *per* Mr. Koenigs (Germany) : « *While certain instruments provided for the presentation of individual claims for the violation of human rights, such provisions did not exist for violations of international humanitarian law. The claim that such a right existed under the Hague Convention N° IV of 1907 or Protocol I Additional to the 1949 Geneva Conventions was entirely unsubstantiated* » (pas de traduction officielle disponible).

tranchée touche au fondement juridique du droit à un recours et à réparation, et sera abordée comme telle plus loin (*infra*, II, A). Bien que l'Allemagne ait constamment réitéré cette position juridique, elle n'a plus exprimé d'abstention formelle à partir de l'examen du texte par la troisième commission de l'Assemblée générale, affirmant ne pas vouloir briser le consensus qui se faisait jour [54]. La raison de cet assouplissement tient peut-être aussi au fait que, comme l'a fait remarquer la représentante des États-Unis lors des débats devant la troisième commission, la résolution reconnaît « que le droit international des droits de l'homme et le droit international humanitaire sont des ensembles de droits distincts » [55]. Bien que la diplomate n'ait pas identifié la disposition du texte contenant cette reconnaissance, celle-ci paraît exprimée par le 7e paragraphe du préambule, reproduit ci-dessus, selon lequel le droit international des droits de l'homme et le droit international humanitaire « sont complémentaires bien que différents dans leurs normes » [56].

Après avoir éclairci la portée normative de la résolution, il faut encore en déterminer ce que le président-rapporteur Salinas nomme son « champ d'application » [57]. Comme on l'a déjà souligné, les principes et directives visent les « violations *flagrantes* du droit international des droits de l'homme » et les « violations *graves* du droit international humanitaire ». Cette terminologie a été retenue après moult débats parce que, selon l'ambassadeur Salinas, elle serait « consacrée » [58]. Ce n'est toutefois pas celle qui avait été proposée par M. van Boven au départ de ses travaux. Se fondant sur le mandat qui lui avait été donné, son rapport final énonçait en effet des « principes et directives concernant le droit à réparation des victimes de *violations graves des droits de l'homme* » [59]. Les principes révisés en 1996 étaient intitulés : « Principes fondamentaux et directives concernant le droit à réparation des victimes de *violations flagrantes des droits de l'homme et du droit humanitaire* » [60]. Le projet amendé en 1997 par l'ancien rapporteur spécial entendait supprimer l'adjectif « flagrantes » et remplacer « droit humanitaire » par « droit international humanitaire » [61]. Considérant que les principes et directives étaient élaborés du point de vue de la victime, l'expert indépendant Bassiouni estima qu'il n'y avait pas de raison d'exclure les violations commises dans le cadre de conflits armés. En outre, il s'interrogea sur la pertinence de l'expression « violations flagrantes », dans la mesure où elle était utilisée non pas pour désigner une « catégorie particulière de violations des droits de l'homme en tant que telles [– qu'il aurait fallu alors définir avec précision –] mais des situations [...] caractérisées par la manière dont les violations ont été commises ou par leur gravité » [62]. Il proposa dès lors, sans autre qualification, des « Principes fondamentaux et directives concernant le droit à un recours et à réparation des

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54. Voy. la position des représentants allemands à l'ECOSOC (Compte-rendu analytique provisoire de la 38e session, 25 juillet 2005, E/2005/SR.38, p. 2, *per* M. Theummel) et à la troisième commission (Compte rendu analytique de la 39e séance, 10 novembre 2005, A/C.3/60/SR.39, *per* Mme Beinhoff).

55. Assemblée générale, troisième commission, compte rendu analytique de la 39e séance, 10 novembre 2005, A/C.3/60/SR.39, p. 3, *per* Mme Zack (États-Unis d'Amérique).

56. Texte anglais : « Emphasizing *that the Basic Principles and Guidelines contained herein do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law* which are complementary though different as to their norms » (nous soulignons).

57. *Rapport de la troisième réunion de consultation*, E/CN.4/2005/59, p. 5, § 15, *supra* note 27.

58. *Ibid.*, p. 5, § 12.

59. *Rapport final van Boven*, E/CN.4/Sub.2/1993/8, p. 61, § 137, *supra* note 10.

60. E/CN.4/Sub.2/1996/17, p. 3, Annexe, *supra* note 17.

61. E/CN.4/1997/104, Annexe, *supra* note 18.

62. E/CN.4/1999/65, pp. 23-24, §§ 84-85, *supra* note 18.

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victimes de violations du droit international relatif aux droits de l'homme et du droit international humanitaire »[63]. Suite aux consultations menées par l'ambassadeur Salinas sous les auspices du haut-commissariat des Nations Unies aux droits de l'homme, les prédicats « flagrantes » et « graves » furent réintroduits dans le texte final, ainsi que cela a déjà été rapporté (*supra*, I, A), alors même que le président-rapporteur et les experts indépendants avaient ultimement proposé une formule plus ramassée visant les « violations flagrantes du droit international »[64].

Cela signifie-t-il que les principes et directives sont applicables aux seules violations « flagrantes » et « graves » ? Non. Selon le 6e paragraphe du préambule, les principes et directives « visent les violations flagrantes du droit international des droits de l'homme et les violations graves du droit international humanitaire, qui, en raison de leur gravité, constituent un affront à la dignité humaine »[65]. En d'autres termes, la résolution vise particulièrement les violations flagrantes et les violations graves parce qu'elles soulèvent le plus d'indignation, non parce qu'elles seraient les seules à faire naître un droit à un recours et à réparation. Ainsi que le principe de « non-dérogation » l'indique, « il est [...] entendu que les présents Principes fondamentaux et directives sont sans préjudice du droit à un recours et à réparation des victimes *de toutes les violations* du droit international des droits de l'homme et du droit international humanitaire » (chapitre XII, § 26)[66]. Dans cette mesure, aussi insatisfaisant que cela puisse paraître conceptuellement, on comprend que la résolution ne contienne pas de définition précise des notions de violations flagrantes de droits de l'homme et de violations graves du droit international humanitaire, alors même que les auteurs successifs du texte s'y étaient essayés[67].

Il ne faut donc pas que la violation soit flagrante ou grave pour que le droit à un recours et à réparation existe, même si c'est en ce cas là qu'il s'impose plus particulièrement, dans toute l'ampleur que lui donnent les principes fondamentaux et directives. Il faut toutefois que la violation existe en tant que telle, c'est-à-dire qu'elle soit un manquement illicite à une norme existant au moment où le fait s'est produit, sans quoi celui-ci ne pourrait être source de responsabilité. En d'autres termes, et ainsi que l'a souligné la représentante du Canada, « il n'existe

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63. *Rapport final Bassiouni*, E/CN.4/2000/62 Annexe, *supra* note 22.

64. *Rapport de la deuxième réunion de consultation*, E/CN.4/2004/57, Appendice II, *Proposition du président-rapporteur et des experts indépendants à la suite des consultations tenues le 22 octobre 2003*, p. 30, *supra* note 26.

65. Texte original en anglais : « Affirming *that the Basic Principles and Guidelines contained herein are directed at gross violations of international human rights law and serious violations of international humanitarian law which, by their very grave nature, constitute an affront to human dignity* ».

66. Nous soulignons. Voy. encore *Rapport de la deuxième réunion de consultation*, E/CN.4/2004/57, p. 13, § 66, *supra* note 26 : « Étant donné que le nouveau projet de texte ne porterait que sur les violations *flagrantes*, il a été proposé d'inclure une disposition séparée soulignant que l'instrument ne porterait pas atteinte au droit de *toutes* les victimes de demander réparation. »

67. *Rapport final van Boven*, E/CN.4/Sub.2/1993/8, p. 61, *supra* note 10 :

« On accordera une attention particulières aux violations graves des droits de l'homme et des libertés fondamentales, qui couvrent, sans s'y limiter, les pratiques suivantes : génocide, esclavage et pratiques analogues, exécutions sommaires ou arbitraires, torture et autres peines ou traitements cruels, inhumains ou dégradants, disparitions forcées, détentions arbitraires et prolongées, déportation ou transfert forcé de populations et discrimination systématique, notamment fondée sur la race ou le sexe. » ; *Rapport de la deuxième réunion de consultation*, E/CN.4/2004/57, Appendice II, p. 30, *supra* note 64 : « Aux fins du présent document, on entend par violations flagrantes du droit international la privation illégale du droit à la vie, les actes de torture ou autres peines ou traitements cruels et inhumains, les disparitions forcées, l'esclavage, la traite des esclaves et les pratiques apparentées, la privation des droits des personnes prévues par la loi et violations analogues graves des libertés et droits fondamentaux et des normes garanties par le droit international applicable. »

aucun droit à un recours pour des actes qui n'étaient pas des violations du droit international au moment où ils se sont produits » [68].

II. – LE DROIT À UN RECOURS ET À RÉPARATION : EXAMEN CRITIQUE

Après cet aperçu général de la résolution 60/147, il importe d'analyser de plus près le droit à un recours et à réparation (*right to a remedy and reparation*) qu'elle consacre au bénéfice des victimes des violations flagrantes du droit international des droits de l'homme et des violations graves du droit international humanitaire, sachant, comme on vient de le souligner, que ces violations ne doivent pas nécessairement atteindre un tel seuil de manifestation ou de gravité pour que, selon la résolution, ce droit existe. Il faut ainsi revenir sur le régime juridique et la conception élargie de ce droit véhiculée par la résolution (B), ce qui permet de mettre en lumière ce dont elle ne parle pas (C). Avant toute chose, il y a lieu de s'interroger sur son fondement (A).

A. *Fondement*

Le droit à un recours et à réparation est envisagé par les principes et directives comme un droit revenant aux *victimes* des violations flagrantes des droits de l'homme et des violations graves du droit international humanitaire. Aucun doute à cet égard n'est permis, ce que confirme la définition de la notion de « victimes » par les paragraphes 8 et 9 de la résolution (*supra*, I, B) : ce sont bien des « personnes, individuellement ou collectivement » qui sont titulaires de ce droit à un recours et à réparation, et non l'État dont ils sont les ressortissants. Se pose dès lors la question du fondement juridique de ce droit individuel, né d'une violation du droit international mais apparemment situé en marge du droit classique de la responsabilité internationale, lequel s'applique entre États.

Dans son rapport final de 1993, M. van Boven affirme qu'« en droit international, toute atteinte à l'un des droits de l'homme fait naître un droit à réparation chez la victime » [69]. Le propos est fondé sur une analyse de la nature particulière des obligations internationales en matière de protection des droits de l'homme, lesquelles ne sont pas seulement convenues au bénéfice des États contractants, mais aussi des individus relevant de leur juridiction [70] : « Il est donc possible de déclarer que les obligations nées de la responsabilité des États pour violation du régime international des droits de l'homme entraînent des droits correspondants en faveur des individus et des groupes d'individus qui relèvent de la juridiction de l'État auteur et qui sont victimes de ces violations. Le droit premier que le droit international reconnaît à ces victimes est le droit à un recours utile et à une juste

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68. Assemblée générale, troisième commission, compte rendu analytique de la 39e séance, 10 novembre 2005, A/C.3/60/SR.39, *per* Mme Hart (Canada). Voy. encore Commission des droits de l'homme, Compte-rendu analytique de la 56e séance, 19 avril 2005, E/CN.4/2005/SR.56, *per* M. Normandin (Canada).

69. E/CN.4/Sub.2/1993/8, p. 61, *supra* note 10.

70. *Ibid.*, pp. 18-21 : le rapporteur spécial constate d'abord l'élargissement de la notion d'États lésés au sens du droit de la responsabilité internationale, notamment suite au développement des obligations *erga omnes*, puis cite l'avis consultatif OC-2/82 du 24 septembre 1982 de la Cour interaméricaine des droits de l'homme au sujet de l'effet des réserves à l'entrée en vigueur de la Convention américaine, série A, *Judgments and opinions*, n° 2, § 29 : « [...] les États peuvent être réputés s'être soumis à un ordre juridique à l'intérieur duquel, pour le bien général, ils assument diverses obligations non seulement à l'égard d'autres États, mais encore à l'égard de tous les individus relevant de leur juridiction [...] ».

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réparation » [71]. Puisque, depuis l'arrêt de la Cour permanente de Justice internationale dans l'affaire de l'usine de Chorzów [72], il n'est pas contesté que toute violation du droit international emporte, au titre de la responsabilité internationale, l'obligation de réparer le dommage qui en découle, il serait logique de considérer que cette obligation constitue un droit dans le chef des personnes ayant subi ce dommage dès l'instant où la norme violée fut convenue à leur bénéfice.

Cette affirmation ne se retrouve pas comme telle dans la résolution commentée. En réalité, celle-ci paraît fonder le droit à un recours et à réparation au bénéfice des victimes, d'une part, dans une forme d'extrapolation de certaines dispositions conventionnelles et, d'autre part, dans l'obligation de respecter, faire respecter et appliquer le droit international des droits de l'homme et le droit international humanitaire.

Le premier paragraphe du préambule de la résolution portant les principes et directives « rappell[e] les dispositions de nombreux instruments internationaux prévoyant le droit à un recours [« *right to a remedy* »] pour les victimes des violations du droit international des droits de l'homme [...] [73] ainsi que de violations du droit international humanitaire [...] [74] ». Le deuxième paragraphe du préambule « rappell[e] les dispositions des conventions régionales prévoyant le droit à un recours pour les victimes de violations du droit international des droits de l'homme [...] [75] ». Ces « rappels » paraissent n'avoir d'autre fonction que d'indiquer que le dispositif de la résolution serait somme toute parfaitement classique, puisqu'il ne ferait que généraliser ce que de nombreux traités internationaux consacreraient déjà. En extrapolant les dispositions conventionnelles, on pourrait donc affirmer l'existence d'un principe général consacrant le droit au recours au bénéfice des individus – à moins, inversement, que les règles écrites soient les incarnations particulières d'un tel principe général, déjà bien établi. Il faut toutefois reconnaître que les textes cités ont des statuts normatifs ou des contenus si différents qu'il est difficile d'en déduire un principe général relatif au droit au recours ou d'y voir l'application d'un tel principe. Certes, les textes régionaux cités (article 7 de la charte africaine, article 25 de la convention américaine, article 13 de la convention européenne de sauvegarde) sont incontestablement directement applicables et consacrent, dans les ordres juridiques régionaux concernés, un tel droit à un recours, sous la forme d'un droit d'accès à la justice, au bénéfice direct des individus. On ne peut toutefois pas en dire autant des textes universels auxquels le préambule renvoie, soit du fait de leur formulation (article 2 du pacte de 1966 sur les droits civils et politiques, article 6 de la convention sur l'élimination de la discrimination raciale, article 14 de la convention sur la torture, article 39 de la convention sur

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71. *Ibid.*, p. 21, § 45.

72. CPJI, arrêt n° 13, *Usine de Chorzów* (Fond), Série A, n° 17, p. 29.

73. « [...] en particulier les dispositions de l'article 8 de la Déclaration universelle des droits de l'homme, de l'article 2 du Pacte international relatif aux droits civils et politiques, de l'article 6 de la Convention internationale sur l'élimination de toutes les formes de discrimination raciale, de l'article 14 de la Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants et de l'article 39 de la Convention relative aux droits de l'enfant [...] ».

74. « [...] en particulier les dispositions de l'article 3 de la Convention de La Haye concernant les lois et coutumes de la guerre sur terre du 18 octobre 1907 (Convention IV), de l'article 91 du Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à la protection des victimes des conflits armés internationaux (Protocole I), du 8 juin 1977, et des articles 68 et 75 du Statut de Rome de la Cour pénale internationale ».

75. « [...] en particulier les dispositions de l'article 7 de la Charte africaine des droits de l'homme et des peuples, de l'article 25 de la Convention américaine relative aux droits de l'homme et de l'article 13 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ».

les droits de l'enfant [76]), soit du fait de leur statut normatif (article 8 de la déclaration universelle des droits de l'homme). Par ailleurs, ainsi que le soutint l'Allemagne (*supra*, I, C) et quoi que paraisse sous-entendre leur inclusion dans le préambule, ni l'article 3 de la convention IV de La Haye de 1907 concernant les lois et coutumes de guerre sur terre, ni l'article 91 du protocole I de 1977, additionnel aux conventions de Genève de 1949, ne consacrent le droit, pour les particuliers victimes des violations du *jus in bello*, d'obtenir réparation [77]. Quant aux articles 68 (« Protection et participation au procès des victimes et des témoins ») et 75 (« Réparation en faveur des victimes ») du statut de la Cour pénale internationale, il s'agit de dispositions liant la Cour dans son fonctionnement. Les « rappels » du préambule sont donc trompeurs si on les comprend autrement que comme un simple relevé de normes éparses : disparates, celles-ci ne constituent pas une pratique normative suffisamment convergente pour fonder un principe général de nature coutumière. Ce sont des règles conventionnelles.

De manière plus affirmative, la résolution déduit le droit à un recours et à réparation de l'« obligation de respecter, de faire respecter et d'appliquer le droit international des droits de l'homme et le droit international humanitaire » (chapitre I & II). En effet, selon le paragraphe 3 de la résolution, cette obligation « comprend, entre autres, l'obligation [...] d'offrir aux victimes des recours utiles, y compris la réparation » (« *includes, inter alia, the duty to [...] provide effective remedies to victims, including reparation* [...] »). Le paragraphe 2 indique que les États remplissent leurs obligations internationales « en assurant des recours suffisants, utiles, rapides et appropriés, y compris la réparation ». Cet ancrage du droit à un recours et à réparation dans le devoir de respecter et faire respecter les droits de l'homme et le droit international humanitaire apparaît pour la première fois explicitement dans le projet révisé présenté en 1996 [78] par M. van Boven [79]. Il sera développé par M. Bassiouni [80] et ne sera plus remis en cause ensuite. Il n'y a pas lieu de mettre en cause ici cette construction, affirmée à l'indicatif présent comme étant du droit positif et non contestée par les États s'étant exprimés lors du processus d'adoption de la résolution. Encore faut-il voir que déduire le droit à un recours et à réparation du devoir élémentaire de respecter, faire respecter et appliquer le droit auquel on est tenu – c'est-à-dire, en substance, d'exécuter de

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76. « Les États parties prennent toutes les mesures appropriées pour faciliter la réadaptation physique et psychologique et la réinsertion sociale de tout enfant victime de toute forme de négligence, d'exploitation ou de sévices, de torture ou de toute autre forme de peines ou traitements cruels, inhumains ou dégradants, ou de conflit armé. Cette réadaptation et cette réinsertion se déroulent dans des conditions qui favorisent la santé, le respect de soi et la dignité de l'enfant » : à lire cette disposition, on comprend mal en quoi elle consacrerait un « droit à un recours », alors que les autres normes citées visent toutes l'obligation des États d'assurer dans leur ordre interne l'accès à des recours utiles... cette disposition est sans doute citée à l'appui de la notion de réadaptation visée par le paragraphe 21 des principes et directives.

77. Sur cette question délicate et controversée, nous nous permettons de renvoyer le lecteur à l'analyse approfondie de ces dispositions réalisée dans notre ouvrage : P. D'ARGENT, *Les réparations de guerre en droit international public, La responsabilité internationale des États à l'épreuve de la guerre*, Bruylant-LGDJ, 2002, pp. 441-449, pp. 507-518 et pp. 784-788 (voy. origine, applications jurisprudentielles et doctrines citées). *Contra* voy. not. F. KALSHOVEN, « State responsibility for warlike acts of the armed forces. From Art. 3 of Hague Convention IV of 1907 to Art. 91 of Additional Protocol I of 1977 and beyond », *ICLQ*, 1991, pp. 827-858.

78. E/CN.4/Sub.2/1996/17, Annexe, p. 3, § 2, *supra* note 17 : « L'obligation de respecter et de faire respecter les droits de l'homme et le droit humanitaire comprend le devoir de lutter contre les violations, d'enquêter sur celles-ci, de prendre les mesures appropriées contre leurs auteurs et d'assurer recours et réparation aux victimes. »

79. Voy. les remarques de l'expert indépendant Bassiouni à ce propos, E/CN.4/1999/65, p. 7, § 15, *supra* note 18.

80. E/CN.4/2000/62, p. 7, § 3, *supra* note 22.

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bonne foi ses obligations internationales – n'explique pas grand chose. Il nous semble en effet que le droit à la réparation n'est pas un appendice du droit à un recours et que ce dernier n'est pas simplement « compris » dans l'obligation de respecter, faire respecter et appliquer le droit. Plus logiquement, c'est la violation de cette obligation qui donne naissance au droit à la réparation, celui-ci étant mis en œuvre grâce au droit au recours. En d'autres termes, c'est parce que le droit à la réparation existe comme droit individuel en conséquence de la violation de l'obligation de respecter le droit – ou, plus simplement dit, en conséquence de la violation du droit –, qu'un recours effectif dans les ordres juridiques internes doit être disponible pour en assurer la jouissance. Le droit à la réparation n'est pas inclus dans le droit à un recours, lequel n'est pas « compris » dans l'obligation de respecter le droit. Le droit à la réparation naît de la violation du droit, et est en ce sens externe à l'obligation de le respecter ; le droit à un recours, entendu – ainsi que les principes le conçoivent (*infra*, II, B) – comme droit d'accès à un tribunal, est le moyen de réclamer la jouissance du droit primaire substantiel, ou à défaut la réparation du dommage qui naît de sa violation. On en revient donc à la question du droit à la réparation en tant que droit individuel consacré par l'ordre juridique international, suite à la violation du droit international – c'est-à-dire à l'affirmation contenue dans le rapport final de M. van Boven et rapportée ci-avant.

Formulée en droit international général, et non au regard d'un système régional de protection de droits fondamentaux, cette affirmation a légitimement pu susciter de nombreuses hésitations, tant le droit de la responsabilité internationale est fondamentalement un droit interétatique[81]. Dans l'avis qu'elle a rendu le 9 juillet 2004 au sujet des *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, la Cour internationale de Justice ne paraît toutefois pas partager ces hésitations puisqu'elle affirme qu'Israël a, en application du droit de la responsabilité internationale, « l'obligation de réparer tous les dommages causés à toutes les personnes physiques ou morales concernées »[82]. La Cour affirme encore qu'« Israël est [...] tenu de restituer les terres, les vergers, les oliveraies et les autres biens immobiliers saisis à toute personne physique ou morale en vue de l'édification du mur dans le territoire palestinien occupé. Au cas où une restitution s'avérerait matériellement impossible, Israël serait tenu de procéder à l'indemnisation des personnes en question pour le préjudice subi par elles. De l'avis de la Cour, Israël est également tenu d'indemniser, conformément aux règles du droit international applicables en la matière, toutes les personnes physiques ou morales qui auraient subi un préjudice matériel quelconque du fait de la construction de ce mur »[83]. Le prononcé est assurément remarquable : la Cour affirme qu'Israël doit indemniser les personnes préjudiciées, et non pas seulement qu'Israël doit réparer les dommages subis par ces personnes. Ainsi, la Cour paraît consacrer une obligation de réparer les violations du droit international au profit des individus, c'est-à-dire leur droit, en droit international général, d'obtenir réparation pour les violations du droit

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81. Tel que codifié par la Commission du droit international, le droit international de la responsabilité *de* l'État pour fait internationalement illicite n'exclut pas que la responsabilité puisse être due *à* d'autres sujets qu'à des États (ou organisations internationales), mais il « ne s'applique pas aux obligations de réparation dans la mesure où celles-ci s'exercent envers une personne ou une entité autre qu'un État ou sont invoquées par cette personne ou cette entité » : *Rapport de la Commission du droit international à l'Assemblée générale sur les travaux de sa 53e session (2001)*, A/56/10, p. 231 (commentaire de l'art. 28). Voy. encore *infra* note 86.

82. *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*, avis consultatif du 9 juillet 2004, *CIJ Recueil 2004*, p. 198, § 152.

83. *Ibid.*, § 153.

des gens dont ils sont victimes. Le prononcé est d'autant plus remarquable que la Cour ne s'embarrasse guère de justifier son assertion, laquelle paraît également relever de l'évidence pour ses membres puisqu'aucun juge n'y revient dans les opinions individuelles ou dans la déclaration jointes à l'avis. Certes, ce prononcé permet à la Cour d'esquiver la difficile question de la réalité étatique de la Palestine, question qui se serait posée dans le cadre de l'exercice d'une réclamation fondée sur le mécanisme de la protection diplomatique. Cela étant, la concision de l'avis sur ce point, et le silence des opinions individuelles, donnent à penser que les principes juridiques sous-tendant le prononcé ne doivent pas être relativisés et compris seulement en fonction des faits de l'espèce. L'avis de la Cour est rédigé en termes très généraux, laissant entendre que toute violation du droit international causant préjudice aux particuliers entraîne à leur profit un droit, consacré par l'ordre juridique international, à obtenir réparation [84].

Toute violation du droit international entraîne-t-elle, dans cet ordre juridique, un droit individuel à la réparation ? Même si la Cour n'en dit rien, il semble logique d'affirmer que, pour que le droit (secondaire) à la réparation existe dans l'ordre juridique international au bénéfice des individus, il faut que la norme de droit international (primaire) violée ait conféré des droits aux individus, c'est-à-dire qu'elle ait été conclue à leur bénéfice et soit directement applicable dans les ordres juridiques internes. En effet, on voit mal comment les individus pourraient, en droit international, être titulaires d'un droit à la réparation de dommages nés de la violation d'une règle qui ne leur aurait pas conféré directement des droits. Cette subordination du droit individuel à la réparation au caractère directement applicable de la norme internationale dont la violation cause le dommage est notamment affirmée en droit communautaire [85] ; elle paraît peu contestable en droit international général et semble d'ailleurs implicitement contenue dans le lien établi entre le droit à un recours, entendu comme le droit d'avoir accès à un tribunal, et le droit à réparation. En effet, conformément aux principes (*infra*, II, B), le droit à un recours consacré par l'ordre juridique international au bénéfice des individus n'est pas le droit d'accéder à des procédures internationales de règlement, mais le droit d'avoir un accès effectif à la justice dans l'ordre juridique interne de l'État concerné – ce qui se comprend puisque les particuliers n'ont, sauf exception, pas de *locus standi* devant les juridictions internationales. Or, ce droit d'accès à la justice n'a de sens que pour y obtenir la

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84. Pour une analyse de l'avis de la Cour sur ces questions, voy. notre contribution P. D'ARGENT, « Compliance, cessation, restitution and reparation in the Wall advisory opinion », *in Festschrift* Christian Tomuschat, 2006 (à paraître).

85. Qu'il s'agisse de la responsabilité non contractuelle de la Communauté (voy. not. CJCE, 4 juillet 2000, *Bergaderm et Goupil c. Commission*, C-352/98, *Rec.*, p. I-5291, point 42 – où la Cour unifie, « en l'absence de justification particulière », les régimes de responsabilité des États membres et de la Communauté, point 41) ou de ses États membres pour violation du droit communautaire (voy. not. CJCE, 19 novembre 1991, *A. Francovich c. République italienne* et *D. Bonifaci e.a. c. République italienne*, aff. jointes C-6/90 et C-9/90, *Rec.*, p. I-5415, point 41 ; CJCE, 5 mars 1996, *Brasserie du pêcheur S.A. c. Bundesrepublik Deutschland* et *The Queen c. Secretary of State for Transport ex parte Factortame Ltd e.a.*, aff. jointes C-46/93 et C-48/93, *Rec.*, I-1149, point 52). On notera que la Cour de Justice subordonne l'existence de la responsabilité à la violation (le cas échéant « suffisamment caractérisée ») d'une « règle de droit ayant pour objet de conférer des droits aux particuliers », plutôt qu'à la violation d'une règle directement applicable. Ce n'est sans doute pas exactement la même chose ; la formule retenue permet d'inclure l'inexécution des directives (normalement dépourvues d'effet direct mais comportant néanmoins des attribution de droits) dans le délai de transposition dans le champ d'application de la responsabilité. S'agissant de la responsabilité de la Communauté dans l'ordre juridique communautaire pour violation du droit international, la Cour considère qu'une règle de droit international conférant des droits aux particuliers doit s'entendre d'une règle directement applicable (voy. not. CJCE, 30 septembre 2003, *Biret International S.A. c. Conseil*, C-93/02, *Rec.*, I-10558, point 51 ; TPI, 14 décembre 2005, *FIAMM c. Conseil et Commission*, T-69/00, point 113).

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protection, le cas échéant sous forme de réparation, de droits dont on peut se prévaloir en droit interne lors de l'exercice du droit à un recours, c'est-à-dire de droits consacrés par des normes internationales directement applicables.

On peut donc regretter que les principes et directives n'aient pas simplement affirmé que la violation de toute règle de droit international directement applicable conférant un droit aux individus faisait naître dans leur chef, en droit international, un droit à obtenir la réparation des dommages qui en découlent. Il y aurait eu là un renvoi élémentaire au droit primaire, sans lequel un régime de responsabilité n'a guère de sens. En identifiant ainsi le fondement et la condition juridiques de l'existence du droit individuel à la réparation, cela aurait peut-être permis de dissiper les objections allemandes et, en même temps, cela aurait mis en lumière le lien qui existe entre le droit à la réparation et le droit à un recours, entendu comme droit d'avoir accès à un tribunal. En se dispensant de devoir donner un semblant de cohérence aux normes conventionnelles éparses citées dans le préambule et en n'étant plus obligé d'introduire le droit à la réparation sous le couvert de l'obligation de respecter et faire respecter le droit, cela aurait en outre permis d'articuler les principes et directives par rapport au droit général de la responsabilité internationale des États, tel que récemment codifié par la résolution 56/83. On sait en effet que le contenu de la responsabilité internationale de l'État qui y est défini « est sans préjudice de tout droit que la responsabilité internationale de l'État peut faire naître directement au profit d'une personne ou d'une entité autre qu'un État » [86]. L'affirmation du droit individuel à obtenir la réparation des violations des règles de droit international directement applicables aurait été une manière de donner du sens à cette disposition, et ainsi de compléter plus explicitement et plus rigoureusement le droit de la responsabilité internationale. La mise en avant de l'obligation de respecter, de faire respecter et d'appliquer le droit international des droits de l'homme et le droit international humanitaire, et l'inclusion du droit à un recours et à réparation dans cette obligation primaire, masque en effet les conditions d'existence de ce droit et son ancrage dans le droit secondaire de la responsabilité internationale.

B. *Régime*

Une chose est d'affirmer – même au titre de l'obligation de respecter et faire respecter le droit – l'existence, en droit international, du droit individuel à obtenir la réparation des violations des normes internationales conférant directement des droits aux individus, une autre chose est de déterminer quel est le régime juridique de ce droit, c'est-à-dire quel est le droit applicable à la relation de responsabilité ainsi créée. Lorsque le droit à la réparation est mis en œuvre en droit interne par le moyen de l'exercice du droit à un recours, le droit applicable à la relation de responsabilité entre créancier et débiteur de réparation devrait être le droit interne désigné par les règles de droit international privé du juge saisi et compétent. Ainsi, en droit communautaire, la CJCE affirme que la violation d'une règle de droit communautaire directement applicable fait naître dans le chef des particuliers un droit individuel à obtenir réparation consacré par l'ordre juridique communautaire, la responsabilité de l'État étant régie par son droit

86. A/RES/56/83, *Responsabilité de l'État pour fait internationalement illicite*, art. 33, § 2. Selon le commentaire de la Commission du droit international, « c'est à la règle primaire particulière qu'il incombe de déterminer si et dans quelle mesure des personnes ou des entités autres que des États peuvent invoquer la responsabilité en leur nom propre » : *Rapport de la Commission du droit international à l'Assemblée générale sur les travaux de sa 53e session (2001)*, A/56/10, p. 253. Voy. encore le commentaire de l'article 28, pp. 230-231, *supra* note 81.

interne, sous réserve de certaines limites fixées par le droit communautaire [87]. Dans ce schéma, le droit communautaire consacre le droit à obtenir réparation et en détermine les conditions d'existence ; le droit interne (de l'État responsable) en régit l'exercice ; le droit communautaire énonce enfin les conditions auxquelles le droit interne applicable à la relation de responsabilité ne peut déroger, ceci afin d'assurer l'effectivité du droit à obtenir réparation consacré par le droit communautaire. Les auteurs de la résolution commentée n'ont pas recouru à un tel schéma, pourtant simple et respectueux des spécificités nationales. Sans pour autant exclure que le droit interne s'applique à l'exercice du droit à un recours et à réparation, ils ont préféré dire ce que les États doivent ou devraient faire, plutôt que de préciser ce que leur droit interne ne peut pas ou ne devrait pas faire à l'occasion de la mise en œuvre du droit à un recours et à réparation. Il en résulte une conception particulièrement élargie, mais aussi relativement embrouillée, de ce droit.

Selon le paragraphe 11 de la résolution, et ainsi qu'on l'a déjà mentionné (*supra*, I, B), le « droit des victimes aux recours » (« *Victim's right to remedies* ») a une triple dimension :

> « a) Accès effectif à la justice, dans des conditions d'égalité ;
> b) Réparation adéquate, effective et rapide du préjudice subi ;
> c) Accès aux informations utiles concernant les violations et les mécanismes de réparation ».

1. *Accès à la justice*

Selon le paragraphe 12 de la résolution :

> « Les victimes d'une violation flagrante du droit international des droits de l'homme ou d'une violation grave du droit international humanitaire auront ("*shall have*"), dans des conditions d'égalité, accès à un recours judiciaire utile, conformément au droit international. Les autres recours à la disposition des victimes incluent l'accès aux organes administratifs et autres, ainsi qu'aux mécanismes, modalités et procédures régis par la législation interne. Les obligations découlant du droit international qui visent à garantir le droit d'accès à la justice et à un procès équitable et impartial doivent être reflétées dans les législations internes ».

Tandis que le droit d'accès à un recours judiciaire utile dans des conditions d'égalité est ainsi affirmé *de lege lata*, la suite du paragraphe 12 ainsi que les paragraphes 13 et 14 sont rédigés sur le mode conditionnel, c'est-à-dire que les principes et directives qui y sont affirmés ne correspondent pas à des obligations internationales. Les États sont ainsi invités à faciliter l'exercice du droit d'accès à un recours judiciaire en diffusant des informations à cet égard, en prenant des mesures permettant de limiter les difficultés rencontrées par les victimes et leurs représentants (protection de la vie privée, protection des témoins...), en fournissant « l'assistance voulue » aux victimes cherchant à avoir accès à la justice, en mettant à leur disposition « tous les moyens juridiques, diplomatiques et consulaires appropriés » [88]. En outre, « par-delà l'accès individuel à la justice, les États

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87. CJCE, 19 novembre 1991, *A. Francovich c. République italienne* et *D. Bonifaci e.a. c. République italienne*, aff. jointes C-6/90 et C-9/90, *op. cit.*, points 42-43 ; CJCE, 5 mars 1996, *Brasserie du pêcheur S.A. c. Bundesrepublik Deutschland* et *The Queen c. Secretary of State for Transport ex parte Factortame Ltd e.a.*, aff. jointes C-46/93 et C-48/93, *op. cit.*, point 63.

88. § 12 : « [...] les États devraient : *a)* Diffuser des informations, par des mécanismes publics et privés, sur tous les recours disponibles en cas de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire ; *b)* Prendre des mesures pour limiter autant que possible les difficultés rencontrées par les victimes et leurs représentants, protéger

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devraient s'efforcer de mettre en place des procédures pour permettre à des groupes de victimes de présenter des demandes de réparation et de recevoir réparation, selon qu'il convient »[89]. Enfin, « l'accès à un recours adéquat, utile et rapide [...] devrait englober tous les mécanismes internationaux disponibles et appropriés dont une personne peut se prévaloir, sans préjudice de l'exercice de tout autre recours interne »[90].

Ces dispositions n'appellent guère de commentaires, sauf que s'y manifeste ce qui fut souligné ci-dessus : le droit d'accès à un recours judiciaire interne est le moyen le plus habituel, pour les individus, de jouir effectivement des droits que leur confère directement l'ordre juridique international. Sans l'affirmation d'un tel droit d'accès au juge interne, le droit à la réparation serait largement illusoire puisque les particuliers n'ont, sauf exception, pas accès aux mécanismes internationaux de règlement des différends. Le droit d'accès revêt lui-même le caractère d'une norme directement applicable, même si, comme le souligne le paragraphe 12, les États doivent garantir, dans leurs droits internes, l'accès à la justice et le procès équitable.

2. *Réparation du préjudice subi*

Les paragraphes 15 à 23 de la résolution sont consacrés à la « réparation du préjudice subi ». La plupart de ces dispositions sont rédigées au conditionnel. Seuls les paragraphes 15 et 17 contiennent des affirmations formulées à l'indicatif présent, ce qui, selon les auteurs de la résolution, est le signe de leur caractère juridiquement contraignant. D'une part, « conformément à sa législation interne et à ses obligations juridiques internationales, l'État assure aux victimes la réparation des actes ou omissions qui peuvent lui être imputés et qui constituent des violations flagrantes du droit international des droits de l'homme ou des violations graves du droit international humanitaire »[91]. D'autre part, « s'agissant des plaintes des victimes, l'État assure l'exécution des décisions de réparation prononcées par ses juridictions internes à l'égard des particuliers ou des entités responsables du préjudice subi et s'applique à assurer l'exécution des décisions de réparation ayant force de chose jugée prononcées par des juridictions étrangères, *conformément à son droit interne et à ses obligations juridiques internationales* »[92]. Il est difficile de contester ces affirmations. À nouveau, elles manifestent indirectement l'emprise du droit interne, tant procédural que matériel, sur l'exercice du droit à la réparation conféré par l'ordre juridique international aux individus. On notera aussi que la résolution considère que l'obligation

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Suite de la note 88.
comme il convient leur vie privée de toute ingérence illégale et assurer leur sécurité, ainsi que celle de leur famille et de leurs témoins, en les préservant des manœuvres d'intimidation et des représailles, avant, pendant et après les procédures judiciaires, administratives ou autres mettant en jeu les intérêts des victimes ; *c*) Fournir l'assistance voulue aux victimes qui cherchent à avoir accès à la justice ; *d*) Mettre à disposition tous les moyens juridiques, diplomatiques et consulaires appropriés pour que les victimes puissent exercer leurs droits à un recours en cas de violation flagrante du droit international des droits de l'homme ou de violation grave du droit international humanitaire ».

89. § 13.

90. § 14.

91. § 13, 3e phrase.

92. § 17, 1re phrase. Nous soulignons. Le renvoi aux « obligations juridiques internationales » a été inséré afin de préciser que l'exécution des jugements étrangers devait se faire dans le respect des règles internationales relatives aux immunités d'État (*Rapport de la troisième réunion de consultation*, E/CN.4/2005/59, p. 10, § 44, *supra* note 27).

La suite du paragraphe 17 se lit ainsi : « À cette fin, les États devraient prévoir, dans leur législation interne, des mécanismes efficaces pour assurer l'exécution des décisions de réparation ».

internationale de réparer n'existe que dans le chef de l'État auquel les « actes ou omissions » illicites sont imputables, et non dans le chef des particuliers auteurs des violations : si « la réparation incombe à une personne physique, à une personne morale ou à une autre entité, la personne ou l'entité *devrait* assurer réparation à la victime ou indemniser l'État lorsque celui-ci a déjà assuré réparation à la victime » [93]. Le droit individuel à la réparation consacré par le droit international ne semble donc pas avoir d'effet direct horizontal, même si les États restent tenus d'assurer l'exécution des jugements par lesquels des particuliers ont été condamnés à payer des réparations et que, par ailleurs, ils « *devraient* s'efforcer de créer des programmes nationaux pour fournir réparation et toute autre assistance aux victimes, lorsque la partie responsable du préjudice subi n'est pas en mesure ou n'accepte pas de s'acquitter de ses obligations » [94].

Selon la résolution, « le but d'une réparation adéquate, effective et rapide est de promouvoir la justice en remédiant aux violations flagrantes du droit international des droits de l'homme ou aux violations graves du droit international humanitaire. La réparation devrait être à la mesure de la gravité de la violation et du préjudice subi » (§ 15). Par ailleurs, « conformément à la législation interne et au droit international, et compte tenu des circonstances de chaque cas, il devrait être assuré aux victimes [...], selon qu'il convient et de manière proportionnée à la gravité de la violation et aux circonstances de chaque cas, une réparation pleine et effective [...] notamment sous les formes suivantes : restitution, indemnisation, réadaptation, satisfaction et garanties de non-répétition » (§ 18). Ces formes de réparation sont précisées par les paragraphes 19 à 23. Ils méritent d'être reproduits comme tels, afin de bien prendre la mesure de l'extension que la notion de réparation reçoit à cette occasion – alors même que l'usage du conditionnel empêche de considérer qu'il y aurait là, à tous égards, des obligations de droit international et que, comme l'indique la formule prudente du paragraphe 18 reproduite ci-dessus, tout est affaire de circonstances :

> « 19. *La restitution* devrait, dans la mesure du possible, rétablir la victime dans la situation originale qui existait avant que les violations flagrantes du droit international des droits de l'homme ou les violations graves du droit international humanitaire ne se soient produites. La restitution comprend, selon qu'il convient, la restauration de la liberté, la jouissance des droits de l'homme, de l'identité, de la vie de famille et de la citoyenneté, le retour sur le lieu de résidence et la restitution de l'emploi et des biens.
>
> 20. *Une indemnisation* devrait être accordée pour tout dommage résultant de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire, qui se prête à une évaluation économique, selon qu'il convient et de manière proportionnée à la gravité de la violation et aux circonstances de chaque cas, tel que :
>
> a) Le préjudice physique ou psychologique ;
> b) Les occasions perdues, y compris en ce qui concerne l'emploi, l'éducation et les prestations sociales ;
> c) Les dommages matériels et la perte de revenus, y compris la perte du potentiel de gains ;
> d) Le dommage moral ;
> e) Les frais encourus pour l'assistance en justice ou les expertises, pour les médicaments et les services médicaux et pour les services psychologiques et sociaux.

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93. § 13, 4e phrase. Nous soulignons.
94. § 16.

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21. *La réadaptation* devrait comporter une prise en charge médicale et psychologique ainsi que l'accès à des services juridiques et sociaux.

22. *La satisfaction* devrait comporter, le cas échéant, tout ou partie des mesures suivantes :

a) Mesures efficaces visant à faire cesser des violations persistantes ;
b) Vérification des faits et divulgation complète et publique de la vérité, dans la mesure où cette divulgation n'a pas pour conséquence un nouveau préjudice ou ne menace pas la sécurité et les intérêts de la victime, des proches de la victime, des témoins ou de personnes qui sont intervenues pour aider la victime ou empêcher que d'autres violations ne se produisent ;
c) Recherche des personnes disparues, de l'identité des enfants qui ont été enlevés et des corps des personnes tuées, et assistance pour la récupération, l'identification et la réinhumation des corps conformément aux vœux exprimés ou présumés de la victime ou aux pratiques culturelles des familles et des communautés ;
d) Déclaration officielle ou décision de justice rétablissant la victime et les personnes qui ont un lien étroit avec elle dans leur dignité, leur réputation et leurs droits ;
e) Excuses publiques, notamment reconnaissance des faits et acceptation de responsabilité ;
f) Sanctions judiciaires et administratives à l'encontre des personnes responsables des violations ;
g) Commémorations et hommages aux victimes ;
h) Inclusion, dans la formation au droit international des droits de l'homme et au droit international humanitaire et dans le matériel d'enseignement à tous les niveaux, d'informations précises sur les violations qui se sont produites.

23. *Les garanties de non-répétition* devraient inclure, le cas échéant, tout ou partie des mesures suivantes qui contribueront aussi à la prévention et qui consistent à :
a) Veiller au contrôle efficace des forces armées et des forces de sécurité par l'autorité civile ;
b) Veiller à ce que toutes les procédures civiles et militaires soient conformes aux normes internationales en matière de régularité de la procédure, d'équité et d'impartialité ;
c) Renforcer l'indépendance du pouvoir judiciaire ;
d) Protéger les membres des professions juridiques, médicales et sanitaires et le personnel des médias et d'autres professions analogues, ainsi que les défenseurs des droits de l'homme ;
e) Dispenser, à titre prioritaire et de façon suivie, un enseignement sur les droits de l'homme et le droit international humanitaire dans tous les secteurs de la société, et une formation en la matière aux responsables de l'application des lois et au personnel des forces armées et de sécurité ;
f) Encourager l'observation de codes de conduite et de normes déontologiques, en particulier de normes internationales, par les fonctionnaires, y compris les responsables de l'application des lois, les personnels de l'administration pénitentiaire, des médias, des services médicaux, psychologiques et sociaux et le personnel militaire, ainsi que par les entreprises ;
g) Promouvoir des mécanismes pour prévenir, surveiller et résoudre les conflits sociaux ;
h) Réexaminer et réformer les lois favorisant ou permettant des violations flagrantes du droit international des droits de l'homme et des violations graves du droit international humanitaire ».

Même si leur régime, leur contenu et leur mise en œuvre ne relèvent pas exclusivement du droit international, les formes de réparation visées par la résolution sont, comme on peut le constater, très directement inspirées par le droit de la responsabilité internationale des États (restitution, indemnisation, satisfaction, garanties de non-répétition). Cette manière d'isomorphisme est frappant. En soi et de prime abord, ceci n'a rien de particulièrement critiquable, le droit international de la réparation entretenant d'ailleurs avec les droits internes une parenté manifeste, du moins en ce qui concerne la restitution et l'indemnisation. Cela étant, au-delà des formules retenues qui peuvent ici et là susciter l'hésitation, l'isomorphisme des principes et directives avec le droit coutumier de la responsabilité internationale est à maints égards trompeur.

D'abord, il est étonnant de considérer la cessation du fait illicite comme une mesure de satisfaction, alors que les articles sur la responsabilité des États en font une conséquence juridique propre de l'illicéité et non une manière de donner satisfaction [95]. Cet étrange déplacement n'est pas expliqué, même s'il résulte peut-être à la fois de la place primordiale réservée par les principes et directives à l'obligation de respecter, faire respecter et appliquer le droit – la cessation n'étant que l'« envers » du devoir d'obéir au droit –, et de l'ampleur qu'ils donnent à la restitution. En effet, si la « restauration de la liberté » est justifiée au titre de la restitution, il est clair qu'il n'est plus besoin de recourir à la cessation du fait illicite pour l'obtenir. Plus fondamentalement, on peut se demander si ce déplacement n'est pas caractéristique de la dimension collective et transformatrice des sociétés de la « réparation » telle qu'envisagée par les principes et directives – dimension sur laquelle il faudra revenir. À cet égard, il est symptomatique que la cessation soit considérée comme une mesure « visant à faire cesser des violations persistantes », et non comme un moyen de redresser un fait illicite particulier.

Ensuite, aucun lien n'est établi entre la restitution et l'indemnisation. On sait pourtant que l'indemnisation ne doit avoir lieu que « dans la mesure où [le] dommage n'est pas réparé par la restitution » [96], puisque la réparation intégrale du préjudice suppose de « rétablir l'état qui *aurait vraisemblablement existé* si [l'acte illicite] n'avait pas été commis » [97], alors que la restitution ne permet que « le rétablissement de la situation qui *existait* avant que le fait illicite ne soit commis » [98]. En mentionnant la restitution et l'indemnisation sans rappeler la subordination, sous forme de complémentarité, de celle-ci à celle-là, les principes et directives donnent erronément à penser que les deux devraient toujours avoir lieu.

Ce « cumul » paraît d'autant plus s'imposer que l'indemnisation devrait être « proportionnée à la gravité de la violation et aux circonstances de chaque cas » [99], alors que la réparation est en principe fonction de la seule nature et ampleur du dommage [100] – et non de la gravité du fait illicite –, dans la mesure où celui-ci n'a

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95. A/RES/56/83, *Responsabilité de l'État pour fait internationalement illicite*, art. 30. En ce sens, voy. D. SHELTON, *op. cit.*, p. 22, *supra* note 11.

96. *Ibid.*, art. 36, § 1.

97. CPJI, arrêt n° 13, *Usine de Chorzów* (Fond), Série A, n° 17, p. 47.

98. A/RES/56/83, *Responsabilité de l'État pour fait internationalement illicite*, art. 35 (nous soulignons), ce que le paragraphe 19 des principes et directives appelle le fait de « rétablir la victime dans la situation originale qui existait avant les violations ».

99. § 20. Le paragraphe 15 indique que la réparation « devrait être à la mesure de la gravité de la violation et du préjudice subi ».

100. Voy. p. ex., *Avena et autres ressortissants mexicains* (Mexique c. États-Unis d'Amérique), arrêt du 31 mars 2004, *CIJ Recueil 2004*, p. 59, § 119 où la Cour souligne que « ce qui constitue une "réparation dans une forme adéquate" [...] dépend, manifestement, des circonstances concrètes de chaque affaire ainsi que de la nature exacte et de l'importance du préjudice ». Il n'est pas fait mention de la gravité du fait illicite.

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pas pu être intégralement réparé par la restitution. Dès l'instant où les principes et directives sont essentiellement relatifs à des violations flagrantes ou graves de règles de droit international souvent considérées comme fondamentales, voire impératives, il est probable que la violation de telles règles sera toujours considérée comme « grave », et qu'en conséquence une indemnisation substantielle sera chaque fois requise. Certes, la formule retenue permet une certaine flexibilité pour apprécier l'adéquation de l'indemnité [101] ; elle comporte cependant le risque d'ouvrir la voie à l'imposition de *punitive damages*, c'est-à-dire d'indemnités disproportionnées par rapport à la réalité du préjudice – que celui-ci soit matériel ou moral –, alors même que cela est exclu par le droit de la responsabilité internationale [102] et apparemment non recherché par les auteurs de la résolution [103]. La critique ainsi formulée à l'encontre de la manière dont les principes et directives suggèrent de mesurer le paiement indemnitaire n'emporte aucune remise en cause des différents types de préjudices indemnisables. Ceux-ci ont toutefois suscité certaines hésitations de la part des États, notamment en ce qui concerne la perte d'une chance (« occasions perdues ») et le préjudice moral [104]. Ces hésitations ne paraissent guère justifiées, même si la justification de la perte d'une chance par la jurisprudence de la Cour internationale de Justice laisse dubitatif [105].

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101. D. SHELTON, *op. cit.*, p. 21, *supra* note 11.

102. « L'indemnisation correspond au dommage susceptible d'évaluation financière subi par l'État lésé ou ses ressortissants. Elle n'a pas pour but de punir l'État responsable et n'a pas non plus un caractère "expressif" ou exemplaire » : *Rapport de la Commission du droit international à l'Assemblée générale sur les travaux de sa 53e session (2001)*, A/56/10, p. 264 (commentaire de l'art. 36). Le commentaire cite notamment l'arrêt de la Cour interaméricaine des droits de l'homme dans l'affaire *Velásquez-Rodríguez vs. Honduras, op. cit., supra* note 5. L'article 45, § 2, c) du projet d'articles arrêté en 1996 par la Commission du droit international envisageait qu'au titre de la satisfaction, et non de l'indemnisation, « des dommages-intérêts correspondant à la gravité de l'atteinte » puissent être demandés (*Rapport de la Commission du droit international à l'Assemblée générale sur les travaux de sa 48e session (1996)*, A/51/10, p. 67, et commentaire dans *Rapport de la Commission du droit international à l'Assemblée générale sur les travaux de sa 45e session (1993)*, A/48/10, pp. 82 et s.). Cette possibilité n'est pas reprise dans l'actuel article 37 de la résolution sur la responsabilité de l'État pour fait internationalement illicite, lequel considère que « la satisfaction ne doit pas être hors de proportion avec le préjudice et ne peut pas prendre une forme humiliante pour l'État responsable ». Dans son commentaire, la Commission estime que cette disposition signifie que la satisfaction « n'est pas censée avoir un caractère punitif, et n'inclut donc pas de dommages-intérêts punitifs » (*Rapport de la Commission du droit international à l'Assemblée générale sur les travaux de sa 53e session (2001)*, *op. cit.*, p. 289 ; Sur ces questions, voy. not. Cl. BARTHE-GAY, « Réflexions sur la satisfaction en droit international », cet *Annuaire*, 2003, pp. 105-128). On notera qu'au titre de la satisfaction, le paragraphe 22 des principes et directives n'envisage aucune allocation de dommages-intérêts.

103. Les travaux préparatoires sont cependant ambigus, en ce que la proportionnalité de la réparation par rapport à la gravité de la violation y a très tôt été introduite : T. van Boven a proposé dès son rapport final que la réparation soit « proportionnelle à la gravité des violations et du préjudice subi » (E/CN.4/Sub.2/1993/8, p. 61, § 4, *supra* note 10) tout en rapportant et semblant se fonder sur la jurisprudence de la Cour interaméricaine des droits de l'homme qui exclut d'allouer des *punitive damages* au titre de la réparation (*ibid.*, p. 41). Selon Ch. Bassiouni (E/CN.4/1999/65, p. 25, § 88, *supra* note 18), « la proportionnalité des dommages-intérêts à la gravité du préjudice subi constitue un principe fondamental de justice » : l'expert indépendant vise bien une proportionnalité en fonction de la gravité du préjudice et non en fonction de la violation qui cause ce préjudice, mais proposera néanmoins que la « réparation devrait être proportionnelle à la gravité de la violation et au préjudice subi » (*Rapport final*, E/CN.4/2000/62, p. 10, § 15, *supra* note 22), formule reprise en substance au paragraphe 15 des principes et directives. D. Shelton, *op. cit.*, p. 23, *supra* note 11, estime que proportionner l'indemnisation à la gravité du préjudice ne suggère pas que l'allocation de *punitive damages* soit appropriée. Nous pensons au contraire que cela emporte un tel risque et qu'il aurait donc mieux valu ne pas s'écarter de la manière dont le montant de l'indemnisation est habituellement mesuré.

104. *Rapport de la troisième réunion de consultation*, E/CN.4/2005/59, p. 11, §§ 48-49, *supra* note 27 et *Rapport de la deuxième réunion de consultation*, E/CN.4/2004/57, p. 11, § 51, *supra* note 26.

105. *Rapport de la troisième réunion de consultation*, E/CN.4/2005/59, p. 11, § 49, *supra* note 27.

La réadaptation, telle qu'envisagée par le paragraphe 21, a également suscité des hésitations. L'utilisation du conditionnel et la souplesse du paragraphe 18 qui constitue comme le « chapeau » de toutes les formes de réparation envisagées permettent de relativiser toute affirmation juridique trop rigoriste en la matière. Cela étant, nul ne contestera que les mesures de réadaptation envisagées par les principes et directives sont, dans toute la mesure du possible, en tous points souhaitables et correspondent à un élémentaire devoir de solidarité et de sollicitude à l'égard des victimes. Dans la mesure où la réadaptation est censée effacer autant que possible les séquelles psychologiques et médicales dont souffrent les victimes, elle paraît d'ailleurs constituer une forme particulière de restitution.

Il est inutile de détailler les mesures de satisfaction et les garanties de non-répétition envisagées par les paragraphes 22 et 23. On peut bien entendu hésiter sur l'un ou l'autre point : on a déjà dit ce qu'il en était de la cessation ; on pourrait encore s'étonner de voir telle mesure considérée sous l'angle de la satisfaction alors qu'elle aurait très bien pu être constitutive d'une garantie de non-répétition. Si « les mesures efficaces visant à faire cesser des violations persistantes » sont envisagées comme mesures de satisfaction, elles constituent tout autant une garantie de non-répétition ; il en est de même des excuses publiques, des sanctions judiciaires, des commémorations ou de l'inclusion d'informations précises sur les violations dans la formation aux droits de l'homme et au droit international humanitaire. Là n'est toutefois pas l'essentiel – d'autant moins que l'utilisation du conditionnel oblige à relativiser une fois encore la portée normative de ces paragraphes.

L'essentiel est de voir qu'avec les mesures de satisfaction et les garanties de non-répétition envisagées, le droit à la réparation quitte les terres connues de la relation juridique intersubjective entre créancier(s) et débiteur(s) pour s'aventurer sur les eaux incertaines, bien plus politiques et sociétales, de ce que l'on peut appeler les « droits collectifs » [106]. C'est ici que réside à la fois toute l'originalité, toute la puissance transformatrice – pour ne pas dire le potentiel révolutionnaire – des principes et directives, et en même temps leurs limites juridiques. Les mesures envisagées – divulgation complète et publique de la vérité, recherche des corps, déclaration officielle, excuses publiques, sanctions des responsables, commémorations, formation au respect des droits fondamentaux et enseignement de ceux-ci dans tous les secteurs de la société, contrôle des forces armées et de sécurité par les autorités civiles, indépendance du pouvoir judiciaire, protection des défenseurs des droits de l'homme, réexamen des lois... : nombre de ces mesures dépassent largement l'intérêt des seules victimes, de telle manière qu'on s'interroge sur leur titre à les faire valoir de manière privilégiée – reviennent en substance à devoir dire la vérité sur les atrocités qui ont été commises et, *ainsi*, à changer la manière dont on gouverna jusqu'alors. En d'autres termes, le « génie » de ces principes et directives, mais aussi leur imposture si l'espoir donné est déçu, est de saisir l'occasion de devoir rendre justice aux victimes pour transformer profondément les sociétés traumatisées. Cette ambition est cachée au cœur des principes et directives depuis leur origine. Ainsi, dans son rapport final, T. van Boven soulignait déjà que « la réparation signifie que la justice doit être pleinement rendue à l'égard de la société dans son ensemble », car « l'obligation d'empêcher et l'obligation de rétablir ou réparer sont étroitement interdépendantes » [107]. Faire entrer une exigence de « bon gouvernement » dans le droit des gens – ou plutôt à sa lisière – par la porte de la responsabilité internationale est autant juridique-

106. Pour utiliser une formule retenue par le *Rapport de la deuxième réunion de consultation*, E/CN.4/2004/57, p. 28, *supra* note 26.

107. E/CN.4/Sub.2/1993/8, p. 40, § 88, *supra* note 10.

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ment ingénieux (bien que peu orthodoxe) que politiquement explosif. Demander à un gouvernement qu'il dise la vérité sur ses crimes, c'est tout simplement exiger un changement de régime. En effet, on voit mal comment le régime qui fait la vérité sur des violations flagrantes ou graves pourrait être le même que celui qui a dû y recourir pour se maintenir au pouvoir. En s'appuyant sur les principes et directives, ce n'est donc pas seulement un changement de comportement à l'égard des victimes que l'on recherche ; c'est ultimement, et presque par nécessité, un changement de régime politique que l'on appelle de ses vœux.

3. *Accès aux informations utiles*

Ceci ressort encore de la troisième dimension du droit à un recours et à réparation, à savoir l'« accès aux informations utiles concernant les violations et mécanismes de réparation ». Le paragraphe 24, qui recoupe largement les dispositions précédentes, se lit comme suit et se passe de commentaires :

> « Les États devraient mettre en place des moyens d'informer le public et, plus particulièrement, les victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire, des droits et recours visés dans les présents Principes fondamentaux et directives, ainsi que de tous les services juridiques, médicaux, psychologiques, sociaux, administratifs et autres auxquels les victimes peuvent avoir un droit d'accès. En outre, les victimes et leurs représentants devraient être habilités à rechercher et à obtenir des informations sur les causes qui ont conduit à leur victimisation et sur les causes et conditions propres aux violations flagrantes du droit international des droits de l'homme et aux violations graves du droit international humanitaire, et *avoir le droit d'apprendre la vérité sur ces violations* » [108].

C. *Silences*

La conception particulièrement large, multidimensionnelle, englobante et collective du droit au recours et à réparation qui se dégage des principes et directives soulève deux difficultés qu'ils n'abordent pas. La première de ces difficultés est relative à l'épuisement de la dette : puisque la réparation intégrale du dommage requiert l'accumulation de formes variées de réparation, comment savoir si le débiteur s'est pleinement et effectivement acquitté de toutes ses obligations ? La deuxième difficulté a trait à la dimension collective des violations et de leurs réparations : à crimes de masse, règlements globaux plutôt que règlements judiciaires individuels – mais comment l'exigence d'une réparation intégrale de chaque préjudice par le moyen des formes variées énumérées par les principes et directives peut-elle se satisfaire du caractère nécessairement forfaitaire des règlements globaux ? En réalité, ces deux difficultés se rejoignent en ce qu'elles posent toutes deux le problème du caractère définitif des règlements, que ceux-ci soient convenus dans un cadre transactionnel (national ou international) ou qu'ils résultent d'une loi édictée au sortir d'une grave crise interne. La valeur d'un règlement indemnitaire tient non seulement à ce qu'il réalise concrètement pour les victimes, mais aussi au fait qu'il mette un point final à leurs réclamations, et cela qu'elles soient totalement ou partiellement satisfaites. Il n'y a en effet guère de sens à s'engager dans un processus de règlement indemnitaire si son issue peut ensuite être remise en cause pour le motif qu'elle ne réaliserait pas

108. Nous soulignons.

une réparation pleine et entière, complète sous toutes ses formes. Il faut reconnaître que l'amplitude donnée à la notion de réparation par la multiplicité des mesures que peut revêtir chacune de ses formes, même formulées au conditionnel, n'est pas faite pour favoriser la sécurité juridique. Celle-ci paraît dès lors nécessiter que l'on puisse conforter et valider des clauses de renonciation (ou de limitation) à toute réclamation complémentaire. Commun à la difficulté de l'épuisement de la dette et à celle du caractère collectif des règlements post-conflictuels, le problème de la renonciation à (ou, par voie législative, de la limitation de) tout ou partie de la créance de réparation n'est nullement abordé par les principes et directives et demeure dès lors régi par le droit international général, conformément au principe de non-dérogation (§ 26) – ce qui explique sans doute pourquoi la résolution n'en dit mot. Malgré ce silence, le mérite de cette dernière est de poser cette difficulté pour ce qu'elle est, vu le changement de perspective induit par les principes et directives : la réparation devenant la règle, sa limitation est une exception qu'il faut pouvoir justifier, le droit à la réparation demeurant entier aussi longtemps qu'une telle limitation (justifiée) n'existe pas.

Pour fondamentale qu'elle est, cette difficulté ne peut cependant pas être approfondie dans le cadre limité de ce commentaire. On se contentera dès lors de mentionner les deux questions qui lui sont sous-jacentes. D'une part, existe-t-il des créances de réparation qui, par leur objet et leur origine, seraient indisponibles, c'est-à-dire des créances auxquelles on ne pourrait pas, en tout ou en partie, renoncer ou porter atteinte ? Certains ont en effet soutenu que l'article 51/52/131/148 commun aux conventions de Genève de 1949 [109] prohiberait toute renonciation conventionnelle à la réparation des infractions graves [110]. D'autre part, s'agissant des créances disponibles – si tant est que certaines ne le seraient pas, il faut déterminer si et dans quelle mesure les États peuvent limiter, par voie législative ou conventionnelle, la jouissance des droits conférés par le droit international aux personnes soumises à leur autorité. Cette dernière question se complique dans le cadre des principes et directives puisque le droit à un recours et à réparation y est conçu comme un droit individuel intersubjectif ayant aussi une dimension collective et sociétale. Aucune de ces questions n'est simple et chacune d'elle mériterait des développements importants [111]. Nul doute que les

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109. « Aucune (Haute) Partie contractante ne pourra s'exonérer elle-même, ni exonérer une autre Partie contractante, des responsabilités encourues par elle-même ou par une autre Partie contractante en raison des infractions prévues à l'article précédent », lequel vise les infractions graves, par ailleurs considérées comme telles par les Principes et directives.

110. P. ex. E. DAVID, *Principes de droit des conflits armés*, 2e éd. 1999, Bruylant, p. 560. Dans la troisième édition de son ouvrage (2002), l'auteur ne soutient plus cette thèse, tout en considérant que la « renonciation décidée par l'État qui (...) représente [le particulier, victime directe] ne lui est pas nécessairement opposable » (p. 623). La question de la portée *ratione personae* des renonciations étatiques est en effet délicate, voy. la note suivante.

111. Dès l'instant où l'on ne peut pas déduire du caractère impératif d'une règle l'impérativité de la créance de réparation qui découle de sa violation, et qu'il n'existe pas de créances de réparation « indisponibles » par nature, la question se pose de savoir dans quelle mesure les États peuvent renoncer à réclamer des indemnités, en leur nom et au nom de leurs ressortissants (ou encore, dans quelle mesure ils peuvent limiter, en droit interne, l'exercice de droits individuels consacrés par le droit international). Nul ne contestera que l'État est maître de ses propres droits, dont l'action en protection diplomatique fait partie. Peut-il également disposer des droits de ses nationaux, en l'occurrence du droit à la réparation conféré directement par le droit international aux victimes de violations flagrantes ou graves ? Certains le contestent (p. ex., L. CONDORELLI, « Conclusions générales », *in* L. BOISSON DE CHAZOURNES, J.-F. QUÉGUINER & S. VILLALPANDO, *Crimes de l'histoire et réparations : les réponses du droit et de la justice*, Bruylant, 2004, p. 301). On voit toutefois mal pourquoi cette créance de réparation bénéficierait d'une protection plus étendue que celle qui s'attache habituellement au droit de propriété, ce qu'elle est en substance sous l'angle de la restitution et de l'indemnisation. Voy. les développements consacrés à ces questions dans P. D'ARGENT, *Les réparations de guerre en droit international public*, pp. 767-774, *supra* note 77.

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réponses de la doctrine renverraient, d'une manière ou d'une autre, à une analyse *in concreto* de chaque règlement indemnitaire, les renonciations ou limitations du droit au recours et à réparation y figurant devant être appréciées au regard de leur nécessité et de leur proportionnalité par rapport à un objectif qui transcende l'intérêt des victimes – mais qui ne leur est pour autant pas étranger –, à savoir le retour durable à la paix et à la concorde (inter)nationale. Pour assurer ce retour, le droit se doit d'être à la fois suffisamment rigide pour que le présent ne soit pas amnésique d'un passé douloureux, et suffisamment souple pour que ce dernier n'empêche pas les peuples de choisir leur avenir. L'usage des principes et directives dira s'ils ne font pas obstacle à ce délicat équilibre.

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Kelly McCracken, ‘Commentary on the basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law’ (2005) 76 Revue internationale de droit pénal 77

COMMENTARY ON THE BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

Kelly McCracken

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COMMENTARY ON THE *BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW* [*]

Kelly McCRACKEN [**]

On 13 April 2005, the Commission on Human Rights at its 61st session in Geneva adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, U.N. Doc. E/CN.4/2005/L.48, subsequent to a vote of (40) Yes, (0) No, and (13) abstentions.[1] The adoption of the *Basic Principles and Guidelines* represents the first comprehensive codification of the rights of victims of international crimes to reparations, remedies, and access to systems of justice. The *Basic Principles and Guidelines* "do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms."[2]

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[*] See *infra* p. 77 the UN document on the Basic Principles.

[**] Assistant to Professor M. Cherif Bassiouni.

[1] The countries that voted in favor were Austria, Argentina, Armenia, Belgium, Bolivia, Brazil, Burkina Faso, Chile, Congo, Costa Rica, Cyprus, Czech Republic, Dominican Republic, Ecuador, Estonia, Finland, France, Greece, Guatemala, Hungary, Ireland, Italy, Japan, Latvia, Mexico, Netherlands, Nigeria, Norway, Paraguay, Peru, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, Uruguay, and Venezuela. Those that abstained were Australia, Egypt, Eritrea, Ethiopia, Germany, India, Mauritania, Nepal, Qatar, Saudi Arabia, Sudan, Togo and United States.

[2] *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*, U.N. Doc. E/CN.4/2005/L.48 (13 April 2005), *preamble*.

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The *Basic Principles and Guidelines* developed out of the 1985 Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and drafted at a regional meeting held in Ottawa, Canada. Although the issue of victim reparation had been addressed piecemeal in various international human rights and international humanitarian law instruments, the Basic Principles of Justice was the first to articulate in one document the rights of victims to have access to justice and the right to reparation for their injuries, albeit aimed at victims of domestic crime.

The chair of the drafting committee at the Ottawa meeting was Professor M. Cherif Bassiouni, who later became the Independent Expert that drafted the *Basic Principles and Guidelines*, originally presented to the Commission on Human Rights in 2000.[3] After the submission of that draft, the Commission, rather than bringing the *Basic Principles and Guidelines* to a vote for adoption, instead placed the text in consultation with interested governments, NGOs, and IGOs. There was speculation at the time that certain governments were interested in keeping the *Basic Principles and Guidelines* from being adopted before the United Nations World Conference on Racism, Racial Discrimination, Xenophobia, and Other Related Intolerance was held in Durban, South Africa in September 2001.

More important, however, was United States' opposition to the *Basic Principles and Guidelines* on the grounds that they included the right to victim compensation for violations of international humanitarian law (hard law), as opposed to being limited simply to violations of human rights law (soft law). This position was successfully disputed, however, by both scholars and government representatives alike, as international humanitarian law and human rights law largely overlap. Furthermore, in 2004, the International Court of Justice concluded in an Advisory Opinion in the case of the construction of a wall in the occupied Palestinian territory[4] that the two regimes complement one another, and that despite their different legal sources, distinctions between the two should not be made. Both international humanitarian law and human rights law are the product of treaties and customary international law, as well as of general principles of law – all of which are sources of international law.

It was also noted during the debates that since the 1907 Hague Convention, international humanitarian law has included the right to compensation, even if it has not included all of the victims' rights of redress contained in the *Basic Principles and Guidelines*. Nevertheless, national legal systems have evolved

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[3] M. Cherif Bassiouni, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms,* U.N. Doc. E/CN.4/62 (18 Jan. 2000).

[4] International Court of Justice Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (9 July).

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with respect to the recognition of the rights of victims, and the notion of restorative justice is fairly well established in a large number of national legal systems. Thus, to extend such concepts of victims-oriented justice at the international level is a step in keeping with the advancement of the field of human rights, which has been consistently developing since the creation of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Other governments opposed the *Basic Principles and Guidelines* because they provided a right to collective action or class action civil suits, which are not known in the Civilist legal systems, while some representatives of Common Law systems objected to the "partie civile" to be included in criminal proceedings because it is a practice in Civilist countries unknown to Common Law countries. The *Basic Principles and Guidelines* ultimately blend a variety of techniques from the Common Law, Civilist, and Islamic legal systems, which represents a particularly interesting development in comparative criminal law and procedure. This was justified on the basis that the *Basic Principles and Guidelines* are premised on the rights of victims, and are therefore not bound by traditional legal orthodoxy dividing Civilist, Common Law, and Islamic legal traditions.

It should be noted that prior to Professor Bassiouni's appointment in 1998, Professor Theo Van Boven was Special Rapporteur for the Sub-Commission on this topic. Between 2002 and 2005, the government of Chile took the lead in advancing the diplomatic process under the leadership of Ambassador Alejandro Salinas, who deserves much of the diplomatic credit, as does the Chilean mission in Geneva, for shepherding the adoption of this text through the Commission. A number of NGOs were also very supportive, including Redress, the International Crisis Group, Human Rights Watch, and others.

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Annex 218

Michael W. Charney, 'Theories and Historiography of the Religious Basis of Ethnonyms in Rakhaing (Arakan), Myanmar (Burma)' (2005) Workshop The Forgotten Kingdom of Arakan: A Public Seminar on the People of Present Day Arakan State of Myanmar (2005)

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"Theories and Historiography of the Religious Basis of Ethnonyms in Rakhaing (Arakan), Myanmar (Burma)"

By

M.W. Charney

Interest in Rakhaing (Arakan), has resurged after a considerable period in which few studies appeared outside of Myanmar (Burma).[1] This newly found interest, at least newly found in terms of foreign scholars, is indicated in the numerous publications which have appeared since the early 1990s and in the holding of the present workshop. One frequently discussed topic that has not yet yielded a satisfactory conclusion, is the association between religious identity and local ethnonyms, which is the subject of the present paper.

"Rakhaing" (Arakanese) used as both an ethnonym and as a geographical and political name for the littoral and the district on the eastern shores of the Bay of Bengal, has become inextricably associated in the prevailing scholarly and popular literature with a Buddhist identity. As one Rakhaing scholar, U Tha Hla, has recently explained:

> The Rakhaings are Buddhists who have embraced Theravada discipline … The Buddhist culture forms the main fabric of the society and dominates the attitude of the people. No Rakhaing professes any other religion but Buddhism.[2]

Further,

[1] One of the few works during this period that kept the study of Rakhaing alive was Pamela Gutman, "Ancient Arakan (Burma) With Special Reference to Its Cultural History Between the 5th and 11th Centuries" (Ph.D. Dissertation. Australian National University, 1976). Recently, Gutman has also published idem., *Burma's Lost Kingdoms: Splendours of Arakan*, photography by Zaw Min Yu (Bangkok: Orchid Press. 2001).

[2] Tha Hla, "The Rakhaing," *Rakhaing Guardian* 1.1 (Spring, 1997): 2

Regarding the history of Buddhism in Rakhaing, and its historiography, the debate concerning privileged origins will likely go on for some time, as long as history remains a tool of modern religious communalim. Nevertheless, in so far as the historical record is concerned, the shared origins of Rakhaing and Rohingya indicate that Rakhaing has not always been solely an ethnonym of Buddhist Rakhaing, but rather one that has come to be peculiarly associated with Buddhism as a result of linguistic change over many centuries, change that produced the term 'Rohingya.' The question remains of whether Rosanga, as a term, emerged within Bengal, in reference to Rakhaing, and was then carried into Rakhaing by Bengali poets, captives, or traders and then emerged as the Rohingya ethnonym of Muslim Rakhaing or if it instead emerged internally, among Rakhaing Muslims and was then adopted by the Bengalis as a result of religious, literary, or commercial intercourse. It can be asserted, however, that one claim of the Buddhist school in Rakhaing historiography, that Rohingya was an invention of the colonial period, is contradicted by the evidence.

These conclusions only suggest the historicity of ethnonyms, not of ethnie per se. It is probably the case, however much contemporary Rohingya or Rakhaing might resist the thought, that Rohingya and Rakhaing were not mutually exclusive ethnonyms. Rakhaing's topography may have led to Rohingya and Rakhaing emerging as separate versions of the same term in different geographical contexts that came, in the eighteenth century to be associated closely with the predominant religious makeup of the local area concerned. Along the same lines, it may indeed have been socially situated in ways other than those involving religion prior to the eighteenth century. There may also have been other local referrents that escaped the notice of court-centred chroniclers or centrally-based monastic writers. This would agree with the classic study by Kris Lehman of ethnic categories in Burma, "Ethnic Categories & Theory of Social Systems." Lehman suggests that ethnicities are roles in a system of other roles, that one has many available ethnicities to chose from, and that one's "ethnicity" changes as one interacts with different people in different contexts.[119] However, as contended in contemporary Rakhaing and Rohingya

[119] F. K. Lehman, "Ethnic Categories in Burma and the Theory of Social Systems," in Peter Kunstadter (ed.). *Southeast Asian Tribes, Minorities, and Nations* (Princeton: Princeton University Press, 1967): 105-107, 110-111.

Annex 219

M. Cherif Bassiouni, 'International Recognition of Victims' Rights' (2006) 6(2) Human Rights Law Review 203

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International Recognition of Victims' Rights

M. Cherif Bassiouni*

Abstract

Since its inception, the United Nations has adopted two General Assembly resolutions dealing with the rights of victims: the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the 2006 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. The focus of the former was on victims of domestic crimes, while that of the latter is on victims of international crimes; more particularly, gross violations of international human rights law and serious violations of international humanitarian law. The 2006 Principles are, for all practical purposes, an international bill of rights of victims. Their adoption has been hard-fought, but their implementation both at the national and international levels is sure to still face many obstacles. Parallel to this historic development have been decisions by the European Court of Human Rights and the Inter-American Court of Human Rights, as well as provisions in the statute of the International Criminal Court (ICC), giving standing to victims in ICC proceedings, but also certain rights of compensation. These parallel developments, as well as others within domestic legal systems, evidence a wide movement towards the recognition of the rights of victims of crime, whether domestic or international, or gross violations of human rights. This article re-traces the historic origin of victims' rights in domestic and international legal systems, focusing particularly on the adoption of the two international instruments mentioned above, and more particularly on the negotiating history of the 2006 Principles. A detailed commentary of these Principles constitutes the centerpiece of this article.

* Distinguished Research Professor of Law and President, International Human Rights Law Institute (IHRLI), DePaul University College of Law; President, International Institute of Higher Studies in Criminal Sciences (Siracusa, Italy); Honorary President, International Association of Penal Law (Paris, France). The author wishes to express his appreciation to Michael Wahid Hanna (Senior Research Fellow, IHRLI), Kelly McCracken (Assistant to IHRLI President) and Kelly Razzouk (1L DePaul University College of Law) for their research assistance and painstakingly checking the numerous footnotes and texts referred to in this article.

1. Introduction

This article outlines a theory of victims' rights, reviewing the historical evolution of the concept and elucidating recent developments, and argues for a strengthening of current victims' rights norms.[1] In accordance with these norms, States must respect, ensure respect for and enforce international human rights and humanitarian law norms contained in treaties to which they are a State Party, in customary international law or in domestic law. The obligation to respect, ensure respect for, and to enforce international human rights and humanitarian law includes a State's duty to prevent violations, investigate violations, punish violators, provide victims with equal and effective access to justice and provide for or facilitate reparation to victims.

Even more crucially, this article seeks to fundamentally alter the legalistic frameworks of international human rights and humanitarian law that have traditionally ignored victims' perspectives. By squarely adhering to a victim-centric rather than a conflict-centric perspective, this article reformulates definitions of international crimes, making them dependent on the suffering experienced by victims rather than the nature of the conflict or the context within which such violations took place. The literature on victims is as disparate as are the disciplines concerned with the subject. This includes victimology, criminology, penology, criminal law and procedure, comparative criminal law and procedure, international criminal law and human rights. Each of these disciplines pursues different goals, relies on different methodologies, employs different terminology and provides for different roles and rights for the victim. More importantly, there is a lack of commonly-shared understanding between these disciplines as to the role and rights of victims. If the victim is our concern and interest, then legal distinctions and technicalities surrounding various classifications of crimes against victims should be re-conceptualised.[2] For instance, this article's approach would make it irrelevant to focus on whether a victim of torture was abused in the context of an international conflict, an internal conflict or as a result of police brutality outside of any such conflict. Rather, the issue of the torture itself would be central to a legal analysis, and would be framed from a victim's viewpoint. Up to now, international human rights law and humanitarian law have created multiple

1 The author was a principal participant throughout much of the process discussed herein and was present during certain formal and informal consultations and meetings for which no documentary record was publicly distributed. When referencing such consultations, the author relies on his personal notes gathered throughout the process. These notes will hereinafter be referred to as 'Bassiouni Personal Notes.'

2 For a victim-oriented approach, see Aldana-Pindell, 'An Emerging Universality of Justiciable Victims' Rights in the Criminal Process to Curtail Impunity for State-Sponsored Crimes', (2004) 26 *Human Rights Quarterly* 605; and Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes', (2002) 35 *Vanderbilt Journal of Transnational Law* 1399.

overlapping sources of law that apply to such victimisation.[3] Thus, from a purely legal perspective, victims' fate and the punishment of violators vary and depend on whether lawyers apply international human rights law, international humanitarian law, international criminal law or domestic criminal law. Such distinctions are of little significance to victims in their quest for redress.

A significant gap exists between international human rights law and international criminal law.[4] The parallel nature of these two bodies of law limits the reach of international criminal law to punish fundamental human rights violations. These rights generally remain without effective enforcement, except as provided for in the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR).[5] If the concept of victims' redress continues to develop in a compartmentalised fashion with gaps and overlaps, victims' rights will never be effectively addressed.[6]

So far, international legal instruments have not given victims a greater role than those provided under national law. Nevertheless, international human rights law has sought to slightly expand victims' right to access, disclosure, compensation, reparations, and above all, symbolic recognition in the context of criminal proceedings.

While there is a growing symbolic recognition of the victim in national criminal proceedings, there is only a limited right for the victim to have access to criminal proceedings, except with respect to those crimes for which public criminal action can only start with an individual's complaint. The area where there has been most growth, both at the international and national law levels, has been with respect to victim compensation. However, it should be noted that while victim compensation is sometimes regarded as justice, it is also regarded as a way of inducing victims to participate in the process so as to enhance successful

3 For the overlap between international humanitarian law and international human rights law, see Bassiouni, 'Humanitarian Law', in Shelton et al. (eds), *Encyclopedia of Genocide and Crimes Against Humanity, Volume 1* (New York: Macmillan, 2004) 469. For the recognition of the co-equal application of the twin regimes of international humanitarian law and international human rights law, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, 131. For the connection between international humanitarian law and international human rights law, see Bassiouni, *Introduction to International Criminal Law* (Ardsley, New York: Transnational, 2004) at 109 *et seq.*

4 See Bassiouni, 'The Proscribing Function of International Criminal Law in the International Protection of Human Rights', (1982) 9 *Yale Journal of World Public Order* 193.

5 Ibid. See also Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights', in Bassiouni (ed.), *Post-Conflict Justice* (Ardsley, New York: Transnational, 2002) 3.

6 Victims' rights are not addressed, in part, because of the uncertainty and unpredictability of which source of law applies and thus which normative prescription will apply, and, in part, because governments use the overlaps and gaps between these sources to create legal vacuums as the United States has sought to do in establishing a detention camp for 'enemy combatants' at the US Naval Base in Guantánamo Bay in Cuba. See, for example, Amann, 'Guantanamo', (2004) 42 *Columbia Journal of Transnational Law* 263. This article explores the international law basis for an internationally based victim-oriented set of rights and a concomitant set of State obligations which are not necessarily responsibility-based.

prosecution. Up to this point there is no evidence in international or national law that there is a right to compensation, reparations, and redress other than as a consequence to the establishment of responsibility for the harm produced. Thus, the idealistic notion of providing compensation, reparations, and redress to a victim on the basis of human or social solidarity is not yet part of mainstream legal thinking, particularly in connection with criminal proceedings. Instead, we find this notion of human and social solidarity in social legislation that provides assistance to those in need and includes victims. However, within this legal context, the person who receives public assistance or support is not considered a victim as in the case of criminal and civil proceedings. Thus, an important distinction must be made between criminal and civil legal proceedings that are driven by the concept of responsibility as opposed to human and social solidarity reflected in social assistance and support programs that are driven by other considerations. This article begins with a discussion of the evolution of victims' rights in international law then sketches the normative framework of a victim's right to reparation under classical international law, and also reviews the jurisprudence of regional and international courts on victims' rights. The article outlines some mechanisms for obtaining reparation for victims, then summarises the history and goals of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2006 Basic Principles and Guidelines).[7] The article ends with reflections on economic and political obstacles to victims' rights.

2. The Evolution of Victims' Rights in International Law

From the early recorded legal systems a private cause of action has existed for persons who have suffered personal harm or material damage at the hands of another.[8] The right to redress in its various forms has existed in every

7 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, GA Res. 147, 21 March 2006, A/RES/60/147; 13 IHRR 907 (2006) ('2006 Basic Principles and Guidelines'). It is important for the reader to note that this Resolution was adopted by the General Assembly on the report of the Third Committee (A/60/509/Add.1), the matter having been referred to the Third Committee on the basis of the Economic and Social Council's Resolution 2005/30 of 25 July 2005, which in turn was based on the Commission on Human Rights Resolution 2005/35 of 19 April 2005. The 2005 Commission Resolution was based on the Report of the Independent Expert, Mr. M. Cherif Bassiouni. The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, 18 January 2000, E/CN.4/2000/62. Consequently, the sequence of documents is in the reverse order from what is listed above.

8 For an overview of world legal systems, see Wigmore, *A Panorama of World Legal Systems* (Washington: Washington Law Book Company, 1936). See also Ellul, *Histoire des Institutions* (Paris: Presses Universitaires de France, 1955) at 1–2.

organised society. Significantly, no legal system known to humankind has ever denied the right of victims to private redress of wrongs.[9]

Redress of wrongs is a fundamental legal principle that constitutes both a general principle of law and a customary rule of law recognised and applied in all legal systems. This principle applies to private claims for which the collectivity, tribe or State provides a forum and enforcement of the remedy. If ever there was an implied social contract[10] between individuals and their collective entity, it was to provide access to some form of justice, to ensure that the justice process functioned, and to enforce a remedy for the aggrieved party. The right to redress was often based on some concept of responsibility rather than human or social solidarity, but did not extend to claims against the collective entity.

Providing remedies to victims of crimes finds its roots in the earliest societies and in many early religious traditions. Legal systems throughout history have provided different fora for the adjudication of claims. They differed as to access, procedures, remedies and decision-making processes. Some were more readily accessible, such as tribal councils, which are still in existence in certain tribal societies in Africa, Asia, the Arab world, South America and other sub-regions of the world.[11] Anthropological studies show that tribal societies had a more advanced concept of social responsibility than that existing in modern societies. Some so-called primitive or tribal systems even provided for what is now called punitive damages as opposed to only restorative damages.[12]

Provision of remedies to victims of crimes has historically been seen as a way to settle disputes between the offender and the victim, thus preventing individualised vindication and further disturbances of peace.[13]

9 For the family of legal systems of the world, see David, *Les grands systèmes de droit contemporains* (Paris: Dalloz, 1973).

10 See Grimsley (ed.), Rousseau, *Du Contrat Social* (Oxford: Clarendon Press, 1972).

11 One such example is in Afghanistan, where the *jirga* or *shura* council of tribes handles most personal disputes including *diyya* (compensation) for homicides. See Johnson *et al.*, *Afghanistan's Political and Constitutional Development* (Overseas Development Institute, 2003) at 19–20.

12 See, for example, Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (MA: Kessinger Publishing, 2004).

13 The concept of awarding damages to victims can be found in the ancient Assyrian Code, as well as the Hittite Laws, which provided for specific payments to victims of offenses against life. The Code of Hammurabi (1750 BCE) similarly provided for a principle of compensation to victims, but also included an early form of compensation by the community in cases where the offender was unknown. The Code of Hammurabi also provided for compensation against medical practitioners' negligence. See Wigmore, supra n. 8 at 86–93. Roman law accorded a well-defined system of reparation to victims starting with the Lex XII Tabularum, developed in the fifth century BCE. Although in its early form this law provided for victims to seek individualised justice against a particular offender (in all cases except those affecting the public order), the Lex XII Tabularum was later modified to provide a strict system of monetary compensation for many types of offenses, and was followed by a more comprehensive set of remedies found in the Praetorian law (in the second century BCE), and the Lex Aquilia de damno (Aquilian law). In the Roman legal system, the right to private redress of wrongs was based on the responsibility for fault. Roman Law over two millennia ago recognised the two sources of criminal and civil responsibility based on *dolus* and *culpa*, the first being intentional and the second being negligence. See Bassiouni, *Crimes Against Humanity in*

However, with the centralising of the administration of justice by European States, and as retributivism gained increased acceptance as the dominant theory of criminal punishment, victims' rights to redress were marginalised during the 1700s and 1800s. Not until the late 1800s did victims' rights play a more significant role in the administration of justice once more. Better organised victim-oriented institutions and a widespread shift away from a purely retributive theory of criminal justice expanded the role of victims in the legal process and their right to redress. The Age of Enlightenment brought about new concepts such as humanism and the rule of law as the mediator of personal and collective grievances.[14]

The 20th century saw the beginning of wars in which new weapons wrought even more devastating human victimisation and material destruction. This culminated in the tragedies of World War I (WWI)[15] and World War II (WWII). International law's concern for the protection of the individual is in part a result of legal developments that occurred in the wake of the atrocities of WWII and the international community's subsequent pursuit of individual criminal responsibility.[16] Once international law made individuals subjects of that discipline for the purposes of international criminal responsibility, the individual became the subject of international legal rights, which

International Criminal Law, 2nd edn (The Hague: Kluwer Law International, 1999) at 127 on principles of legality. From these early examples, the rights of victims have been progressively developing in different legal systems throughout the centuries. For instance, the Islamic criminal justice system, whose application started in the days after the Prophet's *hejra* (migration) from Mecca to Medina in 622 CE, developed the notion of *qesas* (meaning equality or equivalence), which delineated specific categories of crimes involving violations of the rights of individuals, namely homicide and battery. The sanctions prescribed for such *qesas* crimes were the *talion*, the equivalent infliction of physical or bodily harm against the perpetrator, or, in the alternative, *diyya* (compensation) to be paid to the victim or their family by the perpetrator or their family. A victim, with respect to *qesas* crimes, is not only the moving party with respect to the prosecution but has the right to present evidence, interrogate witnesses, and also bring the criminal action to a close by accepting the *diyya*, or victim compensation, as a substitute to prosecution or dismissing the action on the basis of forgiveness. See Bassiouni, 'Qesas Crimes', in Bassiouni (ed.), *The Islamic Criminal Justice System* (New York: Oceana Publications, 1982) 203; and Bassiouni, 'Les Crimes Relevant du Precepte de Quesas', (1989) 4 *Revue Internationale de Criminologie et de Police Technique* 484.

14 See, generally, Durant and Durant, *The Story of Civilization Vol. 10: Rousseau and Revolution* (New York: Simon and Schuster, 1967).

15 After WWI, the Allies imposed collective sanctions on Germany that were in the nature of compensation to the Allies. See US Department of State, *The Treaty of Versailles and After* (New York: Greenwood Press, 1968) (reprinting and providing commentary on Parts VIII and IX of the Versailles Treaty). The burden of the collective sanctions proved to be both unfair to the German people and unwise as they were a principal cause for the rise of national socialism and the start of World War II. See Gannett (trans.), Schacht, *The End of Reparations* (New York: Hyperion Press, 1979).

16 See Bassiouni, 'The Need for International Accountability', in Bassiouni (ed.), *International Criminal Law, Volume 3*, 2nd edn (Ardsley, New York: Transnational, 1999) 3. See also Paust, 'The Reality of Private Rights, Duties, and Participation in the International Legal Process', (2004) 25 *Michigan Journal of International Law* 1229 at 1241 *et seq.*

explains, in part, the beginning of international human rights law.[17] Until WWII, the rights and obligations of the individual *vis à vis* the State were the exclusive prerogative of municipal law, and a State was free under international law to treat its own citizens as it pleased.[18] The magnitude of human victimisation arising out of WWI and WWII and the conflicts thereafter derived essentially from State action, either intentional or negligent. This new reality brought to the fore the need to extend the same rights and obligations that existed among the individuals within a society to the relationship between the individual victim and his/her victimiser. After WWII, numerous international instruments established protections and rights for individuals, requiring States to enact domestic legislation to protect these rights.[19]

The international community's enunciation of internationally protected individual rights was accompanied by efforts to ensure the protection of these rights through a variety of international enforcement mechanisms.[20] Indeed, many instruments on the protection of human rights have created special monitoring bodies as well as procedures to receive complaints of violations of individual rights, and to investigate or adjudicate them, or at least to report on such violations.[21]

Despite the post-WWII human rights conventions, within 50 years of WWII conflicts of an international and non-international character resulted in

17 See, for example, Bassiouni, *The Protection of Human Rights in the Administration of Criminal Justice: A Compendium of United Nations Norms and Standards* (Ardsley, New York: Transnational, 1994); Bayefsky, *How to Complain to the UN Human Rights Treaty System* (Ardsley, New York: Transnational, 2002); Bayefsky, *The UN Human Rights Treaty System: Universality at the Crossroads* (Ardsley, New York: Transnational, 2001); Lyons and Mayall (eds), *International Human Rights in the 21st Century: Protecting the Rights of Groups* (Lanham, MD: Rowman & Littlefield, 2003); Donnelly, *Universal Human Rights in Theory and Practice*, 2nd edn (Ithaca and London: Cornell University Press, 2003); Kretzmer and Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (London: Kluwer Law International, 2002); Andreopoulos (ed.), *Concepts and Strategies in International Human Rights* (New York: Peter Lang, 2002); and Gane and Mackarel (eds), *Human Rights and the Administration of Justice: International Instruments* (The Hague: Martinus Nijhoff, 1997).

18 See Jennings and Watts (eds), *Oppenheim's International Law*, 9th edn (Harlow: Longman, 1992) at 846 *et seq.*

19 See, for example, Article 2(3), International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (ICCPR); Universal Declaration on Human Rights, GA Res. 217A (III), 10 December 1948, A/810 at 71 (Universal Declaration); African Charter on Human and Peoples' Rights 1981, (1982) 21 ILM 58 (AfChHPR); American Convention on Human Rights 1969, 1144 UNTS 123 (ACHR); and European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS No. 5 (ECHR).

20 For a discussion of these enforcement mechanisms, see Lasco, 'Repairing the Irreparable: Current and Future Approaches to Reparations', (2003) 10 *Human Rights Brief* 18. See also Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights', supra n. 2.

21 Such monitoring bodies include: the Inter-American Commission on Human Rights (established pursuant to the ACHR), the European Commission on Human Rights (established pursuant to the ECHR) (upon amendment of the ECHR in 1998 with the adoption of Protocol 11, the European Commission ceased to exist); and the African Commission on Human and Peoples' Rights (established pursuant to the AfChHPR).

casualties double those of the two World Wars.[22] An estimated 70–170 million people have died since WWII in over 250 conflicts around the world.[23]

However, in the aftermath of WWII, a number of human rights and victims mechanisms continued to flourish. A notable example of this trend is the development of the European human rights system, where individuals can bring claims before the ECtHR for violations of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR).[24] Classic notions of rights and responsibilities for victim redress were extended beyond private actors to public actors, at least in the doctrine of State responsibility.[25] The very nature of large-scale victimisation brought about a new social basis for redress, and its impact on world order reinforced the proposition that prevention is an essential goal of security, which brought about accountability as a component of redress.[26]

In addition to regional mechanisms like the ECHR, national mechanisms expanded. The movement in many societies to provide compensation for victims of domestic crimes originated in developed societies whose affluence diminished economic concerns regarding compensation. A 1960s 'victimology' movement grew that was not only concerned with monetary compensation of victims of common crimes but also offered an incentive to governments by linking such compensation to victims' cooperation in the pursuit of criminal prosecutions. Canada and several states within the United States began providing victim compensation for common crimes and thereby encouraged victim participation in criminal prosecutions.[27] The movement gained prominence until the 1980s,

22 Since World War II, there have been more than 250 conflicts resulting in 70 million casualties at the low end of estimates, and 170 million casualties at the high end. See Balint, 'An Empirical Study of Conflict, Conflict Victimization and Legal Redress', (1998) 14 *Nouvelles Etudes Pénales* 101. See also SIPRI Yearbooks 1975–1996; as well as, Jongman and Schmid, 'Contemporary Conflicts: A Global Survey of High and Lower Intensity Conflict and Serious Disputes', (1995) 7 *PIOOM Newsletter and Progress Report* 14. See also Schmid, 'Early Warning of Violent Conflicts: Casual Approaches', in Schmid (ed.), *Violent Crime and Conflicts* (Milan: ISPAC 1997) 47; PIOOM World Conflict Map 1994–1995, (1995) 7 *PIOOM Newsletter and Progress Report*; and Rummel, *Death by Government* (New Brunswick, NJ: Transaction Publishers, 1994) at 3 and 9 (reports a total of 72,521 million casualties).

23 According to a study performed by this author, since WWII there have been over 250 conflicts in which an estimated 170 million people have been killed. See Bassiouni, supra n. 16.

24 See Jacobs and White, *The European Convention on Human Rights*, 3rd edn (by Ovey and White) (Oxford: Oxford University Press, 2002); Gomien, *Judgments of the European Court of Human Rights, 1959–95* (Strasbourg: Council of Europe Publishing, 1996); Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995); Janis, Kay and Bradley, *European Human Rights Law: Text and Materials* (Oxford: Oxford University Press, 1995); and Macdonald et al. (eds), *The European System for the Protection of Human Rights* (The Hague: Martinus Nijhoff, 1993).

25 See, generally, supra n. 19.

26 See Bassiouni, supra n. 5.

27 For Canadian legislation see Policy Center for Victim's Issues, Legislation, available at: http://www.canada.justice.gc.ca/en/ps/voc/vocleg.html#Victim%20Impact%20Statement. See also the compilation of national legislation on victimology and victims' rights, available at: http://www.victimology.nl/. For US resources, see Victims of Crime Act–Crime

when experts of victimology and other fields sought to extend monetary compensation to other forms of redress, including medical, psychiatric and psychological treatment and to expand the basis of such compensation and redress modalities to violations committed by State agencies and State officials.[28] By the 1980s, the movement of victim compensation started to lose momentum. States were willing to recognise victims' rights when the harm arose from individual action, but not when the harm was a product of State policy or committed by State actors.[29] States' reluctance increased significantly when proponents of victims' rights began to claim reparations for historic violations, and were successful in some of these claims. Throughout the 1980s and 1990s, the cause of victims' rights was furthered as a result of the establishment of *ad hoc* and hybrid tribunals and the International Criminal Court (ICC), various national prosecutions, and the burgeoning truth commission industry. In addition, victims' rights have been fundamentally strengthened by the 2006 Basic Principles and Guidelines. An individual victim's right to redress has increasingly become an indispensable component of efforts to protect individual human rights.

3. The Normative Framework of a Victim's Right to Reparation Under Classical International Law

What follows is a description of victims' rights and means of redress under contemporary international law.

A. State Responsibility

The doctrine of State responsibility has long existed. While it comprehends responsibility for wrongful conduct against individuals, the doctrine has historically only applied between States, and has not recognised individual claims against States. Individual claimants have to resort to their State of

Victims Fund, available at: http://www.ojp.usdoj.gov/ovc/publications/factshts/vocacvf/welcome.html. For a listing of US programmes for compensating victims of crime, see: http://www.ojp.usdoj.gov/ovc/help/progdir.htm. For a listing of Victims' Rights Statutes in the US see Victims' Rights in 50 States, available at: http://www.klaaskids.org/vrights.htm.

28 See Tobolowsky, 'Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime', (1999) 25 *New England Journal on Criminal and Civil Confinement* 21; and Anderson and Woodard, 'Victim and Witness Assistance: New State Laws and the System's Response', (1985) 68 *Judicature* 221 at 222–3.

29 See *X et al v State*, Tokyo District Court, Judgment of 27 July 1995, (1996) 39 *Japanese Annual of International Law* 266, where the Tokyo district court held that 'neither the general practice nor the convictions (*opinio juris*) that the State has a duty to pay damages to each individual when that State infringes its obligations under international human rights or international humanitarian law can be said to exist'. This decision was later affirmed in two other 2002 Tokyo district court decisions which rejected claims arising from violations committed by the Japanese Germ Warfare Units in China in 1941–2 and the 1932 massacre of Chinese villagers in Liaoling.

nationality to espouse their claims, and present them as a State claim against another State.[30] From the Peace at Westphalia in 1648 to WWII, the State has been the primary subject of international law. Individuals were deemed objects and not the subjects of rights and obligations that derived not from international law. But before national law the individuals were legal subjects. Individuals who were harmed by a State other than their State of nationality could only claim fulfilment of rights through their own State of nationality. This pre-supposed that the State of nationality would espouse its national's claim and pursue it through diplomatic channels or by judicial means.[31] Such an assumption evidences the State-centric nature of international law, whereby injury to a State's citizens is deemed an indirect injury to the State itself.[32] Vattel expressed this concept in the late 1700s in *Les Droits des Gens*, wherein he states: '*Quiconque maltraite un citoyen offense indirectement l'état qui doit protéger ce citoyen.*'[33] This is still the foundation of States' claims on behalf of their nationals. Indeed, a State that presents a claim against another State for injuries to its citizens, does so purely on a discretionary basis.[34]

States, however, remain averse to committing themselves to accountability to individual victims for obvious political and economic reasons.[35] States that resort to the use of force are reluctant to acknowledge even the principle of civil liability for individual harm and property damage. These States argue legal technicalities about the differences of legal sources and their binding obligations, distinguishing between international humanitarian law, human rights law and

30 In 2001, the ILC adopted its Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 31 May 2001, A/56/10 (2001) which, in Article 33(2), provide that the ILC's approach to the question of State responsibility does not prejudice 'any rights, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.' Thus, although the Draft Articles primarily deal with reparations from States to other States or the international community as a whole, the inclusion of this language may evidence the possibility that an obligation may be owed to a non-State entity—a principle which is re-affirmed in the ILC Commentary to Article 33. See Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 209–10.

31 See, for example, Lillich, *International Claims: Their Adjudication by National Commissions, Volume VI* (Syracuse: Syracuse University Press, 1962).

32 See Jennings and Watts (eds), supra n. 18.

33 Vattel, *Le Droit des gens, Principes de la loi naturelle appliquée à la conduite des affaires des nations souverains* (1773) at 289.

34 See, for example, *Mavrommatis Palestine Concession Case (Greece v UK)*, Jurisdiction, PCIJ Reports 1924, Series A No. 2, 12. But see the English Court of Appeal's judgment in *R (Abassi) v Secretary of State for Foreign Affairs* 2002 EWCA Civ 1598 and the South African Constitutional Court's judgment in *Kaunda v President of the Republic of South Africa* 10 BCLR 1009, in which some limits to a State's discretion were indicated.

35 *Mavromatis Palestine Concession Case*, ibid. See also infra Section 7; Bassiouni, 'Combating Impunity for International Crimes', (2000) 71 *University of Colorado Law Review* 409; and Bassiouni, 'Searching for Justice in the World of Realpolitik', (2000) 12 *Pace International Law Review* 213.

international criminal law. Moreover, such States almost always rely on traditional doctrines of State sovereignty in international law to oppose responsibility.[36]

B. States' Duty to Provide a Remedy Grounded in International and Regional Conventions

A State's duty to provide a domestic legal remedy to victims of violations of international human rights and humanitarian law norms committed in its territory is well-grounded in international law. Provisions of numerous international instruments either explicitly or implicitly require this duty of States. Furthermore, a survey of contemporary domestic legislation and practice reveals that States endeavour to provide remedies for victims injured within their borders.

The existence of a State's duty to provide a remedy is grounded in several international and regional conventions. The Hague Conventions of 1899[37] and 1907[38] were the first international instruments codifying the customary law of armed conflicts. Under these conventions, violations by a State engaged in an international armed conflict that resulted in physical harm or damage to civilians and to civilian property, as well as harm to combatants protected by these customary norms, resulted in the right of the State of nationality to request compensation on behalf of its citizens.[39] This recognition gave rise to damages based on the injuries of individuals, but did not give rise to an individual right of legal action against a State.[40] In keeping with the law of diplomatic protection, it simply allowed the State of nationality or the territorial State in which the violations of these norms occurred to present a claim against the State that committed these violations.

Since WWII, human rights have been codified in numerous international instruments.[41] With respect to violations of international humanitarian law, the following additional conventions implicitly recognise the right to a remedy. These conventions impose a duty on the violating party to provide compensation for violations: (1) the Geneva Convention Relative to the Treatment of Prisoners of

36 Except where State responsibility exists under international law. See *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)*, Merits, Judgment, ICJ Reports 1986, 14.

37 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land 1899.

38 Convention (IV) Respecting the Laws and Customs of War on Land 1907, (1908) 2 *American Journal of International Law* Supplement 90 (1907 Hague Convention).

39 See, for example, Article 3, 1907 Hague Convention.

40 For example, 1907 Hague Convention (XII) provided for the establishment of an International Prize Court, in which proceedings could be instituted by individuals against foreign States for claims involving property rights. However, this convention never entered into force.

41 These include, *inter alia*, the Universal Declaration; the ICCPR; the International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195 (ICERD); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85 (CAT); and the Convention on the Rights of the Child 1989, 1577 UNTS 3 (CRC).

War; (2) the Geneva Convention Relative to the Protection of Civilian Persons in Time of War and (3) Protocol I Additional to the Geneva Convention.[42]

Moreover, several regional conventions[43] also provide for an individual's right to redress or to receive compensation. For example, the ECHR and the American Convention on Human Rights (ACHR) provide for individual compensation for damages arising out of a State's violation of protected rights.[44]

Likewise, the International Covenant on Civil and Political Rights 1966 (ICCPR) expanded victims' rights. Article 2(3) provides that each State Party to the ICCPR undertakes to:

(a) ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) ensure that the competent authorities shall enforce such remedies when granted.

While the ICCPR does not mandate a State Party to pursue a specific course of action to remedy the violation of protected rights, the language of this provision clearly envisages that the remedy is effective, of a legal nature and enforceable. Significantly, the ICCPR renders the 'act of State' defence inapplicable by ensuring the duty to provide a remedy regardless of whether the violations were committed by persons acting in an official capacity. This limitation is fundamental to ensuring that human rights and international humanitarian law violations are remedied, since these acts are often committed only by States. The State Parties to the ICCPR established the United Nations Human Rights Committee (HRC) in 1976, with the goal of ensuring compliance with the provisions of the ICCPR. The jurisprudence of this body has made considerable contributions to defining and clarifying victims' right to redress arising under the provisions of the ICCPR.[45]

42 Convention Relative to the Treatment of Prisoners of War 1949 (Geneva Convention III), 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War 1949 (Geneva Convention IV), 75 UNTS 287; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3 (Additional Protocol I).

43 The principal ones are: the AfChHPR, the ACHR and the ECHR.

44 See Article 63, ACHR; and Article 41, ECHR.

45 See, for example, *Rodriquez v Uruguay* (322/88), CCPR/C/51/D/322/1988 (1994); 2 IHRR 12 (1995) (holding that the State Party's failure to conduct an investigation into human rights violations constituted a considerable impediment to the pursuit of civil remedies, for example compensation, and declaring that the adoption of amnesty laws in cases of gross human rights violations to be incompatible with the obligations of states arising under Article 2(3)); *Blancov v Nicaragua* (328/88), CCPR/C/51/D/328/1988 (1994); 2 IHRR 123 (1995) (clarifying

The International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD) also exemplifies an explicit requirement that States provide a remedy. This convention requires States Parties to:

> assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.[46]

Like the ICCPR, ICERD envisages that the remedy be effective and carried out by competent tribunals and officials.

Other conventions also explicitly require that a State provide a remedy for human rights violations or contain provisions regarding the right to some form of reparation, which implies the right to a remedy.[47] For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, contains language identical to the aforequoted provision of the ICCPR.[48]

In addition to conventions, which create binding obligations on the part of States Parties, numerous international declarations re-affirm the principle that a State has a duty to provide a remedy to victims of human rights abuses and international humanitarian law. The 1993 World Conference on Human Rights emphasised the need for victim reparation stating, '[e]very State should provide an effective framework of remedies to redress human rights grievances or violations'.[49]

the scope of the victim's right to an effective remedy); and *Bautista de Arellana v Columbia* (563/93), CCPR/C/55/D/563/1993 (1995); 3 IHRR 315 (1996) (discussing the victim's right to remedy beyond compensation).

46 Article 6, ICERD.

47 The following instruments all contain provisions regarding the right to some form of reparation, which implies the right to a remedy: Articles 2, 15 and 6, Convention Concerning Indigenous and Tribal Peoples in Independent Countries 1989, ILO No. 169; Article 24, Convention Relating to the Status of Stateless Persons 1954, 360 UNTS 117; Article 14, CAT; Article 39, CRC; Articles 63(1) and 68, ACHR; Article 41, ECHR; and Article 7, AfChHPR (providing individuals with the right to have their cause heard and the right to an appeal to competent national organs against acts violating their fundamental rights as recognised and guaranteed by conventions, laws regulations and customs in force, and therefore, implying by reference a right to some form of reparation).

48 Article 83, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, (1991) 30 ILM 1521; 12 IHRR 269 (2004). Furthermore, the Convention articulates an 'enforceable right to compensation' with respect to unlawful detention or arrest (Article 16(9)). It requests States Parties provide assistance to migrant workers or their families for the prompt settlement of claims relating to death (Article 71(2)). Also, the Convention provides the right to 'fair and adequate' compensation for the expropriation of the migrant's assets by the State. (Article 15).

49 Vienna Declaration and Programme of Action, World Conference on Human Rights, 25 June 1993, A/CONF.157/23 at para. 27; 1-1 IHRR 240 (1993) (Vienna Declaration).

Several declarations of international and regional organisations reflect the principle that a State has the duty to provide a remedy. For example, the Universal Declaration of Human Rights (Universal Declaration) plainly articulates that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'.[50] The United Nations Declaration on the Elimination of All Forms of Racial Discrimination further reflects the concept that 'everyone shall have the right to an effective remedy and protection against any discrimination... through independent national tribunals competent to deal with such matters'.[51] In addition, the Declaration on the Protection of All Persons from Enforced Disappearance envisions a duty to provide 'an effective remedy' as a means of determining the status of such disappeared individuals.[52] Furthermore, the Declaration requires 'adequate compensation' for victims.[53] The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires that the victim of official torture be 'afforded redress and compensation in accordance with national law'.[54] The American Declaration on the Rights and Duties of Man provides that 'every person may resort to the courts to ensure respect for his legal rights'.[55] The Muslim Universal Declaration on Human Rights, issued by the Islamic Council, states that 'every person has not only the right but also the obligation to protest against injustice; to recourse and to remedies provided by the Law in respect to any unwarranted personal injury or loss'.[56]

A comprehensive treatment of this duty was also found in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985 Basic Principles of Justice).[57] These Principles set forth comprehensive details concerning a State's duty to provide a remedy to individual victims.[58] They provide that victims are entitled to redress and recommend that States establish

50 For the Declaration's status as a source of customary law, see generally Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', (1996) 25 *Georgia Journal of International and Comparative Law* 287 at 316–51.

51 Article 7(2), ICERD.

52 Article 9, Declaration on the Protection of All Persons from Enforced Disappearances, GA Res. 47/133, 18 December 1992, A/RES/47/133.

53 Article 19, Enforced Disappearances Declaration, ibid.

54 Article 11, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 3452, 9 December 1975, A/10034 (1975).

55 Article 18, American Declaration on the Rights and Duties of Man, 2 May 1948, OAS Res. XXX.

56 See Article IV(b), Muslim Universal Declaration on Human Rights, reprinted in Lampe (ed.), *Justice and Human Rights in Islam* (Washington, DC: International Law Institute, 1997) at 14.

57 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34, 29 November 1985, A/CONF.121/22/Rev.1 (1985 Basic Principles of Justice).

58 See, generally, Bassiouni (ed.), *International Protection of Victims, 7 Nouvelles Études Pénales* (Eres: Association International de Droit Penal, 1988); and Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 17 April 1988, E/CN.15/1998/CRP.4.

judicial and administrative mechanisms for victims to obtain prompt redress.[59] However, the 1985 Basic Principles of Justice are primarily concerned with the victims of domestic criminal law and are only applicable in the event that the domestic criminal law of a given State has incorporated the applicable international human rights or humanitarian norm.[60]

Specific language in international instruments articulates the duty to provide reparations. With respect to violations of international humanitarian law, the major conventions that regulate armed conflict contain provisions both vesting individuals with the right to claim compensation against State Parties and requiring States to provide reparation for their breaches.[61]

Treaty-based and customary law do not impose an explicit duty on States to create special procedures. However, the language of the international instruments noted earlier contemplates that the remedy be 'effective' and administered by 'competent' tribunals and personnel in order to provide 'just' and 'adequate' reparations. Thus, to the extent that a State's existing legal framework is inadequate to handle the claim, it would seem that the State is implicitly in violation of the requirements of the treaty-based law.[62]

Even in instances where the judicial system has not collapsed, a State may find it advantageous to establish special procedures with respect to situations involving numerous claimants, or with respect to the settlement and distribution of the proceeds of lump sum agreements between States.[63]

Treaty-based and customary law reflect the principle that States' nationals and aliens should have the right to a remedy for violations committed within a State's territory.[64] This is evidenced in treaty-based law by the use of

59 Principles 4–5, 1985 Basic Principles of Justice.

60 Principles 18–9, 1985 Basic Principles of Justice.

61 For example, Article 3, 1907 Hague Convention provides for the duty of a State to pay indemnity in cases of violations of its regulations. Furthermore, the Four Geneva Conventions of 12 August 1949 contain similar provisions with respect to the grave breaches of the convention. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949 (Geneva Convention I), 75 UNTS 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea 1949 (Geneva Convention II), 75 UNTS 85; Geneva Convention III; and Geneva Convention IV. In addition, Article 91, Additional Protocol I provides that a State Party shall be liable 'to pay compensation' for violations of the Convention.

62 For example, Togo noted that during a period of internal strife, *'l'Etat avait perdu certaines de ses prérogatives: le gouvernement était impuissant à faire réprimer les actes délictuels ou criminels qui émaillaient cette période et la justice était loin de disposer des moyens d'agir.'* Specifically, Togo planned to create a ministry of human rights, adopt legislative measures aimed at compensating victims of socio-political problems, and ensure the independence of the judiciary and equal protection for all citizens.

63 See generally Lillich, supra n. 1; Lillich, *International Claims: Postwar British Practice* (Syracuse, New York: Syracuse University Press, 1967); and Lillich and Weston (eds), *International Claims: Contemporary European Practice* (Charlottesville, Virginia: University Press of Virginia, 1982).

64 See generally, Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (Charlottesville, Virginia: University of Virginia Press, 1983); and Lauterpacht and Collier (eds), *Individual Rights and The State of Foreign Affairs: An International Compendium* (New York: Praeger, 1972).

language such as 'any persons'[65] and 'everyone within their jurisdiction'.[66] Failing to provide an alien with an effective remedy amounts to a denial of justice that subsequently gives rise to an international claim by the alien's State of nationality. Thus, clearly a State must afford national treatment to aliens in the provision of remedies for violations committed within its territory.

The aforementioned declarations also provide that human rights violations shall be remedied. If the State is the author of the violation, the duty to make reparations can fall to no other.

C. State Practice

A survey of contemporary State practice, as evidenced in the substantive laws and procedures functioning in domestic legal systems, confirms the duty to provide a remedy to victims. Contemporary State practice, evident in a survey of various domestic legal frameworks, reinforces the hortatory statements contained in the aforementioned declarations as a norm of customary international law.[67] State practice reflects both the legal framework and practice of providing reparations to victims.

65 See Articles 2(3)(a) and 2(3)(b), ICCPR.

66 See Article 6, ICERD.

67 For example, many States have extensive human rights protections within their national constitutions and provisions that create a remedy in cases of their violation. For example, in States such as Peru, Malta, Romania, Uruguay and the United States, the constitution contains, either explicitly or implicitly, an extensive list of human rights guarantees and provides a remedy for their violation. Other States perhaps lack specific legislation with respect to human rights violations; however, their legal systems contain other general remedies which encompass specific violations. For example, under Swedish and UK law, domestic tort law provides a remedy for the compensation of gross violations of human rights. In China, the State Compensation Act and Administrative Proceedings Act allows its citizens to receive compensation when they have been denied their civic rights. Still other States such as Cyprus and Nepal, noted that they were in the process of enacting legislation with respect to redressing individual victims. For Romania, Togo and the UK, see Question of the Human Rights of all Persons Subjected to any form of Detention or Imprisonment, 18 January 1996, E/CN.4/1996/29/Add.3; Cyprus and Kuwait, see Report of the Special Rapporteur, Sir Nigel Rodley, submitted pursuant to Commission Resolution 1995/137, 20 December 1996, E/CN.4/1997/Add.1; Argentina, the Czech Republic, Chile, China, Colombia, Ghana, Mauritius, Namibia, Nepal, the Philippines, the Sudan and Sweden, see Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, 27 November 1995, E/CN.4/1996/29; Peru, The Administration of Justice and the Human Rights of Detainees, 13 June 1995, E/CN.4/Sub.2/1995/17/Add.1; China, Malta, Mexico, Uruguay and Yugoslavia, see The Administration of Justice and the Human Rights of Detainees, 26 July 1995, E/CN.4/Sub.2/1995/17/Add.2; Belarus and the Netherlands, see The Administration of Justice and the Human Rights of Detainees, 11 May 1995, E/CN.4/Sub.2/1995/17; US, see Question of the Human Rights of all Persons Subjected to any form of Detention or Imprisonment, 18 January 1996, E/CN.4/1996/29/Add.2. For the constitutions of the world see Blaustein and Flanz (eds), *Constitutions of the Countries of the World* (Dobbs Ferry, New York: Oceana, 1992, updated through 2002), as well as the following internet-based databases: Constitution Finder database (offers constitutions, charters, amendments and other related documents), available at: http://confinder.richmond.edu/; Constitutions, Treaties and Official Declarations Around the World database (includes links to full texts of foreign constitutions,

In the aftermath of WWII, the first comprehensive restitution and compensation process was undertaken to remedy human rights abuses that took place during the war. Since 1949, the Federal Republic of Germany has undertaken a comprehensive effort to provide compensation for crimes committed by the Nazi regime. Subsequent to WWII, the Allies did not impose reparations or collective sanctions on the German people. However, claims by victims of the Holocaust were made against Germany and were advocated by the newly created State of Israel, even though that State did not exist at the time the victimisation occurred. Germany passed a law entitled 'Wieder Gut Machung,' which provided for individual compensation to Holocaust victims and, for those victims who did not have survivors, their share went to the State of Israel. Subsequently, in the years 2000–2003, Germany made additional victim compensation settlements for the use of slave labour in its industry. Austria similarly compensated victims of the Holocaust and slave labour, and Switzerland compensated victims who held numbered Swiss accounts and who disappeared during WWII. These claims were driven by the World Zionist Organization with strong support from the US government. Some major Jewish organisations had, for years, pursued claims for the WWII Jewish Holocaust.[68] In the late 1990's, significant breakthroughs occurred when the World Zionist Organization was able to negotiate a substantial settlement with Swiss banks, followed by similar successful settlements with German and Austrian industries between 1999–2001.[69] The German remedies provided in the aftermath of WWII have 'focused both on restitution and on compensation for individual suffering, loss of life, health and liberty'.[70] Through a series of laws and agreements (starting with the 1952 Luxemburg Agreement between the Federal Republic

treaties and declarations and other resources) available at: http://www.psr.keele.ac.uk/const.htm; and the National Constitutions database (developed by the Constitution Society) available at: http://www.constitution.org/cons/natlcons.htm.

68 See Statement by Under Secretary of Commerce Stuart Eizenstat before the House Banking and Financial Services Committee, Washington, DC, 11 December 1996, available at: http://www.state.gov/www/regions/eur/961219eizen.html. For a listing of related documents see US Department of State, Holocaust Issues, available at: http://www.state.gov/www/regions/eur/holocausthp.html. See, for example, US Department of State, Press Statement by James P. Rubin/Spokesman, German Government Agreement on Holocaust Compensation, 13 January 1998, available at: http://secretary.state.gov/www/briefings/statements/1998/ps980113b.html.

69 Ibid. See also US Department of State, Press Statement by Nicholas Burns/Spokesman, Swiss Banks to Create Fund, 5 February 1997, available at: http://secretary.state.gov/www/briefings/statements/970205b.html. For more recent developments see US Department of State, Press Statement, Philip T. Reeker, Holocaust Insurance Agreement Reached, 19 September 2002, available at: http://www.state.gov/r/pa/prs/ps/2002/13580.htm.

70 German Compensation for National Socialist Crimes, Background Papers, available at: http://www.germany-info.org/relaunch/info/archives/background/ns.crimes.html. For a table providing a summary of major holocaust compensation programs, as well as major direct compensation programs for Jewish victims of Nazi persecution, see Compensation and Restitution at a Glance, available at: http://www.claimscon.org/compensation.guide.asp. See, generally, Schwerin, 'German Compensation for Victims of Nazi Persecution', (1972) 67 *Northwestern University Law Review* 479. For an examination of restitution claims arising out

of Germany, the State of Israel and the Jewish Claims Conference), the German government and private corporations have provided over $104 billion (US) for compensation to victims of Nazi crimes.[71] In addition to providing material compensation for personal injuries, deprivation of freedom and other abuses that have been perpetrated on account of race, religion, political belief, physical disability or sexual orientation, the German government and industry have also provided other forms of remedies including apologies,[72] laws providing restitution for lost property,[73] compensatory pensions and other compensatory laws and agreements and settlements aimed to supplement the legal framework noted earlier.[74] Germany has also entered into a number of bilateral agreements with European nations and the United States pursuant to which further compensation was paid to victims and their families.[75]

The US government provided redress to American citizens and permanent resident aliens of Japanese ancestry who were forcibly evacuated, relocated and interned by the government during WWII.[76] Through the enactment of the 1988 Civil Liberties Act, the Unietd States government provided $20,000 (US) to each Japanese American person interned during WWII who survived until 1986.[77] The total cost of the effort to compensate this group of victims is

of the Nazi regime in Austria see Kriebaum, 'Restitution Claims for Massive Violations of Human Rights During the Nazi Regime: The Austrian Case', in Ulrich and Boserup (eds), *Human Rights in Development Yearbook 2001* (The Hague: Kluwer, 2002).

71 German Compensation for National Socialist Crimes, ibid. Approximately $624 million (US) continues to be paid each year to about 100,000 pensioners.

72 See, for example, Statement of Konrad Adenauer, 27 September 1951, excerpts available at: http://www.germany-info.org/relaunch/info/archives/background/ns.crimes.html.

73 Claims for property loss resulting from Nazi persecution are handled according to the Federal Restitution Law (Bundesruckerstattungsgesetz) of 19 July 1957. According to official German government sources, as of January 1987, 735,076 claims had been made and settled on the basis of this law. See German Compensation for National Socialist Crimes, supra n. 70.

74 Such laws included a 1949 law which restored the rights and privileges of whose who have been discriminated against in Nazi legislation, laws extending the assistance to (by Nazi law) ineligible war victims (1949), lump sum payments to former concentration camp internees who were the objects of medical experimentation and prisoners of war from Palestine, who, because of their Jewish background, did not receive the humane treatment guaranteed to prisoners of war. For these and other examples of compensatory laws and agreements, see German Compensation for National Socialist Crimes, supra n. 70. In addition, on 17 December 1999, the German industry agreed to a $5 billion (US) global settlement of all US litigation to compensate the approximately one million surviving Nazi-era slave and forced labourers. See Bazyler and Fitzgerald, 'Trading With the Enemy: Holocaust Restitution, the United States Government and American Industry', (2003) 28 *Brooklyn Journal of International Law* 683 at 695.

75 See German Compensation for National Socialist Crimes, supra n. 70 (noting that there are 15 agreements with Western European nations and one with the US).

76 See Robinson, *By Order of the President: FDR and the Internment of Japanese Americans* (Cambridge, MA: Harvard University Press, 2001); and Gott, 'A Tale of New Precedents: Japanese American Interment as Foreign Affairs Law', (1998) 40 *Boston College Law Review* 179.

77 See Civil Liberties Act, Pub.L.No. 100–383, 102 Stat. 903 (1988) (expired 1998). See also Committee on Wartime Relocation and Internment of Civilians, Committee on Internal and Insular Affairs, 102nd Congress, Personal Justice denied (Comm. Print 1992).

estimated at $1.65 billion (US).[78] The US has also provided remedies arising out of the Indian Tribe Land Claims,[79] the Tuskegee Syphilis Study[80] and the claims of victims arising out of the 1923 Rosewood massacre.[81] The US government, however, has not recognised claims made by the descendants of former slaves.[82]

In an effort to account for its human rights abuses of past decades, Chile has created a national commission whose goal is to provide compensation to victims' families.[83] Reparations include monthly pensions, fixed sum payments and health and educational benefits.

Finally, corporations (such as banks and insurance companies) that have benefited from human rights abuses have also provided material reparations to victims as a result of both class action suits filed against them and media, non-governmental organisation (NGO) and political pressure.[84] There is thus

78 In 1992, the funding for the Act was increased from $1.25 billion to $1.65 billion (US). Other, more recent examples of US efforts to remedy past violations of human rights, take the form of apologies. During his term in office, President William J. Clinton made apologies for the genocide in Rwanda, execution of civilians during the Korean War, and the US support of Guatemala's military while it committed numerous serious human rights violations. See Aka, 'The 'Dividend of Democracy: Analyzing U.S. Support for Nigerian Democratization', (2002) 22 *Boston College Third World Law Journal* 225 at 276–7 (discussing Clinton's apologies). See also Broader, 'Clinton Offers His Apologies to Guatemala', *New York Times*, 11 March 1999.

79 This was the first reparation program created by the US Congress in 1946 and aimed to address a number of claims raised by Indian tribes, including the loss of lands under treaties entered into under duress. Approximately $1.65 billion (US) was awarded. See Newton, 'Compensation, Reparations and Restitution: Indian Property Claims in the United States', (1993) 28 *Georgia Law Review* 453.

80 In 1975, the US government also settled a class action lawsuit brought on behalf of the participants (and their families) in the Tuskegee Syphilis Study, agreeing to donate approximately $9 million (US) to the settlement fund. This was followed by a further apology by President Clinton in 1997, as well as other remedial measures. See Mitchell, 'Clinton Regrets "Clearly Racist" U.S. Study', *New York Times*, 17 May 1997.

81 In this case, the state of Florida awarded each of the nine survivors of the massacre $150,000 (US) and paid between $375 and $22,535 (US) to each of the 145 descendants of Rosewood residents. See generally, Yamamoto, 'Racial Reparations: Japanese American Redress and African American Claims', (1998) 40 *Boston College Law Review* 477 at 490.

82 For a discussion of US legal issues arising out of proposed reparations for slavery, see Brophy, 'Some Conceptual and Legal Problems in Reparations for Slavery', (2003) 58 *New York University Annual Survey of American Law* 497.

83 See Commission on Crime Prevention and Criminal Justice, Addendum to the Report of the Secretary-General: Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 10 April 1996, E/CN.15/1996/16/Add.3 at para. 55.

84 A well-known example is the Holocaust Victim Asset Litigation that took place in US Federal Court in 1998 and where selected Swiss banks agreed to pay $1.25 billion (US) to settle claims made by Jewish WWII depositors. For more information see: http://www.swissbank-claims.com. For other examples of litigation related to the Jewish holocaust, including claims against German, Austrian and French banks, as well as cases filed against European insurance companies, see Bazyler, 'The Holocaust Restitution Movement in Comparative Perspective', (2002) 20 *Berkeley Journal of Internartional Law* 11; and Bazyler and Fitzgerald, supra n. 74 (discussing settlements reached with Swiss, German, French, Austrian and Israeli industries and the importance of US pressure on reaching the settlements in the lawsuits filed against corporate entities). For insurance-related claims see the website of the International Commission on Holocaust-Era Insurance Claims in Washington D.C., available at: www.icheic.org.

some indication that State practice supports a State's duty to provide reparations for serious violations of human rights and international humanitarian law. However, this remains a contested matter, as evidenced by the recalcitrant State practice of countries like Japan. Where Germany sought to compensate Holocaust victims, to deliver justice to war criminals and to bear witness to the historical record, Japan, while providing monetary and developmental aid to the nations it attacked, has not accepted moral responsibility for its past action.[85] Japan has faced severe criticism from China and Korea for its post-war policy. Japan has provided some compensation for its use of foreign slave labour during WWII and for other violations of human rights during WWII,[86] establishing a private consolation fund for comfort women who claim that they were used as sex slaves during the war,[87] and paying monetary reparations to many of the individual nations it invaded (it allocated $3.9 billion (US) to the Philippines, Vietnam, Burma and Indonesia). Many governments, including Thailand and China, have relinquished their claims to Japanese reparations at the inter-governmental level.

However, Japan has consistently rejected individual victims' claims in its domestic courts. In recent years, former slave labourers have brought lawsuits to Japanese courts seeking compensation, however, most claims have been dismissed on the grounds that the relevant statute of limitations has lapsed and those decisions in favour of plaintiffs have yet to result in the payment of compensation.[88]

Many of Japan's victims' claims raised in the US courts have failed.[89] For example, victims of Japanese slave labour have filed over two dozen lawsuits in the US

85 See Scheiber, 'Taking Responsibility: Moral and Historical Perspectives on the Japanese War-Reparations Issue', (2002) 20 *Berkeley Journal of International Law* 233.

86 For example, Japan entered into bilateral treaties with Sweden, Spain, Burma, Denmark, the Netherlands and Russia, pursuant to which it agreed to pay compensation to the nationals of those countries. See Bazyler, supra n. 84 at 31 (providing the example that, in the bilateral treaty between the Netherlands and Japan entered into in 1956, Japan agreed to pay $10 million (US)).

87 See Yu, 'Reparations of Former Comfort Women of World War II', (1995) 36 *Harvard Journal of International Law* 528.

88 See Webster, 'Sisyphus in a Coal Mine: Responses to Slave Labor in Japan and the United States', (2006) 91 *Cornell Law Review* 733 at 745–55 (discussing history of slave labor litigation in Japanese domestic courts and noting that '[s]ince 1995, former Chinese slave laborers have filed fifteen suits in Japanese district courts. Two of these suits have been settled, six have been decided (and subsequently appealed), and seven are pending. Among the six decisions handed down, a clear split emerges: three courts have found for plaintiffs, and three courts have found for defendants. The Supreme Court of Japan is currently hearing appeals from three different high courts, and its decisions will provide important guidance to lower courts faced with slave-labor disputes.') It should also be noted that as of April 2006, preparations were being made by former forced Chinese labourers to file class-action lawsuits against Japanese corporations in Chinese domestic courts. See Underwood, 'Lawsuits over Wartime Forced Labor Fuel China-Japan Conflict', 25 April 2006, *New America Media*, available at: http://news.newamericamedia.org/news/view_article.html?article_id=40298e382434db7510a4776fbb4de354.h

89 For a discussion of legal problems arising from WWII Japanese forced labour claims in US courts see Haberstroh, 'In Re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts', (2003) 10 *Asian Law Journal* 253.

courts against Japanese corporations that employed slave labour during the war.[90] Plaintiffs included both US and Allied POWs, as well as civilians of various countries.[91] In a case consolidated in the Northern District of California,[92] the court dismissed the lawsuits while relying on the 1951 peace treaty with Japan,[93] which provided, in relevant part, for the waiver of 'all reparations claims by the Allied Powers, other claims of the Allied powers and their nationals arising out of any action taken by Japan and its nationals in the course of the prosecution of the war'.[94] A lawsuit filed by 'comfort women' who acted as sex slaves of the wartime Japanese army was also dismissed in 2001.[95]

Many countries like Japan not only fail to provide material compensation, but also refuse to give victims moral compensation. The Diet of Japan has consistently refused to issue an official apology. Japanese textbooks have been criticised for downplaying the extent of Japan's war crimes. Most former Japanese Prime Ministers failed to apologise directly for the invasion of China, except in the form of the word regret ('*hansei*'), which Chinese, Korean, and peace activists in Japan consider insufficient. However, the former Prime Minister of Japan, Murayama Tomiichi, offered an official apology (*'owabi'*) in 1995 on the fiftieth anniversary of the end of WWII.

D. State Reparations for Violations Committed by Non-State Actors

A non-State actor perpetrating a violation of human rights and international humanitarian law is individually liable for reparations to victims.[96] While it remains a laudable aspiration, a State's duty to provide reparation for violations by non-State actors is best described as an emerging norm. [97]

90 For a discussion of these and other lawsuits against Japanese companies see Bazyler, supra n. 84 at 25–32.

91 Bazyler, ibid. at 27.

92 In *Re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal. 2000).

93 Treaty of Peace with Japan 1951, 136 UNTS 45.

94 Article 14(b), Treaty of Peace with Japan, ibid.

95 See *Hwang Geum Joo v Japan*, No. 00-CV-288 (D.D.C. filed 27 April 2001). The 'comfort women' lawsuit was dismissed after the US government filed a Statement of Interest in the case, urging the case to be dismissed. For a discussion of reparations for 'comfort women' see Nearey, 'Seeking Reparations in the New Millennium: Will Japan Compensate the "Comfort Women" of WWII?', (2001) 15 *Temple International and Comparative Law Journal* 121; and Bazyler, supra n. 84 at 25–32.

96 See also Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001).

97 The question posed is essentially different from that in *Velasquez Rodriguez*, where Honduras was found to bear responsibility for a failure to investigate and prosecute a crime committed by its agents. In that case, the State did in fact bear responsibility, but not simply for the underlying act committed by its agents, but rather for the distinct wrong, which is commonly characterised as a 'denial of justice' in failing to properly investigate and bring the perpetrators to justice. See *Velasquez Rodriguez (Preliminary Objections)* IACtHR Series C 1 (1987); and *Velasquez Rodriguez (Compensatory Damages)* IACtHR Series C 7 (1989).

With respect to Europe, the European Convention on the Compensation of Victims of Violent Crimes 1983[98] (European Compensation Convention) mandates this principle in instances when applicable international human rights or humanitarian law norms are incorporated within the domestic criminal law. The European Compensation Convention was established by the Council of Europe to introduce or develop compensation schemes for victims of violent crime, in particular when the offender has not been identified or is without resources.[99] At a minimum, the European Compensation Convention mandates that compensation be paid to victims who have sustained serious bodily injury directly attributable to an intentional violent crime, or to the dependants of the persons who have died as a result of such crime, when compensation is not fully available from other sources.[100] In these instances, compensation is to be awarded whether the offender is prosecuted or not.[101] The European Compensation Convention does not mandate any particular compensation scheme; rather it focuses on establishing minimum provisions.[102] As a result, several significant limitations may be placed on a State's duty to provide compensation. Article 3 provides that:

> Compensation shall be paid by the State on whose territory the crime was committed:
> (a) to nationals of the States party to the convention;
> (b) to nationals of all member States of the Council of Europe who are permanent residents in the State on whose territory the crime was committed.

Thus, a State Party can deny compensation to a victim who is either a non-resident or a citizen of a State that is not a member of the Council of Europe.[103] Furthermore, States may limit compensation in situations where a minimum threshold of damage is not met[104] or based on the applicant's financial situation.[105] Moreover, compensation can be reduced or refused: (1) on account of

98 ETS No. 116.
99 See Preamble, European Compensation Convention.
100 Article 1, European Compensation Convention.
101 Ibid.
102 Ibid.
103 Member States of the Council of Europe have adopted domestic measures to facilitate compensation to victims of crimes. See, for example, Victims Assistance Act and Compensation Scheme for Victims of Violent Crimes 1985 (Belgium) (providing for a fixed 'solidarity contribution' to be paid by all those who are convicted of crimes); General Compensation Scheme (enacted in the Law of 6 July 1990) (France) (providing for State compensation for victims of crime); Criminal Injuries Compensation Act of 1975 (Netherlands); Compensation from the State for Personal Injury Caused by a Criminal Act 1976 (Norway) (establishing a Compensation Tribunal for victims of violence); and Scheme of Compensation for Personal Injuries Criminally Inflicted of 1974 (Ireland) (establishing the Criminal Injuries Compensation Tribunal).
104 Article 5, European Compensation Convention.
105 Article 6, European Compensation Convention.

the victims' conduct before, during or after the crime; (2) on account of the victims' involvement in organised crime; or (3) if a full award is contrary to a sense of justice or public policy.[106]

With respect to the countries that are not State Parties to the European Compensation Convention, the 1985 Basic Principles of Justice provide a legal foundation for asserting that a State has a duty to provide a victim with reparations. The 1985 Basic Principles of Justice provide that:

> [W]hen compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to:
> (a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of a serious crime;
> (b) the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.[107]

While this recommendation envisions reparations to victims of crime, it would be applicable in cases where the relevant international violations had been incorporated into the domestic criminal law. A survey of national systems reflects this principle in the growing State practice of providing reparations to victims of crime and their families when the perpetrator is unable to do so.[108]

In 1996, the United Nations (UN) surveyed State practice with respect to the implementation of the 1985 Basic Principles of Justice, and received responses from 44 States.[109] In Cuba, Denmark, Finland, France, Mexico, Jordan, Romania and Sweden, financial compensation from the State was 100% of the reparations that the victim could claim from the offender.[110] Furthermore, 18 States reported that State funds for compensation to victims had been established pursuant to the recommendations in the 1985 Basic Principles of Justice.[111]

The concept of providing reparations from sources other than the violator has also been recognised at the international level in the ICC Statute.[112] The principle is being put into practice as evinced by the efforts of individual States and the world community (for example, through the trust fund contemplated by the ICC Statute).[113] Thus, the groundwork is being laid for establishing collective responsibility that seeks to make victims whole again.

106 Article 8, European Compensation Convention.
107 See Principle 12, 1985 Basic Principles of Justice.
108 See Report of the Commission on Crime Prevention and Criminal Justice, supra n. 83.
109 Ibid.
110 Para. 38, ibid.
111 The following are representative: Australia, Belgium, Canada, Cuba, Finland, France, Jordan, Luxembourg, Mexico, Netherlands, Oman, Peru, Philippines, Qatar, Republic of Korea, Romania, Spain and Sweden. See para. 41, ibid.
112 See Article 79, Rome Statute of the International Criminal Court 1998 (ICC Statute), 2187 UNTS 90; 6 IHRR 232 (1999).
113 For a commentary on Article 79, see Schabas, *An Introduction to the International Criminal Court* (Cambrudge: Cambridge University Press, 2001) at 150; Friman and Lewis, 'Reparation

However, while the European Compensation Convention and the 1985 Basic Principles of Justice set an important precedent establishing States' duty to provide reparations for the conduct of non-State actors, this duty is neither a universal norm nor without significant reservations.

4. Regional and International Courts' Jurisprudence on Victims' Rights

A. Jurisprudence from the Inter-American Court of Human Rights

International human rights law instruments contain a general provision that States Parties are under an obligation to respect or secure the rights embodied in the instrument.[114] These provisions have been interpreted by international bodies to require that some violations—namely serious violations of physical integrity, such as torture, extra-judicial executions and forced disappearances—must be investigated and those responsible for them brought to justice. *A fortiori*, this applies to *jus cogens* international crimes.

The groundbreaking case in which such an interpretation was first adopted is the case of *Velásquez-Rodríguez* before the IACtHR.[115] The case concerned the unresolved disappearance of Velásquez-Rodríguez in Honduras in violation of Article 7 of the ACHR, which, according to the findings of the Inter-American Commission, was committed by persons connected to or acting in pursuance of orders from the armed forces. The IACtHR interpreted Article 1(1) in conjunction with Article 7 to mean that '... States must prevent, investigate, and punish any violation of the rights recognised by the Convention and ... if possible to restore the right violated and provide compensation as

to Victims', in Lee and Friman (eds), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley, New York: Transnational, 2001) 474 at 487; and Jennings, 'Article 79: Trust Fund', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) 1005.

114 See Article 2(1), ICCPR ('to respect and to ensure ... the rights ...'); Article 1, ECHR ('shall secure'); and Article 1(1), ACHR ('to respect and to ensure ...'). See also Article 2, CAT; Article 3, ICERD; Article 2, Convention on the Elimination of All Forms of Violence Against Women 1979, 1249 UNTS 13 (CEDAW); Article 2(1), CRC; Article 7, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families ('to respect and to ensure ... the rights ...'); Article 1, Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277 ('to prevent and punish'); Common Article 1, 1949 Geneva Conventions and Optional Protocol 1; Article 2(1), Universal Declaration; Principle 1(1), Vienna Declaration; Article 2, Declaration on the Protection of all Persons From Enforced Disappearance; Article 4(c), Declaration on the Elimination of Violence Against Women, 23 February 1944, A/Res/48/104; Article 1(1), Inter-American Convention on Forced Disappearances 1994, 33 ILM 1429; and Article 1, Inter-American Convention to Prevent and Punish Torture 1988, OAS Treaty Series No. 67.

115 *Velásquez Rodríguez* IACtHR Series C 4 (1988).

warranted for damages resulting from the violation'.[116] The Court furthermore indicated that:

> the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.[117]

According to the IACtHR, the obligation not only requires States 'to effectively ensure . . . human rights'[118] but also requires that investigations be conducted 'in a serious manner and not as a mere formality preordained to be ineffective'.[119] The Court concluded that '[I]f the State apparatus acts in such a way that the violation goes unpunished . . . the State has failed to comply with its duty to ensure the full and free exercise of those rights to the persons within its jurisdiction.'[120]

The IACtHR regarded this due diligence requirement to be binding 'independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal'.[121] Thus, the obligations are equally applicable to new governments that were not in power at the time the violation occurred. Furthermore, the holding of the Court suggests that it is applicable irrespective of the scale of violations and thus even covers cases of a single, isolated violation.[122]

While both the IACtHR and the Inter-American Commission confirmed this in later decisions,[123] the exact scope of such an obligation to respect and ensure, however, is a matter of discussion, namely as regards the question of whether it implies a duty to conduct criminal proceedings. Some warn not to read too

116 Ibid. at para 166.
117 Ibid. at para. 174.
118 Ibid. at para. 167.
119 Ibid. at para. 177.
120 Ibid. at para. 176.
121 Ibid. at para. 184.
122 See Roht-Arriaza, 'Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress', in Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995) 24 at 31; Orentlicher, 'Settling Accounts—The Duty to Prosecute Human Rights Violations of a Prior Regime', (1991) 100 *Yale Law Journal* 2537; Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law', (1990) 78 *California Law Review* 451 at 475. For opinions of the African Commission on Human and Peoples' Rights, see 211/98, *Legal Resources Foundation v Zambia*, Decision adopted during the 29th Ordinary Session (2001); 9 IHRR 256 (2002) at para. 62; and 155/96, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Decision adopted during the 30th Ordinary Session (2001); 10 IHRR 282 (2003) at paras 44-8 (duty of the State to respect, protect, promote and fulfil all rights).
123 For decisions of the IACtHR, see, for example: *Garrido and Baigorria* (Reparations) IACtHR Series C 39 (1998); 7 IHRR 70 (2000) at para. 72; *Godínez Cruz* IACtHR Series C 8 (1989) at para. 184 *et seq.*; *Aloeboetoe et al.* IACtHR Series C 11 (1991) at para. 76 *et seq.*; *Gangaram Panday* IACtHR Series C 16 (1994); 2 IHRR 360 (1995); *El Amparo* IACtHR Series C 19 (1995); 3 IHRR 349 (1996) at para. 23 *et seq.*; *Neira Alegria et al.* IACtHR Series C 20 (1995); 3 IHRR 362

much into the judgment because the Court, in ordering remedies, did not direct the Honduran government to institute criminal proceedings against those responsible for the disappearance despite the fact that the lawyers for the victims' families, the Inter-American Commission and a group of international experts acting as *amici curiae* had specifically made a request to that effect. In light of the absence of any express reference to criminal prosecution as opposed to other forms of disciplinary action or punishment, the obligation to investigate violations, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation does not appear to exclude non-criminal responses *per se*, as long as one assumes a broad notion of what constitutes 'punishment.' On the other hand, the Inter-American supervisory organs have derived additional criteria for the permissibility of such non-criminal responses from the right to a remedy, as provided for in Article 25 of the ACHR, and the right to a judicial process, contained in Article 8, read together with the obligation to ensure respect embodied in Article 1. The due diligence standard set forth by the ACHR excludes some non-criminal responses, namely blanket amnesties, as elucidated by the jurisprudence of the IACtHR and Inter-American Commission, which held that the amnesty laws adopted in El Salvador,[124] Argentina,[125] Uruguay[126] and Peru[127] were incompatible with the mentioned obligations flowing from the Convention.[128]

B. Jurisprudence of the HRC and ECtHR

While differing in the degree of permissible margins of appreciation in complying with the requirements flowing from the respective instruments, the jurisprudence of the Inter-American supervisory organs was confirmed by

(1996) at para. 41 *et seq.*; *Caballero Delgado y Santana* IACtHR Series C 22 (1995); 3 IHRR 548 (1996) at para. 135 *et seq.*; *Barrios Altos* IACtHR Series C 75 (2001); 10 IHRR 487 (2003) at paras 41–4. For decisions of the Inter-American Commission on Human Rights, see, for example: Case 10.559, *Chumbivilcas v Peru* Report No. 1/96 (1996); 4 IHRR 593 (1997) (State must ensure the effectiveness of all the rights contained in the Convention by means of a legal, political and institutional system appropriate for such purposes; prevent; re-establish; compensate; duty to adopt such domestic provisions, investigate); Case 10.235, *Villamizar et al.* Report No. 11/91 (1992); Case 10.454, *Jurado* Report No. 32/92 (1992); Case 10.581, *Pedraza* Report No. 33/92 (1992); Case 10.433, *Chocas et al* Report No. 9/93 (1993); Case 10.443, *Capcha* Report No. 11/93 (1993); Case 10.528, *Castillo* Report No. 11/93 (1993); Case 10.531, *Navarro* Report No. 12/93 (1993); and Case 10.480, *Lucio Parada Cea et al.* Report No. 1/99 (1999) at para. 130. See also Ambos, 'Völkerrechtliche Bestrafungspflichten bei schweren Menschenrechtsverletzungen', (1999) 37 *Archiv des Völkerrechts* 318 at 319–21, with further references.

124 Case 10.287, *Masacre Las Hojas* Report No. 26/92 (1992).

125 Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311, *Herrera et al.* Report No. 28/92 (1992).

126 Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375, *Santos Mendoza et al.* Report No. 29/92 (1992).

127 See *Barrios Altos Case*, supra n. 123.

128 For a detailed discussion of this jurisprudence, see Cassel, 'Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities', (1996) 59 *Law and Contemporary Problems* 197 at 208–19.

the HRC and the ECtHR. The HRC concluded in its General Comment No. 20,[129] with respect to the prohibition of torture contained in Article 7 of the ICCPR, that amnesties are incompatible with the duty of States to investigate such acts; to guarantee freedom of such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.[130] The HRC also confirmed its view that amnesties are incompatible with States' obligations under the ICCPR in a number of its communications.[131]

In contrast to the Inter-American human rights bodies and the HRC, no jurisprudence with respect to amnesties has emerged in the ECtHR as yet. However, the Strasbourg organs were confronted with the question of States Parties' obligation to investigate and prosecute violations of rights guaranteed by the ECHR. In *Selmouni v France*,[132] the Court had to consider whether an inquiry for alleged acts of torture was effective. The Court affirmed earlier decisions[133] and stated that the notion of an effective remedy[134] entails the State's thorough and effective investigation capable of leading to the identification and punishment of those responsible.[135]

In the recent decision of *Al-Adsani v United Kingdom*, the ECtHR confirmed this approach.[136] However, it did not accept the applicant's claim that the UK was in breach of its obligations under the ECHR by granting State immunity to Kuwaiti authorities, at whose hands the applicant suffered from torture in Kuwait, thus precluding him from civil claims of compensation against the Kuwaiti authorities. While the Court accepted '[. . .] that the prohibition of torture has achieved the status of a peremptory norm in international law', it observed that the case at hand concerned the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of

129 General Comment No. 20, replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7), 10 March 1992, HRI/GEN/I/Rev.7 at 150; 1–2 IHRR 26 (1994).

130 See HRC General Comment 6, The Right to Life (Article 6), 30 April 1982, HRI/GEN/1/Rev.7 at 128; 1–2 IHRR 4 (1994) at para. 305; HRC General Comment 16, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17), 8 April 1988, HRI/GEN/1/Rev.7 at 142; 1–2 IHRR 18 (1994) at para. 1; HRC General Comment 29, States of Emergency (Article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11; 9 IHRR 303 (2002) (on derogations during a state of emergency).

131 See, for example, *Rodriguez v Uruguay*, supra n. 45 at paras 12.3–4.

132 *Selmouni v France* 1999-V 149; (1999) 29 EHRR 403.

133 Among others, these include the following judgments: *Aksoy v Turkey* 1996-VI 2260; (1997) 23 EHRR 553; *Assenov and others v Bulgaria* 1998-VIII 3290; (1998) 28 EHRR 652; and, *mutatis mutandis*, *Soering v United Kingdom*, A 161 (1989); (1989) 11 EHRR 439 at paras 34–5 and 88.

134 Article 13, ECHR.

135 *Selmouni*, supra n. 132 at para. 79. For cases finding a duty to investigate unlawful killings, see *McCann v United Kingdom* A 324 (1995); (1995) 21 EHRR 97 at para. 161; and *Finucane v United Kingdom* 2003-VIII 328; (2003) 37 EHRR 29 at para. 67.

136 *Al-Adsani v United Kingdom* 2001 XI 761; (2001) 34 EHRR 273 at paras 38–40.

that State, rather than the criminal liability of an individual for alleged acts of torture. In such a case, the Court considered itself 'unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged'.[137] However, by stressing the difference between criminal and civil liability,[138] it might be argued that the ECtHR would have come to the conclusion that the UK was in breach of the ECHR, had it granted immunity from its *criminal* jurisdiction to individuals that were responsible for torturing the applicant.

C. The International Criminal Court

One of the most important recognitions of the victim as a subject of international criminal law is contained in the ICC Statute. The Statute's scheme reflects the most advanced position that exists in established international criminal justice. This instrument recognises several significant principles concerning victims: (1) victim participation in the proceedings; (2) protection of victims and witnesses during Court proceedings; (3) the right to reparations or compensation; and (4) a trust fund out of which reparations to victims may be made.[139] However, it is uncertain how these provisions will be made operative and how such a right will be funded.

D. The Permanent Court of International Justice

A State's duty to make reparations for its acts or omissions is well-established in treaty-based and customary law.[140] The Permanent Court of International Justice affirmed this proposition in the *Chorzów Factory Case* when it stated:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparations in an adequate form. Reparation therefore is the indispensable complement of a failure to

137 Ibid. at para. 61. The *Al-Adsani* case was distinguished in *Ferrini v FRG*, 87 *Rivista di Diritto* Internazionale 539 (2004) concerning a war crime on the territory of the State of jurisdiction. See Gattini, 'War Crimes and State Immunity after the Ferrini Decision', (2005) 3 *Journal of International Criminal Justice* 224.

138 For the ECtHR's emphasis on this difference see *Al-Adsani*, supra n. 136 at para. 65.

139 Articles 57, 68(3) and 75 (victims' participation in various stages of Court proceedings); Articles 43 and 68 (protection of victims and witnesses); Articles 75 and 85 (rights to reparation and compensation); and Articles 75 and 79, ICC Statute (trust fund for victims). See also infra section 5 C(iii).

140 See *Palmagero Gold Fields* 5 RIAA at 298 (1931); *Spanish Zones of Morocco Claims* 2 RIAA 615 (1925) (holding that commission of a wrongful act entails a duty of reparation); *Russian Indemnity* 11 RIAA at 431 (1912); and *Martini* 2 RIAA 975 at 1002 (discussing *restitutio in integrum*).

apply a convention and there is no necessity for this to be stated in the convention itself.[141]

5. Mechanisms for Obtaining Reparation for Victims

The provision of a remedy and reparations for victims of serious violations of international human rights and humanitarian law is a fundamental component of the process of restorative justice.[142] States and their national legal systems serve as the primary vehicle for the enforcement of international human rights and humanitarian law. Accordingly, the existence of State duties to provide a remedy and reparations forms the cornerstone of establishing accountability for violations and achieving justice for victims.

While monetary compensation may be central to this process, victims often desire that their suffering be acknowledged, their violators condemned and their dignity restored through some form of public remembrance.[143] Thus, perhaps the most important goals of this process are the 're-humanisation' of victims and their restoration as functioning members of society. Achieving these restorative goals is fundamental to both the peace and security of any State since it eliminates the potential of future revenge and any secondary victimisation that may result from the initial violation.[144]

Notwithstanding the widespread abuses of recent history, few efforts have been undertaken to provide redress to either the victims or their families. This often results from the reality that the provision of remedies and reparations are undertaken by either the violator regime or a successor government

141 See *Chorzów Factory (Claim for Indemnity)*, Jurisdiction, PCIJ Reports 1927, Series A No. 8, 21.

142 See, generally, Bassiouni, 'Searching for Peace Achieving Justice: The Need for Accountability', (1998) 14 *Nouvelles Études Pénales* 45; Danieli, 'Justice and Reparations: Steps in the Healing Process', (1998) *Nouvelles Études Pénales* 303; van Boven, 'Accountability for International Crimes: The Victim's Perspective', (1998) 14 *Nouvelles Études Pénales* 349; Sandoz, 'Reflection on Impunity and the Need for Accountability', (1998) 14 *Nouvelles Études Pénales* 381; Almeida, 'Compensation and Reparations for Gross Violations of Human Rights', (1998) 14 *Nouvelles Études Pénales* 399; and Baehr, 'How to Deal with the Past', (1998) 14 *Nouvelles Études Pénales* 415.

143 See also Danieli, ibid. at 308–12. With respect to refusing compensation out of principle, Danieli quotes an Israeli idealist who had previously fought against taking money from the Germans after WWII: 'I refused. Today, I am sorry, because I concluded that I did not change anything by refusing. There are aging survivors who don't have extended family. The steady sum enables them to go on. The fact that I gave up only left the money in the hands of the Germans. We were wrong.' (at 308). For further discussion of the forms of non-monetary victim reparation, see, generally, Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston, MA: Beacon Press, 1999).

144 For example, the victims may be forced to flee their homelands or deprived of any means of providing for themselves or their families, which subsequently leaves them vulnerable to future victimisation, including starvation, discrimination, and slave-like working conditions. See Victims of Crimes: Working Paper Prepared by the Secretariat, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1 August 1985, A/Conf.121/6, in Bassiouni, supra n. 58 at 241.

that has treated post-conflict justice as a bargaining chip rather than an affirmative duty. However, the international community has become increasingly concerned with providing a legal framework that ensures the redress of violations of international human rights and humanitarian law norms.

Providing victims with a right of reparation is, therefore, an empty victory if there is no corresponding mechanism to provide a victim with a forum to press a claim or obtain an award. One of the cornerstones of a victim's right to reparation is that States have an obligation to have some form of mechanism in place to redress violations of their international and domestic legal obligations.

A. National Prosecutions or Civil Remedies

(i) Universal Jurisdiction

Traditionally, States have enacted criminal laws which provide that their national courts can prosecute anyone accused of committing crimes on their territory, regardless of the nationality of the accused and the victim.[145] However, under international law, States can also enact national criminal laws that allow national courts to investigate and prosecute people suspected of crimes committed outside the State's territory, including crimes committed by a national of the State, crimes committed against a national of the State and crimes committed against a State's essential security interests. There is, however, an all-inclusive form of jurisdiction called universal jurisdiction which provides that national courts can investigate and prosecute a person suspected of committing a crime anywhere in the world regardless of the nationality of the accused or the victim or the absence of any links to the State where the court is located. Certain crimes, including, specifically, genocide, crimes against humanity, war crimes, torture, slavery and slave-like conditions, extrajudicial executions and disappearances are so serious that they amount to an offence against the whole of humanity, and therefore, all States have a responsibility to bring those responsible to justice. This view is illustrated in the Preamble to the ICC Statute.[146]

145 See Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia: University of Pennsylvania Press, 2003); and Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', (2001) 42 *Virginia Journal of International Law* 81.

146 The Preamble to the ICC Statute states in part:

> Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time, Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,
> Recognizing that such grave crimes threaten the peace, security and well-being of the world,
> Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be

While some States have opened their courts to victims of violations that occurred outside of their borders, this type of remedy is not without difficulties. As a general rule, the 'courts of one country will not sit in judgment on the acts of the government of another done within its own territory'.[147] With few exceptions,[148] this renders a foreign State immune for its conduct within another State's domestic legal system, regardless of whether the action attributed to the State violates international law. For example, in *Siderman de Blake v Argentina*, a US court held that Argentina was immune from legal process for its alleged *jus cogens* violations of international law.[149]

Notwithstanding, whilst States have been unwilling to pass judgment on the foreign sovereign, this rule has not prohibited them from sitting in judgment on the acts of citizens of another State, whether State or non-State actors.[150] Thus, if the domestic legal system has an adequate basis to assert jurisdiction over the person, then the State of nationality may permit either a civil claim against the violator or a *partie civile* to complement its own criminal prosecution. In civil law systems, victims having certain rights may also be allowed to join in national prosecutions as *partie civile* in criminal proceedings. Victims and their heirs should be able to institute legal actions to obtain compensatory damages or to receive some form of injunctive relief, compelling the inclusion of a person in national criminal prosecution or in the category of those subject to lustration laws.[151]

> ensured by taking measures at the national level and by enhancing international cooperation,
> Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,
> Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes...

147 See *Underhill v Hernandez* 168 US 250, 252 (1897). See also *Banco Nacional de Cuba v Sabbatino* 376 US 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964); *Alfred Dunhill of London Inc. v Republic of Cuba* 96 S.Ct. 1854, 1859, 425 US 682, 691, 48 L.Ed.2d 301, 301 (1976); and *US v Pink* 62 S.Ct. 552, 567, 315 U.S. 203, 233, 86 L.Ed. 796, 796 (1942).

148 See Foreign Sovereign Immunities Act, 28 USC §§1330, 1602–11. The Foreign Sovereign Immunities Act provides the sole basis for obtaining jurisdiction over a foreign State in US courts. This statute provides for only commercial suits against a state. See *Nelson v Saudi Arabia* 508 US 349 (1993) (alleged acts of torture were not within the commercial exception to sovereign immunity).

149 See *Siderman de Blake v Argentina* 965 F.2d 699, 719 (9th Cir. 1992); See also *Hirsch v Israel* 962 F. Supp. 377, 385 (SDNY 1997); and *Von Dardel v Union of Soviet Socialist Republics* 736 F. Supp. 1 (DDC 1990). The reasoning in *Siderman de Blake* was also adopted in the English case of *Al-Adsani v Kuwait* [1995] 103 ILR 420.

150 See Evans, 'International Wrongs and National Jurisdiction', in Evans (ed.), *Remedies in International Law: The Institutional Dilemma* (Oxford: Hart Publishing, 1998) 173 at 175 and 182–9. Evans is of the opinion that the new emphasis in international law on individual responsibility obfuscates the need to hold States accountable for their failure to comply with their international obligations.

151 But see *Linda R.S. v Richard D.* 410 US 614, 619 (1973), where the Court held that 'in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another.'

A State has limited ability to provide a remedy to non-national victims who were not injured in that State's territory. Still, a limited number of national systems provide access to a remedy for alien victims. The exercise of these domestic remedies is quite limited as a result of both strict jurisdictional requirements and the reality of enforcing the judgment.

(ii) The US Alien Tort Claims Act

Under the Torture Victim Protection Act,[152] the United States provides jurisdictional grounds for its nationals to sue an individual for an official act of torture. However, this cause of action is limited by both the claimants' ability to gain *in personam* jurisdiction over the defendant and their exhaustion of local remedies in the foreign jurisdiction. A requirement of personal jurisdiction over the offender constitutes a serious limitation with respect to the victim's pursuit of a remedy, whether civil or criminal. Unless the offender happens to be in the jurisdiction by chance, this remedy is often meaningless. However, the national's State could request extradition based on a protective interest theory. Nevertheless, if the victim was unable to obtain a remedy in the foreign State, it is doubtful that the State would either extradite the individual or enforce a foreign civil or penal judgment.

The US Alien Tort Claims Act (ATCA)[153] provides that 'the district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.[154] Over the past 20 years, claims have been filed under the ATCA by alien plaintiffs

152 Torture Victim Protection Act, Pub. L. 102-256, Mar. 12, 1992 (codified at 28 USC § 1350). See Goodman, 'Congressional Support for Customary International Human Rights as Federal Common Law: Lessons of the Torture Victim Protection Act', (1998) 4 *ILSA Journal of International and Comparative Law* 455; Murray, 'The Torture Victims Protection Act: Legislation to Promote Enforcement of the Human Rights of Aliens in U.S. Courts', (1987) 25 *Columbia Journal of Transnational Law* 673; Haffke, 'The Torture Victim Protection Act: More Symbol Than Substance', (1994) 43 *Emory Law Journal* 1467; Gruzen, 'The United States as a Forum for Human Rights Litigation: Is This the Best Solution?', (2005) 14 *Transnational Law* 207 at 230–3 (discussing overlap between the Torture Victim Protection Act and the Alien Tort Claims Act); and Aceves, 'Affirming the Law of Nations in U.S. Courts', (2002) *Federal Lawyer* 33 at 36.

153 Alien Tort Claims Act, 28 USC § 1350. See Stephens, 'Individuals Enforcing International Law: The Comparative and Historical Context', in 'Symposium: Export/Import: American Civil Justice in a Global Context', (2002) 52 *DePaul Law Review* 433; Delisle, 'Human Rights, Civil Wrongs and Foreign Relations: A 'Sinical' Look at the Use of U.S. Litigation to Address Human Rights Abuses Abroad', ibid. 473; Shaw, 'Uncertain Justice: Liability of Multinationals Under the Alien Tort Claims Act', (2002) 54 *Stanford Law Review* 1359; Poullaos, 'The Nature of the Beast: Using the Alien Tort Claims Act to Combat International Human Rights Violations', (2002) 80 *Washington University Law Quarterly* 327; Betz, 'Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict Ridden Nations', (2001) 14 *DePaul Business Law Journal* 163; and Dellapenna, 'Civil Remedies for International Terrorism', (2000) 12 *DePaul Business Law Journal* 169.

154 28 USC § 1350.

for genocide,[155] war crimes,[156] slavery,[157] torture,[158] forced disappearance,[159] arbitrary detention,[160] summary execution,[161] cruel, unusual and degrading treatment[162] and environmental damage.[163] Under the ATCA, only violators in their individual capacity can be named as defendants and, as such, a violator foreign State is immune.[164] Furthermore, the court must be able to exercise *in personam* jurisdiction over the individual defendant, which requires the defendant to be present in the United States at least for service of process. This requirement presents a unique challenge, and severely limits the ability of a plaintiff to pursue a claim, as personal jurisdiction is often achieved only by chance. For example, in one case, a victim of torture in Ethiopia who was living in exile in the United States stumbled across her former torturer in a hotel in Atlanta where they both happened to work.[165]

One of the most important cases interpreting the ATCA is the *Kadic* case decided by the Second Circuit Court of Appeals in 1995.[166] In that case, two groups of victims from Bosnia and Herzegovina brought actions for damages (under the ATCA) against Radovan Karadzic, the then-President of the Serbian part of the Bosnian Federation called Republika Srpska. The victims and their representatives asserted that they were victims of various atrocities including brutal acts of rape, forced prostitution, forced impregnation, torture and summary execution which were carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the war in former Yugoslavia.[167] Karadzic's liability was predicated on the fact that the plaintiff's injuries were committed 'as part of a pattern of systematic human rights violations that was directed by Karadzic and carried out by military forces under his command'.[168]

155 *Kadic v Karadzic* 70 F.3d 232, 241 (2d Cir. 1995). For an example of a class action lawsuit under the ATCA, see *In Re Estate of Ferdinand E. Marcos* 978 F.2d 493 (9th Cir. 1992); and *In Re Estate of Marcos* 25 F.3d 1467 (9th Cir. 1994) ('*Marcos* litigation').

156 *Kadic*, ibid. at 242–3; and *Doe I v Islamic Salvation Front* 993 F. Supp. 3, 8 (DDC 1998).

157 *Doe I v Unocal* 963 F. Supp. 880, 892 (CD Cal. 1997).

158 *Filartiga v Pena-Irala* 630 F.2d 876 (2d Cir. 1980).

159 *Forti v Suarez-Mason* 694 F. Supp. 707 (N.D. Cal. 1988).

160 *Martinez v City of Los Angeles* 141 F.3d 1373 (9th Cir. 1998); and *Eastman Kodak v Kavlin* 978 F. Supp. 1078, 1092 (SD Fla. 1997).

161 *Xuncax v Gramajo* 886 F. Supp. 162 (D. Mass. 1995).

162 Ibid. at 887.

163 *Aguinda v Texaco, Inc.* 1994 WL 142006 at *1 (No. 93 Civ. 7527) (SDNY April 11, 1994).

164 Foreign Sovereign Immunities Act, supra n. 148.

165 See *Abebe-Jira v Negewo* 72 F.3d 844 (11th Cir. 1996).

166 *Kadic*, supra n. 155. In this case, the plaintiffs were among the rape victims who were interviewed by the Commission of Experts in 1993. A published summary of what they and other victims suffered is contained in the Annex II to the Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), 27 May 1994, S/1994/674 (1994); *Annexes to the Final Report*, 27 May 1994, S/1994/674/Add.2 (1994).

167 *Kadic*, ibid. at 236–7.

168 Ibid. at 237.

The suit was dismissed in September 1994 by a District Court judge who held that 'acts committed by non-state actors do not violate the law of nations'.[169] Finding that the 'current Bosnian-Serb warring faction' did not constitute a 'recognized state',[170] and that 'the members of Karadzic's faction do not act under the color of any recognized state law,' the District Judge found that 'the acts alleged in the instant action[s], while grossly repugnant, cannot be remedied' thorough the ATCA.[171]

The Court of Appeals reversed that decision, holding that the plaintiffs sufficiently alleged violations of customary international law and the laws of war for the purposes of the ATCA. The Court dismissed the argument that the law of nations 'confines its reach to state action'.[172] Rather, the Court of Appeals held that 'certain forms of conduct violate the law of nations whether undertaken by those acting under the 'auspices of the state or only as private individuals'.[173] Noting that the customary international law of human rights 'applies to states without distinction between recognized and unrecognized states', the Court held that the plaintiffs sufficiently alleged that Republika Srpska was a 'State' and that Karadzic acted under colour of law for the purposes of international law violations requiring official action.[174] Finally, the Court held that Karadzic was not immune from personal service of process while an invitee of the UN[175] and that the causes of action brought by the plaintiffs were not precluded by the political question doctrine.[176] As a result of these findings, the decision of the District Court was reversed and the cases were remanded for further proceedings.[177]

The potential monetary judgments in ATCA cases are substantial. For example, in *Mushikiwabo v Barayagwiza*, over $100 million (US) was awarded

169 866 F. Supp. 734, 739.
170 Ibid. at 741.
171 Ibid. at 740–1.
172 *Kadic*, supra n. 155 at 239.
173 Ibid.
174 Ibid. at 245.
175 Ibid. at 248.
176 Ibid. at 249 and 250. The act of State doctrine was not asserted in the District Court and, therefore, was waived on appeal, ibid. at 250.
177 Despite the court's ruling, Karadzic did not submit to a requested deposition in the matter and the case was appealed all the way to the US Supreme Court, which denied review. See 518 US 1005 (1996). On 27 February 1997, without giving the requisite deposition, Karadzic notified his attorney Ramsey Clark that he no longer wanted to mount a defense to the suit. See Appleson, 'Karadzic Drops Human Rights Case Defense', *Reuters News Service*, 4 March 1997. Following Karadzic's default, US District Court Judge Peter Leisure entered a default judgment against the former Bosnian Serb leader finding him liable for directing troops to terrorise the women of Bosnia and Herzegovina through an organised campaign of mass rape between 1991 and 1993. In August 2000, a jury awarded $745 million (US) to the plaintiffs. See Freund, 'Karadzic Verdict', available at: http://www.hri.org/news/usa/voa/2000/00-08-10.voa.html#03. In another case against Karadzic, also brought under the provisions of ATCA, the jury in New York awarded $4.5 billion in compensatory and punitive damages to the plaintiffs. See 'Radovan Karadzic Proven Guilty of Atrocities', *Associated Press*, 27 September 2000.

to five plaintiffs against a single defendant arising out of the genocide in Rwanda.[178] But the actual likelihood of attaining full satisfaction from the defendant is minimal; unless the defendant has significant assets in the jurisdiction or his State of nationality is willing to enforce the judgment, the victim is likely to receive virtually no compensation.[179] ATCA cases illustrate that domestic remedies in a third State can be complicated due to the lack of effective inter-State mechanisms for the recognition of foreign judgments.[180] However, it does serve the purposes of documenting the violations and providing, at the very least, a public forum for the victim to expose and denounce the perpetrator.

Many domestic courts are not willing or able to fulfil and enforce international and domestic legal obligations. In some cases, a violator regime is still in power or the domestic legal infrastructure has been so devastated by conflict that it is unable to cope with claims.[181]

(iii) Specialised National Courts

An example of a national human rights mechanism established by the parties to the conflict in the former Yugoslavia, and pursuant to an internationally-brokered peace agreement, is the Commission on Human Rights (which is

178 *Mushikiwabo v Barayagwiza* 1996 WL 164496 at *3 (94 Civ. 3627) (SDNY April 9, 1998) (not reported in F.Supp.). Other similar awards include one of several million dollars per plaintiff against a single individual defendant in *Xuncax*, supra n. 161 at 197–202, and a judgment of over $10 million (US) against a defendant police inspector in *Filartiga v Pena-Irala* 577 F. Supp. 860, 867 (EDNY 1984).

179 In other cases brought under the ATCA, progress towards the recovery of damages awarded by US courts has been extremely limited. For example, in *Filartiga v Pena-Irala* the plaintiffs were unsuccessful in attempting to enforce the judgment of the US Court in Paraguay. In *Forti v Suarez-Mason*, supra n. 159, where $8 million (US) was awarded as total damages in 1990, the plaintiffs could only recover $400 (US) from the defendant via a local bank account from which a defendant's family member was receiving a monthly disbursement. The plaintiffs in *Abebe-Jira v Negewo*, supra n. 165 (damages award of $1.6 million (US)) and *Mushikiwabo v Barayagwiza*, ibid. (damages award of $105 million (US)), have all been unsuccessful in their attempts to enforce the judgments and collect damages awarded. In the *Marcos* litigation part of the damages award has been turned over from Swiss banks to the Philippines government and the plaintiffs are presently trying to enforce the judgment in Philippines courts.

180 A pair of conventions aimed at addressing this problem in the Member States of the European Union are the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (Brussels Convention), [1972] OJ L/299/32, as amended by the 1989 Accession Convention, and the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1988 (Lugano Convention). Since the conventions only apply to parties that are members of the EU, they have a limited geographic reach. The Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission of the Hague Conference on Private International Law at its fifth meeting in October 1999, is intended to be universal in scope and provide a more comprehensive solution to the problems associated with the enforcement of foreign judgments.

181 A good example is found in the case of Guatemala where officials obstruct the criminal process and the incompetence and inadequate resources for the administration of justice resulted in a record of impunity for human rights violations. See Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights', supra n. 2 at 1480–1501.

comprised of an Ombudsperson and a Human Rights Chamber) established pursuant to the provisions of the Dayton Peace Agreement signed in Paris on 14 December 1995.[182] Pursuant to the terms of the Peace Agreement,[183] the Human Rights Chamber, had jurisdiction over violations of human rights as provided in the ECHR, as well as 15 other documents provided for in the Peace Agreement.[184] The Chamber was composed of 14 members, eight being appointed by the Committee of Ministers of the Council of Europe, four members appointed by the Federation of Bosnia and Herzegovina and two members by Republika Srpska.[185] Victims could submit cases to the Chamber either in their individual capacity or through representative organisations and groups. In cases where a violation was found, the Chamber had competence to award reparations which it deemed most appropriate to redress the violation in question, including restitution of illegally taken property and monetary compensation. Although alternative forms of reparation have been awarded in a small number of cases, the principal form of redress awarded by the Chamber has been monetary compensation.[186]

B. Regional Commissions and Courts

Several regional mechanisms also exist that provide victims with an alternative venue to pursue a claim. These include the African, American and European human rights commissions and courts.[187] These entities provide an important check to national systems. However, it should be noted that they are not venues of first instance as they all require victims' prior exhaustion of domestic remedies.

In the Inter-American System, the victim presents claims first to the Inter-American Commission.[188] The Commission investigates the claims and attempts to facilitate a settlement with the offending State.[189] If this is not accomplished

182 The signing of the Dayton Peace agreement ended the conflict in the former Yugoslavia. It was concluded by the Republic of Bosnia and Herzegovina, the Federal Republic of Yugoslavia, and the Republic of Croatia on 21 November 1995 in Dayton, Ohio. For the text of the Agreement see (1996) 35 *International Legal Materials* 75. See Williams and Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (Oxford: Rowman & Littlefield Publishers, 2002); and Gaeta, 'The Dayton Peace Agreement and International Law', (1996) 7 *European Journal of International Law* 2.

183 In particular, Annex II, Article II, Dayton Peace Agreement.

184 See Appendix to Annex VI, Dayton Peace Agreement. The Chamber ceased functioning in December 2003.

185 See the website of the Bosnian Human Rights Chamber, available at: http://wwwuser.gwdg.de/~ujvr/hrch/hrch.htm.

186 Alternative measures of victim redress awarded by the Human Rights Chamber include the revocation of a municipal ordinance for the closure of a Muslim cemetery ordered in *Islamic Community in BiH v Republika Srpska* Case No. CH/99/2177 (2000); 10 IHRR 584 (2003) and the ordering of investigation into the conduct of local enforcement officials involved in the commission of human rights abuses against the applicant in *Przulj v Federation of BiH* Case No. CH/98/1374 (2000); 8 IHRR 845 (2001).

187 See supra n. 21.

188 Article 44, ACHR.

189 Article 48, ACHR.

and there is merit to the claim, then the Inter-American Commission may submit the claim to the IACtHR, if the defendant State has accepted that Court's jurisdiction.[190]

While the victim also has a right of access to the ECtHR, the jurisprudence of the ECtHR includes many decisions involving several Member States as to the rights of victims with respect to access to national criminal proceedings. This jurisprudence evidences the symbolic nature of victims' participation in domestic legal processes even when such a right is legislatively recognised. However, the ECtHR has never recognised that under the ECHR a victim has a right to participate in national criminal proceedings if national law does not provide such a right. Some legal systems allow the victim to initiate a criminal action but through an official channel such as the prosecutor or the judge of instruction. However, even in those cases, the victim does not have the right to examine witnesses or appeal decisions in criminal cases. Criminal proceedings are more limiting than civil proceedings, which are not only initiated by the victim but are carried out by the victim, who is the moving party in the proceedings. The jurisprudence of the ECtHR that limits the rights of victims in the course of criminal proceedings is without prejudice to victims' rights with respect to compensation, reparations and other redress modalities as may be provided under national law. The jurisprudence of the IACtHR and the ECtHR has played a significant role in clarifying the rights of victims to redress and is reflected in the 1985 Basic Principles of Justice.[191]

C. International Claims or Criminal Prosecutions

As noted earlier, victims have limited standing to pursue claims for violations of human rights and international humanitarian law norms. Typically, such claims have had to be presented by the State of nationality or a State with a 'genuine link' to the victim. Even the language of the famous *obiter dictum* in *Barcelona Traction* conceived of *erga omnes* obligations owed to 'the international community as a whole', and did not imply an individual right of enforcement.[192] However, international treaty bodies such as the Committee Against Torture, established by the Convention Against Torture,[193] provide for different standing thresholds. Movement in this direction is positive but, as yet, incomplete in assimilating the rights of victims and their access to justice.

190 Articles 60 and 61, ACHR.

191 See notes accompanying Section 3.

192 *Barcelona Traction, Light and Power Co. Ltd. (Belgium v Spain)* ICJ Reports 1970, 3.

193 See Rodley, *The Treatment of Prisoners Under International Law*, 2nd edn (Oxford: Oxford University Press, 1999); Burgers and Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff, 1988); and de la Cuesta Arzamendi, *El Delito de Tortura* (Barcelona: Bosch, 1990).

(i) United Nations Compensation Commission

In 1991, after the war in Iraq, the UN Security Council established a Compensation Fund and UN Compensation Commission (UNCC), under Chapter VII of the UN Charter, to administer and process compensation claims arising out of Iraq's unlawful invasion and occupation of Kuwait.[194] The UNCC was not envisioned as a court or tribunal, but rather a 'claims resolution facility'.[195] It was designed to deal with property compensation issues arising from unlawful activities and international human rights and humanitarian law violations. The UNCC was the first victim-compensation system ever to be established by the Security Council acting under Chapter VII of the UN Charter. It provided individual victims with a primary role in the process of compensation. In contrast to the established practice of providing compensation only to injured States, the UNCC compensation scheme provides a pioneering procedure whereby a State is required to provide direct compensation to both individual victims and corporate entities.[196] Since its establishment in 1991, the UNCC has received over 2.7 million claims seeking compensation in excess of $350 billion (US).[197] The claims were considered and resolved by panels, each of which was made up of three Commissioners who were independent experts, with the assistance of technical experts and consultants with respect to the verification and valuation of the claims. The panel's recommendations on the claims were then submitted to the Governing Council, whose membership was identical to that of the Security Council, for approval. The payment of compensation awards awarded by the UNCC was provided from the Compensation Fund established by the Security Council, which was principally funded by

194 See SC Res. 692, 20 May 1991, S/RES/692 (1991). See also Crook, 'Current Development: the United Nations Compensation Commission–A New Structure to Enforce State Responsibility', (1993) 87 *American Journal of International Law* 144.

195 Secretary-General's Report, 2 May 1991, S/22559.

196 Individual victims and corporations were required to present their claims through their respective governments or international organisations on behalf of those individual victims who are not in a position to have their claims filed by a government. The latter type of claims were submitted by, for example, the United Nations Development Program and the UN High Commissioner for Refugees.

197 See UNCC website, available at: http://www.unog.ch/uncc/start.htm.

198 The Fund is principally funded from 25% of revenues of the sales of Iraqi oil in accordance with the UN Oil-for-Food Program.

199 While the approach of the UNCC in incorporating victims in the processing of mass claims resolutions is innovative, it should also be noted that the experiences of international dispute resolution bodies dealing with commercial claims are instructive as to the possibility of processing large numbers of individual claims and can be seen as a potential model with respect to future processes established to process the claims of victims who have experienced serious violations of fundamental rights. The Iran-United States Claims Tribunal (IUSCT) is one such arbitral body. The IUSCT arose as one of the measures taken to resolve the hostage crisis at the US Embassy in Tehran and the subsequent freeze of Iranian assets by the US. The IUSCT was established in 1981 pursuant to the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, commonly referred to as the Algiers Accords.

a percentage of the proceeds generated by export sales of Iraqi petroleum and petroleum products.[198] The work of the UNCC concluded in June 2005, when the UNCC had approved awards of approximately $52.5 billion (US) in respect of approximately 1.55 million claims, of which $20.6 billion (US) has been made available to the governments and international organisations for distribution to successful claimants. Sadly, while the UNCC provided an interesting model for incorporating victims' voices in mass claims resolutions,[199] it also had a major impact upon ordinary Iraqis, in effect, punishing a war-weary and impoverished society for the aggressions of a dictator.

(ii) The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda

In 1993, responding to serious violations of international humanitarian law committed in the former Yugoslavia, the UN Security Council passed a resolution creating the International Criminal Tribunal for the former Yugoslavia (ICTY). Security Council Resolution 827 of 25 May 1993, which contained the Statute of the ICTY, stated in its preambular language that the 'work of the International Criminal Tribunal will be carried out without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of humanitarian law'.[200] In 1994, in response to the murder of approximately 800,000 Rwandans, the UN Security Council passed a resolution creating the International Criminal Tribunal for Rwanda (ICTR).[201]

Although both *ad hoc* tribunals play a role in the enforcement of international criminal and humanitarian law, they fail to adequately address the issue of victim reparations. The tribunals' statutes and judge-made rules

See Caron, 'The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution', (1990) 84 *American Journal of International Law* 104. The IUSCT began hearing claims for the taking of property in 1983. For the text of the Accords, see 1 Iran-United States Claims Tribunal Reports 9. Further information regarding the IUSCT is available at: http://www.iusct.org. The IUSCT received 4,700 private claims by US citizens filed against the Government of Iran, most of which have been resolved and have resulted in more than $2.5 billion (US) in awards to the US citizens and companies; the period for filing new private claims against Iran expired on 19 January 1982. See Iran–United States Claims Tribunal, available at: http://www.state.gov/s/l/3199.htm. The example of collective mechanisms such as the IUSCT and the implementation of this type of model with respect to victims' rights could serve the overall goal of the 2006 Basic Principles and Guidelines.

200 See SC Res. 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, 25 May 1993, S/RES/827 (1993) (ICTY Statute). It was clear at that time that there was no intention on the part of the Security Council to implement victims' rights in the Statute. For a comment on the ICTY's reference to victims in its Statute's Preamble, see Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Ardsley Park, NY: Transnational Publishers, 1996) at 234–45.

201 SC Res. 955, Establishing the International Tribunal for Rwanda (with Annexed Statute), 8 November 1994, S/RES/955 (1994) (ICTR Statute). The ICTR Statute does not refer to victim compensation.

of procedure and evidence provide only limited guidance on the issue of reparations. In particular, the legal provisions of both tribunals limit reparations to the return of stolen property 'to their rightful owners', without providing redress for personal injuries of a physical or mental nature.[202] Rule 106 in both the tribunals' Rules of Procedure allows a victim, or persons claiming through the victim, to bring a legal action in national courts (or other competent body) for compensation, provided that relevant national legislation is available.[203] Thus, the structure of the tribunals pre-supposes individual access to national courts on the part of individual victims and leaves the ultimate decision on whether to provide compensation to a victim to national justice systems.

202 Article 24(3), ICTY Statute. See Lasco, supra n. 20 at 19. Rule 105 at both *ad hoc* tribunals further elaborates on the procedure for carrying out restitution in case the Trial Chamber can determine the rightful owner. The issue of victims' reparations has also been inadequately addressed by the hybrid tribunals that have been established in East Timor, Sierra Leone and Kosovo and the hybrid tribunal that is to sit in Cambodia. The Special Panels for Serious Crimes in East Timor were the most ambitious of the hybrid tribunals with respect to victims' rights and victim compensation. However actual results were disappointing. See United Nations Transnational Administration in East Timor (UNTAET) Regulation 2000/11 on the Organization of Courts in East Timor, 6 March 2000, UNTAET/REG/2000/11; UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses, 6 June 2000, UNTAET/REG/2000/15; and UNTAET Regulation 2000/30 on Transitional Rules of Criminal Procedure, 25 September 2000, UNTAET/REG/2000/30 (adopting the law of the ICC with minor variations with respect to the rules and procedures governing the Special Panels for Serious Crimes). While the mechanisms for addressing victims' rights were modelled on the expansive ICC provisions regarding the victim compensation, see infra Section 5 C(iii), the rights of victims were not truly taken into account or properly addressed in the decisions of the panels. The structure and provisions establishing and governing the hybrid tribunals of Sierra Leone, Kosovo and Cambodia are less ambitious with respect to victims' rights. See Article 14, Statute of the Special Court for Sierra Leone; and Article 10, Special Court Agreement (2002) Ratification Act (incorporating the Rules of Procedure and Evidence of the ICTR aplicable at the time of establishment of the Special Court) and Rules of Procedure and Evidence, as amended 14 May 2005 (amending Rules 105 and 106 in a non-substantive manner with respect to the approach to victim reparations and providing no further mechanism for obtaining victim reparations); United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation 1999/5 on Establishment of an Ad Hoc Court of Final Appeal and an Ad Hoc Office of the Public Prosecutor, 4 September 1999, UNMIK/REG/1999/5; UNMIK Regulation 1999/6 on Recommendations for Structure and Administration of the Judiciary and Prosecution Service, 7 September 1999, UNMIK/REG/1999/6; UNMIK Regulation 2000/15 on Establishment of the Administrative Department of Justice, 6 June 2000, UNMIK/REG/2000/15; UNMIK Regulation 2000/64 on Assignment of International Judges/Prosecutors and/or Change of Venue, 15 December 2000, UNMIK/REG/2000/64; and Article 39, Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 2001 (providing that the Court may, in addition to ordering imprisonment, order the confiscation of personal property, money and real property acquired unlawfully or by criminal conduct; however, any such confiscated property is to be returned to the State).

203 Rule 106,Rules of Procedure and Evidence. National courts are bound by the Tribunals' findings with respect to the criminal responsibility of the convicted person. Nothing has come from Rule 106, however, even though the cases dealt with by the ICTY evidenced the victimisation of specific persons, as well as a larger category of victims mostly unidentified in the cases.

In post-war Yugoslavia and Rwanda, domestic courts were ill-prepared to handle such cases.[204]

(iii) The International Criminal Court

The most promising potential for the development of victims' rights lies in the ICC provisions concerning victim compensation.[205] Rule 85 of the ICC Rules of Procedure and Evidence defines victims as: (a) 'Natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court' and (b) 'organizations or institutions that have sustained direct harm to any of their property'.[206] The definition of a victim under the ICC Statute and Rules is broader than those set out in the ICTY and ICTR provisions. It does not require that the victim be a direct target of the crime.[207] Rule 85, therefore, covers all persons who have directly or indirectly suffered harm as a result of a commission of any crime within the jurisdiction of the court.[208] Since the ICC definition also includes 'organizations,' this definition is also broader than the definition contained in the 1985 Basic Principles of Justice that speaks of 'persons' and does not include 'legal persons'.[209] The inclusion of entities in the definition of victims is established through Article 8 of the ICC Statute, which denotes certain objects as forbidden targets of military operations,[210] owners of which may properly be considered victims of reparations.

204 Rules 105 or 106 have yet to be applied in the jurisprudence of the ICTY, and no restitution or compensation was ordered pursuant to these provisions in the national courts of the former Yugoslavia. See Chifflet, 'The Role and Status of the Victim', in Boas and Schabas (eds), *International Criminal Law Developments in the Case Law of the ICTY* (Leiden: Martinus Nijhoff, 2003) 75. In October 2000, the President of the ICTY proposed to the UN Security Council the establishment of a 'claims commission' that would provide a 'method of compensation' for the victims of crimes in the former Yugoslavia. (Ibid. at 102, citing the Report attached to a letter dated 12 October 2000 from the President of the ICTY addressed to the Secretary-General, S/2000/1063, Annex, para. 45.) As noted by Chifflet, this effectively ended any prospect that the proceedings before the Tribunal would be extended to include the granting of compensation to the victims of crimes committed in the former Yugoslavia (ibid. at 104). In addition, the Security Council is yet to respond to the President's invitation to create a compensation commission. The situation is similar at the ICTR where the judges have rejected proposals to amend the ICTR Statute with the aim of providing direct redress to victims. See Letter of 14 December 2000 by the UN Secretary-General to the UN Security Council, 15 December 2000, S/2000/1198, at Annex.

205 Articles 75 and 79, ICC Statute.

206 Rule 85, International Criminal Court Rules of Procedure and Evidence, 9 September 2002, ICC-ASP/1/3 (ICC Rules of Procedure and Evidence).

207 See Timm, 'The Legal Position of Victims in the Rules of Procedure and Evidence', in Fischer, Kress and Lüder (eds), *International and National Prosecution of Crimes Under International Law: Current Developments* (Berlin: Arno Spitz, 2001) 307.

208 Rule 85, ICC Rules of Procedure and Evidence. See also Donat-Cattin, 'The Rights of Victims and International Criminal Justice', in ELSA (ed.), *International Law as We Enter the 21st Century* (Berlin: Arno Spitz, 2001) 186; and Donat-Cattin, 'The Role of Victims in ICC Proceedings', in Lattanzi and Schabas (eds), *Collection of Essays on the Rome Statute of the International Criminal Court* (Sirente: Ripa Fagnano Alto, 1999) 1.

The ICC also has the power to order the payment of appropriate reparation to the victims by the convicted person.[211] The Court, either by request or in exceptional circumstances on its own motion, may determine the scope and extent of any damage, loss and injury to victims.[212] The Court may, then, make an order for reparation (compensation, restitution and rehabilitation) directly against the convicted person.[213] Before making an order, the ICC may invite and take account of representations from or on behalf of the offender, victims and other interested persons or States.[214] By inviting comment from other interested persons, the Court may take into account the needs of the victim and others who might be affected by the award, such as the offender's family or a *bona fide* purchaser of property that is to be restored. In order to facilitate enforcement of awards, the ICC Statute mandates States Parties to give effect to all decisions entered.[215]

The ICC Statute also envisions a Trust Fund for the benefit of victims and their families.[216] Assets of the Trust Fund may come from money or property collected through fines or forfeiture.[217] The ICC Statute leaves open the determination of what the court may do with forfeitures. The Court may use forfeiture funds to order reparations to victims, or it can turn over the proceeds of forfeitures to the Trust Fund for distribution to victims.[218] The Court is powerless to order reparations from anyone other than the individual violator. Thus, even though the individual offender's acts may be attributed to the State, an order for reparations cannot be imposed on that State. However, nothing in Article 75 is

209 See 1985 Basic Principles of Justice.

210 Article 8, ICC Statute.

211 Article 75, ICC Statute. See also Donat-Cattin, 'Article 75: Reparations to Victims', in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, supra n. 113, 965.

212 Article 75(1), ICC Statute. Under Rule 102, ICC Rules of Procedure and Evidence, a victim's request for reparations shall be made in writing. The request is filed with the Registrar and must be as specific as possible in terms of content. Thus, it should include, at a minimum, the victim's identity and address, a description of the incident, injury, loss or harm suffered, the form of compensation sought, as well as the identity of the alleged perpetrator (if known). See Timm, supra n. 207 at 302 and 303 (discussing conditions and content of the Award).

213 Article 75(2), ICC Statute.

214 Article 75(3), ICC Statute. Claims for reparations can be heard in a separate hearing (related to sentencing) and may be initiated by the victims or their legal representative. See Article 76(3), ICC Statute and Rule 143, ICC Rules of Procedure and Evidence. At the hearing, the legal representative of the victim(s) may question witnesses, experts and the convicted person. (Rule 93(4), ICC Rules of Procedure and Evidence.)

215 Article 75(5), ICC Statute. Under the provisions of this Article, reparations are treated in the same manner as fines and forfeitures. National courts may not modify the order for reparations during its enforcement. (Rule 129, ICC Rules of Procedure and Evidence.) Furthermore, Rule 218 provides for the content of every reparation order issued by the Court.

216 Article 79, ICC Statute. See also Ingadottir, 'The Trust Fund for Victims', in Ingadottir (ed.), *The International Criminal Court: Recommendations on Policy and Practice: Financing, Victims, Judges and Immunities* (Ardsley, New York: Transnational, 2003) 111.

217 Article 79(2), ICC Statute.

218 Ibid.

to be interpreted as prejudicing the rights of victims under national or international law; thus these claims can be pursued in other fora.[219]

In addition to the potential for reparation, the ICC Statute contains other victim-centred notions. Specifically, the Statute envisions the creation of a Victims and Witnesses Unit.[220] Victims are allowed to participate in several stages of the proceedings at the discretion of the court,[221] including: (a) the Pre-Trial Chamber's decision to authorise an investigation;[222] and (b) the award of reparation.[223] However there is a great deal of ambiguity as well as lack of clarity in the mechanisms applicable to victims' access, participation and rights. For example, the ICC Statute uses alternatively the term 'participant' and 'party' in addressing victims without regard to the implications of these terms for the role of victims in the proceedings. If the victim is deemed a 'party', then the victim has certain procedural rights by implication. If the victim is a 'participant', then the victim has only those procedural rights specified in the Statute. As a 'participant', a victim does not have the right to present evidence or to examine and cross-examine witnesses for the prosecution and for the defence. As a 'party', it may by implication have such rights, although there is nothing in the legislative history of the ICC Statute to assume that the victim was to be anything more than a participant. Nevertheless, these ambiguities have given rise to a difference in

219 Article 75(6), ICC Statute. A number of States Parties to the ICC have enacted legislation to implement the victim's right to reparation contained in the ICC Statute and facilitate cooperation with the ICC in the enforcement of both reparation orders under Article 75 and orders of fines and forfeiture ordered pursuant to Article 77(2). Such legislation includes, for example, the Canadian Crimes Against Humanity and War Crimes Act of 2000; Part IV, UK's International Criminal Court Act of 2001; French Loi No. 2002-268 relative à la Cooperation avec la Cour Penale Internationale; and s.151–2, Australian International Criminal Court Act of 2002.

220 Article 43(6), ICC Statute. See also Ingadottir et al., 'The Victim and Witnesses Unit', in Ingadottir (ed.), supra n. 216, 1.

221 Article 68(3), ICC Statute allows presentation of the views and concerns of victims where the personal interests of the victim are affected. Such views and concerns are to be presented at appropriate stages of the proceedings as determined by the Court. In January 2006, Pre-Trial Chamber I considered a request on behalf of victims to be 'grant[ed] status as victims in the procedure . . . [to] allow them to present their views and concerns during the rest of the proceedings under way on the "Situation in the Democratic Republic of Congo."' Application No. ICC-01/04-31-Conf-Exp-tEN at para. 23. See also the application forms presented to the Chamber. Application No. ICC-01/04-25-Conf-Exp-tEN; Application No. ICC-01/04-26-Conf-Exp-tEN; Application No. ICC-01/04-27-Conf-Exp-tEN; Application No. ICC-01/04-28-Conf-Exp-tEN; Application No. ICC-01/04-29-Conf-Exp-tEN; and Application No. ICC-01/04-30-Conf-Exp-tEN. The Chamber took an expansive view of the role of victims, rejecting the arguments of both the Prosecutor and *ad hoc* Defence counsel and decided that Article 68(3), ICC Statute is applicable to 'the stage of investigation of the situation', and accorded the applicants the status of victims 'allowing them to participate in the proceedings at the stage of investigation of the situation in the DRC'. Decisions on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, and VPRS 6, ICC-01/04-101-tEN-Corr at para. 42.

222 Article 57, ICC Statute.

223 Article 75, ICC Statute. In addition to the ICC, victims' participatory rights in the criminal process are also mentioned in several declarations or recommendations from the UN and Council of Europe and in the case law of the ECtHR. See Aldana-Pindell, 'In Vindication of Justiciable Victims Rights', supra n. 2 at 1425–37.

approach between the Pre-Trial Chamber and the Office of the Prosecutor, as evidenced in two Pre-Trial Chamber decisions (17 January 2006 and 29 June 2006) that are presently on appeal before the Appeals Chamber. An expanded procedural role for the victim may be in contradiction with the role and prerogatives of the Office of the Prosecutor. It should be noted that the ICC Statute's provisions and the Rules of Procedure are very detailed as to the role of the Office of the Prosecutor, and it would be highly inconsistent with the goals and purposes of these provisions to allow the victim a parallel role or one that could be in conflict with the Office of the Prosecutor.

D. Limitations of National, Regional and International Prosecutions

Although the existing national, regional and international mechanisms provide some provisions regarding reparations, there are several reasons why they cannot always ensure victims' access to reparations.[224] First, only some of the instruments that exist today (such as the CAT) are binding treaties. Others, such as the 1985 Basic Principles of Justice, are binding only to the degree they reflect principles of customary international law.[225] Such instruments are often referred to as 'soft law' because of their non-binding nature.[226] It is not uncommon, however, for these to be later turned into treaties or conventions. Even binding treaties that provide for victim reparations can be limited by States' willingness or ability to comply.[227] Second, many of the human rights instruments available today lack effective enforcement measures.[228] For example, while the CAT gives individuals the right to lodge a complaint with the Committee Against Torture, in order for the Committee to admit and examine the complaint in question the State Party must first expressly recognise the Committee's competence to do so.[229] In most cases of State-perpetrated abuses and violence, the State is unwilling to do so. In addition, even if a State does recognise the jurisdiction and competence of the competent body, many States are unable to provide reparations to victims due to a lack of resources.[230]

224 See Lasco, supra n. 20 at 18.
225 Ibid.
226 In the 2003 consultations, the US argued that in view of the widely differing domestic legal systems of States, the 2006 Principles and Guidelines should be characterised as 'aspirational and not binding in law.' See International Movement Against All Forms of Discrimination and Racism, Second Consultative Meeting on 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law', 20-23 October 2003 (IMADR) available at: http://www.imadr.org/geneva/2003/2nd.CM.restitution.html.
227 Ibid. Lasco, supra n. 20, notes that, with respect to the CAT, while many of its provisions have attained the status of customary international law, States Parties to the CAT bear the burden of determining the amount of compensation to victims of torture. This is especially problematic in light of the fact that many of the abuses are committed by governments.
228 IMADR, supra n. 226.
229 Ibid.
230 See infra Section 7.

6. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

The 1985 Basic Principles of Justice,[231] which are founded, in part, on Article 8 of the Universal Declaration, were the first international instrument to articulate victims' right to access justice and obtain reparation for their injuries. This instrument distinguishes between victimisation that occurs as a result of actions in breach of national criminal law committed by individuals, and those that are the result of an 'abuse of power' by the State.[232] Indeed, with respect to victims of crimes committed by other individuals, the Principles fully articulate the steps that States 'should endeavor' to take in order to provide victims with compensation, restitution and rehabilitation.[233] Although not specifically mentioned, this includes compensation for international crimes.

A. Evolution of the Basic Principles

In 1984, the United Nations Basic Principles of Justice for Victims of Crime and Abuse of Power were prepared by a committee of Experts which I had the honour of chairing, hosted in Ottawa by the Canadian Ministry of Justice.[234] The Ottawa draft was quite extensive with respect to the obligations of States for victimisation occurring as the result of a State's 'abuse of power'. However, when the text was adopted at the Seventh United Nations Congress on Crime Prevention and Criminal Justice held in Milan, Italy in 1985, the draft was significantly shortened.[235] Governments did not want to assume any responsibility, even for the acts of their own agents, preferring to limit victims' rights to the commission of crimes committed by non-State actors. That position persisted until the adoption of the 2006 Principles. It is also the reason why

231 See supra n. 57. The instrument was adopted by the UN General Assembly in Resolution 40/34 of 29 November 1985, on the recommendation of the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders. The author wishes to acknowledge that throughout the 21-year evolution from the 1985 Basic Principles of Justice to the 2006 Basic Principles and Guidelines, the most consistent supporter of this effort was Irene Melup, a lifelong staff member of the UN. Everyone involved in this effort knows that it was Irene's untiring and dedicated efforts that brought about this result. This is why, in 2004, many of her friends contributed to a book of studies in her honor dedicated to victims' rights. See Vetere and David (eds), *Victims of Crime and Abuse of Power: Festschrift in Honour of Irene Melup* (New York: United Nations, 2005). The two editors have also been consistent advocates of victims' rights and supporters of UN efforts involving these rights.

232 See Article 18, 1985 Basic Principles of Justice.

233 Articles 19–21, ibid.

234 See supra n. 231.

235 See Bassiouni, supra n. 58 at 10.

there has never been a convention on the rights of victims, even though there are many treaties dealing with many other diverse human rights issues.

After the adoption of the 1985 Basic Principles of Justice in Milan, and the General Assembly's Resolution adopting the resolutions of the Seventh United Nations Congress on Crime Prevention, there was a loss of momentum by the NGO community supporting victims' rights, and it took approximately four years for a new momentum to develop to bring about a resolution to implement the 1985 Basic Principles of Justice. However, by then, the focus had shifted away from the work of what was then called the United Nations Centre for Crime Prevention and Criminal Justice located in Vienna (UNOV), to the United Nations in Geneva (UNOG), and more specifically, to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.[236]

In 1989, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities entrusted a study concerning the status of the right of reparation for victims of human rights violations to Mr Theo van Boven who, in 1997, prepared the Draft Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation, for Victims of Gross Violations of Human Rights and Fundamental Freedoms.[237] The Commission on Human Rights found this document useful, and circulated the draft among States and interested organisations for comments. The task of finalising a set of basic principles and guidelines based on the comments of interested States and organisations was then entrusted to the author by the Commission on Human Rights pursuant to its Resolution 1998/43.[238]

The subsequent drafting process included extensive research of extant international law norms, consultations with representatives of interested governments and organisations, as well as highly respected experts. This resulted in the preparation, by the author, of the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (2000 Draft Principles and Guidelines), which were presented to the Commission on Human Rights in April 2000.[239] Between 2000 and 2002, the Office of High Commissioner for Human Rights

236 This is another example of the unfortunate lack of integration of UN's efforts. For years, UNOV has dealt with problems of crime and criminal justice, while UNOG has dealt with human rights issues. It is obvious that issues of criminal justice are not distinct from issues of human rights and *vice versa*, but the administrative division has produced a dual track of UN efforts and instruments concerning these two respective subjects, which are, in many respects, inseparable.

237 Draft Basic Principles and Guidelines on the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, 16 January 1997, E/CN.4/1997/104, Annex.

238 UNCHR Res. 1998/43, 17 April 1998, E/CN.4/1998/43.

239 Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, 18 January 2000, E/CN.4/2000/62, Annex (2000 Draft Principles and Guidelines).

(OHCHR) circulated this text, which resulted in comments being received from Member States, inter-governmental organisations and NGOs.[240]

However, the adoption of the draft text was delayed as a result of the September 2001 World Conference on Racism where the issue of victim compensation was contested by many States.[241] In preparation for the World Conference on Racism, many governments and NGOs advanced the proposition that governments which carried out racist policies, including colonialism and slavery, should be required to pay reparations.[242] Major governments with a past of colonialism, slavery and racism joined forces to put the whole question of victims' rights on hold, fearing that claims arising out of their past racial or colonial practices could be raised. The adoption of the 2000 Draft Principles and Guidelines was thus postponed by the Commission until 2001, and then postponed again to 2002.

This was followed by an international consultation convened by the OHCHR with the cooperation of the government of Chile to finalise the text.[243] A report on the consultative meeting was submitted to the Commission at its 59th session in 2003, recommending that the Commission establish an appropriate and effective mechanism with the objective of finalising the elaboration of the Draft Principles and Guidelines.[244] It was desired by the majority of States that a UN normative instrument on the right to reparation for victims of human rights and humanitarian law violations be adopted.[245]

In accordance with Commission resolution 2003/34, the Chairperson-Rapporteur of the consultative meeting, in consultation with Mr Van Boven and myself, prepared a revised version of the 2000 Draft Principles and

240 This was based on UNCHR Res. 2000/41, 20 April 2000, E/CN.4/RES/2000/41; and UNCHR Res. 2002/44, 23 April 2002, E/CN.4/RES/2002/41.

241 See Report of the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, 25 January 2002, A/CONF.189/12. See also World Conference on Racism, Daily Highlights, 8 September 2001, available at: http://www.un.org/WCAR/dh/; and UN Race Conference On Thin Ice, *CBS News*, 25 July 2001, available at: http://www.cbsnews.com/stories/2001/07/25/world/main303313.shtml. For the European Commission view, see Council Conclusions on the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, available at: http://europa.eu.int/comm/external_relations/human_rights/doc/gac.07.01.htm.

242 See Bowcott, 'Africans Call For Slavery Reparations', *Guardian Unlimited*, 29 June 2001. See also, African Regional Preparatory Conference For the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Declaration and Recommendations (2001), available at: http://www.hri.ca/racism/official/dakar.shtml.

243 This consultation was chaired by Mr Alejandro Salinas (Chile) and was attended by the mandated authors of the Draft Principles and Guidelines, Mr Van Boven and the author.

244 The Commission took note of the report in resolution 2003/04. See Report of the Consultative Meeting on the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, 27 December 2002, E/CN.4/2003/63 (First Consultative Meeting Report).

245 Joint NGO Position Paper Second Consultative Meeting, The Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation For Victims of International Human Rights and Humanitarian Law, available at: http://www.redress.org/publications/NGO.common.position.paper.pdf.

Guidelines on 14 August 2003. In accordance with the same resolution, a second consultative meeting was held in Geneva on 20–23 October 2003. During this meeting, governments, inter-governmental organisations and NGOs reviewed the revised text and submitted comments that were incorporated by the Chairperson-Rapporteur and the two independent experts into a revised (24 October 2003) version of the text.[246]

As noted by the Chairman-Rapporteur in his Report on the Second Consultative Meeting, the Draft Principles and Guidelines 'greatly benefited from the broad consultative process facilitated by the two consultative meetings'.[247] The 24 October 2003 version of the guidelines incorporated 'input from various governments, intergovernmental organizations' and NGOs, as well as the 'ongoing efforts and assistance of the two experts.'[248] The preparatory work then continued with a third consultative meeting held on 29 September and 1 October 2004 in accordance with Commission resolution 2004/34. The foundation for this consultation was a revised (5 August 2004) version of the guidelines.

In 2005, after some 20 years of work on the text, the Basic Principles and Guidelines were approved by Member States. The resolution was adopted by the Commission by a roll-call vote (requested by the United States) with 40 countries voting in favour, none against and 13 abstentions.[249] The 2006 Basic Principles and Guidelines were then placed before the UN General Assembly, which adopted them by consensus.

246 Pursuant to Resolution 2003/34, the Chairperson-Rapporteur of the Second Consultative meeting, Mr Alejandro Salinas (Chile), prepared a Report of the Second Consultative Meeting that incorporated the Chairperson-Rapporteur's general observations and specific observations on the revised principles and guidelines, the Explanatory Comments (intended to be read in conjunction with the Chairperson-Rapporteur's report), as well as the Chairperson-Rapporteur's Recommendations for the follow-up to the Second Consultative Meeting. The annex of the Report also contains the 24 October 2003 revised version of the Basic Principles and Guidelines, as well as the Chairperson-Rapporteur's and independent experts' proposal arising out of the second Consultative meeting. See Report of the Second Consultative Meeting on the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (Geneva 20, 21 and 23 October 2003), 10 November 2003, E/CN.4/2004/57 (Second Consultative Meeting Report).

247 Second Consultative Meeting Report at 5.

248 Ibid.

249 The following States abstained from the vote: Australia, Egypt, Eritrea, Ethiopia, Germany, India, Mauritania, Nepal, Qatar, Saudi Arabia, Sudan, Togo, and the United States. Delegations gave various reasons for abstaining. The United States opposed the inclusion of the International Criminal Court (Explanation of Vote, US). Germany cited as its reason a failure to 'adequately differentiate between human rights law on the one hand and international humanitarian law on the other.' (Explanation of Vote, Germany). India indicated it was considering national legislation on the subject.

See also Bassiouni, 'Appendix II', in Vetere and David (eds), supra n. 231, 628. While the adoption of the 2006 Basic Principles and Guidelines was a major milestone, the comments of various Member States indicate that the controversy surrounding the interpretation of the scope of the document still exists.

B. The Goals of the Basic Principles

Rather than creating new substantive international or domestic legal obligations, the 2006 Basic Principles and Guidelines are drafted from a 'victim-based perspective' and provide 'mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law'.[250] With the goal of maximising positive outcomes and minimising the diversity of approaches that may cause uneven implementation, the principles 'seek to rationalize through a consistent approach the means and methods by which victim's rights can be addressed.'[251]

The provisions principally address 'gross violations of human rights law' and 'serious violations of international humanitarian law', which involve the protection of life, physical integrity and other 'matters essential to the human person and to human dignity'. In the course of consultations, various governments emphasised the need to differentiate between the terms 'gross violations', 'serious violations' and 'violations.'[252] The precise wording of the document evolved over time, and the adopted version refers to 'gross violations of international human rights law and serious violations of international humanitarian law', as opposed to earlier constructions which referred to 'violations of international human rights and humanitarian law'. The evolution of this wording represents an attempt to narrow the focus of the 2006 Basic Principles and Guidelines.

However, the terms 'gross violations of international human rights law' and 'serious violations of international humanitarian law' should be understood to qualify situations with a view to establishing a set of facts that may figure as a basis for claims adjudication, rather than to imply a separate legal regime of reparations according to the particular rights violated.[253] In addition, the Principles and Guidelines also address separately violations of human rights and humanitarian law that 'constitute international crimes or that require States to take measures associated with criminal violations such as

250 Second Consultative Meeting Report at 26 (Explanatory Comments).

251 Ibid.

252 See the comments of Chile, 16 January 1997, E/CN.4/1997/104 at paras 2–4.

253 Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, 8 February 1999, E/CN.4/1999/65 at 85. The Explanatory Comments further note that this is not intended to minimise the importance of other violations of human rights law, but merely to distinguish those violations which require the implementation mechanism provided in the guidelines. The following (included in Annex II of the Second Consultative Meeting Report) provides the proposed definition of 'gross violations of international law' that emerged from consultation in October 2003:

> For purposes of this document gross violations of international law means unlawful deprivation of the right to life, torture, or other cruel, inhuman treatment or punishment, enforced disappearance, slavery, slave trade and related practices, deprivation of the rights of persons before the law and similar serious violations of fundamental rights and freedoms and norms guaranteed under applicable international law.

investigation, prosecution, punishment and international cooperation in connection with the prosecution or punishment of alleged perpetrators'.[254]

Throughout the consultations, some States sought to underscore the differences between international human rights law and international humanitarian law. Some States emphasised that international humanitarian law is a separate body of law that has no place in a human rights instrument.[255] The final wording adopted in this respect seems to adopt this viewpoint and seeks to clearly differentiate the two bodies of law. The 2006 Basic Principles

254 Second Consultative Meeting Report at 26–7. The Comments further notes that these violations are commonly referred to as grave breaches of the 1949 Geneva Conventions and Protocol I thereto, as well as war crimes under customary law of armed conflict. In addition, the Comments note that although not identified as either grave breaches or war crimes in the Conventions, violations of Common Article 3 of the 1949 Geneva Conventions have been recognised in customary international law as equivalent to their counterparts relating to international armed conflict. (Ibid. at 27.)

The language in connection with this obligation was also revised. Initial Drafts used the term 'violator,' but this was seen as too harsh a term and was changed to 'those allegedly responsible.' Article 2, Principle 3(b), 2006 Basic Principles and Guidelines. However, in an attempt to clarify the relationship of the various types of violations, Article 12, Non-Derogation, sought to make clear that the classification of 'gross violations of international human rights law and serious violations of international humanitarian law' did not restrict or derogate 'from any rights or obligations arising under domestic and international law', and that the impact of the document was 'without prejudice to the right to a remedy and reparation for victims of all violations of international human rights law and international humanitarian law'.

255 During the 2003 consultations, the US proposal called for only human rights to be addressed in the meeting and for international humanitarian law to be addressed in a separate forum. The United States argued that international humanitarian law is outside of the competence of the Commission on Human Rights and its mandate. The United States stressed that the two have different implications. For example, international humanitarian law in wartime tolerates acts including the killing of innocent victims, lawful collateral damage and imprisonment without trial in a court of law. The United Kingdom expressed the view that only States can violate human rights law while others can violate international humanitarian law. See First Consultative Meeting Report at Principle 3, section 34. Various other objections were raised by Member States during the consultations preceding adoption. The former colonial powers, including the United States, France and the United Kingdom, noted their objections to the use of the 2006 Basic Principles and Guidelines in connection to claims over colonial policies and slavery. The potential retrospective impact of the 2006 Basic Principles and Guidelines also coloured the views of Japan, which expressed concern regarding the effect of the Basic Principles and Guidelines on previously concluded treaty arrangements arising out of the cessation of hostilities following WWII. While these treaty arrangements represent 'hard law' obligations, Japan worried that the Basic Principles and Guidelines could evolve from 'soft law' obligations into binding obligations that would supersede such treaty arrangements. Germany expressed concern regarding potential future obligations for reparations in light of their extensive reparations programs for atrocities and violations committed during WWII. The United Kingdom also sought to emphasise the non-binding nature of the 2006 Basic Principles and Guidelines. US objections centred on the duty to prosecute individuals and hold them criminally responsible for violations. This raised the further possibility that the threshold for bringing civil suits would be lowered under the ATCA. The United States also raised objections regarding potential government liability for military operations in light of the extensive military engagements of the US armed forces. Civil jurisdictions opposed the inclusion of common-law based actions and mechanisms for remedies, including 'class-actions' for groups of victims: Bassiouni, Personal Notes.

and Guidelines refer to two separate bodies of law and apply differing standards in connection with each.[256] This wording gives the appearance that these two bodies of law are fully separate and distinct. Principle 2 of the adopted text refers to 'respective bodies of law', which further indicates a substantive division. This view, however, ignores moves towards the union of the two regimes. During consultations in 2003, the government of Chile argued that the ICC Statute already criminalises violations of both the international human rights and humanitarian law, thus setting a precedent for the unification of the two sources of law. Chile also went on to describe a second precedent set when the Security Council established the ICTY which specifies its rulings are 'without detriment to the right of victims to reparation'.[257]

Throughout the process, the present author emphasised the fact that distinguishing between types of violations diminishes the purpose of the document and its relevance to the victims. The document does not address the substantive claims of human rights and international humanitarian law and it does not enumerate what falls under their respective ambits. It simply says that violations require remedies.[258] However, it is clear from the comments and approaches of various Member States and the wording of the 2006 Basic Principles and Guidelines that there is significant resistance to conceptualising international human rights law and international humanitarian law as linked and unified.[259]

256 The adopted language refers to 'gross violations of international human rights law' and 'serious violations of international humanitarian law', as opposed to the previous formulation, which covered 'violations of international human rights and humanitarian law'. Compare the 2006 Basic Principles and Guidelines and the 2000 Draft Principles and Guidelines. The implication of the revision is that these are wholly separate and distinct bodies of law, which would also help to justify the varying standards for determining liability for reparations. In the *Wall* case, the ICJ regarded the two regimes as co-equal: see supra n. 3.

257 IMADR, supra n. 226. See also Article 5, ICC Statute.

258 IMADR, ibid.

259 The 2006 Basic Principles and Guidelines also differ in various other ways from the previously considered drafts. The thrust of the majority of revisions is an overall attempt to soften the obligations of States. In this respect, the revisions to Principles 1 and 3 are instructive which contemplated '[t]he obligation to respect, ensure respect for and enforce international human rights and humanitarian law'. The adopted text refers to '[t]he obligation to respect, ensure respect for and implement international human rights law and international humanitarian law', Principles 1 and 3, 2006 Basic Principles and Guidelines. The softening of the language is subtle but nonetheless evident, as the obligation to implement has prospective implications, as opposed to the more stringent requirements of enforcement. However, the State duty to implement international legal obligations in domestic law has been recognised in the following instruments: Article 2(2), International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3 (ICESCR); Article 2(1), CAT; Articles 3 and 4, ICERD; Articles 2–16, CEDAW; Article 4, CRC; Article 2, ACHR; Article 6(1), Inter-American Convention to Prevent and Punish Torture; Article III, Inter-American Convention on Enforced Disappearance; Article 1, AfrCHPR; Article 3, Declaration on the Protection of All Persons from Enforced Disappearances; Article 1, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; Article 4, Declaration on the Elimination of Violence against Women; and Article 4(2), Declaration on the Elimination of all Forms of

The relationship between the right to reparation in human rights law and that in relevant international humanitarian law is complex, filled with overlapping norms. Non-derogable human rights, such as the right not to be tortured, killed or enslaved, intersect with norms of international humanitarian law. A normative connection exists between the right to reparation in both

Intolerance and of Discrimination Based on Religion or Belief. This duty was further recognised in the jurisprudence of various adjudicative and supervisory bodies. See, for example, *Exchange Of Greek and Turkish Populations*, Advisory Opinion, PCIJ Reports, Series B 10 (1925) at 20 (States have to adopt the adequate modifications to their internal laws so as to comply with their national obligations); HRC General Comment No. 3, Implementation at the National Level, 29 July 1981, HRI/GEN/1/Rev.7 at 126; 1-2 IHRR 2 (1993) at para. 1; HRC General Comment No. 18, Non-Discrimination, 10 November 1989, HRI/GEN/1/Rev.7 at 146; 1-2 IHRR 22 (1993) at para. 4; HRC Concluding Observations: Peru, 15 November 2000, CCPR/CO/70/PER at para. 8 (State is to take necessary measures to guarantee rights recognised in the ICCPR); *Garrido and Baigorria (Reparations)*, supra n. 123 at para. 68 (duty to adopt effective internal measures); *Mayagna (Sumo) Awas Tingni Community* IACtHR Series C 79 (2001); 10 IHRR 758 (2003) at para. 164 (duty to adopt, pursuant to Article 2, ACHR, the necessary legislation and other measures); *Bamaca Velasquez (Reparations)*, IACtHR Series C 91 (2002); 11 IHRR 655 (2004) at para. 85 (duty to adopt internal measures to guarantee international humanitarian law and human rights); *Caracazo (Reparations)*, IACtHR Series C 95 (2002); 12 IHRR 169 (2005) at para. 120 (adopt law to insure investigation and punishment); and Case 12.051, *Maria Da Penha Maia Fernandez*, Report No. 54/01 (2001) at para. 60(4) (State violated obligation to adopt measures).

Principle 1, Article 2(d) is similarly narrowed. The draft text stated that in harmonising domestic law with international legal obligations, States must ensure 'in the case that there is a difference between national and international norms, that the norm that provides the greatest degree of protection is applied', Principle 1, 2000 Draft Principles and Guidelines. The adopted text only requires States to ensure 'that their domestic law provides at least the same level of protection for victims as required by their international obligations', Principle 1, 2006 Basic Principles and Guidelines. The overall effect, in practical terms, is likely not to be significant, but reflects a spirit of greater modesty.

The 'duty to prosecute' in cases of gross violations of international human rights law and serious violations of international humanitarian law was also softened such that States have a duty to 'investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations.' Ibid. at Principle 3. The effect of this change was also seen in the treatment of statutes of limitations. While the previous text tilted toward the lack of applicability of statutes of limitations when dealing with violations, the adopted text qualifies their application to 'where so provided for in an applicable treaty or contained in other international legal obligations', Principle 4, 2006 Principles and Guidelines, while domestic statutes of limitations for other types of violations that do not constitute crimes under international law 'should not be unduly restrictive', Principle 4, 2006 Principles and Guidelines.

In distinction to this more modest trend, the obligation of investigation was bolstered such that a State's duty includes the duty to '[i]nvestigate violations effectively, promptly, thoroughly and impartially', Principle 1, 2006 Principles and Guidelines, as opposed to simply investigating violations 'in accordance with domestic and international law', Principle 2, 2000 Draft Principles and Guidelines. The duty to extradite was also qualified in the adopted version to explicitly provide that such extraditions must be 'consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition on torture and other forms of cruel, inhuman or degrading treatment or punishment', Principle 3, 2006 Basic Principles and Guidelines. Additionally, the treatment of victims was made more comprehensive and stated that 'appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy', Principle 6, 2006 Basic Principles and Guidelines.

international human rights law and international humanitarian law.[260] The International Committee of the Red Cross describes international humanitarian law as 'the body of rules which, in wartime, protects people who are not or are no longer participating in the hostilities'. These rules are to be observed by both governments and any other parties involved in the conflict.[261] Human rights law stems from the same commonly shared human values as international humanitarian law. There is an overlap between the two legal regimes. The 2006 Basic Principles and Guidelines attempted to create a bridge between international human rights and humanitarian law, because for victims it would be artificial and counterproductive to make separations on the basis of legal definitions.

The evolution of international humanitarian law has not always been linear. There have been overlaps and gaps, and it is sometimes difficult to retrace an obligation or right to an initial legal source.[262] This article argues that irrespective of how the issue is approached by each source, it is imperative that we consider the violation from the point of view of the victim.[263] UN Secretary-General Kofi Annan emphasised the importance of a victim-based perspective in his address to the 2003 Commission on Human Rights:

> When we speak of human rights, we must never forget that we are laboring to save the individual man, woman or child from violence, abuse and injustice. It is that perspective–the individual's–which must guide your work, and not the point of view of contending States.[264]

C. Defining the Term 'Victim'

An issue of concern during consultations was the precise definition of a 'victim.' Throughout the consultation process it was important that a victim be considered a person and not a moral or abstract entity. That person, however, could be part of a collectivity or group.[265] Principle 8 of the 2006 Basic Principles and Guidelines defines 'victims' of gross violations of international

260 See 1999 Report of Independent Expert, supra n. 253. See also Roht-Arriaza, 'Reparations, Decisions and Dilemmas', (2004) 27 *Hastings Law Review* 157 at 164.

261 See Bassiouni, supra n. 3 at 469.

262 For example, historically, torture has been a crime under customary law under the Hague Conventions of 1889 and 1907, followed by incorporation in the 1929 Geneva Convention, and then again in 1949 and 1977. Thus there are overlaps on torture between the customary law of armed conflict and treaty-based law. In addition, other sources prohibit torture. See IMADR, supra n. 226.

263 See ibid.

264 Press Release, Human Rights Commission, 'UN Secretary General to Commission On Human Rights: We Must Hope A New Era of Human Rights in Iraq Will Begin Now', 24 April 2003, available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/975E2E36F2593DCAC1256D12002DDDBF?opendocument.

265 See First Consultative Meeting Report at Principles 8 and 9, section 78.

human rights law and serious violations of international humanitarian law as follows:

> Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.[266]

The aforequoted definition[267] is quite similar to that adopted by the Preparatory Commission on the Establishment of the ICC in its Rules of Procedure and Evidence.[268] The definition contemplates four types of victims: (1) those individuals who directly suffer harm; (2) dependents or family of a direct victim who suffer indirectly because of the primary victimisation; (3) individuals injured while intervening to prevent violations; and (4) collective victims such as organisations or entities.[269]

The first category of victims includes those individuals who personally are the victims of violations such as torture and arbitrary arrest or property confiscation. The second category includes members of their household or dependants who suffer because of the primary violation. For example, if the primary income earner is 'disappeared' or unable to work because of injuries sustained, then the family suffers loss as well. The trauma suffered by the family members of a victim can be severe and have long-lasting implications. According to Huyse, this can include: 'serious socio-economic deprivation, bereavement, the loss of a breadwinner, missed educational opportunities [and] family breakdown'.[270]

266 See also Principle 8, 2000 Draft Principles and Guidelines.

267 See also Rules of Procedure of the Inter-American Court of Human Rights, at Definition 31; EC Council of Ministers Framework decision of 15 March 2001 on the standing of victims in criminal proceedings, [2001] OJ L 82/1, 'Definitions'; and Second Consultative Meeting Report at 8 ('Consistent with this definition, it is not necessary for the State to be directly culpable in order for a person to fall within the definition.')

268 Rule 85, ICC Rules of Procedure and Evidence. See also supra Section 5.

269 During the drafting and consultation process, a view was expressed that the definition of victim was too narrow and that it should embrace groups, such as those affected by violations that impact whole communities. See Second Consultative Meeting Report at 8. The 2000 definition of a victim included the term 'legal personality,' which would include corporate entities, but the term was eliminated during the October 2003 Consultation.

270 Bloomfield, Barnes and Huyse (eds), *Reconciliation After Violent Conflict: A Handbook* (Stockholm: International Institute for Democracy and Electoral Assistance, 2003), available online at: http://www.idea.int/publications/reconciliation/upload/reconciliation.chap04.pdf.

The third category includes individuals who are injured trying to intervene on behalf of a victim. Injuries that such a person might suffer are from physically trying to pull a victim from harm's way, loss of employment or imprisonment for challenging authorities for persecuting a targeted group.[271]

The collective victim is, perhaps, best illustrated by organisations or entities who suffer harm to property that is dedicated to religious, educational, humanitarian or charitable purposes. This includes those entities that are in fact the community's custodians of cultural property, such as historical monuments.[272] Collective victims are part of a specific population, targeted as such. This fourth category also includes victims who belong to an identifiable group whose victimisation, irrespective of the merits of the case by and against the causes of the conflicts that gave rise to it, was based on their belonging to a given group. Since WWII, three non-international conflicts have produced an estimated total of five million collective victims.[273]

An important step in the recovery and reintegration of a victim into society is that his/her status as a 'victim' be acknowledged. Dismissing a victim or placing blame for what Huyse describes as 'a perceived passivity to their fate' are attempts to depreciate their pain and suffering.[274] Individuals and groups categorised as victims benefit from States' obligation to treat victims with humanity[275] and

271 During consultations, several States felt that only direct victims and their immediate families could be classified as 'victims'. See comments of Germany in First Consultative Meeting Report. The author stressed the point that if we, as a society, wish to encourage victim intervention, then one who intervenes and is harmed must be given some rights and protection.

272 The recognition of collective victims is found in the following international and regional treaties and instruments: Article 1, ICESCR; Article 1, ICCPR; Article 2, Indigenous and Tribal People's Convention; Article 2, Optional Protocol to CEDAW; and Article 3(2), European Framework Convention for the Protection of Minorities. For the recognition of collective victims in the jurisprudence of international and regional tribunals, see *Mayagna (Sumo) Awas Tingni Community*, supra n. 260; and Case 11.10, *'Coloto Massacre'* Report No. 36/00 (2000) at paras 23 and 75(3) ('social reparations' for an indigenous community after massacre).

273 This includes one million Biafrans, one million Bengalis/Bangladeshis, and three million Cambodians. See Bassiouni, 'The Protection of Collective Victims in International Law', in Bassiouni (ed.), supra n. 7, 184.

274 An example of this occurred during the Jewish Holocaust when victims were described passively as 'going like sheep to the slaughter.' See Bloomfield, Barnes and Huyse, supra n. 270 at 61. See also Danieli, 'The Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Preliminary Reflections from a Psychological Perspective', in Vetere and David (eds), supra n. 231.

275 Initial Drafts used the term 'compassion' but some delegations took the view that there should be a focus on treating victims 'with respect for their dignity', Principle 10, Second Consultative Meeting Report. It was noted, however, that the 1985 Basic Principles of Justice also used the term 'compassion.' See Article 4, 1985 Basic Principles of Justice. In addition, with regard to 'special consideration' to be provided to victims, the Report noted that 'an appropriate balance should be sought with regard to the rights of others, in order to avoid imbalances between the accused and the victim', Second Consultative Meeting Report at 10. Several countries including Mexico, Chile and Angola objected to the use of the word 'compassion' stating that it carries paternalistic connotations, and they sought

respect, as well as to ensure that appropriate measures are taken for their safety and privacy and that of their family.[276] Moreover, inter-governmental organisations, NGOs and private enterprises also serve victims' needs.

D. Protection of Victims, Their Families and Witnesses

The 2006 Basic Principles and Guidelines elaborate on an emerging norm: the protection of victims along with their families and witnesses who participate in judicial, administrative or other proceedings that affect the interests of such victims. This remains largely aspirational, but should be further developed, and has increasingly been recognised in international and regional conventions and instruments.[277] In particular, the ICC Statute requires the special protection of victims at trial by allowing such measures as the presentation of evidence by closed-camera or other means, particularly to protect children and victims of sexual violence from re-traumatisation.[278] Moreover, the ICC Statute entrusts the Registrar of the Court to establish a Victim and Witnesses programme to provide relevant protection and services.[279]

terms with legal implications. IMADR, supra n. 226. The author disagreed with this assessment as compassion is more than a sentimental desideratum. Rather, it reflects societal values and the way a legal system treats victims. The Resolution's Preamble, however, did retain the term stating 'victims should be treated with compassion and respect for their dignity', Preamble, para. 4, 2006 Basic Principles and Guidelines. An explanation for this discrepancy is due to the fact that a preamble is not seen as a having a normative character and therefore terms may often be retained in the Preamble even though they are deleted from the main document.

276 Principle 10, 2006 Basic Principles and Guidelines. Principle 10 also states that a 'person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim'.

277 See Articles 6–8, ICTY Statute and ICTR Statute; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2001, A/45/49 supplementing the UN Convention against Transnational Organized Crime, 15 November 2000, A/RES/55/25; Articles 13(3) and 13(5), Declaration on the Protection of All Persons from Enforced Disappearance; Article 2, Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, supra n. 267; Principles 4–7, 1985 Basic Principles of Justice; UNCHR Res. 2003/72, 25 April 2003, E/CN.4/RES/2003/72 at para. 8 (participation and protection of victims and witnesses); UNCHR Res. 2003/38, 23 April 2003, E/CN.4/RES/2003/38 at para. 4(c) (protect witnesses, lawyers and families); Report of the Special Rapporteur on Violence against Women on Trafficking in Women, 29 February 2000, E/CN.4/2000/68 at para. 116; Council of Europe Committee of Ministers, Recommendation No. R (85) on the position of the victim in criminal law and criminal procedure, 28 June 1985 at paras 1,8 and 15.

278 Article 68, ICC Statute. See Donat-Cattin, 'Article 68: Protection of Victims and Witnesses and their Participation in the Proceedings', in Triffterer (ed.), supra n. 113, 869; and, Bitti and Friman, 'Participation of Victims in the Proceedings', in Lee and Friman (eds), supra n. 113, 456.

279 Article 43(6), ICC Statute. See Tolbert, 'Article 43: The Registry', in Triffterer (ed.), supra n. 113, 637; and Dive, 'The Registry', in Lee and Friman (eds), supra n. 113, 262.

E. Non-Discrimination

The 2006 Basic Principles and Guidelines also stress the need for non-discrimination in the matter of who is categorised as a victim. Principle 26 provides that in application the Guidelines must 'be without any discrimination of any kind or ground, without exception'. There were several discussions over what to include in this non-discrimination provision. Initial drafts elaborated on types of discrimination, stating the principles must be:

> without any adverse distinction founded on grounds such as race, colour, gender,[280] sexual orientation,[281] age,[282] language, religion, political or religious belief, national, ethnic or social origin, wealth, birth, family or other status, or disability.[283]

The final version of the 2006 Basic Principles and Guidelines, however, was changed to refer to non-discrimination without listing specific categories.

280 Women are often the most victimised during conflict situations. They are exposed to increasing risks of abuse including the use of rape as a weapon of war. Many women also lack basic knowledge of redress mechanisms available to them and are uncomfortable with consulting the proper authorities. See Bloomfield, Barnes and Huyse, supra n. 270 at 55. [footnote added.]

281 At the Second Consultative meeting, some delegations, including Pakistan on behalf of the Organization of the Islamic Conference (OIC), raised objections to the inclusion of sexual orientation in the document. The author noted, however, that regardless of the direct treatment of different sexual orientations by domestic legal orders, there was no legal basis for discrimination against persons of different sexual orientation in terms of access to remedies for human rights violations. OIC States do not discriminate on the basis of sexual orientation with regards to health services and police protection. See Principle 27, First Consultative Meeting Report. The reason for the initial inclusion of the term was due to the fact that sexual orientation has been the basis for persecution and torture of some victims. [footnote added.]

282 Child victims are guaranteed victims' rights as outlined in Article 39, CRC: 'States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts'. Children are particularly susceptible to victimisation in conflict situations. For example, more than half a million children have been abducted or recruited as child soldiers and female children often are used as both soldiers and sex slaves. It is estimated that at any given time over 300,000 children under the age of 18 are actively engaged in conflicts around the world. See UNICEF, *Adult Wars, Child Soldiers*, available at: http://www.unicef.org/publications/pub_adultwars_en.pdf. Countries opposed specific wording that would create classes of victims, including the child victim, because of the financial and social implications. They did not want to be responsible for implementing specific measures for redress such as the hiring of legal advocates to represent the child. [footnote added.]

283 Principle 27, 2000 Draft Basic Principles and Guidelines.

F. The Rights of Victims

A victim's right to remedies[284] for violations of international human rights encompasses three overarching rights.[285] The first is equal and effective access to justice. The second is the right to adequate, effective and prompt reparation for the harm suffered. The third is the right to truth.[286]

(i) Equal and Effective Access to Justice

Principle 12 of the 2006 Basic Principles and Guidelines describes the right of access to justice as follows:

> A victim of a gross violation of international human rights law or a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities, and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:
>
> (a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;
>
> (b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and

284 The victims' right to remedy for violations of human rights has been recognised in the following international and regional instruments: Article 2(3), ICCPR; Article 13, CAT; Article 6, ICERD; Article 6(2), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; Article 13, ECHR; Article 47, Charter of Fundamental Rights of the European Union; Article 7(1)(a)(25), ACHR; Article XVIII, American Declaration of the Rights and Duties of Man; Article III(1), Inter-American Convention on Forced Disappearance of Persons; Article 8(1), Inter.-American Convention to Prevent and Punish Torture; Article 7(a), AfrCHPR; Article 9, Arab Charter on Human Rights; Article 8, Universal Declaration; and Articles 9 and 13, Declaration on the Protection of All Persons from Enforced Disappearance. In addition, the victims' right to a remedy has also been recognised in the following jurisprudence: UNCHR General Comment 29, supra n. 130 at para. 14; and *Chahal v United Kingdom*, 1996-V 1831; (1997) 23 EHRR 413 at paras 150–1 (scope of the remedy varies with the nature of the right).

285 Principle 11, 2006 Basic Principles and Guidelines. The Second Consultative Meeting Report notes that there was debate concerning the structure of this principle and the linguistic problems associated with the terms 'remedy' and 'reparations', which, the Report notes, 'should be maintained as different concepts', Second Consultative Meeting Report at 6.

286 Principle 11, 2006 Basic Principles and Guidelines.

retaliation, as well as that of their families and witnesses, before, during, and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Provide proper assistance to victims seeking access to justice;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to a remedy for gross violations of international human rights or serious violations of international humanitarian law.[287]

Principle 13 adds to the aforequoted as follows,

> In addition to individual access to justice, States should endeavor to develop procedures to allow groups of victims to present collective claims for reparation and to receive reparation collectively, as appropriate.[288]

The inclusion of Principle 13 in the 2006 Basic Principles and Guidelines indicates recognition that, while the Principles and Guidelines deal 'essentially with individual rights', they do not 'exclude the concept of collective rights or the rights of collectivities'.[289] As noted in the Chairman-Rapporteur's Report, the issue of collective rights is of particular relevance to the rights of indigenous peoples and 'certain collective communities of victims, who are unable to represent themselves and more so to have their individual members, seek remedies under domestic or international law'.[290] The only way to provide for the presentation of such claims is to 'recognize their right to do so in a collective capacity'.[291]

The term 'collective rights' is intended to cope with two types of scenarios. The first are the situations where violations are committed against a 'class of persons or an identifiable group, and those who represent that class or group seek to implement or enforce the rights of individuals as members of that class or group'. The second are the situations where violations are committed by States 'in a manner that targets a specific group as a whole'.[292] With respect to the former, the term 'collective rights' provides for 'enforcing rights already established in a manner that enhances the capacity of States to address these claims

287 See also Principle 12, 2000 Draft Principles and Guidelines. The language in connection with a victim's access to justice was revised and narrowed in the adopted version. Access to justice is defined in reference to international law. While other remedies available to victims in accordance with domestic law are not prejudiced, the victim's access to justice must not specifically include such domestic laws other than to the extent necessary to ensure compliance with obligations arising under international law.

288 See also Principle 13, 2000 Draft Principles and Guidelines.

289 Second Consultative Meeting Report at 28 (Explanatory Comment 5).

290 Ibid. at 9.

291 Ibid.

292 Ibid. at 28 (Explanatory Comment 5).

in a collective as opposed to individualised manner'.[293] The latter 'gives rise to that group's ability to address procedurally its claims to a State and receive the remedies provided for in these principles and guidelines'.[294] Due to the concerns expressed by several States regarding the use of the term 'collective', the word was changed to 'groups'.[295]

The duty of States to make known the availability of remedies has been recognised in Article 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, which is supplemental to the United Nations Convention against Transnational Organized Crime.[296] This State duty was also affirmed by both the UN Special Rapporteur on Torture[297] and the Council of Europe Committee of Ministers.[298] Similarly, the State's duty to facilitate assistance to victims seeking access to justice has also been recognised in both the universal

293 Ibid. States can achieve administrative and judicial economy by recognising collective claims and class actions.

294 Ibid. at 28 (Explanatory Comment 5). The Explanatory Comment further notes that, insofar as international law has not reached the level that requires States to provide for the judicial exercise of collective rights, 'such notions as "class actions" are left to the determination of domestic law.' At the second consultative meeting, delegates raised a number of issues with respect to 'collective rights'. See ibid. at 9. A principal point of contention arose with regards to the issue of collective rights and claims for reparations, with the Report noting that 'it might be difficult to resolve the issue of collective rights' (ibid.). The Report includes a compromise solution to this issue which could be achieved by 'inserting a reference to relevant mechanisms for protection of collective rights that may exist under domestic law' or to 'clarify in more detail what was meant by collective rights and when collective reparations would be appropriate' (ibid.). The Reports further notes that, while some legal systems allow for organisations or groups representing collectivities to act in a collective capacity to present claims and even receive remedies on behalf of the group or collectivity, most legal systems 'do not recognize a cause of action . . . unless an agency relationship exists' (ibid.). Although the Report notes that it may be difficult to reconcile these two approaches at the present time, Explanatory Comment 6 explicitly notes that nothing in the 2006 Basic Principles and Guidelines 'precludes the future development of victims' collective rights under treaty-based and customary international law' (ibid. at 28 (Explanatory Comment 6)). For an example of a class action lawsuit aimed at addressing serious human rights violations in the United States, see *Marcos* litigation, supra n. 155. In this case, close to 10,000 Filipinos filed a class action suit under the ATCA alleging mass human rights violations including torture, extrajudicial killings and detention committed during the Marcos regime. The US District Court in Hawaii held the estate of Marcos responsible for the violations and the jury awarded close to $1.2 billion (US) in punitive damages and $766 million (US) in compensatory damages.

295 During the first consultative session, the government of Portugal stated that their delegation 'recognize(s) groups of victims, but not collective victims as such'. See Principle 8, First Consultative Meeting Report. Deletion of the term 'collective' was later proposed by the International Commission of Jurists and the United Kingdom at the Second Consultative Session. The Chairperson-Rapporteur proposed the insertion of 'groups'. First Consultative Meeting Report at 17. The Preamble, however, retained the term collective saying that (victimisation) 'may nevertheless also be directed against groups of persons who are targeted collectively', Preamble, 2006 Basic Principles and Guidelines.

296 See also Article 4, EC Council of Ministers Framework Decision of 15 March 2001, supra n. 267.

297 See Consolidated Recommendations of the Special Rapporteur on Torture, 3 July 2001, A/56/156, at para. 39(c).

298 See Council of Europe, Committee of Ministers, Recommendation No. R (85), supra n. 277 at para. 2.

treaties[299] and the jurisprudence of the ECtHR.[300] At present, however, international law does not provide for the modalities pursuant to which a victim may present a claim.[301]

A victim's right to access justice includes the State's duty to prosecute those responsible for human rights violations. The duty to prosecute contained in Principle 4 of the 2006 Basic Principles and Guidelines is 'intended to reflect the general international law obligation to proceed under national law or in accordance with the statutes of international judicial organs'.[302] The framing of prosecutions as a victim's right has emerged primarily from international human rights tribunals' interpretation of provisions in human rights treaties that establish a right to access to justice or to be heard and the right to an effective remedy.[303] A victim's right to prosecution, however, is not a substitute for the State's duty to ensure respect for international human rights and humanitarian law, but rather co-exists with it.[304] Victims' claims to prosecution have, therefore, become a justifiable right that victims should be able to claim against a State.[305]

A victim's right to prosecution has developed as a remedy for violations of international human rights and humanitarian law.[306] The right to criminal

299 Article 6(2)(b), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; Article 6, Council Framework Decision of 15 March 2001, supra n. 267 (providing for advice, and where appropriate, free legal aid).

300 See *Airey v Ireland* A 32 (1979); (1979) 2 EHRR 305 at para. 33 (right to legal assistance). See also, CEDAW General Recommendation 19, Violence Against Women, 29 January 1992, HRI/GEN/1/Rev.7 at 246; 1-1 IHRR 25 (1994) at para. 24(e).

301 For a discussion of victims' access to the international criminal justice system, see Jorda, 'Victim's Access to the International Criminal Justice System', in Doucet (ed.), *Terrorism, Victims, and International Criminal Responsibility* (Paris: SOS Attentats, 2003) 258. For the rights of victims in German criminal trials and their right to seek civil damages in a criminal court, see Maigne, 'Victims' Rights in German Criminal Trials', in Doucet (ed.), ibid., 198. For the provisions in French law allowing victims to join as civil parties before a criminal court, see Article 421(1) *et seq.* of the French Penal Code.

302 Second Consultative Meeting Report at 27 (Explanatory Comment 3). The Comments, however, further note that the duty to prosecute is 'not intended to have any bearing on the concept of complementarity between national and international legal organs, and is also not intended to have any bearing on theories of criminal jurisdictions that states and international judicial organs may rely on'. (Ibid.) The delegates at the second consultative meeting expressed the view that it was important to ensure that the obligation to prosecute did not exceed the relevant legal boundaries. (Ibid. at 7.) In response to these concerns, the Explanatory Comments clarify the meaning of the 'duty to prosecute', within the meaning of the principles and guidelines.

303 See Bassiouni, supra n. 5. For the jurisprudence of international human rights tribunals, see also Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights', supra n. 2 at Part II B(1), and the cases cited therein.

304 See Aldana-Pindell, ibid. at 1415. The author notes that this point was reinforced in the IACtHR's decision in *Villagran-Morales v Guatemala, (The Street Children Case) (Reparations)*, IACtHR Series C 77 (2001); 10 IHRR 995 (2003) where the Court declared that the duty to conduct an effective criminal process is independent and separate from the State's duty to repair.

305 See Aldana-Pindell, ibid. at 1415 at footnote 88.

306 See supra Section 6A.

prosecution is included in Principle 22(f), which provides for the availability of judicial or administrative sanctions against persons liable for violations, as part of the satisfaction and guarantees of non-repetition.[307] Thus, where States fail to conduct effective prosecutions they violate not only their general duty to ensure respect for and enforce human rights, but also the victim's right to an effective remedy.[308] The absence of judicial responsibility and punishment, in turn, undermines a State's legitimacy and its ability to promote the rule of law.[309] Criminal accountability for gross human rights violations is essential

307 See also Principle 25(f), 2000 Draft Principles and Guidelines, supra n. 240. The duty to prosecute and punish has been recognised in numerous international instruments. See Articles 4, 5 and 7, CAT; Articles 3 and 4, ICERD; Article 2(b), CEDAW; Articles IV, V and VI, Genocide Convention; Article 18, Indigenous and Tribal Peoples Convention; Article 4(d), Declaration on the Elimination of Violence against Women; Article 4, Declaration of the Protection of All Persons from Enforced Disappearance; Articles 1 and 6, Inter-American Convention to Prevent and Punish Torture; Articles 1 and IV, Inter-American Convention on Forced Disappearance of Persons; Article 49, 1949 Geneva Convention I; Article 50, 1949 Geneva Convention II; Article 129, 1949 Geneva Convention III; Article 146, 1949 Geneva Convention IV. For cases discussing the right to prosecution and punishment see *Nydia Bautista v Colombia* (563/93), CCPR/C/55/D/563/1993 (1995); 3 IHRR 315 (1996) at para. 8.2 (administrative or disciplinary action is not sufficient, it must be a judicial remedy); *Celis Laureano v Peru* (540/93), CCPR/C/56/D/540/1993 (1996), 4 IHRR 54 (1997) at para. 10 (bring to justice those responsible for disappearance); HRC Concluding Observations: Libyan Arab Jamahiriya, 6 November 1998, CCPR/C/79/Add.101 at paras 7 and 10; HRC Concluding Observations: Hungary, 19 April 2002, CCPR/CO/74/HUN at para. 2; HRC General Comment 20, supra n. 129 at para. 13; *Hajrizi Dzemajl et al. v Yugoslavia* (161/2000), CAT/C/29/D/161/2000 (2002); 10 IHRR 411 (2003) at paras 9.4 and 11; *Velasquez Rodriquez (Compensatory Damages)*, supra n. 97 at paras 34–5; *Garrido and Baigorria (Reparations)*, supra n. 123 at para. 74; *Loayza Tamayo* Case *(Reparations)* IACtHR Series C 42 (1998); 7 IHRR 136 (2000) at paras 170–1; *Castillo Paez (Reparations)* IACtHR Series C 43 (1998); 7 IHRR 179 (2000) at para. 107; *Suarez Rosaro (Reparations)* IACtHR Series C 44 (1999); 7 IHRR 633 (2000) at para. 80; *Blake (Reparations)* IACtHR Series C 7 (1999); 7 IHRR 661 (2000) at paras 64–5; *Panel Blanca (Reparations)* IACtHR Series C 76 (2001); 10 IHRR 698 (2003) at paras 200-1; *Street Children (Reparations)*, supra n. 304 at paras 99–101; *Cesti Hurtado* (Reparations), IACtHR Series C 78 (2001); 10 IHRR 1050 (2003) at paras 63–4; *Cantoral Benavides (Reparations)* IACtHR Series C 88 (2001); 11 IHRR 469 (2004) at paras 69–70; *Durand and Ugarte (Reparations)* IACtHR Series C 89 (2001); 11 IHRR 501 (2004) at para. 39(c); *Bamaca Velasquez (Reparations)*, supra n. 259 at paras 73–8; *Juan Sanchez* IACtHR Series C 99 (2003); 13 IHRR 451 (2006) at para. 185 (the Inter-American Court's jurisprudence reveals that the duty to punish is an obligation to combat impunity); *Maria Da Penha Maia Fernandez*, supra n. 259 at para. 61(1) (criminal proceedings against perpetrator of domestic violence); Council of Europe Committee of Ministers, Interim Resolution DH (99) 434, Action of the Security Forces in Turkey; Measures of General Character, 9 June 1999 (duty to punish agents of security forces who abuse their powers so as to violate human rights); 54/91, *Malawi African Ass. et al. v Mauritania* 13th Annual Activity Report of the ACHPR (2000); 8 IHRR 268 (2001) ('bring to book' authors of violations).

308 See Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights', supra n. 2 at 1425. See also CEDAW General Recommendation No. 19, supra n. 300 (noting that a State may be responsible under international law for private acts if it fails to provide compensation to the victims, as part of a duty to prevent unlawful acts and punish those who committed such acts).

309 The absence of prosecutions, or too lenient a punishment, also fails to purge a State of those who perpetrate violence and deter others from committing similar acts in the future. See Aldana-Pindell, ibid. at 1457.

for achieving the goals of accountability, retribution, and equal treatment under the law.[310] In some scholars' view, the victims' right to the truth is best revealed through the criminal process, even in situations where a State offers alternative remedial means such as truth commissions.[311]

(ii) Reparation for Harm Suffered

If an individual is a victim of a violation of an applicable international human rights or humanitarian law norm, then effective reparation must be made.[312] Such reparations may be made to either the individual victim or other persons, such as, for example, the victim's family and dependants[313] as well as those who

310 Aldana-Pindell, ibid. at 1444.

311 Aldana-Pindell, ibid. at 1442. The author notes that 'to many surviving human rights victims, truth commissions that substitute for criminal prosecutions comprise individual accountability.' (at 1442–3.)

312 Principle 15, 2006 Basic Principles and Guidelines. Reparation is 'intended to promote justice by redressing gross violations of international human rights or serious violations of humanitarian law', Second Consultative Meeting Report at 10. However, a number of delegations at the meeting considered that the appropriate focus ought to be on 'gross violations' of human rights, while others believed that the principles should 'relate to all violations of human rights.'

313 International and other instruments recognise the following persons or groups entitled to reparations: Article 9(5), ICCPR (victim); Articles 14(1) and 14(2), CAT (victim or other persons); Articles 16(4) and 16(5), Indigenous and Tribal Peoples Convention (peoples removed from land and relocated persons); Articles 75(1) and 85, ICC Statute (victims of crime); Rule 106, ICTY Rules of Procedure and Evidence and Rule 106, ICTR Rules of Procedure and Evidence (victims of crime); Article 35(5), ECHR (victim); Articles 10 and 63(1), ACHR (victims and injured party); Articles 9(1) and 9(2), Inter-American Convention to Prevent and Punish Torture (victim of torture and victim or other persons under national law); Article 21(2), AfrCHPR (dispossessed people); Article 68, 1949 Geneva Convention III (prisoners of war); Article 91, Additional Protocol I to the Geneva Conventions (prisoners of war); and Article 19, Declaration on the Protection of All Persons from Enforced Disappearance (victims, family and dependants). See also Articles 34–37, ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts.

The categories of persons entitled to reparations have also been recognised in the jurisprudence of various adjudicatory and supervisory bodies. See, for example, *Aksoy v Turkey*, supra n. 133 at para. 113 (father of the victim); *Kurt v Turkey* 1998-III 1152; (1998) 27 EHRR 373 at para. 174 (applicant on behalf of her son and on her own behalf); *Mahmut Kaya v Turkey* 1998-I 297; (1999) 28 EHRR 1 at para. 139 (brother of the victim); *Ulku Ekinci v Turkey*, Judgment of 16 July 2002, Application No. 27602/95 at para. 167 (applicant on behalf of her husband and herself); *Aktas v Turkey* 2003-V 194; (2004) 38 EHRR 18 at paras 349–64 (brother on behalf of victim and for widow and daughter of victim); *Finucane v United Kingdom*, supra n. 135 at paras 85–93 (widow); *Loayza Tamayo (Reparations)*, supra n. 307 at para. 92 (all persons with a close family link, including children, parents, and siblings); *Panel Blanca (Reparations)*, supra n. 307 at paras 85 and 86 (next of kin if there was a relationship of effective and regular dependence); *Street Children (Reparations)*, supra n. 304 at para. 68 (next of kin if there was a relationship of effective and regular dependence); *Bamaca Velasquez (Reparations)*, supra n. 259 at paras 31–6 (parents, wife and children; other next of kin or third parties if there was a relationship of effective and regular dependence); *Juan Sanchez*, supra n. 307 at para. 152 (family members for victim and in their own right, siblings, non-biological father, wife and other partner); *Almeida de*

have 'suffered harm in intervening to assist victims in distress or prevent victimization'.[314] The reparation should be proportional to the gravity of the harm suffered.[315] In accordance with its domestic and international legal obligations, a State shall provide reparation to victims for its acts or omissions that can be attributed to the State and constitute gross violations of international human rights and humanitarian law.[316] In cases where an individual, a legal person or other entity is found liable for reparation to a victim, such a party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.[317]

States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations.[318] To such ends, States

Quinteros et al. v Uruguay (107/1981), CCPR/C//19/D/107/1981 (1983) at paras 14 and 16 (disappeared and mother, who is also a victim); *John Khemraadi Baboeram et al. v Suriname* (146/1983), CCPR/C/24/D/146/1983 (1985) at para. 16 (surviving families); HRC Concluding Observations: Libyan Arab Jamahiriya, supra n. 307 at para. 7 (victims and their families). See also *Malawi African Ass. et al. v Mauritania*, supra n. 307 (widows and beneficiaries of victims).

314 Reference to 'persons who intervened to assist a victim or prevent occurrence of further violations,' was proposed by the International Commission of Jurists at the October 2003 consultation. See Second Consultative Meeting Report at 21. This is accounted for in the 1985 Basic Principles of Justice at para. 2, 'The term victims also includes, where appropriate, (. . .) persons who have suffered harm in intervening to assist victims in distress or to prevent victimization'.

315 Principle 15, 2006 Basic Principles and Guidelines. See also Principle 16, 2000 Draft Principles and Guidelines.

316 Principle 15, 2006 Basic Principles and Guidelines. See also Principles 12 and 13, 1985 Basic Principles of Justice. Initial drafts used the term 'should.' See discussion of 'should' versus 'shall', Second Consultative Meeting Report.

317 Principle 15, 2006 Basic Principles and Guidelines. See also Principle 17, 2000 Draft Principles and Guidelines. See also Principle 11, 1985 Basic Principles of Justice; and Council of Europe Committee of Ministers Recommendation No. R (85), supra n. 277 at paras 3, 5, 6 and 7 (consideration of victim's right to reparations in decision on prosecution, information of victim on police inquiry and on decision to prosecute or discontinue the proceedings, right of victim to appeal the decision to prosecute or discontinue prosecution). During the process of drafting the Principles and Guidelines, it was noted that in relation to 'non-State actors', the use of the term 'abuse' was to be preferred to 'violation'. See Second Consultative Meeting Report at 10 (noting that, in Principle 17, one suggestion was that the text might read: 'In cases where the abuse is not attributable to the State . . .'). It should also be noted that the 2006 Basic Principles and Guidelines reflect a more stringent threshold for reparations in such cases. Previously, such reparations were to be provided if 'the violation is not attributable to the State', Principle 17, 2000 Draft Principles and Guidelines. The language that was adopted requires provision of reparations only in such instances where 'a person, a legal person, or other entity is found liable for reparation to a victim', indicating that a formal legal judgment is necessary prerequisite.

318 Principle 15, 2006 Basic Principles and Guidelines; and Principle 17, 2000 Draft Principles and Guidelines. See also Principles 12 and 13, 1985 Basic Principles of Justice. With respect to 'non-State actors' the Explanatory Comments note that '[t]here is no legal reason why such non-State actors would be excluded either from responsibility for their actions or for the consequences of their policies and practices with respect to victims of these policies and practices'. The Comments further state that 'the intention here is not to make States

should seek to establish national programmes,[319] in keeping with Article 78 of the ICC Statute[320] and with the 2006 Basic Principles and Guidelines' call to establish such programmes.[321] The establishment of national funds for reparation was previously contemplated by the 2000 Draft Principles and Guidelines, which also included an explicit principle dealing with reparations owed by successor governments 'in cases where the State under whose authority the violation occurred is no longer in existence'.[322] The principle was deleted after delegations expressed concern over whether it was in alignment with relevant international legal principles governing State succession.

A State is also required to enforce its domestic judgments for reparations and 'shall endeavor to enforce valid foreign legal judgments'.[323] Under their domestic laws, States are to provide effective mechanisms for the enforcement of reparation judgments.[324]

As stated in the Principles and Guidelines, there are four principal forms of reparation available for violations of international human rights and humanitarian law, namely: (1) restitution; (2) compensation; (3) rehabilitation; and (4) satisfaction and guarantees of non-repetition.[325]

responsible for the policies and practices of non-State actors, but to make these non-State actors responsible for their policies and practices, while at the same time allowing victims to seek redress on the basis of social and human solidarity and not on the basis of State responsibility', Second Consultative Meeting Report at 27 (Explanatory Comment 4). The delegates at the Second Consultative meeting considered the extent of a State's obligation to provide reparations in circumstances where it is not responsible for the violation, nor for the violation of a relevant non-State actor. Ibid. at 9 ('There were considered to be a number of ways in which a State party could facilitate redress, on the basis of solidarity with the victim, in situations where it is not responsible for the breach in question.').

319 Principle 16, 2006 Basic Principles and Guidelines. Compare Principle 17, 2000 Draft Principles and Guidelines. Prior to the Second Consultative Meeting, this principle referred to the establishment of 'national funds'. During the meeting, it was suggested that the reference to such funds is too narrow and that it should be replaced with the more general reference to 'programmes.' See Second Consultative Meeting Report at 10 ('This would embrace a much broader range of possible support mechanisms, extending beyond only the financial.')

320 Article 78, ICC Statute.

321 Article 13, 1985 Basic Principles of Justice.

322 Principles 18 and 20, 2000 Draft Principles and Guidelines. See also Second Consultative Meeting Report at 10.

323 Principle 17, 2006 Basic Principles and Guidelines; and Principle 19, 2000 Draft Principles and Guidelines.

324 Ibid. The International Commission of Jurists commented that an act committed by an individual may be the actual violation; however, the State would be responsible if it does not take appropriate action. See Second Consultative Meeting Report at 13 (stating that, with respect to the enforcement of judgments under Principle 18, it is evident that, where enforcement is not possible, such as where the doctrine of sovereign immunity or act of State applies, the obligation of a State should be limited to its best efforts).

325 Principle 18, 2006 Basic Principles and Guidelines; and Principle 21, 2000 Draft Principles and Guidelines. See Second Consultative Meeting Report at 10 (noting that the list contained in this principle could be interpreted as being exhaustive and that it would be appropriate to insert wording that makes clear that the list is 'open ended'). See also

Restitution should, whenever possible, restore the victim to the original situation before the gross violation of international human rights law or serious violation of international humanitarian law occurred.[326] Restitution includes, as appropriate: restoration of liberty,[327] enjoyment of human rights,[328] identity, family life and citizenship,[329] return to one's place of residence,[330] restoration of employment and the return of property.[331]

Compensation is, in turn, designed for economically assessable damages resulting from a violation, including: physical or mental harm, lost opportunity

Loayza Tamayo (Reparations), supra n. 307 at para. 85 (noting that reparations is a generic term that covers the various ways a State may make amends for the international responsibility it has incurred (*restitutio in integrum*, payment of compensation, satisfaction, and guarantees of non-repetition among others)).

326 Principle 19, 2006 Basic Principles and Guidelines; and Principle 22, 2000 Draft Principles and Guidelines. See also Second Consultative Meeting Report at 10 (noting that during the meeting, some concerns were raised that the wording of this principle was 'too categorical' by requiring that restitution should, whenever 'possible,' restore the victim to the original situation, and it was suggested that other words could be used. Also, a number of delegations also considered the final sentence of Principle 21 to be 'too prescriptive' and that less mandatory language should be used).

327 Principle 19, 2006 Basic Principles and Guidelines; and Principle 22, 2000 Draft Principles and Guidelines. See also *Loayza Tamayo* IACtHR Series C 33 (1997); 6 IHRR 683 (1999) at para. 5; HRC Concluding Observations: Peru, supra n. 259 at para. 11(b); and *Reece v Jamaica* (796/1998), CCPR/C/78/D/796/1998 (2003); 11 IHRR 72 (2004) at para. 9 (improve conditions of detention or release applicant).

328 Principle 19, 2006 Basic Principles and Guidelines. Initial drafts of the document included the term 'legal rights' but this was later removed. See Principle 22, 2000 Draft Principles and Guidelines. Restitution of legal rights as a form of restitution has been recognised in the jurisprudence of various bodies. See, for example, *Loayza Tamayo (Reparations)*, supra n. 307 at para. 122 (annulment of all effects of a judgment in violation of the ACHR); *Suarez Rosaro (Reparations)*, supra n. 307 at para. 76 (annulment of fine and deleting from register on criminal background); Application No. 2673/95, *Yoyler v Turkey* Judgment of 24 July 2003 at para. 124; Council of Europe Committee of Ministers, Interim Resolution DH (2001) 106, 23 July 2001, on Violations of Freedom of Expression in Turkey: Individual Measures (consequences of convictions contrary to freedom of expression as found by the Court must be erased); HRC Concluding Observations: Peru, supra n. 259 at para. 11 (pardon is not a sufficient compensation for an illegally convicted person).

329 Principle 19, 2006 Basic Principles and Guidelines; and Principle 22, 2000 Draft Principles and Guidelines. For restoration or recognition of citizenship see *Malawi African Ass. et al. v Mauritania*, supra n. 307.

330 Principle 19, 2006 Basic Principles and Guidelines; and Principle 22, 2000 Draft Principles and Guidelines. See also *Jimenez Vaca v Columbia* (859/99), CCPR/C/74/D/859/1999 (2002); 9 IHRR 916 (2002) at para. 9 (State has an obligation to take all measures to protect security of applicant and allow his return home); and, *Malawi African Ass. et al. v Mauritania*, supra n. 307.

331 Principle 19, 2006 Basic Principles and Guidelines; and Principle 22, 2000 Draft Principles and Guidelines. For cases addressing the right to restoration of employment, see *Loayza Tamayo (Reparations)*, supra n. 307 at paras 113–6 (right to restoration of employment—if not available, then victim has a right to a guarantee of salary, social security and employment benefits); *Malawi African Ass. et al. v Mauritania*, supra n. 307 (reinstate the rights due to the unduly dismissed and/or forcibly retired workers); and *Busyo v Congo* (960/2000), CCPR/C/78/D/933/2000 (2003) at para. 6.2 (restoration of employment or similar employment). For cases discussing the right to return of property see *Papamichalopoulos v Greece* A 330-B (1993); (1993) 16 EHRR 440 at para. 38 (return of land); *Brumarescu v Romania* 2001-I 105; (2001) 33 EHRR 36 at para. 22; and *Malawi African Ass. et al. v Mauritania*, supra n. 307.

(including employment, education and social benefits),[332] material damages and loss of earnings including earning potential, moral damage and costs associated with presenting a claim.[333] During the course of consultations, NGOs like Amnesty International emphasised the important role compensation plays in setting the victim on a path to reintegration in society. With regard to torture, attempts to obtain compensation are important to survivors and their supporters. Often, compensation can be easier to pursue than criminal prosecution because it is less threatening to authorities. Amnesty International strongly supported the view that compensation is a 'tangible recognition of wrong inflicted'.[334] Efforts to include concepts of victim compensation in international texts like the statutes of international *ad hoc* tribunals have met with great resistance.[335]

332 At the Second Consultative meeting, some delegations expressed the belief that compensation for 'lost opportunities' was problematic 'as such opportunities could be very difficult to assess and quantify for the purpose of compensation.' See Second Consultative Meeting Report at 10. The government of Cuba expressed the opinion that 'lost opportunities should not only include education, but also food, employment, and health' (ibid. at 131).

333 Principle 20, 2006 Basic Principles and Guidelines; and Principle 23, 2000 Draft Principles and Guidelines. Numerous legal instruments provide for various forms of compensation. See, for example, Article 14, CAT; Article 75(1), ICC Statute; Article 63(1), ACHR; Articles 16(4) and 16(5), Indigenous and Tribal Peoples Convention; Article 9, Inter-American Convention to Prevent and Punish Torture; Article 21(2), AfrCHPR; Article 41(3), EU Charter of Fundamental Rights; Article 68, 1949 Geneva Convention III; and Article 91, Protocol I to the 1949 Geneva Conventions. The following instruments provide for the right to compensation resulting from unlawful arrest, detention, or conviction: Article 9(5), ICCPR; Article 5(5), ECHR; Article 10, ACHR; Article 16, Arab Charter on Human Rights; and Article 85, ICC Statute. The victims' right to compensation has also been affirmed in the following jurisprudence: HRC Concluding Observations: Libyan Arab Jamahiriya, supra n. 307 at para. 7; *Malawi African Ass. et al. v Mauritania*, supra n. 307 (compensation not defined by Commission); Case 11.771, *Catalan Lincolei v Chile* Report No. 61/01 (2001); 9 IHRR 450 (2002) at para. 96(3) (providing for compensation for physical and non-physical damages, including moral damages, for members of family); *Maria Da Penha Maia Fernandez*, supra n. 259 at para. 61(3) (symbolic and actual compensation for State failure to prevent domestic violence); Case No. 10.247, *Extrajudicial Executions and Forced Disappearances of Persons v Peru* Report No. 101/01 (2001); 10 IHRR 829 (2003) at para. 253(3) (noting that the Inter-American Commission recommends compensation, but does not determine the exact amount); and *Hajrizi Dzemajl et al v Yugoslavia*, supra n. 307 at para. 11. For a collective entitlement to compensation see Case 11.100, *Caloto v Columbia* Report No. 36/00 (2000); 8 IHRR 676 (2001) at paras 23 and 75(3) ('social reparations' for an indigenous community after massacre).

At the Second Consultative Meeting, suggestions were made with regards to the principle dealing with 'moral damage.' This term was chosen over previous versions that used 'harm to reputation and dignity'. See Second Consultative Meeting Report at 10.

334 Amnesty International, Combating Torture: A Manual for Action, available at: http://www.amnesty.org/resources/pdf/combating.torture/combating.torture.pdf.

335 In 1993, the author was in a position to propose the inclusion of a victim compensation provision in SC Res. 827 establishing the ICTY. See Bassiouni and Manikas, *The Law of the International Tribunal for the Former Yugoslavia* (Ardsley, New York: Transnational, 1996) at 199–235. But, as stated above, there was only a reference to victims in the Resolution's preambular language, and not in the Statute's text. The Resolution establishing the ICTR, however, does not even mention victim compensation.

Rehabilitation includes the provision of medical and psychological care as well as legal and social services.[336] It is necessary that rehabilitation addresses the victim's psychological needs and empowers them to move past their pain. Silence and repression[337] of emotions can lead to the psychological effects of victimisation, especially in cases of torture, being transmitted to subsequent generations. According to Huyse:

> The second generation, particularly, tends to absorb and retain pain and grief, consciously or unconsciously. They carry traces of the experience into adulthood, and this is a problematic heritage that can threaten the future of a society.[338]

A victim is also entitled to satisfaction and guarantees of non-repetition which should include, where applicable, any or all of the following:

(a) Effective measures aimed at the cessation of continuing violations;[339]
(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations.
(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance

336 Principle 21, 2006 Basic Principles and Guidelines; and Principle 24, 2000 Draft Principles and Guidelines. See also Article 14, CAT; Article 39, CRC; Article 75, ICC Statute; Article 19, Declaration on the Protection of all Persons from Enforced Disappearances; Principles 14–7, 1985 Basic Principles of Justice; Report of the Special Rapporteur on Torture, 10 January 1999, A/54/426 at para. 50; HRC Concluding Observations: Mexico, 27 July 1999, CCPR/C/79/Add.109 at para. 15; *Elena Beatriz Vasilskis v Uruguay* (80/1980), CCPR/C/18/D/80/1980 (1983) at para. 12 (medical care); and UNCAT, Conclusions and Recommendations: Turkey, 27 May 2003, CAT/C/CR/30/5 at para. 7.

337 Dr Rojas Baeza, neuro-psychiatrist, defines this type of victim response as 'frozen mourning' because the victim remains paralysed in a static existence, unable to move past their traumatisation. This can be linked to rage, guilt, and non-acceptance. See Baeza, 'Mental Health Disturbances Caused by the Absence of Truth and Justice', paper delivered at the 6th International Conference for Health and Human Rights, organised by the International Society for Health and Human Rights, Cavtat, Croatia, 2001, available at: http://www.ishhr.org/conference/articles/rojas.pdf. The *Caracazo* Case, supra n. 259, also discussed this phenomenon, stating 'daily normality is hardly ever recovered, as mourning remains frozen in one of its stages, linked to rage and non-acceptance of the outcome'.

338 Bloomfield, Barnes and Huyse, supra n. 270. See also Danieli, 'Right to Restitution', supra n. 274 at 252 (discussing Holocaust survivor's victims). See also Danieli, 'Separation and Loss in Families of Survivors of the Nazi Holocaust', (1985) 29 *Academy Forum* 7.

339 See Draft Articles on State Responsibility; *Bleier v Uruguay* (30/78), CCPR/C/15/D/30/1978 (1982) at para. 5; and *Trujillo Oroza (Reparations)* IACtHR Series C 92 (2002); 11 IHRR 701 (2004) at para. 110 (duty to make all measures to guarantee non-repetition in the future). On the ICJ's approach to non-repetition, see *LaGrand*, Judgment, ICJ Reports 2001, 466. [footnote added.]

with the expressed or presumed wish of the victims, or the cultural practices of the families and communities;[340]

(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim;[341]

(e) Public apology, including acknowledgement of the facts and acceptance of responsibility;[342]

340 The forms of satisfaction described in (b) and (c) may be referred to generally as a duty to conduct a prompt, effective, independent and impartial investigation into grave human rights violations, including disappearances. The full verification and facts and disclosure of truth (i.e. right to truth, see infra) contained in principle 25(b) and the duty to search for the whereabouts of the disappeared and the bodies of those killed, and the return of such bodies to relatives in principle 25(c) have been referenced in the following international instruments: Article 12, CAT; Article 8, Inter-American Convention to Prevent and Punish Torture; Article 9, Declaration on the Protection of all Persons from Enforced Disappearances; UNCHR Res. 2003/72, supra n. 277 at para. 8 (impunity); UNCHR Res. 2003/38, supra n. 277 at para. 5(c); UN Expert on the Right to Restitution, Compensation, and Rehabilitation, Report to the Human Rights Sub-Commission, 2 July 1993, E/CN.4/Sub.2/1992/8 at para. 5.2. See also *Hajrizi Dzemajl et al. v Yugoslavia*, supra n. 307 at paras 9 and 11; HRC General Comment 6, supra n. 130 at para. 8; *Rodriquez v Uruguay*, supra n. 45 at para. 12(3) (investigate torture); HRC Concluding Observations: Peru, supra n. 259 at para. 22 (investigate excessive use of force); *Velasquez Rodriquez (Compensatory Damages)*, supra n. 97 at paras 34 and 35; *Garrido and Baigorria (Reparations)*, supra n. 123 at para. 74; *Loayza Tamayo (Reparations)*, supra n. 307 at paras 170–1; *Castillo Paez (Reparations)*, supra n. 307 at para. 107; *Suarez Rosaro (Reparations)*, supra n. 307 at para. 80; *Blake (Reparations)*, supra n. 307 at paras 64 and 65; *Panel Blanca (Reparations)*, supra n. 307 at paras 200–1; *Street Children (Reparations)*, supra n. 304 at paras 99–101; *Cesti Hurtado (Reparations)*, supra n. 307 at paras 63–4; *Cantoral Benavides (Reparations)*, supra n. 307 at paras 69-70; *Durand and Ugarte (Reparations)*, supra n. 307 at para. 39(c); *Bamaca Velasquez (Reparations)*, supra n. 259 at paras 73–8; *McCann v United Kingdom*, supra n. 135 at para. 161; *Aksoy v Turkey*, supra n. 133 at paras 95–100; *Ulku Ekinci v Turkey*, supra n. 313 at para. 179 (awarding no right to investigation under Article 41, ECHR as reparation, because *restitution in integrum* is not possible); *Finucane v United Kingdom*, supra n. 135 at para. 89; Council of Europe, Committee of Ministers, Interim Res. DH(99)434, supra n. 307 (duty to investigate so as to comply with Court's decision on violation for lack of investigation); and *Malawi African Ass. et al. v Mauritania*, supra n. 307 (duty to clarify fate of disappeared, identify perpetrators). The reference to search for the 'identities of the children abducted,' was added following consultations in 2003, see Second Consultative Meeting Report. [footnote added.]

341 See, for example, *Panel Blanca*, supra n. 307 at para. 105 (judicial decision of an international tribunal may constitute satisfaction in itself, but in case of a grave violation it is not sufficient); *Bamaca Velasquez (Reparations)*, supra n. 259 at para. 84 (judgment is a form of reparation next to others); and *Golder v United Kingdom* A 18 (1975); (1975) 1 EHRR 524 at para. 46. But see *Ocalan v Turkey* (2003) 37 EHRR 238 at para. 250 (Court's finding constitutes sufficient satisfaction). [footnote added.]

342 See, for example, UNCHR Resolutions on Impunity: UNCHR Res. 2001/70, 25 April 2001, E/CN.4/RES/2001/70 at para. 8; UNCHR Res. 2002/79, 25 April 2002, E/CN.4/RES/2002/79 at para. 9, and UNCHR Res. 2003/72, supra n. 277 at para. 8; *Cantoral Benavides (Reparations)*, supra n. 315 at para. 79; and *Juan Sanchez*, supra n. 307 at para. 188 (publication of judgment in official newspaper). For sources regarding the right to apology and recognition of responsibility see, for example, UNSubCHR Res. 2002/5, 12 August 2002, E/CN.4/SUB.2/RES/2002/5 at para. 3 (recognition of responsibility and reparation for

(f) Judicial and administrative sanctions against persons responsible for the violations;[343]
(g) Commemorations and tributes to the victims;[344]
(h) Inclusion of an accurate account of the violations that occurred in international human rights and international humanitarian law training and in educational material at all levels.[345]

Moral reparations, including commemorations and tributes, are often more important to the victim than material ones. Danieli states that they help bridge a gap between victims and their community. 'Commemorations can fill the vacuum with creative responses and may help heal the rupture not only internally but also the rupture the victimisation created between the survivors and their society.'[346] They include a variety of actions, most having to do with a need to share their experiences and see justice being carried out.

Reparations are not simply backward-looking but also help ensure a victim's place in the future. They serve to recompense for losses and also to help reintegrate the marginalised and isolated back into society.[347] Cohen argues:

> There is a need for victimization to be addressed at the community level and not be shouldered entirely by the victim. When the world

flagrant violations of human rights which constitute crimes against humanity and which took place during the period of slavery, colonialism, and wars of conquest); *Bamaca Velasquez (Reparations)*, supra n. 259 at para. 84; and *Durand and Ugarte (Reparations)*, supra n. 307 at para. 39(b). Some recent examples of States accepting responsibility and providing apologies for crimes committed in the past include the 1996 declaration of responsibility by France for crimes against humanity committed during the Vichy regime; President Cardozo's statement of responsibility for human rights violations committed during the military dictatorship in Brazil between 1964 and 1985; and the US government's acknowledgment that US soldiers had killed unarmed civilians during the Korean War. [footnote added.]

343 See also supra Section 6F(i). [footnote added.]

344 See, for example, UNSubCHR Res. 2002/5, supra n. 342 at para. 4 (recognition of responsibility and reparation for flagrant violations of human rights which constitute crimes against humanity and which took place during the period of slavery, colonialism, and wars of conquest); *Street Children (Reparations)*, supra n. 304 at para. 103 (State must name an educational centre after the victims); and *Trujillo Oroza*, supra n. 339 at para. 122 (educational centre to be named after victim). [footnote added.]

345 Principle 22(h), 2006 Basic Principles and Guidelines.
Accounts of history are often altered to suit a specific viewpoint. For example, conservative, neo-nationalists in Japan who did not feel a moral or legal responsibility for 'comfort women' (women and girls forced to provide sexual services to officers and soldiers during WWII) engaged in campaigns to remove historical references to them. This resulted in five of the eight middle-school history textbooks, approved for use from the year 2002, not mentioning the military 'comfort women'. See Soh, *Japan's Responsibility Toward Comfort Women Survivors*, Japan Policy Research Institute Working Paper No. 77, May 2001, available at: http://www.jpri.org/publications/workingpapers/wp77.html.

346 Danieli, supra n. 274 at 261.

347 See Roht-Arriaza, supra n. 260 at 160.

community takes steps to redress victimization and analyze its causes, this will free the victims and reduce their need to retaliate.[348]

Within national legal systems, the guarantees of non-repetition should include, where applicable and as appropriate, any or all of the following:[349]

(a) Ensuring effective civilian control of military and security forces;[350]
(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;[351]
(c) Strengthening the independence of the judiciary;[352]
(d) Protecting persons in the legal, medical and health care professions, the media and other related professions and human rights defenders;[353]

348 Cohen, Secretary General Conference 'Confronting Anti-Semitism: Education for Tolerance and Understanding', UN Chronicle, 21 June 2004, available at: http://www.un.org/Pubs/chronicle/2004/webArticles/062104sg.remarks2.asp.

349 Principle 23, 2006 Basic Principles and Guidelines.

350 See UNCHR Res. 2000/47, 25 April 2000, E/CN.4/RES/2000/47; OAS GA Res. 1044 (XX-0/90) (1990); HRC Concluding Observations: Romania, 28 July 1999, CCPR/C/79/Add.111 at para. 9; HRC Concluding Observations: Lesotho, 8 April 1999, CCPR/C/79/Add.106 at para. 14; and Case No. 11.286, *Cavalcanti et al v Brazil* Report No. 55/01 (2001) at para. 168(6) (independent, impartial and effective supervision of military police). [footnote added.]

351 During the Second Consultative meeting, the role of military tribunals in peacetime was discussed by the delegates. See Second Consultative Meeting Report at 11. While many of the delegates appeared to be satisfied with the current provision, a number of other delegations raised concerns (ibid.). Some considered that military tribunals should have no role in peacetime, while others felt that it was 'important to allow a role for military tribunals even in peacetime, and that to do otherwise would create problems in relation to their domestic legislation' (ibid.). The Report notes that 'the provision to limit the jurisdiction of military tribunals to military offenses committed by military personnel is not intended to address the general issue of military jurisdiction . . . Rather, it addresses only those cases in which military tribunals have a record of violations, and therefore by limiting their jurisdiction one can achieve non-repetition' (ibid. at 13). Some delegations also noted that the restriction on the jurisdiction of these tribunals 'could apply to cover other ad hoc tribunals invested with special jurisdiction'. (ibid. at 11.) See also Article 16(2), Declaration on the Protection of All Persons from Enforced Disappearance; Article IX, Inter-American Convention on Forced Disappearance of Persons; HRC Concluding Observations: Peru, supra n. 259 at para. 12; *Durand and Ugarte (Reparations)*, supra n. 307 at paras 117–8; *Cantoral Benavides (Reparations)*, supra n. 307 at para. 75; *Cavalcanti et al*, ibid. at para. 168(5). For the ECtHR jurisprudence on this issue, see *Incal v Turkey* 1998-IV 1547; (2000) 29 EHRR 449 at paras 68–73; *Ciraklar v Turkey* 1998-VII 3059; (2001) 32 EHRR 535 at paras 39–41; and Application No. 24919/94, *Gerger v Turkey* Judgment of 8 July 1999 at paras 60–2. The final version of the document included both civilian and military proceedings but did not specify jurisdiction. See Second Consultative Meeting Report at 22. [footnote added.]

352 See, for example, UN Basic Principles on the Independence of the Judiciary; UNCHR Resolutions on the Independence of the Judiciary, UNHCR Res. 2001/39, 23 April 2001, E/CN.4/RES/2001/39; UNHCR Res. 2002/43, 23 April 2002, E/CN.4/RES/2002/43; and UNHCR Res. 2003/43, 23 April 2003, E/CN.4/RES/2003/43; HRC Concluding Observations: Algeria, 18 August 1998, CCPR/C/79/Add.95 at para. 14; and HRC Concluding Observations: Libyan Arab Jamahiriya, supra n. 307 at para. 14. [footnote added.]

353 See, for example, Articles 12–31, Additional Protocol I to the 1949 Geneva Conventions; UNCHR Res. 2003/32, 23 April 2003, E/CN.4/RES/2003/32 at para. 11 (torture); and Case 11.405, *Mendez et al v Brazil* Report No. 59/99 (1999) at para. 120(2) (guarantee judicial protection to representatives of rural workers and human rights defenders). [footnote added].

(e) Providing on a priority and continued basis, human rights and international humanitarian law education to all sectors of society, including law enforcement officials, as well as military and security forces;[354]
(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well by economic enterprises;[355]
(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution;[356]
(h) Reviewing and reforming laws contributing to or allowing gross violations of human rights law and serious violations of international humanitarian law.[357]

Each of the forms of reparation may be sought either singularly or collectively.[358] Moreover, several are not dependant on a judicial proceeding,

354 See, for example, Article 10(2), Protocol to Prevent, Suppress and Punish Trafficking in Persons; Principle 16, 1985 Basic Principles of Justice; Article 25, AfrCHPR; UNCHR Res. 2003/32, ibid. at para. 20 (torture); HRC Concluding Observations: Libyan Arab Jamahiriya, supra n. 307 at para. 10; HRC Concluding Observations: Columbia, 5 May 1997, CCPR/C/79/Add.76 at para. 35; *Trujillo Oroza*, supra n. 339 at para. 121; *Caracazo (Reparations)*, supra n. 259 at para. 127 (educating and training all members of armed forces and security services); Case 11.291, *Carandiro v Brazil* Report No. 34/00 (2000) at Recommendation 3 (training of prison personnel); and Council of Europe Committee of Ministers, Interim Resolution DH (99) 434, supra n. 307 (duty to train members of security forces, judges and prosecutors). [footnote added.]

355 See Second Consultative Meeting Report at 11 (noting that this sub-principle, by listing specific sectors of society in reference to the promotion of codes of conduct 'excludes other sectors.' The Report suggested that 'it would be prudent to either delete references to these sectors, or make clear that the listed categories are inclusive, not exclusive'). [footnote added.]

356 Initial drafts used the term 'preventive social intervention'. Principle 25(g), 2000 Draft Principles and Guidelines. At the Second Consultative meeting, the term 'intervention' was discussed at some length. Second Consultative Meeting Report at 11 ('Concern was raised about the word 'intervention', and questions were raised about the intended meaning of this new provision.'). Some States thought that the term suggested external intervention in a State's internal affairs. The Second Consultative Meeting Report notes, however, that the wording of this principle 'was intended to focus attention on social tensions and conflicts that may give rise to situations where human rights abuses occur, and that States should take appropriate preventive measures to avoid such situations' (ibid.). [footnote added.]

357 This sub-part was added in response to suggestions at the Second Consultative meeting which highlighted the responsibility of States to reform laws that have contributed to or permitted the violation of human rights. See Second Consultative Meeting Report at 11. With regard to Principle 26 as a whole, it was suggested that the provision 'would benefit from a paragraph stating that concrete legislative and administrative measures should be taken in relation to guaranteeing the non repetition and prevention of violations' (ibid.). [footnote added.]

358 Principle 22, 2006 Basic Principles and Guidelines. An example of a newer, mixed form of reparation orders that combines the typical criminal sanction and the civil law claim for compensation is found in the British compensatory order. See Timm, supra n. 207. See also Redner, 'National Report of England', in Eser and Walter (eds), *Reparation in Criminal Law: Vol 1* (Freiburg: Max Planck Institute for Foreign and International Criminal Law, 1996) 109 at 169–80.

and indeed may in many cases only come about by decisions of a State's political branches. This is especially true with respect to the elements of satisfaction and guarantees of non-repetition. In addition, inter-governmental organisations and NGOs can assist in providing forms of reparation such as the facilitation of truth and rehabilitation services and commemoration. However, such actions by third parties are in no way a substitute for reparation provided by the principal violator and by the necessary and appropriate redress modalities that a State or international organisation can offer.[359]

(iii) The Right to Truth

An important aspect of the guarantee of non-repetition includes the victims' right to access factual and other relevant information concerning the violation.[360] Understanding and public disclosure of the truth is important to victims because the truth (1) alleviates the suffering of the surviving victims; (2) vindicates the memory or status of the direct victim of the violation; (3) encourages the State to confront its dark past; and (4) through it, seek reform.[361]

359 See Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights', supra n. 2 at 1499.

360 Principle 24, 2006 Basic Principles and Guidelines describes the 'right of access' that victims are guaranteed. '[V]ictims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and to learn the truth in regard to these violations'. The right to the full disclosure of truth (i.e. right to truth) has been recognised in international humanitarian law. See, for example, Articles 16 and 17, 1949 Geneva Convention I; Articles 122 *et seq*, 1949 Geneva Convention III; Articles 136 *et seq*, 1949 Geneva Convention IV; and Article 33, Additional Protocol I to the Geneva Conventions (duty to search for missing persons). This right has also been recognised in the jurisprudence of various international bodies. See HRC Concluding Observations: Guatemala, 3 April 1996, CCPR/C/79/Add.63 at para. 25 (right to truth applies to all human rights violations); Case 11.481, *Ignacio Ellacuria v El Salvador* Report No. 136/99 (1999); 8 IHRR 501 (2001) at para. 221 (right to truth linked to the right to a remedy); Case 10.480, *Lucio Parada Cea v El Salvador* Report No. 1/99 (1998) at para. 147 (right to know what happened, the reasons and the circumstances, as well as the participants); *Velasquez Rodriguez* IACtHR Series C 4 (1988) at para. 181; *Godínez Cruz*, supra n. 123 at para. 191; *Castillo Paez (Reparations)*, supra n. 307 at para. 90; *Blake (Reparations)*, supra n. 307 at para. 97; and *Caracazo*, supra n. 259 at para. 118. The persons or groups entitled to the right to truth include the following: *Bamaca Velasquez (Reparations)*, supra n. 259 at paras 73–8 (family members and society); *Caracazo*, supra n. 259 at paras 115 and 118 (investigation and search for the truth as a benefit to society); and *Juan Sanchez*, supra n. 307 at para. 185 (public disclosure of truth to the society). See also *Ellacuria v El Salvador*, ibid. at para. 224 (collective right that ensures society's access to information and private right for relatives of the victims, which affords a form of compensation).

361 During the process of drafting, delegations suggested that this principle should be properly aligned with principle 11(c), 'in order to facilitate the access by victims and their representatives to factual information concerning violations.' Second Consultative Meeting Report at 12 ('the text should refer to the right to know, seek, obtain and retain information on the alleged violations, and to the truth.'). See also Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights', supra n. 2 at 1439–43. Aldana-Pindell divides the right to truth into the substantive and procedural right to truth, noting that the right to the truth is not violated if the State does not uncover each of the components of truth that surviving human rights victims seek from the State (at 1441).

Truth can help provide an historical record, educate people, promote forgiveness and prevent future victimisation.[362] Truth is an imperative, not an option to be displaced by political convenience.

Recent attempts to engage in truth finding have involved the establishment of truth commissions and other forms of fact-finding commissions in a number of countries predominantly in South America and Africa.[363] Such efforts include the establishment of the National Commission on Disappeared Persons and an accompanying reparation scheme in Argentina;[364] the National Commission on Truth and Reconciliation established in 1990 in Chile, to shed light on human rights violations that occurred during the military dictatorship from 1973 to 1990;[365] the Commission on Truth in El Salvador established in 1992 under the direction of the UN, to investigate serious acts of violence that occurred since 1980;[366] and the Truth and Reconciliation Commission established in post-apartheid South Africa.[367] Although some commissions may have played an important restorative role in the process of reconciliation and peace-building, the work of truth commissions to date has not produced the most effectual results in terms of individual victim redress.

7. Economic and Political Considerations

Victims' right to redress has not been universally guaranteed, but rather has been dependent on States' whims and political exigencies. Even in cases where victims' reparations issues are addressed, a victim-oriented resolution does not always ensue:

> Where victims' reparations issues have been eventually addressed, they have been dealt with in the context of peace settlements, national

362 See Osiel, 'Ever Again: Legal Remembrance of Administrative Massacre', (1995) 144 *University of Pennsylvania Law Review* 493.

363 See Hayner, 'Fifteen Truth Commissions–1974 to 1994: A Comparative Study', (1994) 16 *Human Rights Quarterly* 597.

364 See Pasqualucci, 'The Whole Truth and Nothing But the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System', (1994) 12 *Boston University International Law Journal* 321; and Hayner, *Confronting State Terror and Atrocity* (London: Routledge, 2000).

365 Although limited in its mandate, as of 1996 the Chilean Commission paid compensation to close to 5,000 relatives of victims totaling over $80 million (US). See Reisman, 'Compensation for Human Rights Violations', in Randelzhofer and Tomuschat (eds), *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (The Hague: Kluwer Law International, 1999) 106.

366 See From Madness to Hope: The 12-Year War in El Salvador, report of the Commission on the Truth for El Salvador, annexed to a Letter dated 29 March 1993 from the Secretary-General to the President of the UN Security Council, 1 April 1993, S/25500.

367 See Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid Regime* (Cambridge: Cambridge University Press, 2001).

> reconciliation programmes or peace-building efforts, but they have often been subordinated or even sacrificed to political or strategic considerations. Worse, victim's reparations have sometimes been bargained away completely in peace negotiations or postponed indefinitely.[368]

Economic factors remain critical in any evolution of victims' rights. Who bears the costs? Victims of State violence are often denied their rights when the government that has perpetrated the harm is still in power, or when a new government (perhaps even representing those who have been previously victimised) is impoverished. The post-genocide regime change in Rwanda illustrates the difficulty of this question. Can a Tutsi government with no resources be expected to provide compensation to Tutsi citizens for violations committed by a Hutu regime?

Some feel that there is a duty of human social solidarity requiring the establishment of an international trust fund. Regrettably, this is far from being achievable, either politically or economically. With respect to torture, the UN established a Voluntary Fund for Victims of Torture (Voluntary Fund) in 1981, which is funded by voluntary donations of governments,[369] organisations and individuals. Although the Voluntary Fund could address the State compliance problem by pooling the resources of wealthier countries, it does not currently provide direct financial compensation to victims of torture.[370] Rather, it provides funding for NGOs that provide 'direct medical, psychological, social, economic, legal, humanitarian or other forms of assistance to torture victims and members of their family'.[371] The Voluntary Fund lacks monetary resources.[372] Other examples of UN-sponsored victim redress mechanisms include the UN Voluntary Trust Fund on Contemporary Forms of Slavery;[373]

368 Bottigliero, *Redress for Victims of Crimes Under International Law* (Leiden: Martinus Nijhoff, 2004).

369 As of the 21st session of the Board of the Fund in 2003, contributions were received from 38 of the 191 Member States. United Nations Voluntary Fund for Victims of Torture, Report of the Secretary General, 14 August 2003, A/58/284.

370 See Lasco, supra n. 20 at 18.

371 Ibid. Lasco notes that, in order for victims of torture to receive these services, they must reside in the region where a Voluntary Fund-supported NGO operates, be aware of the NGO and its services, have the means to request assistance, and meet the guidelines the particular NGO establishes. (ibid. at 19.)

372 Ibid. 2003 figures indicate the amount available for allocation to new grants came to a little over $7 million (US) while the total sum of requests was over $13 million (US). As a result, only a small fraction of torture victims worldwide receive necessary rehabilitation or support. United Nations Voluntary Fund for Victims of Torture Report of the Secretary General, supra n. 379.

373 Established by GA Res. 46/122, 17 December 1991, A/RES/46/122, with the goal of assisting individuals who were victims of contemporary forms of slavery. See Report of the Secretary-General on the Status of the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery, 18 July 2000, A/55/204.

and the UNDP Trust Fund for Rwanda established in 1995.[374] With regard to terrorism, the Security Council established a working group in 2004 to 'consider the possibility of establishing an international fund to compensate victims of terrorist acts and their families, which might be financed through voluntary contributions, which could consist in part of assets seized from terrorist organisations, their members and sponsors'.[375] Efforts to bolster victims' rights through the creation of 'funds' are incremental and will probably remain limited to certain conflicts or categories of victims.

8. Conclusion

The victim's right to reparation has been recognised in numerous international and regional instruments and in the jurisprudence of various adjudicatory and supervisory bodies. States bear the obligation to respect and enforce norms of international human rights and humanitarian law that are incorporated in treaties to which they are parties, found in customary international law, and those that have been incorporated into their domestic legal system. This obligation gives rise to a State's duty to take appropriate legislative, administrative and other measures to prevent violations; investigate violations and take action against those allegedly responsible; provide victims with equal and effective access to justice and provide effective remedies to victims, including reparation.

An increasing concern for victims of human rights violations can be traced through the evolution of international law over the course of the last 50 years, especially between 1984 and 2006. The adoption of the 2006 Basic Principles and Guidelines is a monumental milestone in the history of human rights as well as international criminal justice. The road leading to its adoption has been a long and winding one wrought with obstacles and challenges, but its adoption is a step towards putting victims on the road to recovery and reparation. In some instances, legal developments have sparked practical progress to ensure that victims are not denied the basic right of redress for their injuries. There is already evidence that the document is having an effect on State policies. Several Latin American countries have taken the draft version of the Principles and Guidelines into consideration when preparing legislation on reparation for victims. The IACtHR has referred to the draft in several rulings,[376]

374 UNDP Trust Fund for Rwanda succeeded the Secretary General's Trust Fund for Rwanda, which was organised with the goal of providing humanitarian assistance to victims of the Rwanda atrocities in 1994. See UNDP Trust Fund for Rwanda, Progress Report No. 15 (1999).

375 SC Res. 1566, 8 October 2004, S/RES/1566 (2004).

376 See *Bamaca Velasquez (Reparations)*, supra n. 259 at para. 75; and *Castillo Paez*, supra n. 307.

and Article 75 of the Statute of the ICC includes elements of the draft relating to victim reparation.[377] The document has also been used as a standard for governments when implementing programmes for victims[378] and its effect can be seen in the provisions of both universal and regional instruments.[379]

However, despite the positive developments in international law which have taken place, much more is needed to make this academic progress a reality for victims on the ground. While the 2006 Basic Principles and Guidelines are indeed a triumph for victims, the quest for reparation has not yet ended. The realisation of victims' rights requires the establishment of implementation mechanisms and governmental will to take the Principles from being mere words on a page and put them into practice. The international legal system is far from being victim-oriented.

By honouring victims' rights to benefit from remedies and reparation, the international community expresses solidarity with victims and reaffirms the principles of accountability, justice and the rule of law. Recognising the rights of victims of gross human rights violation is the most crucial imperative of our age. After all, we may one day find ourselves in their place. In the eloquent words of John Donne:

> No man is an island, entire of itself; every man is a piece of the continent, a part of the main . . . Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee . . ..[380]

377 Article 75, ICC Statute provides that the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

378 For example, the draft was also used as a point of reference by the US Secretary of State in requesting that the Northern Ireland Human Rights Commission consult and advise the Secretary on the scope of a Bill of Rights for Northern Ireland. The Commission relied on the standards set forth in the draft when dealing with victim's rights and defining the term victim. 'Making a Bill of Rights for Northern Ireland,' consultation document by the Northern Ireland Human Rights Commission, September 2001, as cited in Joint NGO Position Paper Second Consultative Meeting, supra n. 245.

379 The HRC, in General Comment No. 29, supra n. 130 at para. 14, recalled that even during a state of emergency, the right to a remedy is non-derogable.

380 Donne, *Devotions Upon Emergent Occasions* XVII (London, 1626).

Annex 220

Pierre d' Argent, 'Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion' in Dupuy, Fassbender, Shaw & Sommermann (eds), *Völkerrecht als Wertordnung/ – Common values in International Law, Festschrift für Christian Tomuschat/Essays in Honour of Christian Tomuschat* (N.P. Engel Verlag 2006)

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The Advisory Opinion delivered on 9 July 2004 by the International Court of Justice on the *Legal consequences of the construction of a wall in the occupied Palestinian territory*[1] is remarkable in many ways. The question asked by the UN General Assembly related to a conflict that has inflamed a whole region for nearly 60 years. For that reason, the Court probably understood the exercise of its judicial responsibility to be of a very special historical importance and it responded with an Opinion in which (apparent) legal clarity supports political strength. Even if important parts of the Opinion are open to discussion – commentaries will no doubt stress that legal clarity might sometimes entail (over)simplification[2] –, such 'strength' is in sharp contrast with recent contentious rulings in which the Court might be considered to have been much less 'courageous'.[3] This comment is limited to the way the Court dealt, in a few short paragraphs, with issues of compliance with international law, cessation, restitution and reparation, including the question of the dismantlement of (parts of) the wall. It will, *inter alia*, try to show how

* My thanks to Kathleen Cavanaugh, David A. Westbrook and Marcelo Kohen for their comments and careful reading. This paper is based on a presentation made at the UN international meeting on the question of Palestine, held in Geneva on 8-9 March 2005, and updated in December 2005.

[1] ICJ Reports (2004), p. 136 = 25 HRLJ 161 (2004).

[2] See *e.g.* the contributions published in the *Agora:* "ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory", *AJIL*, 2005/1, pp. 1-141.

[3] See, e.g., the judgment of 6 November 2003 in the *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Reports (2003), p. 161 and my comment P. d'Argent, « Du commerce à l'emploi de la force : l'affaire des plates-formes pétrolières (arrêt sur le fond) », *AFDI*, 2003, pp. 266-289. On the role and position of the judge, see also in relation to that case E. Jouannet, « Le juge international face aux problèmes de cohérence et d'instabilité du droit international. Quelques réflexions à propos de l'arrêt CIJ du 6 novembre 2003, Affaire des Plates-formes pétrolières », *RGDIP*, 2004, pp. 917-948.

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the Court took into account the difficult sociological reality on the ground by dealing with the question of the dismantlement of the wall under the duty to put an end to a continuous violation of international law, rather than under the concept of restitution as claimed by Palestine in its written submissions. The affirmation by the Court of a right to reparation to the direct benefit of individuals will also be commented.

Before addressing the Opinion on those points, it is worth remembering that the Court limited very explicitly its ruling to the legal consequences arising from the construction of the wall 'in the Occupied Palestinian Territory, including in and around East Jerusalem', as precisely asked by the General Assembly.[4] According to the Court, those words must mean that it is not called upon to examine the legal consequences arising from the construction of the parts of the wall being built, or planned to be built, 'on the territory of Israel itself'.[5] Without explicitly defining the Israeli territory, the Court nevertheless considers the relevant occupied Palestinian territory to be situated between the 1949 armistice line of demarcation (the 'Green Line') and the former eastern boundary of Palestine under British mandate.[6] The Court thus implicitly considers that Israel is not an occupying power west of the Green Line – to the exclusion of the Gaza strip –, at least for the purpose of answering the General Assembly's question. Does this mean that the Opinion must be read as implying that Israel is there – again, with the exclusion of the Gaza strip – sovereign? Even if the Opinion is silent on this point, it is quite difficult to understand it differently. The affirmation of the existence of 'the territory of Israel itself' might at least be understood as a short but strong rejection of some arguments that were submitted to the Court on the question of the legality of the presence of Israel west of the Green Line.[7] In other words, 'the territory of Israel itself' seems to imply a *ratione loci* limitation to

[4] GA, Res. ES-10/14, 8 December 2003.

[5] ICJ Reports (2004), p. 164, para. 67: "The Court notes furthermore that the request of the General Assembly concerns the legal consequences of the wall being built 'in the Occupied Palestinian Territory, including in and around East Jerusalem'. As also explained below (see paragraphs 79-84 below), some parts of the complex are being built, or are planned to be built, *on the territory of Israel itself*; the Court does not consider that it is called upon to examine the legal consequences arising from the construction of those parts of the wall" (emphasis added).

[6] *Ibid.*, para. 78 at p. 167: "The territories situated between the Green Line (see paragraph 72 above) and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of an occupying Power".

[7] See e.g. the concluding remarks by M. Chemillier-Gendreau on behalf of the Organization of the Islamic Conference, Verbatim record, CR 2004/5, 45-46.

the right of the Palestinian people to self-determination.[8] Positively, and in a certain way balancing the affirmation of the existence of 'the territory of Israel itself', that territorial limitation to the right of the Palestinian people to self-determination is to be understood as an implicit affirmation of the existence of a Palestinian (and not a disputed) territory. In other words, the right of the Palestinian people to self-determination is to be exercised on the territories east of the Green Line (and the Gaza strip), not only because they are occupied by Israel, but, first and foremost, because they are Palestinian. This said, the Court did not address the question whether the wall infringes the territorial integrity of Palestine, as it was suggested by some States.[9]

However, as far as the question put to the Court is concerned, no firm conclusion on those points of territorial rights is needed, since it is certain that only those parts of the wall built – or planned to be built – east of the Green Line are of concern to the Court. In other words, nothing in the Advisory Opinion relates to the fact of building a wall, such as the one built by Israel, on territories which are not considered to be occupied. This said, since the structure of the wall 'has a width of 50 to 70 metres, increasing to as much as 100 meters in some places'[10] with 'depth barriers' being eventually added, none of its parts may be considered as literally built 'on' the Green Line. So, except for the sections of the wall that might be entirely built west of the Green Line, the findings of the Court on issues of compliance with international law, cessation, restitution and reparation are of importance not only to the parts of the wall that clearly depart from the Green Line to the east, but also to those that follow the Green Line and extend across it.

After having considered that Israel's responsibility 'is engaged under international law'[11] because the 'construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem, and its associated regime, are contrary'[12] to international law, the reasoning of the Court on issues of compliance with international law, cessation, restitution and reparation is limited to five short paragraphs (149 to 153). Neither the separate opinions of six of the judges nor the declaration of judge Buergenthal discuss those issues. This lack of debate might give the impression that the Opinion is of little interest in regard to remedies. This comment suggests the opposite view.

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[8] Sep. Op. Higgins, ICJ Reports (2004), p. 215, para. 31: " 'Peoples' necessarily exercise their right to self-determination within their own territory."

[9] See e.g. *Written Statement of Malaysia*, p. 41, para. 110 et al., available at www.icj-cij.org. On the Palestinian character of the occupied territories, see *ibid.*, p. 19, paras. 45 et al.

[10] ICJ Reports (2004), p. 170, para. 82.

[11] *Ibid.*, p. 197, para. 147.

[12] *Ibid.*, and concluding para. 163 (3) A, at p. 201. Fourteen votes to one.

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I. Duty to comply

Paragraph 149 stresses 'first' that Israel has the duty 'to comply with the international obligations it has breached by the construction of the wall in the Occupied Palestinian Territory', i.e. those obligations dealt with by the Court in its preceding paragraphs 114 to 137. There is no need to detail here those obligations, nor to recapitulate the reasoning of the Court in that regard. In brief, the Court rules that 'Israel is bound to comply with its obligation to respect the right of the Palestinian people to self-determination and its obligations under international humanitarian law and international human rights law. Furthermore, it must ensure the freedom of access to the Holy Places that came under its control following the 1967 War'.[13]

This duty to comply with existing international obligations that are breached by the very fact of building the contentious wall is not repeated in the 'operative' paragraph 163 of the Opinion: as such, obeying existing rules is not a specific legal consequence of building the wall. To respect the right of the Palestinian people to self-determination, and uphold international humanitarian and human rights law, are obligations binding on Israel as the occupying power, independently of the construction of the wall. The fact that building it breaches Israel's duty to respect such general obligations does not imply that putting an end to the construction would automatically ensure respect for them. Building the wall is just a specific violation of the same obligations. Since the Court is only called by the General Assembly to determine the legal consequences of that specific breach, it does not have to recall in its concluding paragraph what remains unaltered despite of it, i.e. the 'primary' duty to obey existing rules.

The Court's reasoning is very much in conformity with the approach taken, after some hesitation,[14] in article 29 of the ILC draft articles on responsibility of States for internationally wrongful acts. The 'continued duty of the responsible State to perform the obligation breached' is considered to be 'not affect[ed]' by the 'legal consequences of an internationally wrongful act'[15] – the legal consequences of a wrongful act, e.g. the duty to pay reparations, are of a 'secondary' nature and do not excuse or otherwise affect the duty to comply with the 'primary obligations' that continue to be binding despite of their breach. This is all the more the case since it is not a matter for the law on State responsibility to determine if and to which extent the breach of a 'primary obligation' affects its very existence, but to the rules applicable to that obligation itself.[16] The apparently innocuous affirmation by the ICJ of the

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[13] *Ibid.*, p. 197, para. 149.

[14] See the positions respectively adopted by W. Riphagen, "Second Report on the Content, Forms and Degrees of International Responsibility", *YbkILC* (1981), v.II(I), para. 68 and G. Arangio-Ruiz, "Preliminary Report on State Responsibility", *YbkILC* (1988), v.II(I), 11.

[15] GA Res. 56/83, 28 January 2002, art. 29 'Continued duty of performance'.

[16] *Report of the ILC on the work of its 53rd session* (2001), A/56/10, Ch.IV, 216.

continued duty of Israel to comply with the breached obligations is therefore a statement about the character of such obligations, rather than an insistence on a remedy *stricto sensu*, that is, a legal consequence of the construction of the wall.

II. Cessation

In contrast to the duty to comply, the 'obligation to put an end to the violation of [Israel's] international obligations flowing from the construction of the wall in the Occupied Palestinian Territory'[17] is a specific legal consequence of the illegality of that construction. By quoting its jurisprudence, the Court recalls that the obligation of any responsible State to cease an act violating its international obligations is 'well established in general international law'.[18] The concept of 'cessation' seems thus to be part of the contemporary 'grammar' of international law, even if it can be seen more simply as the other side of the normal duty to obey the law. This is however not the place to re-open this debate which divided the ILC for a while, and this comment assumes that the logic of the Court and the ILC is to be taken seriously. Hence, according to the Court, Israel's duty to put an end to the violations resulting from its construction of the wall entails three different concrete obligations:

1. the obligation 'to cease forthwith the works of construction of the wall being built in the Occupied Palestinian Territory, including in and around Jerusalem';[19]

2. the obligation to 'dismantle forthwith the structure therein situated';[20]

3. the obligation to 'repeal or render ineffective forthwith all legislative and regulatory acts relating'[21] to the construction of the wall and its associated regime, 'except in so far as such acts, by providing compensation or other forms of reparation for the Palestinian population, may continue to be relevant for compliance by Israel with'[22] its obligations to compensate the damages suffered as a result of the wall's construction.

1. Halting the construction of the wall

The fact that the Court deals with the question of halting future constructions under the notion of cessation, rather than under the duty to

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[17] ICJ Reports (2004), p. 197, para. 150.

[18] The Court refers to its judgments in the *Nicaragua* case (ICJ Reports (1986), p. 149), in the *US Diplomatic and Consular Staff* case (ICJ Reports (1980), 44, para. 95) and in the *Haya de la Torre* case (ICJ Reports (1951), p. 82). See also *Rainbow Warrior*, XX *RIAA* (1990), p. 215, at p. 270, para. 114; GA Res. 56/83, 28 January 2002, art. 30 'Cessation and non-repetition', and commentary in *Report of the ILC on the work of its 53rd session* (2001), A/56/10, Ch.IV, p. 216.

[19] ICJ Reports (2004), p. 201, para. 163 (3) B; see also para. 151 at p. 197.

[20] *Ibid.*, p. 201, para. 163 (3) B.

[21] *Ibid.*

[22] *Ibid.*, p. 198, para. 151.

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comply with existing obligations, suggests the importance given to the act that occasions the question of the General Assembly. That act is considered to be an ongoing (illegal) Israeli project, which encompasses past, present and future constructions. In the Advisory Opinion, it is clear that the Court does not limit its analysis of facts and law to the sections of the wall that have already been built, but takes the question of the General Assembly as relating to a construction project, be it partly or entirely achieved. Since important sections of the wall were actually already built by the time the General Assembly requested the Advisory Opinion, it is speculation to ask whether the mere intent of building such a wall, with all its preparatory planning, could have been considered as a wrongful act. One could be tempted to consider that if future constructions have to be halted on the basis of cessation, it is because the intent of implementing that project in the future is itself wrongful. A negative answer to this question would seem to be more consistent with the jurisprudence of the Court, which has in the past been reluctant to consider preparatory acts as illegal.[23] Such a negative answer would, nevertheless, leave open the possibility to affirm a duty to halt future – *ex hypothesis* – constructions, but then under the obligation to comply with binding rules rather than under the notion of cessation. Such discussion remains speculative however, since the Court took a global approach to the Israeli project, considered as a breach of a continuous character.[24]

2. Dismantling the wall

The Court understands cessation as including also the duty to dismantle existing sections of the wall (2) and the duty to repeal Israeli legislation relating to the construction of the wall (3). By doing so, the Court reaches substantially the same conclusions as Palestine, but on a different legal ground. In its written statement, Palestine argued that it is because Israel has a duty to make reparation for the damage arising from its illegal conduct that it must, in the form of restitution, demolish the portions of the wall already built and annul its legal acts associated with the construction.[25]

This discrepancy between the submissions of Palestine and the reasoning of the Court, despite their common substantial outcome, calls for a few comments.

From a theoretical point of view, the Court extends the notion of cessation as far as possible. The difference between cessation and restitution is

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[23] *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports (1997), p. 7 at p. 54, para. 79, quoting ILC work on the subject.

[24] In the sense of art. 14, 2, of the draft articles on State responsibility, GA Res. 56/83, 28 January 2002.

[25] ICJ Reports (2004), p. 196, para. 145. See *Written Statement submitted by Palestine*, p. 284, para. 617 et al., available at www.icj-cij.org.

sometimes difficult to make, as illustrated in the *Rainbow Warrior* case.[26] More generally, one may consider that to give back stolen property is at the same time to stop receiving goods, i.e. cessation, and to make good the damage caused, in the form of a restitution of the object of the theft. But while cessation assumes a breach of a continuous character that must simply stop, the need for restitution may exist after the breach has ceased. Restitution requires an action by the author of the violation which serves 'to re-establish the situation *which existed* before the wrongful act was committed'[27]. For that reason, restitution is a form of reparation, but, according to the circumstances, is often an incomplete one, since to make good the damage means to 'reestablish the situation which *would*, in all probability, *have existed*' had the illegal act not been committed.[28] This justifies that, alternatively or additionally to restitution, full reparation might require compensation.

Why is it important that the Court did not follow the Palestinian submissions regarding the dismantlement of the wall on the basis of restitution, but considered the removal and destruction of the illegal sections of the wall as flowing from the duty to put an end to the violations resulting from its construction? Even if the Court did not give any explanation to that change, two reasons appear to be decisive in that regard.

Firstly, founding the dismantlement of the wall on cessation is a way to reaffirm the continuous character of the breaches committed by Israel. The very fact of building the wall is no doubt a process, a behaviour which extends over time. But once the entire wall is built and the construction finished, there nevertheless remains a continuous breach of the same obligations. In other words, it is the presence of the wall – which is designed to be manned – and not only its construction over the years, which violates international law. As long as the wall is there, partly or completed – not only as long as the wall is being built – Israel does not comply with its obligations. Calling for the dismantlement of the wall on the basis of restitution does not allow to take fully into account the temporal dimension of the breaches, and hence the real nature of the underlying obligations.

Secondly, founding the dismantlement of the wall on cessation rather than on restitution prevents various arguments that otherwise could be made by Israel to complicate the issue in order to drag it as long as possible, so as to keep the wall in place.

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[26] *Rainbow Warrior*, XX *RIAA* (1990), p. 217, at p. 267, paras. 111-114. See also J. Crawford, *Third Report on State Responsibility (2000)*, A/CN.4/507/Add.1, paras. 130-134.

[27] Art. 35 of the draft articles on State responsibility, GA Res. 56/83, 28 January 2002 (emphasis added) and commentary in *Report of the ILC on the work of its 53rd session* (2001), A/56/10, Ch.IV, 237.

[28] *Factory at Chorzow* (Merits), 1928 PCIJ Series A, n° 17, p. 47 (emphasis added). On the notion of reparation and the various uses and understandings of the notion of restitution, see P. d'Argent, *Les réparations de guerre. La responsabilité internationale des États à l'épreuve de la guerre*, Bruxelles, Bruylant/LGDJ, 2002, pp. 662-699.

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On the one hand, not being a form of reparation, cessation is not subject to the exceptions that exist in case of restitution. As codified by article 35 of the 2001 ILC draft articles, restitution must not be made when it is 'materially impossible' or when it involves 'a burden out of all proportion to the benefit deriving from restitution instead of compensation'.[29] In the 1996 ILC draft, apart from the general limit resulting from peremptory norms, another exception existed, i.e. the fact that restitution would 'seriously jeopardize the political independence or economic stability of the State which has committed the international wrongful act, whereas the injured State would not be similarly affected if it did not obtain restitution in kind'.[30] Assuming that this last exception to restitution reflects customary law and was not included in the final work of the ILC because it was redundant with the second exception listed by the current article 35,[31] Israel could eventually argue that it applies in this case, due to suicide bombings by Palestinian militants. This argument would require a balance between the benefit gained from restitution for the Palestinian population with the cost to the protection of the Israeli public. Even if the 'balance will invariably favour the injured State in any case where the failure to provide restitution would jeopardize its political independence or economic stability',[32] it is certain that such balancing test would be highly controversial. By founding dismantlement on cessation rather than on restitution, the Court avoids in advance any arguments in that regard.

On the other hand, more importantly perhaps, because dismantling the wall flows from the duty to put an end to its illegal conduct, Israel could never pretend to 'buy' its wrongful act. Restitution is indeed just one of the forms in which the damage can be made good; the other form, alternative or cumulative, is compensation. Seeing that the Court considers Israel's obligation to make good the damage exists for the direct benefit of the concerned individuals (cfr. *infra*), there is a risk that, if Palestinian victims of the wall were to accept compensation instead of restitution, Israel could argue that the preference given by the victims to compensation exempts it from dismantling the wall. That argument would be ill-founded since compensating for the land taken does not necessarily make Israel owner of that land, and certainly never sovereign of it: as such, compensation for a wrong committed[33] is not the price of a purchase and, being not sovereign but only owners, landlords cannot transmit a right they do not hold. Nevertheless, those distinctions between ownership and sovereignty, compensation and purchase

[29] *Supra* note 27.

[30] *Report of the ILC on the work of its 48th session* (1996), A/51/10, Ch.III, 142.

[31] On the reasons for the non-inclusion of that exception to restitution in the 2001 draft articles, see J. Crawford, *Third Report on State Responsibility (2000)*, A/CN.4/507/Add.1, para. 144.

[32] *Report of the ILC on the work of its 53rd session* (2001), A/56/10, Ch.IV, 243.

[33] This must be stressed: the compensation due by Israel is the consequence of a wrong committed; it is not to be considered as the price of a lawful taking.

price, which are easy to make for any lawyer, are not so clear for the general public. The Court was probably aware of the great sensitivity of this issue of compensation among the Palestinian people, where accepting money from Israel for any piece of land taken or property destroyed is considered as a shameful betrayal of the national cause because it is understood as a renunciation to any title or claim on that land or property. Hence, by founding the dismantlement of the wall on cessation rather than on restitution, the Court prevents all those arguments to be made and keeps this issue at an 'international' level, avoiding it to be mixed with reparation issues at a more domestic level where individuals could prefer compensation to restitution. So, if well explained to the Palestinian public, the Opinion could help victims to present reparation claims to the Israeli authorities, by overcoming their natural reservation to any compensation. Popular psyche and law are sometimes quite difficult to reconcile. Be it voluntary or not, the Court undoubtedly made an effort to try to overcome those difficulties by defining legal consequences that are very protective of the Palestinian population from Israel ... but also from itself. In other words, the preference given in that regard to cessation over restitution is not only legally logical but also politically, or even sociologically, sensible – even if it has some strange paternalistic flavour. Despite departing from the Palestinian submission, it is actually much beneficial to the Palestinian substantial claim: the wall must be removed, whatever the compensations paid by Israel.

3. Repealing domestic acts

Cessation is also, according to the Court, the legal ground for the duty to 'repeal or render ineffective forthwith all legislative and regulatory acts relating'[34] to the construction of the wall and its associated regime. That obligation does not apply when those acts provide 'compensation or other forms of reparation for the Palestinian population',[35] since Israel has the obligation to compensate for the damages resulting from the construction of the wall (cfr. *infra*). Here again, by preferring cessation over restitution, the Court departs from the written submissions of Palestine. Palestine's arguments were undoubtedly influenced by the findings of the Court in the *Arrest Warrant* case.[36] In that case, the cancellation of the arrest warrant issued by a Belgian investigating judge against the acting Foreign Affairs minister of the DRC was considered by the Court to be part of the duty to make full reparation, and not as part of the duty to put an end to the wrongful act. How can one explain this difference of approach by the Court?

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[34] ICJ Reports (2004), p. 201, para. 163 (3) B.

[35] *Ibid.*, p. 198, para. 151.

[36] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports (2002), paras. 76 & 78 (3) = 23 *HRLJ* 330 (2002). The Palestinian written submissions make explicit reference to that case: see *Written Statement submitted by Palestine*, p. 284, para. 616, available at www.icj-cij.org.

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In the Congo case, the cancellation of the arrest warrant could not have been claimed by the DRC on the basis of cessation since Mr. Yerodia did not hold any ministerial office by the time of the ruling of the Court. This is why some judges disagreed with the finding that Belgium had, by way of its own choosing, to cancel the arrest warrant.[37] In that case, the difficulty resulted from the fact that a domestic *act* (the Belgian arrest warrant) was, at the time it was issued, constitutive of the international illegal *fact* (the breach of the rule on immunity benefiting acting Foreign Affairs ministers) and that this wrongful *fact* had ceased to exist following a cabinet reshuffle, while the domestic *act*, as such, remained in existence. It was only by arguing[38] that full reparation – i.e. the establishment of the situation that would, in all probabilities, have existed had the illegality not been committed – required the disappearance of the domestic act that was no longer constitutive of an international wrongful fact, that the cancellation of the arrest warrant was granted by the Court. In contrast, in the Advisory Opinion there was no need to resort to such distinction between a domestic act and an international wrongful fact. Since Israel's action is continuous, the duty to cease it carries the obligation to repeal or render ineffective its domestic legal basis. In both cases, one sees the ICJ dealing with domestic legal acts and considering the end of their material existence on the basis of the rules of States responsibility for internationally wrongful acts, either as a matter of cessation when the international breach still exists by the time of the ruling, or as a matter of reparation, (usually) in the form of restitution, when it is not the case anymore. It must be noticed that the Court does not list in the Opinion the relevant domestic acts that must be (partially or totally) repealed by Israel, leaving thus some uncertainty on the concrete scope of its obligation.[39]

The *Warrant Arrest* case and the present Opinion must both be distinguished from the *LaGrand*[40] and *Avena*[41] cases. As the Court stressed in the latter, 'it is not the convictions and sentences of the Mexican nationals which are to be regarded as a violation of international law, but solely certain

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[37] See Joint Sep. Op. Higgins, Kooijmans and Buergenthal, ICJ Reports (2002), paras. 86-89, 23 *HRLJ* 344 (2002).

[38] See my pleading in the *Arrest Warrant* case, Verbatim record, CR 2001/10, 22-25 and reference made to G. Arangio-Ruiz, "Preliminary Report on State Responsibility", *YbkILC* (1988), v.II(I), 28, para. 84 a).

[39] It is for instance difficult to assess whether the duty to repeal applies to an Israeli law enacted in 1950 which allows for the taking of Palestinian 'absentees' property, without any compensation. The day before the delivery of the Advisory Opinion, that law was reactivated in East Jerusalem following the construction of the wall. See *Le Monde*, 23 January 2005. Since then, its application seems to have been suspended.

[40] *LaGrand case (Germany v. United States of America)*, Judgment, ICJ Reports (2001) = 22 *HRLJ* 36 (2001).

[41] *Avena and other Mexican nationals (Mexico v. United States of America)*, Judgment, ICJ Reports (2004).

breaches of treaty obligations which preceded them'.[42] Hence, as a matter of reparation, the Court found the US to be obliged 'to provide, by means of its own choosing, review and reconsideration'[43] of the contentious convictions and sentences, rather than their cancellation. Those distinctions may seem to be fairly subtle and quite theoretical, but they actually help to understand that if Israeli laws are to be cancelled as a matter of cessation it is because, as such and as domestic acts, they *constitute* international wrongful facts of a continuous character.

III. Reparation and restitution

According to the Court, 'Israel is under an obligation to make reparation for all damage caused by the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem'.[44] It is not so much the existence of an obligation to make reparation, but the scope and forms of the obligation that are of interest. By recalling the famous *Chorzow Factory* formula,[45] the Court clearly intends to stress the predictability of its findings and the classical articulation between restitution and compensation. This said, despite this apparent continuity in the reparation jurisprudence of the Court(s), the Advisory Opinion is more interesting and innovative than its limited text might suggest, especially regarding the beneficiaries of the duty to make reparation.

In paragraph 152 of the Opinion, the Court affirms 'that Israel has the obligation to make reparation for the damage caused to all the natural and legal persons concerned'. In paragraph 153, the Court stresses the 'obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for the purposes of construction of the wall', as well as the 'obligation to compensate the persons in question' when the restitution 'should prove to be materially impossible'.[46] In paragraph 147, the Court had considered that Israel's responsibility 'is engaged under international law'. This suggests that, under the rules of international responsibility, States have a duty to make reparation directly in favour of individuals. This seems to be confirmed by the fact that 'the Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction'.[47] The approach of the Court is far from classical. The Court does not consider diplomatic protection as the only way through which damages suffered by

[42] *Ibid.*, para. 123, p. 60.

[43] *Ibid.*, para. 153 (9), and (11) as far as future breaches of article 36 of the Vienna consular convention may occur. On future breaches, see also *LaGrand case, op. cit.* (note 40), para. 128 (7).

[44] ICJ Reports (2004), p. 202, para. 163, 3, C.

[45] *Ibid.*, p. 198, para. 152.

[46] For examples of damages, see also *ibid.*, pp. 189-191, para. 133.

[47] *Ibid.*, p. 198, para. 153.

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individuals as a result of violations of international law may be claimed, allowing individuals to receive compensation eventually and indirectly. On the contrary, the Opinion goes so far as to affirm not only that the duty of the debtor State arises from international law directly in favour of the individuals, but also that the relationship between the debtor (the State) and the creditors (the individuals) is itself regulated by international law, and not by any domestic law.[48] This is both very novel and far-reaching in many ways.

It is novel because, to our knowledge, it is the first time that such an authoritative statement of the law is made in relation to the right of individuals to receive reparation when they suffer from a breach of international law. This topic has been much discussed lately, especially following some important claims,[49] the work of UN Commission on Human Rights[50] and the establishment of international criminal jurisdictions.[51] The Opinion clarifies in that regard a basic question of principle.

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[48] Compare with ECJ rulings regarding the obligation under Community law for Member States to compensate individuals in case of wrongful breach of EC law. Whereas the ECJ affirms the individual's right to compensation under Community law, it leaves the regime of the claim up to the relevant domestic law, provided some Community standards are met. See C-6/90 & C-9/90, *Francovich v. Italy & Bonifaci v. Italy*, [1991-9] ECR I-5415, paras. 41-43; C-46/93 & C-48/93, *Brasserie du pêcheur v. Germany & The Queen v. Secretary of State for Transport ex parte Factortame Ltd e.a.*, [1996-3] ECR I-1149, paras. 52, 66-67.

[49] See the practice referred to in A. Randelzhofer & Chr. Tomuschat (ed.), "State responsibility and the individual. Reparation in instances of grave violations of human rights", Leiden/Boston, Martinus Nijhoff, 1999; also in G. Ulrich & L. Krabbe Boserup (ed.), "Reparations: Redressing past wrongs", *Human Rights in Development Yearbook* (2001).

[50] See Th. van Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report*, E/CN.4/Sub.2/1993/8; *Revised set of basic principles and guidelines on the Right to reparation for victims of gross violations of human rights and international humanitarian law*, E/CN.4/1996/17 and also E/CN.4/1997/104; Ch. Bassiouni, *Report on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms*, E/CN.4/1999/65; 'Basic Principles and Guidelines' contained in the *Final Report*, E/CN.4/2000/62 and the following reports containing revised 'Principles and Guidelines' (E/CN.4/2003/63, E/CN.4/2004/57); finally the *Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law* (Rev. 1 October 2004), submitted to the 61st session of the Commission on Human Rights and adopted on 19 April 2005 by 40 votes in favour, 0 against and 3 abstentions. *The Basic Principles and Guidelines* have become a General Assembly resolution on 16 December 2005 (A/RES/60/147). See also, I. Bottigliero, *Redress for victims of crimes under international law*, Leiden/Boston, Martinus Nijhoff, 2004; Chr. Tomuschat, *Current issues of responsibility under international law*, IV Cebdi (2000), ch. IV; and my comment of the Basic Principles and Guidelines in the *AFDI*, 2005 (forthcoming).

[51] Compare art. 106 of the Rules of Procedure and Evidence of the ICTY and ICTR to art. 75 of the ICC Statute.

It is far-reaching because the findings of the Court are made in very general terms. Hence, they suggest that any breach of international law, including rules that are not to the direct benefit of individuals, may, at any time and not only in circumstances of occupation, entail a duty to make reparation in favour of individuals. In this sense, the Advisory Opinion does not clearly identify, when it affirms the duty to make good the damages, the illegalities from which it flows – despite the fact that most of the developments of the reasoning of the Court are concerned with those breaches, ranging from the violation of the right of the Palestinian people to self-determination[52] to various violations of the laws of occupation and human rights, more particularly the rules on the protection of property.[53] This seems also to suggest that the Court considers the duty to make good the damage as flowing from all and any of those breaches. No matter if the obligation breached was specially owned to the victim. It is however questionable whether the individual's right to reparation exists as a matter of international law when the breach does not relate to a rule benefiting individuals and having direct effect. This said, according to the Opinion, the only thing that the victim seems to have to prove is that its damage occurred as a result of the construction of the wall beyond the Green Line, which is globally considered as being illegal, for various intertwined grounds. The proof that the damage results more precisely from this or that illegality appears not to be required. This is all the more advantageous to the victims. It does however not enlarge beyond reasonableness the notion of causality, which always supposes that a damage stems concretely from an act (building the wall) constitutive of a (or various) breach(es) – and not abstractly from such breach(es).

What is most striking is that all this seems so obvious to the Court that no effort whatsoever is made to try to justify it. Maybe some will say that Israel's duties towards individuals have been affirmed by the Court only to circumvent the difficult question of Palestinian statehood that would have arisen within the framework of diplomatic protection. The clarity of the Advisory Opinion on those points, and the absence of any discussion of this issue by the judges in their various opinions, suggest however that the underlying legal principles of the findings should not be circumscribed by the facts which led to the request by the General Assembly. In that regard, it must be remembered that the Court affirmed that Israel had the obligation to compensate 'all natural and legal persons'.[54] If 'natural persons' refer to individuals, the concept of 'legal persons' does not only include corporations and other private law entities but also, due to its generality, Palestine or the Palestinian people as subjects and potential claimants. In this sense, and even if the precise content of the international responsibility towards individuals remains to be seen, the Court gives some

[52] ICJ Reports (2004), p. 184, para. 122.
[53] *Ibid.*, pp. 189-194, paras. 132-137.
[54] *Supra*, note 47.

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concrete content to article 33, paragraph 2, of the 2001 ILC draft articles which, so far, has remained fairly enigmatic.[55]

The Court seems to limit the right of 'all natural or legal persons' to the compensation of 'any form of *material* damage'[56] they suffered. Moral damages are not mentioned. This might be explained by the fact that the Court was mainly concerned with the question of property seized for the purpose of the construction of the wall. The apparent reservation of the Court might also be due to a certain fear of unreasonable claims to moral damages amounting nearly to some form of punitive damages. It remains however to be seen whether such moral damages, especially those of individuals, are (or should) *per se* (be) excluded from any compensation. Finally, it is worth mentioning that the Advisory Opinion does not address the Palestinian claim according to which, on the basis of restitution, 'Israel has a duty to cause the immediate removal and repatriation of its civilian population transferred to the section of the Wall within the Occupied Palestinian Territory since the commencement of the construction of the Wall, to dismantle any existing settlements in the relevant area, to ensure and facilitate the safe and immediate return of any and all displaced Palestinian civilians to the relevant area, and to release any person or persons detained as a result of Israel's construction and maintenance of the regime of the Wall'.[57] There are no doubt many reasons for the silence of the Court, that claim being very sensitive, not to say potentially explosive in relation to the larger question of the right to return of Palestinian refugees. But here too, that silence might be of relevance when one tries to circumscribe the extent of the individual reparation rights arising from the international responsibility of a State.

IV. Conclusion

Future will tell what influence, if any, the Advisory Opinion may have on the resolution of the Israeli-Palestinian conflict. The words of the law, even when they are those of the principal judicial body of the United Nations, may seem to be pointless in front of such an exceptional accumulation of mutual grievances and such a long confrontational history. Distrust runs so deep on both sides that the very commonality of the law, which appears to be the

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[55] "This part 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", GA Res. 56/83, 28 January 2002, and commentary in *Report of the ILC on the work of its 53rd session* (2001), A/56/10, Ch.IV, 234.

[56] ICJ Reports (2004), p. 198, para. 153 (emphasis added). Following a request by the General Assembly (A/RES/ES-10/15, para. 4), the Secretary General established a Registry in charge of registering the damages specified in paras. 133 and 153 of the Opinion (*Letter dated 11 January 2005 from the Secretary-General to the President of the General Assembly*, A/ES-10/294).

[57] *Written Statement submitted by Palestine*, p. 289, para. 625, available at www.icj-cij.org.

prerequisite of its effective application, is itself more and more evanescent. For many lawyers, the forceful findings of the Court will in that context resound as a welcome reiteration of fundamental principles that are in danger of vanishing in thin air. Whereas this is undoubtedly true, it is far from resolving any real problem, and it could actually be more destructive of the law itself and its institutions if, by fuelling high hopes, only angry disillusions come about. Hence, by its Opinion, the Court places great political responsibility on the world community and its main players, even if it concentrates on the legal responsibility of Israel. What these few pages have tried to show is that the development of the reasoning of the Court in that regard is not only important as far as the Palestinians are concerned; it is also of deep interest for the general theory of the law of State responsibility. As is often the case with jurisprudence, what is briefly and discretely said in a ruling might contain more *legal* potential than the actual outcome of the case, however spectacular it sounds. The real impact of the words of the Court is often unpredictable as it lives between two uncertainties: the first one relates to what its findings actually become in relation to the concrete case at hand; the second one relates to how its reasoning is used in relation to future claims. Maybe the future of this Opinion lies elsewhere than exclusively on the Green Line.

Annex 221

William A. Schabas, *Genocide in International Law* (Cambridge University Press 2009)

GENOCIDE IN INTERNATIONAL LAW

The Crime of Crimes

SECOND EDITION

WILLIAM A. SCHABAS OC MRIA
National University of Ireland, Galway

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minority when I see one.'[79] Put differently, difficulty in definition does not render an expression useless, particularly from the legal point of view. For example, issue may be taken with the term 'racial' because the existence of races themselves no longer corresponds to usage of progressive social science.[80] However, the terms 'racial' as well as 'race', 'racism' and 'racial group' remain widely used and are certainly definable. They are social constructs, not scientific expressions, and were intended as such by the drafters of the Convention. To many of the delegates attending the General Assembly session of 1948, Jews, Gypsies and Armenians might all have been qualified as 'racial groups', language that would be seen as quaint and perhaps even offensive a half-century later. Their real intent was to ensure that the Convention would contemplate crimes of intentional destruction of these and similar groups. The four terms were chosen in order to convey this message. International law knows of similar examples of anachronistic language. One of the earliest multilateral treaties dealing with human rights was aimed at 'white slavery'.[81] Its goal, the eradication of forced prostitution on an international scale, remains laudatory and relevant, although the terminology is obviously archaic.

The four terms in the Convention not only overlap,[82] they also help to define each other, operating much as four corner posts that delimit an area within which a myriad of groups covered by the Convention find protection. This was certainly the perception of the drafters. For example, they agreed to add the term 'ethnical' so as to ensure that the term 'national' would not be confused with 'political'.[83] On the other hand, they deleted the reference to 'linguistic' groups, 'since it is not

[79] Max van der Stoel, 'Prevention of Minority Conflicts', in L. B. Sohn, ed., *The CSCE and the Turbulent New Europe*, Washington: Friedrich-Naumann-Stiftung, 1993, pp. 147–54 at p. 148. His comment was inspired by United States Supreme Court Justice Potter Stewart who said the same thing about pornography: *Jacobellis* v. *Ohio*, 378 US 184 at 197 (1963).

[80] According to the Commission of Experts on Rwanda, 'to recognize that there exists discrimination on racial or ethnic grounds, it is not necessary to presume or posit the existence of race or ethnicity itself as a scientifically objective fact': 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)', UN Doc. S/1995/1405, annex, para. 159.

[81] International Agreement for the Suppression of the White Slave Traffic, (1904) 1 LNTS 83; International Convention for the Suppression of the White Slave Traffic, (1910) 7 *Martens Nouveau Recueil* (3d) 252, 211 Consol. TS 45.

[82] 'Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, by Mr Doudou Thiam, Special Rapporteur', UN Doc. A/CN.4/398, para. 56.

[83] UN Doc. A/C.6/SR.73 (Petren, Sweden); UN Doc. A/C.6/SR.74 (Petren, Sweden).

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believed that genocide would be practised upon them because of their linguistic, as distinguished from their racial, national or religious, characteristics'.[84] The drafters viewed the four groups in a dynamic and synergistic relationship, each contributing to the construction of the other.

The 1996 report of the International Law Commission on the Draft Code of Crimes Against the Peace and Security of Mankind adopted this approach in considering 'tribal groups' to fall within the scope of the definition of genocide,[85] although the Darfur Commission disagreed, stating that 'tribes as such do not constitute a protected group'.[86] The Darfur Commission looked to anthropological textbooks for the meaning of 'tribe' or 'tribal'. The *Shorter Oxford English Dictionary* defines a tribe as '[a] group of families, esp[ecially] of an ancient or indigenous people, claiming descent from a common ancestor, sharing a common culture, religion, dialect, etc., and usually occupying a specific geographic area and having a recognized leader'. Certainly, tribal groups are cognates of the four terms used in article II of the Convention, whereas it is obvious that other categories, such as political or gender groups, are not. In any event, the Darfur Commission subsequently concluded that the three 'tribes' were in fact protected groups because they themselves as well as their oppressors viewed them as such. Thus, a tribe that is perceived as a racial or ethnic group falls within the scope of the Convention. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia noted that Raphael Lemkin conceived of genocide as targeting 'a race, *tribe*, nation, or other group with a particular positive identity'.[87]

Yet, in concluding that tribal groups meet the definition of genocide, it seems unnecessary to attempt to establish within which of the four enumerated categories they should be placed. In the same spirit, the Canadian Criminal Code's genocide provision includes the term 'colour' in its list of protected groups.[88] We readily appreciate the fact that groups defined by 'colour' are also protected by the Convention without

[84] UN Doc. A/401.
[85] 'Report of the International Law Commission on the Work of Its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, p. 89.
[86] 'Report of the International Commission of Inquiry on Violations of International Humanitarian Law and Human Rights Law in Darfur', UN Doc. S/2005/60, para. 496.
[87] *Prosecutor* v. *Stakić* (IT-97-24-A), Judgment, 22 March 2006, para. 21 (my italics).
[88] Criminal Code (Canada), RSC 1985, c. C-46, s. 318(4): 'any section of the public distinguished by colour, race, religion or ethnic origin'.

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it being important to determine whether they are in fact subsumed within the adjectives national, racial, ethnical or religious.

There is a danger that a search for autonomous meanings for each of the four terms will weaken the overarching sense of the enumeration as a whole, forcing the jurist into an untenable Procrustes bed. To a degree, this problem is manifested in the 2 September 1998 judgment of the International Criminal Tribunal for Rwanda in the *Akayesu* case,[89] as well as in the definitions accompanying the genocide legislation adopted by the United States,[90] both of which dwell on the individual meanings of the four terms. Deconstructing the enumeration risks distorting the sense that belongs to the four terms, taken as a whole.

A negative approach to definition, referring to a group by what it is not rather than what it is, has been fairly convincingly rejected by the courts. This had first been mooted by the Commission of Experts for the former Yugoslavia.[91] An early Trial Chamber decision of the International Criminal Tribunal for the former Yugoslavia agreed that 'all individuals thus rejected would, by exclusion, make up a distinct group',[92] but the view has since been rejected by another Trial Chamber[93] whose views were upheld on appeal.[94] The conclusions of the Appeals Chamber were endorsed by the International Court of Justice. In *Bosnia* v. *Serbia*, the applicant had argued that the victim of genocide has been 'the non-Serb national, ethnical or religious group within, but not limited to, the territory of Bosnia and Herzegovina, including in particular the Muslim population'. According to the Court, genocide 'requires an intent to destroy a collection of people who have a particular group identity. It is a matter of whom those people are, not whom they are not.[95] The Court referred to General Assembly Resolution 96(I), which contrasted genocide, as 'the denial of the existence of entire human groups', with homicide, considered as 'the denial of the right to live of individual human beings'.[96] According to the Court, the drafters of the Genocide

[89] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998.
[90] Genocide Convention Implementation Act of 1987 (Proxmire Act), S. 1851, s. 1093.
[91] 'Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)', UN Doc. S/1994/674, para. 96.
[92] *Prosecutor* v. *Jelisić* (Case No. IT-95-10-T), Judgment, 14 December 1999, para. 71.
[93] *Prosecutor* v. *Stakić* (Case No. IT-97-24-T), Judgment, 31 July 2003, para. 512.
[94] *Prosecutor* v. *Stakić* (Case No. IT-97-24-A), Judgment, 22 March 2006, paras. 20–8.
[95] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, 26 February 2007, para. 193.
[96] *Ibid*., para. 195.

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a hospital and he did not respond. On the same day, after the meeting, the children were killed. He acknowledges that he failed in his duty to ensure the safety of the children and the population of Rwanda.[31]

Moreover, the possibility that a commander or superior may be found guilty of genocide for failing to intervene when subordinates are actually carrying out acts of genocide, while not specifically contemplated by the Convention, is also clearly recognized in the statutes of the *ad hoc* tribunals as well as in the Rome Statute.[32] Nevertheless, troubled by the possibility that crimes of omission might not be adequately covered, Benjamin Whitaker proposed an amendment to article II: 'In any of the above conduct, a conscious act or acts of advertent omission may be as culpable as an act of commission.'[33] The word 'advertent' clarifies the intentional aspect of the omission, although the proposed amendment is totally unnecessary for judges to give such an interpretation to article II.

Killing

The term 'killing' initially appeared in the 1946 Saudi Arabian proposal.[34] The Secretariat draft divided the *actus reus* into three categories, the first entitled 'causing the death of members of a group or injuring their health or physical integrity'. Its four subcategories included 'group massacres or individual executions'.[35] In the Ad Hoc Committee, China significantly simplified this provision.[36] The Committee's chair further reworked the text to contain two paragraphs dealing with physical genocide, and a third covering cultural genocide. The first form of physical genocide was 'killing members thereof'.[37] The concept was

[31] *Prosecutor* v. *Kambanda* (Case No. ICTR 97-23-S), Judgment and Sentence, 4 September 1998, para. 39(ix).

[32] 'Statute of the International Criminal Tribunal for the Former Yugoslavia', UN Doc. S/RES/827, annex, art. 7(3); 'Statute of the International Criminal Tribunal for Rwanda', UN Doc. S/RES/955, annex, art. 6(3); Rome Statute of the International Criminal Court, (2002) 2187 UNTS 90, art. 28.

[33] Benjamin Whitaker, 'Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide', UN Doc. E/CN.4/Sub.2/1985/6, p. 20, para. 41.

[34] UN Doc. A/C.6/86: 'Mass killing of all members of a group, people or nation.'

[35] UN Doc. E/447.

[36] UN Doc. E/AC.25/9: '1. Destroying totally or partially the physical existence of such group; 2. Subjecting such group to such conditions or measures as will cause the destruction, in whole or in part, of the physical existence of such group.'

[37] UN Doc. E/AC.25/SR.12.

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relatively uncontroversial, and, with the final wording changed to '[k]illing of members of the group', it was adopted.[38] The Sixth Committee agreed to 'killing' as the first form of genocide, after little discussion and without a vote.

A Trial Chamber of the International Criminal Tribunal for Rwanda in *Akayesu* identified two material elements: the victim is dead; and the death resulted from an unlawful act or omission of the accused or a subordinate.[39] The reference to 'members of the group' as victims of the genocidal act in paragraph (a) of article II, as well as in the subsequent paragraphs, may suggest that the act itself must involve the killing of at least two members of the group.[40] Such an interpretation seems a bit absurd, however, and, from a grammatical standpoint, the phrase can just as easily apply to a single act of killing. Judgments of the Tribunals support the thesis that only one victim is required.[41] In one judgment, the Appeals Chamber of the International Criminal Tribunal for Rwanda said that 'there need not be a large number of victims to enter a genocide conviction'.[42] The co-ordinator's discussion paper, submitted at the conclusion of the February 1999 session of the Working Group on Elements of Crimes, following informal discussions with interested States, took the reference to 'members of the group' to mean 'one or more persons of that group'.[43] Clearly, the quantitative dimension, that genocide involves the intentional destruction of a group 'in whole or in part', belongs to the mental and not the material element, as explained in chapter 5.

The Elements of Crimes of the Rome Statute state that the term 'killed' is interchangeable with the term 'caused death'.[44] While there

[38] UN Doc. E/AC.25/SR.13, p. 8 (five in favour, two against).

[39] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998, para. 588. In *Prosecutor* v. *Kayishema et al.* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, another Trial Chamber purported to discuss the *actus reus* of 'killing', but in fact addressed only the difficulties in defining the mental element: paras. 101–4.

[40] This must be why the United States genocide legislation specifies that 'the term "members" means the plural': Genocide Convention Implementation Act of 1987 (the Proxmire Act), S. 1851, s. 1093(4). Yet the United States delegation to the Preparatory Commission of the International Court took the view that acts of genocide apply to one or more members of a group: 'Draft Elements of Crimes', UN Doc. PCNICC/1988/DP.4, pp. 5–6.

[41] *Prosecutor* v. *Mpampara* (Case No. ICTR-01-65-T), Judgment, 11 September 2006, para. 8.

[42] *Prosecutor* v. *Ndindabahizi* (Case No. ICTR-01-71-A), Judgment, 15 July 2004, para. 135.

[43] 'Discussion Paper Proposed by the Co-ordinator, Article 6: The Crime of Genocide', UN Doc. PCNICC/1999/WGEC/RT.1.

[44] Elements of Crimes, ICC-ASP/1/3, p. 113.

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Giorgio Gaja, 'States Having an Interest in Compliance with the Obligation Breached' in Crawford, Pellet, Olleson & Parlett (eds), *The Law of International Responsibility* (Oxford Commentaries on International Law, Oxford University Press 2010)

Chapter 64

STATES HAVING AN INTEREST IN COMPLIANCE WITH THE OBLIGATION BREACHED

GIORGIO GAJA

1 Breach of *erga omnes* and *erga omnes partes* obligations	957
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While article 42 ARSIWA concerns the invocation of responsibility by States specially affected by the breach of an international obligation owed to a group of States or the international community as a whole, article 48 concerns the situation of States other than injured States, but to whom the obligation breached is also owed. The term 'injured State' could be used also in relation to this category of States, for they are also affected by the breach. But the ARSIWA, with a choice of terminology that may be regarded as questionable, call 'injured States' only those States falling within the categories outlined in article 42. In any event, what seems important is the entitlement which the States referred to in article 48 benefit from, rather than the term employed to define these States.

1 Breach of *erga omnes* and *erga omnes partes* obligations

When an obligation is owed by a State to all other States (which is implicit in the indication that 'the obligation breached is owed to the international community as a whole') or to all the other States parties to a treaty, all those States are necessarily affected by a breach of that obligation. In this respect, it is possible to speak of a breach of an obligation *erga omnes* or of an obligation *erga omnes partes*, respectively. These are expressions that are not always understood in the same way and ARSIWA do not use them: the only Latin words in ARSIWA (*lex specialis*) appear in the text of article 55. But the expression 'obligations *erga omnes*', already classical, is found in the Commentary to the Articles, where the famous passage of the International Court of Justice's judgment in *Barcelona Traction*—the case which launched the term—is reproduced.[1] Reference is made to the Court's incidental mention of 'obligations of States towards the international community as a whole' and to the remark according to which, 'in view of the importance of the rights involved, all States

[1] Commentary to art 48, para 8.

can be held to have a legal interest in their protection; they are obligations *erga omnes*'.[2] The Court took examples from:

> the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.[3]

In relation to the breach of some of these obligations, there is no State that may be considered as injured. This is the case, for instance, of the obligation to protect the fundamental rights of the human person. The injured subjects in this case are the individuals concerned; only if they are foreigners in relation to the State responsible for the breach, one could argue that their national State is specially affected by the breach.

In other cases, as has been mentioned in respect of article 42, there is an injured State: for instance, in the case of aggression, the State which was the object of the aggression is assimilated to the State to whom a bilateral obligation is due. But the position of States other than the injured State is not in principle different from that which would apply in the absence of an injured State. Since the obligation is owed to all States or all the States party to a treaty, all these States are necessarily affected. They are affected directly, for the obligation breached is owed to them as well: the terminology of 'indirect injury', sometimes used, is inappropriate since it evokes, in the presence of an injured State, the idea that an indirect injury depends on a direct injury; it is even less adequate when no State may be considered as injured.

Article 48 establishes the right of the States to whom the obligation is owed, but who do not fall within the category of injured States, to invoke the responsibility of the State author of the breach. Although the definition of the categories of injured States in article 42 renders the identification of the other cases in which the obligation is owed unnecessary, article 48 describes in a pedagogical way the cases in which a State which is not injured in the sense of article 42 is entitled to invoke responsibility.

Article 48(1)(b) incorporates the situations mentioned by the International Court of Justice in *Barcelona Traction*: that is the case of breach of obligations 'owed to the international community as a whole'. The reference of the Court to the 'international community as a whole' concerns all States other than the responsible State, and not a superior and distinct entity. The situation has not evolved much since the judgment, other than in the growing tendency to admit that certain subjects other than States also form part of the international community. It would thus be difficult to maintain that responsibility can only be invoked by 'a distinct entity', situated above States.[4] Further, it does not follow from the articles that in cases of breach of *erga omnes* obligations States can invoke responsibility only collectively. If this were so, the significance of article 48 would be drastically limited.

Insofar as the reaction to a breach is taken by the organized international community within the framework of the United Nations, the initiatives that a State could take against the responsible State would be restricted. Similarly, interferences could also result from the Security Council taking measures without specific consideration for the existence of a breach of the obligation. These possible restrictions are recalled, although in a synthetic manner, in article 59, which in a 'without prejudice' provision refers to the Charter of the United Nations.

[2] *Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports 1970*, p 3, 32 (para 33).

[3] Ibid, 32 (para 34).

[4] As advocated by the Greek delegate before the Sixth Committee, C Economides, 1 November 2001, A/C.6/56/SR.14, para 22.

The breach of obligations *erga omnes*, or rather a sub-category of these obligations, is also addressed in another provision: article 40, concerning the 'serious breach . . . of an obligation arising from a peremptory norm of general international law'. The term used in this provision underlines the importance of the content of the rule for the international community and in consequence the seriousness of a breach, whereas the reference to the international community in article 48 indicates that the obligation is owed by a State to all other States. This is explained by the fact that articles 40 and 41 deal with the consequences of the unlawful act, whereas article 48 concerns the invocation of responsibility, thus specifying which States are entitled to invoke it. Even if there are diverging views about the relation between peremptory norms and rules imposing obligations *erga omnes*, it is clear that the latter comprise peremptory norms in the sense of article 53 of the Vienna Convention on the Law of Treaties.[5] It does not seem that these provisions admit the interpretation that has been given, according to which article 40 would be a special rule excluding the applicability of article 48, and that in consequence the latter article does not apply to the invocation of responsibility for a serious breach of an obligation arising from a peremptory norm.[6]

In relation to obligations *erga omnes*, article 48 implies that States have a collective interest in compliance with the obligation. The existence of a collective interest is expressly required by article 48(1)(a), which concerns the case where the obligation breached is owed 'to a group of States' and 'the obligation is established for the protection of a collective interest of the group'. The reference in this text to the collective interest is probably intended to specify that it concerns the category of multilateral treaties (or customary rules) which establish obligations which in any specific circumstance are owed to all the other States party to the treaty (or addressees of the rule) and thus do not give rise only to a set of bilateral obligations. In other words, this is the case of obligations whose breach affects in any event all the other addressees of the international legal rule. Special Rapporteur Crawford suggested that even a rule that generally sets forth bilateral obligations could protect a collective interest in the case of a breach of a certain degree of seriousness.[7]

I have already pointed out, in relation to article 42, the difficulty in defining the scope of obligations imposed by a multilateral treaty. The character of the obligation can in fact give rise to controversy. It is sufficient to recall here the judgment of the International Court of Justice in the *South West Africa* cases, where the Court excluded, with the narrowest majority, the right of States formerly members of the League of Nations to invoke the responsibility of a mandatory State.[8] The commentary of the ILC maintains that article 48 'is a deliberate departure' from this judgment.[9] In fact, article 48 seems neutral in respect of the existence of a collective interest of the group concerning the obligation imposed by a multilateral treaty. The answer can only be given through the interpretation of the treaty. It would seem that what the ILC intended to say is that, in its opinion, a collective interest should have been recognized by the Court in relation to the mandate for South West Africa.

[5] 1155 *UNTS* 331. See G Abi-Saab, 'The Uses of Article 19' (1999) 10 *EJIL* 339.

[6] See especially the interventions before the Sixth Committee of the delegates of Finland, M Koskenniemi, and Israel, Y Dinstein, on 29 and 31 October 2001, A/C.6/56/SR.11, paras 31–33 and SR.13, para 21. This interpretation was criticized, notably by the delegates of the Netherlands, J Lammers, on 31 October 2001 and of Jordan, MD Hmoud, on 1 November 2001, A/C.6/56/SR.12, para 29 and SR.15, paras 22–25.

[7] J Crawford, Fourth Report on State Responsibility, 2001, A/CN.4/517, para 40.

[8] *South West Africa, Second Phase, Judgment, ICJ Reports 1966*, p 6.

[9] Commentary to art 48, para 7 (n 725).

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The ILC's approach finds some support in the separate opinion of Judge Simma in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*.[10] Part of Uganda's counterclaim had been rejected by the Court as the claim was brought by way of diplomatic protection, and Uganda had failed to prove that the relevant persons were its nationals.[11] Judge Simma expressed the view that the Court should have gone on to find that the 'victims of the attacks at the Ndjili International Airport remained legally protected against such maltreatment irrespective of their nationality, by other branches of international law, namely international human rights and, particularly, international humanitarian law',[12] and that Uganda had standing to raise such claims on their behalf.[13] Referring to article 48, he stated:

> [a]s to the question of standing of a claimant State for violations of human rights committed against persons which might or might not possess the nationality of that State, the jurisdiction of the Court not being at issue, the contemporary law of State responsibility provides a positive answer as well. The International Law Commission's 2001 draft on Responsibility of States for Internationally Wrongful Acts provides not only for the invocation of responsibility by an injured State (which quality Uganda would possess if it had been able to establish the Ugandan nationality of the individuals at the airport) but also for the possibility that such responsibility can be invoked by a State other than an injured State . . . The obligations deriving from the human rights treaties cited above and breached by the DRC are instances par excellence of obligations that are owed to a group of States including Uganda, and are established for the protection of a collective interest of the States parties to the Covenant.[14]

In 2006, the Court expressly noted that the existence of jus cogens or erga omnes obligations would not exclude the requirement of jurisdiction, stating:

> . . . the Court deems it necessary to recall that the mere fact that rights and obligations *erga omnes* or peremptory norms of general international law *(jus cogens)* are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties . . .[15]

This does not mean that the Court could not examine the breach of one of these obligations in a context where its jurisdiction was established, for example, by a treaty.

2 The legal position of States other than the injured State in cases of breach of obligations owed to them

The fact that the obligation breached is owed to a State entails that this State can request the cessation of the unlawful act. It is in fact an essential aspect of the existence of an obligation imposed by the primary rule. The same conclusion may be reached in respect of assurances and guarantees of non-repetition, which equally concern compliance with the

[10] Separate Opinion of Judge Simma, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), ICJ Reports 2005*, p 168, 334.

[11] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), ICJ Reports 2005*, p 168, 276 (para 333).

[12] Separate Opinion of Judge Simma, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), ICJ Reports 2005*, p 168, 334.

[13] Ibid, 348–349 (para 37). [14] Ibid, 347 (para 35).

[15] *Armed Activities on The Territory of The Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda), Jurisdiction and Admissibility, ICJ Reports 2006*, p 6, 50 (para 125).

same obligation, rather than the fulfilment of new obligations arising as a consequence of the wrongful act.

A State which has not been injured, but which may invoke the responsibility of the wrongdoing State, does so essentially in the exercise of a collective interest. It will rarely have suffered damage (moral or material) that affects it individually. This could be the case of a State which, even if its coastal and maritime areas are not affected by the consequences of pollution in the high seas, incurs expenses to combat pollution.

Normally, damage resulting from the breach of obligations *erga omnes* or obligations *erga omnes partes* does not affect any State other than an injured State, if there is one. It would be inconceivable that another State would be entitled to claim compensation for its own benefit to make reparation for damage that it has not suffered.

The question is whether a State other than the injured State would be entitled to invoke responsibility in order to request that the obligation of reparation be fulfilled. Restitution or compensation and, depending on the case, satisfaction would be claimed by any State other than the injured State, not for its own benefit, but for the benefit of the injured State or any other injured subject. Article 48(2)(b) resolves this question by allowing every State to demand 'performance of the obligation of reparation . . . in the interest of the injured State or of the beneficiaries of the obligation breached'. The latter case is normally that in which the obligation is owed to States and also to other subjects, like individuals and peoples. It could also be that the obligation exists only towards other States and no State is injured by its breach, but reparation is necessary in the interest of the international community. An example of this situation could be heavy pollution of the high seas which requires a form of restitution.

The solution adopted by the ILC, to allow a State other than the injured State to claim reparation, has given rise to criticism within the Sixth Committee. Mr B Ebotou, delegate of Cameroon, considered that article 48 was one of the 'aspects of the progressive development of international law which were a source of legitimate concern';[16] even stronger criticism was expressed by the Chinese delegate, H Xue.[17] The Commission admits in its commentary that the solution proposed 'involves a measure of progressive development'.[18] And yet this provision responds to practical and logical exigencies.

On the logical plane, in the absence of such provision, the responsible State could avoid fulfilling any obligation of reparation when there is no injured State. No State would in fact be able to invoke the responsibility of the wrongdoing State. In the case of heavy pollution of the high seas or unlawful harm to the ozone layer, the responsible State would have an obligation of reparation that would not be owed to any other State and would therefore remain theoretical. This would also imply that the obligations not to pollute the high seas and not to cause harm to the ozone layer would also be theoretical, for they could easily be breached without consequences. Similarly, in the case of human rights violations, at least when the violations concern nationals of the responsible State, there would be no State which could claim the reparation owed. Again, the obligation to protect human rights would not have any practical significance. It therefore seems that where an obligation is imposed on a State to protect a collective interest, it must follow that other States are entitled to request reparation in case of a breach of that obligation.

[16] 1 November 2001, A/C.6/56/SR.14, para 60.
[17] 29 October 2001, A/C.6/56/SR.11, paras 59–61.
[18] Commentary to art 48, para 12.

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The possible presence of an injured State should not alter the legal situation of the other States to whom the obligation is owed. The injured State may claim reparation on its own account, while the other States may only make a claim for the benefit of another subject, such as the injured State.

It is true that practice shows few examples of cases in which a non-injured State has claimed the performance of the obligation of reparation. In this respect, Resolution 687 of the Security Council, concerning the damages caused by the invasion of Kuwait, constitutes an important example. It is also interesting to note that article 41 of the European Convention on Human Rights expressly allows States which bring claims to the European Court of Human Rights to request reparation for the breach of obligations suffered by individuals. Even in the case of the breach of a bilateral obligation, reparation is very rarely claimed. This results from a choice that the claimant State makes, and does not necessarily affect the principle.

The existence of a State's right to invoke international responsibility has certain implications in relation to its right to present a claim in this respect before the International Court of Justice, when a dispute arises between the State invoking responsibility and the allegedly responsible State. There is no reason to exclude this type of dispute from the application of the rules generally concerning the jurisdiction of the Court over disputes between these two States. The ILC's Commentary seems however to take a different approach, when it states that for:

> the filing of an application before a competent international tribunal, or even the taking of countermeasures . . . a State . . . should have a specific right to do so, e.g., a right of action specifically conferred by treaty, or it must be considered an injured State.[19]

This passage is closer to the position taken in certain separate and dissenting opinions by judges of the Court, insofar as it considers that one should not resolve the question of a right of action before the Court simply on the basis of the existence of a legal position corresponding to the *erga omnes* obligation.[20]

The question of the admissibility of countermeasures by a State which is not injured by the breach is even more controversial. Article 54 ARSIWA explicitly indicates that the chapter concerning countermeasures:

> does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

The question of countermeasures by States other than the injured State arose in practice in relation to serious breaches of obligations owed to the international community as a whole, and will be analysed in this context.[21] It is however interesting to note that the 'without prejudice' clause in article 54 concerns in general all the situations covered by article 48, thus even cases where there is no serious breach. However, the clause does not imply that the problem of admissibility of countermeasures should be solved in a uniform manner in all cases where responsibility may be invoked by a State other than the injured State.

[19] Commentary to art 42, para 2.

[20] Separate opinion of Judge Fitzmaurice, *Barcelona Traction, Light and Power Company, Limited, Judgment, ICJ Reports 1970*, p 66; and the joint dissenting opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga, and Sir Humphrey Waldock, *Nuclear Tests (Australia v France), Judgment, ICJ Reports 1974*, p 312, 370.

[21] See L-A Sicilianos, Chapter 80.

In relation to the conditions for the invocation of responsibility by a State other than the injured State, according to article 48(3), the 'requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1'. It is therefore clear that the specified requirements apply to the State invoking responsibility, whether it has suffered injury or not, without regard to the fact that the injured State may have also presented a claim.

On the basis of the reference to article 43, a State other than the injured State is also required to notify its request. The indication of the 'form reparation should take' does not affect the content of the obligation of the responsible State, even when this indication comes from the injured State. It seems reasonable that in principle the indication of the latter State, if there is one and if the indication exists, should prevail over that of other States, but it is not necessarily decisive.

A waiver on the part of the injured State solely affects the claim of that State. It does not prevent other States from invoking responsibility. The reference to article 45 entails only that also these other States can waive their right to invoke responsibility.

The reference to article 44, concerning admissibility of claims, is only partly appropriate. In fact, the requirement of 'nationality of claims' does not apply when a State other than the injured State is entitled to invoke responsibility. The first State asserts a collective interest, and this is hardly reconcilable with the application of a requirement derived from nationality. It would be different where the claim is presented by a State as the injured State, if this quality depends on the fact that the injury affects one of its nationals.

Instead, the rule of exhaustion of domestic remedies could apply both to the injured State and to any other State invoking responsibility with the aim of protecting a collective interest. This could occur when responsibility is invoked by virtue of a breach of a human rights obligation, insofar as the invocation comes under the application of the rule.

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Oxford Public International Law

Part IV The Content of International Responsibility, Ch.39 Assurances and Guarantees of Non-Repetition

Sandrine Barbier

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(p. 551) Chapter 39 Assurances and Guarantees of Non-Repetition

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The Articles on State Responsibility establish assurances and guarantees of non-repetition as a consequence of internationally wrongful acts. According to article 30(b) 'the State responsible for the internationally wrongful act is under an obligation … to offer appropriate assurances and guarantees of non-repetition, if circumstances so require'.

According to the Commission, assurances and guarantees of non-repetition are distinguishable from the other two consequences of the wrongful act—reparation and cessation of continuing breaches—in that they aim at preventing the commission by the responsible State of analogous breaches and they thus are exclusively concerned with the future. Having regard to this specific function, guarantees of non-repetition do not constitute a systematic consequence of the internationally wrongful act; rather they have an exceptional character.

The recognition of assurances and guarantees as a specific consequence of an internationally wrongful act is essentially the product of the ILC work on State responsibility. Assurances and guarantees of non-repetition appeared for the first time in the work of the ILC at the suggestion of Special Rapporteur Riphagen.[1] The subsequent Special Rapporteurs, Arangio-Ruiz and Crawford, both maintained that assurances and guarantees of non-repetition should be included as a consequence of internationally wrongful acts, and their reports contributed to a better understanding of this notion.[2]

(p. 552) On 27 June 2001, in the *LaGrand* case, the International Court of Justice granted guarantees of non-repetition for the first time. This was recorded in the *dispositif* as follows:

> this commitment [undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b), of the Convention] must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition[3]

and:

> should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights under Article 36, paragraph 1(b), of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and

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> sentence by taking account of the violation of the rights set forth in that Convention.[4]

In granting Germany's request for guarantees of non-repetition, the Court's judgment could be interpreted as a ratification of the work of the ILC. It is however necessary to highlight that the Court did not make any reference to the work of the ILC and did not include any specification concerning the legal foundation and the legal regime of guarantees of non-repetition. No further clarification has been given in any of the Court's subsequent decisions. Such clarification would have been useful: certain questions persist as to the basis of guarantees of non-repetition in international law and the content of the principle itself as a legal consequence of an internationally wrongful act.

1 Guarantees of non-repetition as the legal consequence of internationally wrongful acts

Considering guarantees of non-repetition as a consequence of the internationally wrongful act raises a series of preliminary questions. The first question concerns the principle itself, namely whether there exists in general international law an obligation for the responsible State to offer guarantees of non-repetition. The second question concerns the legal foundation of guarantees of non-repetition, specifically whether they constitute a form of reparation or an autonomous consequence of the internationally wrongful act.

(a) The obligation of the responsible State to offer guarantees of non-repetition

Article 30 ARSIWA establishes guarantees of non-repetition in terms of an obligation of the responsible State and not as a right of the injured State, in the same way that ARSIWA addresses reparation and cessation of the continuous unlawful act. But unlike the other consequences of internationally wrongful acts, the existence in general international law of an obligation to provide guarantees of non-repetition on the part of the responsible State can be doubted. This scepticism is evidenced in the work of the ILC itself.[5] Special Rapporteur Crawford advocated for example 'a modest version' of the article on guarantees (p. 553) of non-repetition, which used non-mandatory wording.[6] In their comments and observations, some States also expressed doubt in relation to the customary character of the obligation to offer guarantees of non-repetition.[7]

It must be noted that, for a long time, guarantees of non-repetition played only a marginal role, such that if precedents existed, international practice did not permit it to be concluded with certainty that there existed in general international law an obligation on the responsible State to offer guarantees of non-repetition. In their reports, Special Rapporteurs Arangio-Ruiz and Crawford quote very few examples, and those which are quoted are mostly related to very old diplomatic practice of the 19th and the beginning of the 20th centuries, such as the *Dogger Bank*[8] incident between Great Britain and Russia in 1904 and the *Doane* case[9] between the United States and Spain in 1886.[10] More fundamentally, the majority of these examples concern requests on the part of the injured State to the responsible State to offer guarantees of non-repetition. The Special Rapporteurs also fail to mention whether the responsible States acceded to these requests. Among the rare pertinent examples, that is, cases where the responsible State agreed to or was required to adopt measures in order to avoid repetition of the wrongful act in the future, reference can be made to the Declaration of 1961 of the Minister of Justice of Federal Germany in relation to the *Vracaritch* case and the Award of 11 March 1941 in the *Trail Smelter* arbitration.[11] Nevertheless, even if it can be considered that a certain practice has been established, these examples fail to establish the presence of an *opinio juris* of States in support of an obligation to offer such guarantees. It is difficult to determine whether, in these rare cases, a promise of the responsible State constituted a political or moral undertaking or a legal undertaking; and whether the undertaking was

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motivated only by ‘considerations of courtesy, convenience or tradition’ or ‘by any sense of legal duty’.[12]

Given the state of international practice in this field, it is clear that in adopting a provision on guarantees of non-repetition as a consequence of internationally wrongful acts, the ILC engaged more in progressive development of international law than in codification of customary law, as already acknowledged by Special Rapporteur Arangio-Ruiz.[13] But the question is whether, as a consequence of the work of the ILC and the development of recent international practice, the obligation of the responsible State to offer guarantees of non-repetition in certain circumstances has become a customary rule. This phenomenon would not be new. If the ILC uses practice and case law to elaborate its drafts—the Drafting Committee even deferred the analysis of the provision on guarantees of non-repetition until the judgment in *LaGrand*—it is manifest that its work influences State practice.

Several elements can be invoked to support the emergence of an obligation on the responsible State to offer the injured State guarantees of non-repetition. First, the support (p. 554) given by the majority of the ILC members and, most importantly, of States to the wording of article 30(b), and thus, to the mandatory character of the guarantees of non-repetition must be mentioned.[14] Indeed, the vast majority of States did not comment in relation to guarantees of non-repetition. Their silence can reasonably be interpreted as agreement in principle, or at least an absence of disagreement. Other States expressed very favourable opinions on this provision.[15] Only the United States vigorously objected to the inclusion of a provision on guarantees of non-repetition, arguing that ‘assurances and guarantees of non-repetition cannot be formulated as legal obligations, have no place in the draft articles on State responsibility’ and that they reflect ‘neither customary international law nor State practice’.[16] Surely, the imminence of the judgment in *LaGrand* had some influence in respect of this statement.

The *LaGrand* case constituted a major step towards the recognition of the mandatory character of guarantees of non-repetition. The judgment of the Court is open to criticism for its brevity—perhaps a sign of the Court’s caution in addressing the issue—but it must be noted that the Court was unanimous in its treatment of guarantees of non-repetition (the dissenting opinion of Judge Oda did not deal with this aspect of the case), and further that the Court upheld Germany’s claim to obtain guarantees of non-repetition and took note of the obligation of the United States to take the necessary measures in case of breach of the Vienna Convention on Consular Relations.[17] Moreover, although the Court pronounced on guarantees of non-repetition for the first time in *LaGrand*, it had been argued in earlier cases that guarantees of non-repetition were a consequence of an unlawful act: by Hungary and Slovakia in *Gabcíkovo-Nagymaros Project*;[18] and by Spain in *Fisheries Jurisdiction*, on the basis that Canada was bound to give Spain guarantees of non-repetition by virtue of ‘the principles drawn from customary law as stated by’ the ILC.[19]

After the judgment in *LaGrand*, the Court was once more seized with claims requesting guarantees of non-repetition of internationally wrongful acts. That this has become a habit of States making claims is to be regretted. In three cases, the Court considered that such a request could not be upheld.[20] In two other cases, the Court held that the requests had been satisfied by the commitments undertaken by the respondent States to abide by their obligations.[21] In these five cases, the Court did not question the right of the injured State to obtain guarantees of non-repetition, nor the obligation of the responsible State to offer such assurances. In *Cameroon v Nigeria* the Court explicitly recognized, invoking the (p. 555) *LaGrand* precedent, that such a request was admissible.[22] Nevertheless, it appears that the Court was somewhat reluctant to recognize guarantees of non-repetition as a consequence of an internationally wrongful act. The Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* constitutes another example of this reluctance.[23] In fact the Court did not respond to the allegation according to which Israel would have the obligation to give assurances and guarantees of non-repetition,

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although it noted that the allegation had been made.[24] Finally, in *Certain Questions of Mutual Assistance in Criminal Matters* the Court did not even bother to pronounce on the request for specific guarantees of non-repetition made by Djibouti.[25]

If an indisputable conclusion on the customary character of guarantees of non-repetition cannot be deduced from the case law of the International Court, it remains that the requests submitted to it tend to demonstrate that States increasingly subscribe to the idea that the responsible State is under an obligation to give guarantees of non-repetition. In this respect, the undertaking of the Turkish Government to adopt specific measures to limit breaches of the European Convention of Human Rights in the future,[26] and especially article 3 on inhuman or degrading treatment, can also be mentioned.[27]

Apart from bilateral inter-State relations, the practice of international supervisory bodies, in particular in the field of human rights, seems to also offer some support for the existence of an obligation on the responsible State to offer guarantees of non-repetition. For instance, the Human Rights Committee frequently reminds the State author of a breach of the International Covenant of Civil and Political Rights[28] that the State party is under an obligation to 'take effective measures to ensure that similar violations do not reoccur in the future'.[29]

Even if caution is in order, it can without doubt be considered that guarantees of nonrepetition are now part of the legal consequences of an internationally wrongful act.[30]

(b) An autonomous consequence of the internationally wrongful act

The ILC Articles on State Responsibility distinguish guarantees of non-repetition from reparation and cessation of a continuing breach, the two other consequences of an internationally wrongful act. The recognition of this autonomy is nevertheless fragile. The work of the ILC reflects the persistent hesitations on the legal foundation of guarantees of non-repetition. Traditionally guarantees are considered as a form of reparation. For Special Rapporteurs Riphagen and Arangio-Ruiz, guarantees of non-repetition are a form (p. 556) of satisfaction. The inclusion of guarantees in a separate article[31] marked the separation of satisfaction and guarantees of non-repetition on the basis that the latter 'perform a distinct and autonomous function. Unlike other forms of reparation which seek to reestablish a past state of affairs, they are future-oriented. They thus have a preventive rather than remedial function'.[32]

The '*sui generis*' character of assurances and guarantees of non-repetition[33] led the ILC, during second reading, to cease treating them as a form of reparation and to link them to cessation of the wrongful act. This link was justified by the fact that the two notions are 'closely and logically related',[34] for they constitute 'two conditions for ensuring that the legal relationship impaired by the breach had been restored'.[35] The relationship between cessation of the wrongful act and guarantees of non-repetition is reinforced by the definition given by the ILC of continuing breaches, constituted either by the extension in time of the breach or by the existence of a risk of repetition of the breach.[36] If these two consequences of a wrongful act can be considered linked by this fact, they must nevertheless be clearly distinguished. While cessation purports to re-establish the initial legal relationship, guarantees of non-repetition are aimed at the future respect of the obligation breached and they are required when 'mere restoration of the pre-existing situation does not protect [the injured State] satisfactorily' even if the responsible State is relieved of its obligation to make reparation.[37]

Despite the rationalizing effort of the ILC on the prospective and preventive character of guarantees of non-repetition, as opposed to the retrospective and compensatory character of reparation, the relationship between guarantees of non-repetition and satisfaction remains ambiguous. Guarantees of non-repetition, in fact, can constitute an 'appropriate form of satisfaction', pursuant to article 37(2) ARSIWA.[38] At the same time, 'assurances or

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guarantees of non-repetition may be sought by way of satisfaction (eg the repeal of the legislation which allowed the breach to occur) and there is thus some overlap between the two in practice'.[39] It is useful to observe that the case law of the International Court does not add much. The judgments rendered in *LaGrand*, *Avena*, and *Armed Activities on the Territory of the Congo* do not specify whether the Court intended to treat guarantees of non-repetition as an autonomous consequence of an internationally wrongful act. These judgments do not confirm or invalidate the autonomy of guarantees of non-repetition since the Court answered the claim in terms corresponding to the formulation put forward by the State, without itself taking a stand on the issue.

The question remains whether the guarantees are a form of satisfaction or an autonomous consequence of the wrongful act. It would seem that, under the influence of the ILC's work and as evidenced by their regulation in a separate article, the tendency is to treat guarantees of non-repetition as an autonomous consequence, rather than as a form of reparation. And yet the question of their character does not only have theoretical (p. 557) implications; it has direct effects in respect of the extent of the rights of the State invoking the responsibility of another State. According to article 48(2)(a), guarantees of nonrepetition may be requested, in its own name, by any State other than the injured State. In contrast, under article 48(2)(b) a State other than the injured State can request the performance of the obligation of reparation only in the interest of the injured State.

Even if there exists in international law a general obligation of the responsible State, distinct from the obligation of reparation, to offer guarantees of non-repetition, it is difficult to appreciate the exact scope of such an obligation, since the legal regime of guarantees of non-repetition is characterized by uncertainties.

2 The legal regime of guarantees of non-repetition

A notion largely neglected by legal doctrine, the legal regime of guarantees of non-repetition was not the subject of any real analysis until the work of the ILC on State responsibility. The work of the Commission has not revealed all the aspects of this regime. Nonetheless, it brings out its dominant characteristics, notably its flexibility and exceptional character. These characteristics relate both to the circumstances which require an offer of guarantees of non-repetition and the form that the guarantees may take.

(a) Circumstances requiring an offer of guarantees of non-repetition

Article 30(b) establishes that the responsible State is under an obligation to offer guarantees of non-repetition 'if circumstances so require'. Thus, unlike reparation or cessation, guarantees of non-repetition do not constitute an automatic or systematic consequence of a wrongful act. The ILC has in fact underlined the exceptional character of guarantees.[40] It is in this sense that the expression 'if circumstances so require' must be understood: it replaced the expression 'where appropriate', which was considered by the ILC to be too liberal.[41] The ILC justified its relatively strict approach to guarantees of non-repetition by reference to past abusive or excessive claims made by States requesting guarantees of nonrepetition with outrageous demands, although it did not cite any examples.[42]

The work of the ILC is not lengthy in its treatment of the elements to take into consideration to determine whether the circumstances demand that the responsible State offer guarantees of non-repetition. Nevertheless, three factors seem to emerge: the risk of repetition, the seriousness of the breach, and the character of the obligation breached.[43] It is not specified in the commentary to article 30 whether the conditions are cumulative or alternative. The probability of repetition of the internationally wrongful act undoubtedly constitutes an essential condition, in that it is the *raison d'être* of this consequence. In the light of the ILC debates, the seriousness of the breach also constitutes an important element to take into account. The rationale of guarantees of non-repetition supposes

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without doubt that the guarantees be due in case of a particularly serious breach, even if the risk of repetition appears to be minimal.[44] Guarantees of non-repetition, inasmuch as they may entail a (p. 558) 'new undertaking over and above the initial undertaking that had been breached',[45] must arguably be limited to cases of serious and recurring breaches of international law. The reference to the character of the obligation breached is relevant to this inquiry. It is relevant to note that guarantees of non-repetition do not constitute a specific consequence of serious breaches of obligations arising under a peremptory norm of general international law, pursuant to article 40. But due to the character of peremptory norms they are bound to be required in such circumstances.

In *LaGrand* the International Court did not articulate any general observation concerning the regime of guarantees of non-repetition; nor did the Court do so in any subsequent decisions. Hence the Court did not elaborate on the circumstances entailing the obligation on the responsible State to offer said guarantees. But the criteria offered by the ILC are implicit in the decision in *LaGrand*, and certainly influenced the Court's decision. The risk of repetition of the wrongful act, in that case the breach by the United States of its obligation of consular notification, eventually materialized, as evidenced by the executions of Breard and Faulder. In addition, the Court expressly mentioned in the *dispositif* that the German nationals had been condemned to a serious sentence, evidencing that it took into account the seriousness of the damage.[46] In this respect, it is worth noting that more than the seriousness of the breach invoked by the ILC, it was the seriousness of the damage that was determinative. Moreover, it is important to note that in *LaGrand* the Court considered that, in the circumstances, 'an apology [by the United States would not be] sufficient in this case' if analogous breaches were to happen again.[47] This observation could mean that the Court considers the unavailability and/or the insufficiency of other consequences of the wrongful act, in particular reparation, constitute one of the circumstances to take into account to determine the necessity of guarantees of non-repetition. Moreover, this seems to have been the reasoning of the Court when refusing the request for specific assurances and guarantees of non-repetition made by Bosnia-Herzegovina: the Court considered that its declaration concerning the obligation by Serbia to take effective measures to comply with its obligation to cooperate constituted adequate satisfaction and that it 'therefore [did] not consider that this is a case in which a direction for guarantees of non-repetition would be appropriate'.[48] The Court took a similar approach in its 2009 decision in *Costa Rica v Nicaragua*.[49]

The circumstances in which the responsible State is required to offer guarantees of nonrepetition remain largely vague. The silence of article 30(b) implies that the grant of the guarantees requires a case-by-case analysis. If the circumstances are met the responsible State is required, according to article 30(b), to 'offer' guarantees of non-repetition. The choice of the verb 'offer' and not 'give' or 'provide' entails some ambiguity. 'Offer' is a verb susceptible of various meanings. Strictly speaking, it might suggest that the obligation of the responsible State is limited to proposing assurances but not to providing them. But taking account of the ILC work and practice, it seems that the choice of this verb rather suggests that the offer of guarantees of non-repetition must be accepted by the injured (p. 559) State, or that it must be at least acceptable to the injured State. Furthermore, this interpretation is reinforced by the case law of the International Court, which has concluded in several cases that the undertaking of the responsible State must be considered as 'satisfying' the request of the injured State to obtain guarantees of non-repetition.[50] In any event, the practice reveals that despite the obligation incumbent upon it, the responsible State rarely takes the initiative to offer guarantees of non-repetition and that it adopts such measures only at the request of the injured State.

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In addition to the requirement of special circumstances, guarantees of non-repetition must be, according to the ILC, 'adequate'. This adjective may be interpreted in two ways. It can mean, on the one hand, that the guarantees must be strictly necessary in the circumstances. This interpretation clearly communicates the desire of the ILC to reduce recourse to guarantees of non-repetition. On the other hand, the adjective can also be understood as requiring the guarantees both to constitute a suitable and effective response and to achieve their purpose, that is, the avoidance of the repetition of the wrongful act. The 'adequate' character of the guarantees leads thus to the question of their form.

(b) The form of guarantees of non-repetition

The form that guarantees of non-repetition must take is not specified in article 30(b). The Special Rapporteurs undertook a survey of the different forms of guarantees of nonrepetition, while emphasizing that the practice was not uniform. Two major categories of guarantees can nevertheless be distinguished: general and specific guarantees. In respect of general guarantees, the injured State requests 'safeguards against the repetition of the wrongful act without any specification'[51] as to the means of implementation. In respect of specific guarantees, the injured State requests the responsible State to 'adopt specific measures or act in certain ways considered to be apt to avoid repetition':[52] for example, requests to give specific instructions to its agents, to adopt a certain line of conduct, and even to adopt or to abrogate certain legislative provisions. The latter type remains a rare case in inter-State relations; on the contrary, it has been developed in the framework of international bodies for the supervision of treaty-based human rights.[53]

In *LaGrand*, the International Court considered that Germany had made a request for both general and specific guarantees of non-repetition. Concerning the first, the Court considered that the general request was satisfied by the 'commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1(b)' of the Vienna Convention on Consular Relations.[54] The United States had implemented a vast programme destined to ensure that (p. 560) its competent authorities respect article 36 of the Vienna Convention.[55] In relation to the specific request, the Court concluded that, if despite the general commitment of the United States, German nationals were in the future:

> sentenced to severe penalties, without their rights under Article 36, paragraph 1(b), of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.[56]

Despite the specificity of the wording of the obligation, the Court recalled that the 'choice of means' belongs to the responsible State.[57] Equally, the Court underlined that the United States was not in a position to provide absolute assurance that a breach would not occur again in the future.[58]

In *LaGrand*, the Court did not explicitly indicate that the obligation of review and reconsideration of the guilty verdicts and of the sentences constituted for the United States an obligation following from guarantees of non-repetition. But, since the Court established this obligation in response to Germany's request for guarantees of non-repetition, it can be deduced that the foundation of the obligation of review and reconsideration is the responsible State's obligation to give guarantees of non-repetition. *LaGrand* arguably constitutes thus the illustration that guarantees of non-repetition can entail a 'new undertaking over and above the initial undertaking that had been breached'.[59] In fact, the United States remained bound by its obligations under article 36 of the Vienna Convention on Consular Relations—the original undertaking—and was also under the obligation to ensure the review and reconsideration of the guilty verdicts and of the sentences, in case of

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breach of article 36 of the Vienna Convention, as a guarantee of non-repetition—the new undertaking. Thus, the obligation to offer guarantees of non-repetition, a secondary obligation resulting from State responsibility, can give rise, where appropriate, to a new obligation for the responsible State, constituted by the content of the measures taken to avoid the repetition of the unlawful act, and whose breach is susceptible to engage its responsibility. This analysis does not seem to have been followed by the Court in *Avena*, thus creating certain confusion about the notion of guarantees of non-repetition. In fact, in *Avena*, the Court concluded that:

> by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the conviction and sentences … the United States of America breached the obligations incumbent upon it under Article 36, paragraph 2, of the Convention.[60]

Thus, the Court seems to have considered that the obligation of review and reconsideration did not constitute a new undertaking on the United States by virtue of guarantees of non-repetition, and in any case had only been provided to Germany, in accordance with the relative effect of *res judicata*,[61] but that it arose from article 36(2) of the Vienna Convention on Consular Relations. In effect, through an interpretation of article 36(2) (p. 561) which is open to question, the Court denied any link between the obligation to review and reconsider and the guarantee of non-repetition, further blurring the understanding of this consequence of the unlawful act.

A last question concerns the character of the undertaking of the responsible State. If by virtue of article 30(b) ARSIWA, the responsible State has an obligation, in certain circumstances, to offer guarantees of non-repetition, its offer may have very little mandatory force, for the offered guarantees may range from 'extraordinarily rigorous arrangements to mere promises or undertakings in different cases'.[62] The use of the expression 'assurances and guarantees of non-repetition' in the ARSIWA is intended to reflect this variety. Assurances would be 'normally given verbally, while guarantees of non-repetition involve something more—for example, preventive measures to be taken by the responsible State'.[63] The Court did not adopt this distinction in *LaGrand*. It uses, in a constant manner, the term 'assurances' when dealing with the adoption by the United States of preventive measures specially conceived to avoid the repetition of the unlawful act. This raises the question whether Germany obtained guarantees or only assurances[64] and whether the choice of either word by the Court is irrelevant or deliberate. The answer cannot be found in the Court's judgments. The future case law of the Court, and more generally international practice, will possibly help to dissipate this semantic hesitation.

The international law regime of guarantees of non-repetition as a specific consequence of the wrongful act appears filled with uncertainties. Precisely for this reason, the ILC worded the provision on guarantees of non-repetition very flexibly. However, the questions raised justify cautious treatment of guarantees. The recognition of this obligation on the responsible State seemed to evidence some progressive development in international law. In fact, as emphasized by Dupuy, 'the interest in the "guarantee of non-repetition of unlawful acts" highlights the fundamental function of responsibility in the maintenance, restoration and guarantee of respect of international legality'.[65]

Further reading

L Dubin, 'Les garanties de non-répétition à l'aune des affaires LaGrand et Avena: la révolution n'aura pas lieu' (2005) 109 *RGDIP* 859

G Palmisano, 'Les garanties de non-répétition entre codification et réalisation juridictionnelle du droit: à propos de l'affaire *LaGrand*' (2002) 106 *RGDIP* 753

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CJ Tams, ‘Recognizing Guarantees and Assurances of Non-Repetition: *LaGrand* and the Law of State Responsibility’ (2002) 27 *Yale JIL* 441(p. 562)

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2 G Arangio-Ruiz, Second Report on State Responsibility, *ILC Yearbook 1989*, Vol II(1), 1, 42–47; J Crawford, Third Report on State Responsibility, 1999, A/CN.4/507, 24–27.

3 *LaGrand (Germany v United States of America), ICJ Reports 2001*, p 466, 514 (para 127), 516 (para 12 8(6)).

4 Ibid (para 128(7)).

5 See eg Report of the ILC, 52nd Session, A/55/10, *ILC Yearbook 2000*, Vol II(2), 26 (para 88).

6 J Crawford, Third Report on State Responsibility, 1999, A/CN.4/507, 26 (paras 58–59).

7 See observation by Germany, A/CN.4/488, 103.

8 F de Martens, *Nouveau recueil général de traités*, Vol 33, 642, or *Dogger Bank Case, United Kingdom v Russia* (1905) *Scott Hague Court Rep* 403.

9 JB Moore, *A Digest of International Law Vol VI* (Washington, Government Printing Office, 1906), 345–346.

10 See G Arangio-Ruiz, Second Report on State Responsibility, *ILC Yearbook 1989*, Vol II(1), 1, 44–46 (paras 155–159).

11 Ibid, 44–45 (para 156), 45–46 (para 158).

12 *North Sea Continental Shelf (Germany v Denmark/the Netherlands), ICJ Reports 1969*, p 3, 44 (para 77).

13 Summary records of the meetings of the 45th Session, 2123rd meeting, 19 July 1993, *ILC Yearbook 1993*, Vol I, 164 (para 29).

14 Report of the ILC, 52nd Session, *ILC Yearbook 2000*, Vol. II(2), 29 (para 110).

15 See eg comments by Mongolia and the Czech Republic, A/CN.4/488, 113.

16 Comments and observations received from Governments, A/CN.4/515, 36.

17 596 *UNTS* 261. See *LaGrand (Germany v United States of America), ICJ Reports 2001*, p. 466, 514 (para 127).

18 *Gabcíkovo-Nagymaros Project, ICJ Reports 1997*, p 7, 74–75 (paras 127, 129).

19 *Fisheries Jurisdiction (Spain v United Kingdom), Jurisdiction of the Court, Judgment, ICJ Reports 1998*, p 432; See the oral pleading of JA Pastor Ridruejo, CR 98/9, 9 June 1998, 14 (para 9); and A Remiro Brotóns, ibid, 44–45 (paras 31–32).

20 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002*, p 303, 452 (para 318); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Serbia)*, Judgment, 26 February 2007, 166–167 (para 466); *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, 13 July 2009, 50 (para 150).

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21 *Avena and Other Mexican Nationals (Mexico v United States of America), ICJ Reports 2004*, p 12, 70 (para 153(10)); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), ICJ Reports 2005*, p 168, 256 (para 257).

22 *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening), Judgment, ICJ Reports 2002*, p 303, 452 (para 318).

23 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p 136.

24 Ibid, 196ff.

25 *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)*, Judgment, 4 June 2008, 8, para 17 (point 8), 10, para 17 (point 11). During the oral hearings France maintained that the request of Djibouti reflected a 'worrying abuse of the concept of guarantees of non-repetition', CR 2008/5, 25 January 2008, 53 (para 17).

26 213 *UNTS* 221.

27 See *Denmark v Turkey* (App No 34382/97), *ECHR Reports 2000-IV*.

28 99 *UNTS* 171.

29 Human Rights Committe, *Ratiani v Georgia*, Communication No 975/2001, CCPR/C/84/D/975/2001, 4 August 2005, para 13; *Platonov v Russia*, Communication No 1218/2003, CCPR/C/85/D/1218/2003, 16 November 2005, para 9; *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka v Sri Lanka*, Communication No. 1249/2004, CCPR/C/85/D/1249/2004, 18 November 2005, para 9.

30 See G Palmisano, 'Les garanties de non-répétition entre codification et réalisation juridictionnelle du droit: à propos de l'affaire *LaGrand*' (2002) 106 *RGDIP* 753, 781.

31 Art 10bis of the 1993 draft, Report of the ILC, 45th Session, *ILC Yearbook 1993*, Vol II(2), 54; and art 46 of the 1996 draft, Report of the ILC, 48th Session, *ILC Yearbook 1996*, Vol II(2), 63.

32 Report of the ILC, 45th Session, *ILC Yearbook 1993*, Vol II(2), 81–82 (para 1).

33 Ibid, 83 (para 5).

34 Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session prepared by the Secretariat, A/CN.4/513, 15 February 2001, 15 (para 55).

35 Report of the ILC, 52nd Session, *ILC Yearbook 2000*, Vol II(2), 24 (para 77). See also Commentary to art 30, para 1.

36 Commentary to art 30, paras 2–3.

37 Ibid, para 9; Report of ILC, 45th Session, *ILC Yearbook 1993*, Vol II(2), 82 (para 2).

38 Commentary to art 37, para 5.

39 Commentary to art 30, para 11.

40 Commentary to art 30, para 13.

41 Report of the ILC, 52nd Session, *ILC Yearbook 2000*, Vol II(2), 26 (para 91).

42 Commentary to art 30, para 13.

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43 Topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-fifth session prepared by the Secretariat, A/CN.4/513, 15 February 2001, 15 (para 57).

44 Ibid.

45 Report of the ILC, 52nd Session, *ILC Yearbook 2000*, Vol II(2), 26 (para 87).

46 *LaGrand (Germany v United States of America), ICJ Reports 2001*, p 466, 512 (para 123), 516 (para 128.7).

47 Ibid, 512 (para 123), 513 (para 125).

48 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Serbia)*, Judgment, 26 February 2007, 167 (para 466).

49 *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, Judgment, 13 July 2009, 50 (para 150).

50 *LaGrand (Germany v United States of America), ICJ Reports 2001*, p 466, 516 (para 128.7); *Avena and Other Mexican Nationals (Mexico v United States of America), ICJ Reports 2004*, p 12, 73 (para 153.10); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), ICJ Reports 2005*, 81 (para 257).

51 G Arangio-Ruiz, Second Report on State Responsibility, *ILC Yearbook 1989*, Vol II(1), 1, 44 (para 154).

52 Ibid, 45 (para 158).

53 See eg Human Rights Commitee: *Blazek et al v Czech Republic*, Communication No 857/1999, CCPR/C/72/D/857/1999, 12 July 2001, para 7; *Fijalkowska v Poland*, Communication No 1061/2002, CCPR/C/84/D/1061/2002, 4 August 2005, para 10; *Jeong-Eun Lee v Republic of Korea*, Communication No 1119/2002, CCPR/C/84/D/1119/2002, 23 August 2005, para 9; Inter-American Court of Human Rights: *Castillo Petruzzi et al v Peru, Inter-Am Ct HR, Series C, No 52*, (1999) para 222.

54 *LaGrand (Germany v United States of America), ICJ Reports 2001*, p 466, 513 (para 124), 516 (para 128 (6)).

55 Ibid, 512 (para 123).

56 Ibid, 516 (para 128.7).

57 Ibid, 513–514 (para 125).

58 Ibid, 513 (para 124).

59 Report of the ILC, 52nd Session, *ILC Yearbook 2000*, Vol II(2), 26 (para 87).

60 *Avena and Other Mexican Nationals (Mexico v United States of America), ICJ Reports 2004*, p 12, 72 (para 153.8).

61 See Declaration of President Guillaume, *LaGrand (Germany v United States of America), ICJ Reports 2001*, p 466, 517.

62 Report of the ILC, 52nd Session, *ILC Yearbook 2000*, Vol II(2), 24 (para 77).

63 Commentary to art 30, para 12.

64 P Weckel, 'Chronique de jurisprudence internationale' (2001) 105 *RGDIP* 788, 773.

65 P-M Dupuy, 'Responsabilité et légalité', in SFDI, *La responsabilité dans le système international* (Paris, Pedone, 1991), 295.

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Annex 224

Kazi Fahmida Farzana, 'Music and Artistic Artefacts: Symbols of Rohingya Identity and Everyday Resistance in Borderlands' (2011) 4(2) ASEAS - Austrian Journal of South-East Asian Studies 215

***Aktuelle Südostasienforschung** / Current Research on South-East Asia*

Music and Artistic Artefacts: Symbols of Rohingya Identity and Everyday Resistance in Borderlands

Kazi Fahmida Farzana[1]

National University of Singapore

Citation Farzana, K. F. (2011). Music and Artistic Artefacts: Symbols of Rohingya Identity and Everyday Resistance in Borderlands. *ASEAS – Austrian Journal of South-East Asian Studies, 4*(2), 215-236.

This study looks at the creation of music and art by Rohingya refugees in Bangladesh as a symbol of social resistance and identity. Ethnographic research on the Rohingyas' use of music and art suggests that these non-conventional means play an important role in communicating their coherent identity and expressing their resistance to the discrimination and oppression experienced in their country of origin as well as in their exile in Bangladesh. This informal resistance is used to keep their memory alive, to transmit that history through verbal and visual expressions to the new generations, and to communicate information about themselves to outsiders. This article posits that these forms of expression, while suggestive of their identity and everyday resistance, occur mostly in an informal and indirect form, rather than in direct confrontation and protest. These informal means also reflect the Rohingyas' pragmatism and coping strategies for living in the borderlands.

***Keywords:** Music; Art; Rohingya Refugees; Bangladesh; Burma/Myanmar*

Die vorliegende Studie untersucht die Bedeutung der Musik und Kunst der Rohingya-Flüchtlinge in Bangladesch als Symbole sozialen Widerstands und Ausdruck ihrer Identität. Ethnographische Forschungen zur Rohingya-Musik und -Kunst lassen darauf schließen, dass diese nicht-konventionellen Mittel eine wichtige Rolle bei der Vermittlung ihrer kohärenten Identität spielen und ihren Widerstand gegen Diskriminierung und Unterdrückung in ihrem Herkunftsland als auch im Exil in Bangladesch ausdrücken. Der informelle Widerstand wird dazu verwendet ihre Erinnerung lebendig zu halten, ihre Geschichte mittels verbaler und visueller Ausdrucksformen weiterzugeben sowie mit der jungen Generation und Außenstehenden Informationen über sich selbst zu teilen. Der Artikel postuliert, dass diese Ausdrucksformen – wenngleich suggestiv in ihrer Identität und im alltäglichen Widerstand – meist in informeller und indirekter Form auftreten und nicht mittels direkter Konfrontation und Protest. Die informellen Mittel spiegeln auch den Pragmatismus der Rohingyas und deren Bewältigungsstrategien für das Leben in der Grenzregion wider.

***Schlagworte:** Musik; Kunst; Rohingya-Flüchtlinge; Bangladesch; Burma/Myanmar*

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1 Kazi Fahmida Farzana is a PhD Candidate in the South Asian Studies Programme, Faculty of Arts and Social Sciences, National University of Singapore. She wishes to thank Vineeta Sinha, Carl Grundy-Warr, Shapan Adnan, and Alexander Horstmann for their support and guidance while writing the draft version of this article. She also wishes to extend her thanks to the two anonymous ASEAS reviewers for their insightful comments. Contact: k.f.farzana@nus.edu.sg

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tions: first, the methodology and data used in this research; second, an examination and analysis of the documentary records of music and artwork; and finally, a reflective analysis of arts and artefacts in refugee life. This article posits that music and the arts play a significant role in communicating the Rohingyas' coherent identity and expressing a more informal form of resistance against the discrimination and oppression they have experienced.

Methodological Approach Adopted

The data for this article is from fieldwork conducted in 2009 and 2010 as part of a larger study on the documented and undocumented Rohingya refugees in various parts of Teknaf,[5] in the south-eastern corner of Bangladesh adjacent to Burma. The primary data I used for this article are three songs and two drawings produced by the refugees.[6] Using these documents as a basis for reflecting and contemplating, I conducted in-depth interviews[7] with the refugees to ascertain their personal stories, thoughts, feelings, and interpretation of the meanings and processes in their country of origin as well as their current life in Bangladesh.[8]

While doing individual interviews, my primary attention was on the refugees' responses to my questions, but I found myself looking into issues I had not originally intended to examine. For example, the Rohingyas' behaviours, different symbols, communication systems, and so forth. Therefore, besides the interview method, I also included ethnographic participant observation as part of my data collection. This then opened the door to other 'non-conventional' aspects such as drawings and music in refugee life. I noticed that ordinary Rohingya refugees[9] frequently used visual means of communication which are particularly expressive and helpful in il-

5 Teknaf is an Upazila (sub-district) of Cox's Bazar, bounded by Cox's Bazar district on the North, the Bay of Bengal on the South and West, and the Naff river and the Arakan region of Myanmar on the East. I chose Teknaf as my field site as it is one of two officially registered refugee camps and likely the main centre for undocumented migrants from Arakan.

6 For a more extensive project, I collected 15 drawings, seven poems, and 16 songs (*taranas*) produced by the refugees. Because of space constraints, I selected only a few representative works to discuss in this article.

7 Non-probability selection techniques of sampling were utilised for this study. Questions were mostly descriptive in nature. Questions were memorised and discussed with the respondents so as to make the interview sessions friendly and less formidable. I took a semi-structured, informal, and more open-ended approach.

8 Besides several fieldtrips to Teknaf, I continue to maintain constant communication with several refugee individuals and families via mobile phone to get their updates. I am very much indebted to the refugees for their selfless generosity in sharing their stories and information.

9 These songs and images were produced by ordinary refugees from every strata of life – both male and female, registered and unregistered, single mothers, rickshaw pullers, daily labourers, and beggars.

by multiple layers of security installations, which control entry, exit, and in-camp activities. The registered refugees live on allocated food rationing and are subject to restrictions on movement, behaviour, activities, and their relationship with the authorities. They live a miserable life, subject to the control and mercy of the authorities, alongside internal power politics of discrimination and exploitation.

The self-settled, undocumented Rohingya refugees are even more vulnerable. They remain unprotected by the Bangladeshi government and international organisations. As in Myanmar, they are viewed by the Bangladeshi government as 'illegal immigrants'. Some of them live among the local community, while others hide in remote areas in the hills near the town. Their living conditions are varied. Some are so poor they have only an assortment of tree branches and plastic paper to cover and make tents for families of 8 to 10. For food, water, and work, they have to find their way to the nearest town. Many find themselves in low-skilled and menial work such as rubbish collection or cooking and selling fried food, dried fish, and so forth. As there is no protection afforded them, many find themselves in a cycle of abuse, exploitation, and arrest.

Documentary Record of Music

Music plays an important role in the life of a displaced community like the Rohingyas. An analysis of one form of their spoken arts known as *tarana* (poems/songs) suggests that these are highly significant for their collective memory. This section looks at their poetry and songs, especially those commonly available among the ordinary refugees (both documented as well as undocumented), telling of their experiences on both sides of the Naff river.

The Concept of Despair

The following tarana is from Aleya Banu, a 39-year-old housewife and mother of five, living in a shabby thatch, hiding with other Rohingya families at the hilltop close to Naitong *para* (village).[13] She had come with her family to Bangladesh from the

13 All names of the Rohingyas used in this study are pseudonyms.

Buthidaung township of Arakan in 1991. As she explains the song in her language:

> *This song tells about what we encountered in Arakan. Our life . . . our memory about our homeland. We could not tolerate the persecution (*julm*) any more. . . . We had to leave our place. This tarana is all about that feeling.*

Although the context of this song is about life in Arakan, it was later reproduced by their popular local singers to depict their displaced life in Bangladesh in a bid to keep their memories alive. To Aleya, this song reflects her own life in Arakan. Watching her sing, it was difficult to overlook the intensity of her facial expressions and emotional involvement with the song, magnifying her frustration and insecurity in life, and her resentment articulated as the song's lyrics.

The word *dor* (fear) is used eight times in this song, in nearly every stanza, to explain why they had to spend a lifetime crying in their own homeland. Specific sources of fear mentioned are the torture at the hands of the Burmese government, the military men, and

Rohingya Song 1

ARKANI ORIGINAL	ENGLISH TRANSLATION
Kandi kandi din katailam	***We spent our life crying***
Kandi kandi din katailam *Mog Bormar vitore* *Helom pori no parilam* *Hokumote dore*	*We spent our days crying* *Surrounded by the Mogs in Burma* *So we've left behind homeland* *Fearing torture of the government*
Kani kandi buk vashailam *Arkan nor vitore* *Helom pori no parilam* *Hokumote dore*	*We spent our life crying* *In a home called Arakan* *So we've left behind homeland* *Fearing torture of the government*
Gura gura doodhor jadu *Gura gura doodhor puain* *puashsha kene more* *Pori thori no parilam* *Hokumote dore*	*Tender babies and charming lovely kids* *Why should they starve to death?* *So we've left behind homeland* *Fearing torture of the government*
Kandi kandi din katailam *Mog Bormar vitore* *Helom pori no parilam* *Hokumote dore*	*We spent our life crying* *Surrounded by the Mogs in Burma* *So we've left behind homeland* *Fearing torture of the government*
Mogor puain dui class pori *chori dhori thake* *Valor puain BA pass hoile* *panor khili beche*	*Mogs attend elementary* *Yet they pick the stick to rule,* *But we get to sell betel leaves* *Even if we earn a BA**
Gura gura doodhor puain *puashsha kene more* *Helom pori no parilam* *Arkan not dore* *Helom pori no parilo* *Biyaginor dore*	*Tender babies and charming lovely kids* *Why should they starve to death?* *So we've left behind Arakan* *So we've left due to fear of everyone*
Gura gura doodhor puain *Na khai kene more* *Helom pori no parilo* *Biyaginor dore* *Helom pori no parilam* *Militarir dore*	*Tender babies and charming lovely kids* *Why should they starve to death?* *So we've left due to fear of everyone* *So we've left due to fear of military men*
Kandi kandi din katailam *Mog Bormar vitore* *Helom pori no parilam* *Hokumote dore*	*We spent our life crying* *Surrounded by the Mogs in Burma* *So we've left behind homeland* *Fearing torture of the government*
	**higher degree above school*

Source: Author's Field Research

der crossing facility creating an escape route for the Rohingya people from Myanmar. This generated hopes in their minds while they were still in their homeland about an imagined safe life across the river. However, once they crossed the border, they encountered the crude reality of harsh security forces and camp life which bring them to see the reality of their exile life. As shown in this drawing, the living space on the Bangladesh side consists of congested tin-sheds and is surrounded by heavily armed security forces. The security forces not only confine the living space of the refugees but also control the entry-exit flows. While living in exceptional places like refugee camps or in scattered settlements, the refugees encounter serious life-threatening dangers such as getting killed by police firing on them, beatings and rape, torture, being tied up with ropes, and so forth.[17]

As mentioned earlier, the Rohingyas' production of art forms has not yet reached the level of altercation with the authorities because it would be more dangerous and costly for them.[18] Therefore it remains at the stage of raising their consciousness (Denisoff, 1983, p. 5; Qualter, 1963, p. 99). Yet, such drawings evidently show the power of the visual symbols, as they successfully explain that the Arakani Rohingyas are caught between the politics of two sovereign states – Myanmar and Bangladesh. Their right to exist in their homeland was not accepted by Myanmar, and their right to stay in the borderland was also never accepted by Bangladesh. They have been forcibly displaced from their homes and many have crossed the border several times. Such forcible relocation and involuntary movements have been driven by systematic acts of violence and/or coercion, which have made the community fearful for their existence and which have affected their socio-economic security.

After talking to the refugees and observing their verbal expressions, body language, and opinions, it was clear that, while living in the borderlands, the refugees maintained a psychology of strong attachment to their homeland. Although they were forced to flee in fear for their lives, the homeland across the river remains visible in their mind's eye. Drawing 1 shows a sun that is hidden behind the hill (signify-

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Arakan/Rakhine. A displaced person, who arrived in Nayapara Refugee Camp I in 1990, noted: "Continuous harassment and economic hardships makes life impossible to live in Arakan. It is just like a jail for us."

17 Having no rights before the law, they are not entitled to education, health care, or even to seek help regarding any injustice and violence they suffer.

18 Kerkvilet, in his study on *Everyday Resistance to Injustice in a Philippine Village*, shows that with everyday forms of resistance the target might not necessarily be aware of it. As he mentions: "The target may eventually discover what the resister has done but that need not be the intention of the ones resisting. Indeed, those resisting, often perceiving themselves to be extremely vulnerable [sic]" (Kerkvilet, 1986, p. 109).

ing their past). The sun is shining brightly. The river is seen as the pathway between their past and their present, and the fact that the past (sun) seems so close makes the pain (of their memories) even more poignant. This makes them even more homesick for their homeland.

Their drawings tell powerful stories of their struggles and sufferings and explain their frustration with the authority, who continue to torment them. In their displaced state, they feel both attached to and yet alienated from their homeland and their past. Without a sense of identity in the present, they seek to find identity in (and through) their music and drawings. The music and drawings also play another role: to depict the crimes they have encountered (abuse, etc.) at the hands of the authorities.

Music and Art as Symbols of Resistance and Identity

Resentment and resistance are not always necessarily violent and physical. They can be intellectual and expressed in artworks such as music, the visual arts, and songs. This ethnographic research on the Rohingygas' musical (verbal) expression and artistic (visual) expression suggests that these texts are highly meaningful. They raise the concept of emotion in people's minds and are able to transmit messages which are central to their displaced life. Two things are common in all these documentary records: one is the domination by the powerful, who have power and influence; and the other is the subordination of the less powerful group. Here, these documents assert the Rohingyas' own perceptions about their situation and experiences. It serves to make the suffering of a stateless life in Arakan as well as in Bangladesh very real and alive. These also serve to inspire a feeling of connectedness with the displaced community in a way more effective than any printed statistics could. In this way, these documents can convince outsiders that the conditions of life in Arakan were intolerable, and being stateless, the situation in Bangladesh is also not much different. Therefore, something must be done. A number of points and arguments can be made using the data presented in the preceding sections.

First, these artistic expressions used a certain kind of language. For example, the particular words in their songs such as *Jala*, *Julum*, *Dukh*, *koshto*, or *Nirjato* are indicators of oppressions. When a refugee says *"Ara kichu korti no pari, biyagin shojjo*

goron poribo" ("we cannot do anything, everything has to be accepted"), this refers to their subordinate status and their frustration at all the oppression they suffer. In this regard, James C. Scott in his book, *Weapons of the Weak*, brought to light the importance of everyday resistance by looking at various signs and symbols, and examining the vocabulary of exploitation. According to him, such everyday forms of resistance occur in the form of "footdragging, dissimulation, false compliance, pilfering, feigned ignorance, slander, arson, sabotage and so forth" (1985, p. 292).

When a refugee said, "We [the Rohingyas] are like people without knees", he was referring to their powerless condition in which they are not able to say or do anything against those who have displaced them from their homes and made their lives miserable. Indeed, these musical items and drawings are actual living stories of the Rohingyas' struggle and social experience, of their agony and hatred towards those who cause them to suffer. What these documents convey is resistance, not only to their socio-economic and political conditions, but also resistance to the attributed identity that has been imposed on them from above, making them subjects without protection and outside the law.[19]

Second, the songs, artworks, and poems have a certain spirit that helps sustain the Rohingyas for many years in a foreign land. The refugees produce and memorise them as they typically find them reflections of their own experience. They can also send emotional messages through these songs and artworks which are able to work as a communication bridge among the Rohingyas. Their resources or opportunities to resist openly are less than minimal, but their spirit remains alive and is expressed through these artistic creations. Without these media, it would have been difficult for an illiterate community to keep their memory, identity, and history alive. By engaging in these media, they are also able to communicate with the outside.

Third, this medium of expression shows some kind of action that keeps these people active. These simple things of everyday life, such as music and art, are tools that have been used by the ordinary Rohingyas to show consciousness and awareness about their situation. Simultaneously, they clearly express negation of the system of domination. Weitz (2001, p. 670) referred to these as "actions that not only reject subordination but do so by challenging the ideologies that support that subordination".

19 Hanna Arendt defined statelessness as a situation when people "left their homeland they remained homeless, once they had left their state they became stateless, and once they had been deprived of their human rights they were rightless" (Arendt, 1966, p. 267).

Moreover, it is these people who have complete authority over these artistic productions, and no one else can control or subjugate their songs and artworks (Brodsky, 1992, p. 220).

Fourth, these artworks especially break the complicity of silence. It shows one form of psychological warfare against domination as it provides a sense of opposition (Hollander & Einwohner, 2004, p. 538; Hughes et al., 1995). We have seen that refugees are raising questions through their songs about the discrimination towards them in jobs, educational opportunities, and power sharing. Another example was in Drawing 1, where the word 'raping' depicts a military man raping a female at gunpoint. These drawings are more expressive than words. These are certainly observable as expressions of resistance, yet not necessarily recognised by the target (the powerful dominants). The intention here is to negate that domination, talk about the persecution, and effectively expose the songs and drawings to shame the oppressors. This is the voice of the oppressed. It is their form of resistance, and that makes it very significant.

Fifth, these documents exhibit a non-conventional form of resistance which is covert in nature. Similar to Scott's analysis of resistance that is accomplished through symbolic behaviour, the ordinary Rohingyas use music and artworks as symbols of their form of resistance. When a refugee sings "where should I go", not only is it referring to their uncertain destination as a stateless being, it also serves as tools of opposition asking for a social change. According to Brodsky (1992, p. 221), "Art is a form of resistance to the imperfection of reality, as well as an attempt to create an alternative reality, an alternative that one hopes will possess the hallmarks of a conceivable, if not an achievable, perfection".

Sixth, it allows the refugees to escape for a while from the sense of despair by overcoming it not so much through political efforts but through music and art. This modest form of struggle is neither a collective defiance nor rebellion, rather, these should be seen as individual acts of resistance. This form of resistance does not wait for recognition (McCann & March, 1996; Scott, 1985). Because these are people "who have experienced tragedy [but who] do not see themselves as protagonists and do not really care about the means by which tragedy is expressed, being themselves their embodiment" (Brodsky, 1992, p. 221). The Rohingyas are primarily performing these music and artworks for themselves. Although their music and arts are oppositional,

they are deliberately hidden from public view because it could be dangerous for their safety and security. They avoid direct confrontation to stop escalating further persecution. They are opportunistic and accommodate things that suit their situation best.

Therefore, it can be argued that the Rohingya refugees' use of texts in the form of music and art clearly exhibits resistance to the reality they have experienced. The logical question that arises out of this is: Can this form of resistance bring any positive change to the life of the refugees? This covert form of resistance may not bring any revolutionary change in the life of the Rohingyas, yet these are valuable documents, because these have a certain spirit that helps sustain the people who create them: these are expressions of their consciousness of their situation and also expressions of negation of the system of domination, and this allows them to escape from the sense of despair, at least for a few moments, and this is what makes such informal resistance effective and significant. As mentioned before, the refugees create these works for themselves, to vent their frustration, to show their coherent identity, to keep their memory alive, to break the complicity of silence, and to speak out against the injustices that have happened and are still happening to them. Such a humble form of resistance, according to Scott, is perhaps the only "spirit and practice that prevents the worst and promises something better" (1987, p. 452). The real intention of this form of resistance has always been "the hope for survival and persistence" for ordinary people.

Conclusion

Non-conventional resistance using arts and artefacts is increasingly visible in social research on social movements. The article has provided an in-depth understanding about how a displaced community uses music and art to express their resistance. Ethnographic research on the use of music and art by the Rohingya refugees in Bangladesh suggests that it plays a very important role in communicating their coherent identity and displaying an unconventional form of resistance to discrimination and oppression. They use music and art to keep their memory alive, to transmit that history to the new generations, and to communicate information about themselves to outsiders. This might be a different approach to protest, but it is their everyday form of local resistance and is central to Rohingyas' life. This approach is important to

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Andrew Selth, 'Myanmar's Police Forces: Coercion, Continuity and Change' (2012) 34(1) Contemporary Southeast Asia 53

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Myanmar's Police Forces: Coercion, Continuity and Change[1]

ANDREW SELTH

Myanmar's police forces have received little attention over the years, but they have always played a critical role in the country's administration and national security. Since the 1962 military coup, the national police force has been overshadowed by the armed forces, but it has continued to evolve and grow. It is now larger and more powerful than at any time in the country's history, and is considered a key instrument of reform and control by the hybrid civilian-military government which was inaugurated in Naypyidaw in March 2011. This article aims to provide an introduction to this neglected subject. It sketches the historical development of the police as an institution from the beginning of the colonial period to the present day. It then outlines the current structure and organization of the Myanmar Police Force (MPF). This is followed by a discussion of eight broad themes that have characterized policing in Myanmar over the past 185 years. Finally, the article looks at some of the challenges facing the MPF and its likely future under the new government.

Keywords: Myanmar, Burma, police, crime, prisons, security.

> The Police department has always been and will always be one of the most important branches of administration of Burma.
>
> Daw Mya Sein
> *The Administration of Burma (1938)*

ANDREW SELTH is a Research Fellow at the Griffith Asia Institute, Griffith University, Australia.

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which was established with Australian help in 2004. Most of these courses have been for mixed classes drawn from Association of Southeast Asian Nation (ASEAN) member states and other regional countries. At least one course, however, has been tailored to the specific needs of the MPF.[25]

Structure and Organization

During the colonial and early post-independence periods, Myanmar's policing roles and capabilities were divided between separate civil and military police forces, supplemented by a number of distinct functional units. During the 1950s, the Burma Police was assisted by "special police reserves" and a bewildering array of militia organizations.[26] After the 1962 coup, however, the Union Military Police (renamed the Union Constabulary by the "caretaker" government) was absorbed into the *Tatmadaw*. All civil police forces, including the separately organized Rangoon Town Police, were consolidated into one centralized police structure. This was to remain the situation until 1974, when widespread labour and student unrest prompted Ne Win's Burma Socialist Programme Party (BSPP) government once again to create a force of paramilitary "riot police".[27] Even then, however, the *Lon Htein* remained within the national police command structure.

The MPF falls within the jurisdiction of the Minister for Home Affairs, currently headed by Myanmar Army Lieutenant General Ko Ko. His last position was as Chief of Bureau of Special Operations 3 in the Defence Ministry. The Minister reports directly to President Thein Sein, and is a member of the National Defence and Security Council which was established under the 2008 Constitution.[28]

Exact numbers are difficult to determine, but the current strength of the MPF is believed to be close to 80,000.[29] This represents an increase of some 8,000 men and women over the past decade.[30] INTERPOL's website states that the MPF's strength is "more than 93,000", and some unofficial estimates range as high as 100,000; these claims, however, are difficult to substantiate.[31] That said, a recruitment programme is underway to increase the MPF's numbers. A special effort is reportedly being made to boost the number of women in the force, which currently stands at less than 2 per cent of the total. The developed country norm is around 25 per cent.[32]

In organizational terms, the MPF has for at least a decade been made up of six separate, but inter-related component parts. These are the national headquarters, the State and Region (formerly Division)

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police forces, four special departments, five training centres, up to nineteen police security battalions and several small auxiliary forces.[33] This is in addition to a number of other units and organizations that are either administered by, or in other ways closely connected to, the MPF.

National Headquarters

At national headquarters in Naypyidaw, the MPF is headed by the Chief of Police, who usually holds the rank of Police Major General. The present incumbent is the former Deputy Commander of the Tatmadaw's Yangon Command, (Myanmar Army) Brigadier General Kyaw Kyaw Tun.[34] Under him is the Deputy Chief of Police (DCP), who holds the rank of Police Brigadier General. As the MPF's second-in-command, the DCP has responsibility for "the proper command, control and monitor all the Departments of the Myanmar Police Force" (sic).[35] There are six other Police Brigadier Generals in the national headquarters. They manage the General Staff Department, Criminal Investigation Department (CID), Special Branch, Adjutant General's Office, Quartermaster-General's Office and Police Battalion Command.

State and Region Police Forces

Under national command, there are now fourteen Region and State Police Forces, matching Myanmar's fourteen regions and states. Under the 2008 constitution, these administrative entities have the same formal status, the difference in nomenclature simply reflecting the 1974 division of the country into seven ethnic Burman-dominated divisions and seven states named after major ethnic minorities.[36] Each is commanded by a Police Colonel, working from the respective State and Region capitals. Generally speaking, the jurisdictions of these forces follow established civil administrative boundaries, as laid down in the 2008 Constitution.[37] Below them are police at the district, township and (in some places) village level. There are currently over 1,200 police stations in the country.[38] These range in size from quite large facilities in densely populated areas to small rural outposts manned by only a few officers.

"Special" Departments and Agencies

There are four "special" departments in the MPF, namely the Criminal Investigation Department, Special Branch, Railways Police and City Development Police Force.

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Christian J. Tams, Lars Berster & Björn Schiffbauer, *Convention on the Prevention and Punishment of Genocide: A Commentary* (2014)

Convention on the Prevention and Punishment of the Crime of Genocide:

A Commentary

by

Christian J. Tams,
Lars Berster and
Björn Schiffbauer

C.H. BECK · Hart · Nomos
2014

2. Individual acts of genocide

a. Killing members of the group

61 Killing members of the group means causing the death[290] or, more precisely, diminishing the natural lifespan[291] of at least *two* persons belonging to the same protected group.[292] However, the prevailing interpretation proposes that despite the pluralized term 'members', killing a *single* victim is sufficient to complete the crime.[293] *Schabas* holds that any interpretation to the contrary would seem 'a bit absurd' and submits that the phrase could just as easily apply to a single act of killing.[294] The latter aspect is elucidated by *Satzger* who explains that the general prohibition of killing other persons can be formulated by using the singular (you must not kill another person) or the plural (you must not kill other persons) without any difference in meaning.[295]

62 While this finding as such is indisputably accurate, it would nevertheless seem to disregard the context of the *chapeau* of Article II which speaks of 'any of the following acts'. This phrase makes clear that 'killing members of the group' spells out the incriminated individual act of the perpetrator, and not the underlying general rule 'thou shalt not kill'. Read in context, therefore, the wording quite unambiguously requires the killing of at least two persons. Moreover, consideration should be given to the context of the genocide provisions within the statutes of the ICTY, ICTR and ICC, as well as the Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia[296] and the ILC Draft Codes of Crimes against the Peace and Security of Mankind of 1954 and 1996. All of these weighty codifications consistently chose to retain the plural within the definition of genocide[297] whilst placing it in the immediate vicinity of crimes against humanity and war crimes, which clearly indicate if a given act requires a plurality of victims or a single person only.[298] This, along with the fact that all four criminalized acts consistently stipulate a plurality of victims ('members, group, births, children'), indicates that the plural form used in Article II lit. (a) should indeed be taken seriously. Particularly with respect to the ICC-Statute, an additional problem arises

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[290] Kreß, IntCrimLRev 6 (2006), 480. See also: ICC Elements of Crimes, Article 6 lit. (a) (1), fn. 2: 'The term 'killed' is interchangeable with the term 'caused death'.

[291] Kreß, MK, § 6 VStGB, mn. 48, referring to § 6 (1) No. 1 VStGB.

[292] Khan/Dixon/Fulford, International Criminal Courts, § 13–32. See also: U.S. Code; Chapter 50A; Section § 1093: 'As used in this chapter – ... (4) the term 'members' means the plural; ....'

[293] ICTR Akayesu, TC, 2 September 1998, para. 473; ICTR Kajelijeli, TC, 1 December 2003, para. 757; ICTR Semanza, TC, 15 May 2003, para. 377; ICTR Gacumbitsi, TC, 17 June 2004, para. 255. IStGH v. 12. 7. 2010, ICC Al Bashir, PTC, 12 July 2010, para. 20; Werle, Int'l Criminal Law (2nd ed.), mn. 726; Schabas, Genocide in Int'l Law (2nd ed.), 179; Jeßberger, in: Gaeta, Genocide Convention, 97; Kreß, IntCrimLRev 6 (2006), 480; Kreß, MK, § 6 VStGB, mn. 49.

[294] Schabas, Genocide in Int'l Law (2nd ed.), 179.

[295] Satzger, Int'l and Eur. Crim. Law, § 14 mn. 19, (252); For a different view, see: Cassese, International Criminal Law (2nd ed.), 134.

[296] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

[297] Article 4 para. 2 lit. (a) ICTY Statute; Article 2 para. 2 lit. (a) ICTR Statute; Article 6 lit. (a) ICC Statute; Article 4 Law of the Establishment of the ECCC; Article 2 para. 10 (i) ILC-Draft (1954); Article 17 lit. (a) ILC-Draft (1996).

[298] See, for instance, Article 7 para. 1 ICC-Statute (Crimes Against Humanity): '... 'crimes against humanity' means any of the following acts ...: (a) Murder; ... (d) Deportation or forcible transfer of population; ... (i) Enforced disappearance of persons; ....' Emphasis added.

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Kazi Fahmida Farzana, 'Boundaries in Shaping the Rohingya Identity and the Shifting Context of Borderland Politics' (2015) 15(2) Studies in Ethnicity and Nationalism 292

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Boundaries in Shaping the Rohingya Identity and the Shifting Context of Borderland Politics

Kazi Fahmida Farzana*
University Utara Malaysia

Abstract

In recent years, new waves of ethnic violence in the Arakan (Rakhine) state of Burma (Myanmar) have resulted in increased internal displacement and the continued exodus of the Rohingya people to neighbouring countries. At the heart of this problem is the fact that Burma (which the Rohingyas claim as their ancestral land) and Bangladesh (where many Rohingyas are unwelcome and/or undocumented refugees) continue to deny the Rohingyas their political identity, each insisting that the displaced Rohingyas are the responsibility of the other. This study examines the history of the region to explore how political identities are shaped (generally) and how Rohingya refugees in Bangladesh, living along the borders, identify themselves in the midst of political sovereignty claims and a social space that exists across artificially drawn borders (specifically). This article argues that the true political identity of the displaced Rohingya refugees can be located in their social memory and their life-politics in the borderlands. In this social memory, the Rohingyas' beliefs in ethnicity, identity, and belongingness play an important role in shaping their current identity. Their production of cultural artefacts while in exile suggests a non-conventional resistance, and the close proximity of the refugees to their homeland creates a completely different psychology of attachment and alienation, which needs further attention in refugee studies. Such an understanding of life-politics along the border may challenge our current understanding of borderland conflicts within the framework of state-imposed boundaries. The boundaries of identity may go beyond traditional notions of national borders and the identity of the state.

* Kazi Fahmida Farzana's research focuses on refugees and statelessness in Southeast and South Asia, including national identity and contemporary political theories. She earned a Ph.D. from the National University of Singapore (NUS) in 2013. She is currently a senior lecturer at University Utara Malaysia's Department of International Affairs. Email: fahmida@uum.edu.my.

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artefacts illustrate the refugees' perspectives about territoriality, identity, and belongingness. These primary documents proved invaluable in providing first-hand documentation of, and insights into, Rohingya refugee experiences. My purpose in using these visual and aural records was to tease out the voices and nuances of the individuals behind those artefacts, as this music and artwork are powerful symbolic expressions of refugees' identity that reflect their situation of being stranded.

The Historical and Politico-Military Context of the Border

The Northern Arakan or Rakhine state of Burma, which borders Bangladesh's Chittagong and the Cox's Bazar districts, shares a porous international boundary-line of 270 kilometres along the River Naff. Historically, the line separating these two political jurisdictions, between Burma and Bangladesh, was not conceptualized as the 'boundary' separating communities. Arakan's natural geographic location is an important factor that binds this group into one sociological unit. Geographically, the area is separated by the Arakan Yoma (Mount Arakan), separating this region from the central Burma region (Oberoi 2006:172). Between Arakan and Chittagon, there is no physical barrier. Second, in pre-colonial days, this geographical area 'changed hands among neighbouring feudal rulers and boundaries were always elastic' (Zarni 2013). The Arakan kingdom, – formerly known by its ancient name, Maruk-U – was once independent (Charney 1998), separated from the two Burmese kingdoms in central Burma and the Irrawaddy delta, as well as Bengal and the Mogul empire in India. In 1459, the Arakan conquered Chittagong and ruled it until 1666.

The area between modern Burma and Bangladesh has a long history of people travelling or moving back and forth across the boundary. The history of the Rohingya Arakanese Muslims highlights their diverse origins, with roots going back several hundred years. Moshe Yegar's (1981 [1972]), *The Muslims of Burma*, traced the Rohingyas' ancestors to Arab and Persian traders who established their settlement in lower Burma and Arakan in the ninth century C.E.; Muslims have had a well-established presence in northern Arakan since the twelfth century.[4] Yegar observed that, 'Today, the Arakanese Muslims call themselves Rohinga or Roewengyah. This name is used more by the Muslims of North Arakan, . . . than by those living near Akyab' (ibid.:25).

Events occurring throughout the era of Arakan rule in Chittagong resulted in a close relationship between the Arakanese and the Bengal of India. The Muslim influence in Arakan was so predominant that 'the Arakanese kings though Buddhist in religion, became somewhat Mahomedanised in their ideas' (Bhattacharya 1927:141). Evidence from Arakan genealogy demonstrates that during their occupation of Chittagong, the Arakanese kings adopted Muslim names, in addition to their own earlier names (Jilani 1999; Phayre 1967). During this time, the Muslims' relationship with the Maruk-U (Arakan) kingdom became stronger, which also explains the Bengali influence in Arakan. 'An attitude of tolerance prevailed, with Theravada and Mahayana Buddhism, together with Brahmanism, Hinduism, animism and other beliefs flourished side by side' (Blackburn 2000:14).

citizenship rights, basic needs, and services to military operations and interference in their everyday lives. Most of the refugees mentioned their fear of 'threats' from the NaSaka (Border Security Force), the military, and the Rakhines in Arakan, in the form of physical torture of Rohingya men and women. Many respondents also experienced forced labour, eviction from their land and villages, insufficient and expensive medical treatment, forced relocation to model villages,[9] denial of education, the settlement of Buddhist colonizers, and destruction of religious sites. It appears that some of these processes were more severe than others; however, it is not possible to determine or rank which of these had the greatest impact, because each, or a combination of these factors and threats, made individuals decide to leave home. These processes were complex and interconnected.

Despite this, during my fieldwork I observed that the Rohingyas are able to maintain the semblance of a cultural life despite this adversity. Songs (commonly known as *taranas*) seem common among both registered and unregistered refugee men and women. Some songs are thought out or 'composed' from their past, and others are produced during their self-exile in Bangladesh. Approximately once or twice a month, Nayapara refugees (those living in registered camps) sit around for small singing sessions, usually on a moonlit night, in the small area between their huts. Before their sing-along sessions, Rohingya camp representatives are required to seek permission from the camp authority, primarily the Camp-in-Charge.[10] At these gatherings, they play traditional musical instruments – *tabla* and *juri* (a guitar-like instrument) – and sing folk songs, religious philosophical songs, and songs that represent everyday issues within the camp. In many cultures, songs are the glue to community bonding, and remain highly significant to their identity. For the ordinary Rohingyas, songs are their life-line, and are a cathartic means by which they express their thoughts, share their pain with fellow community members (who would understand their shared experiences), connect and strengthen their community bonds, and pass on their social memories to the next generation. As one refugee acknowledged, 'Our memory remains alive in our *taranas*'. Therefore, it is not uncommon to find even a drifter expressing his or her sorrow in song.

Songs as Cultural Depictions of Life in Exile

Song 1 (*tarana*) documents the Rohingyas' frustration and despair. Hafeza Khatun, a forty-two-year-old undocumented refugee and single mother of two daughters and one autistic son, is a beggar and, depending on availability of work, also serves as housemaid to the local community. Prior to leaving for Bangladesh, her home was in the Shikdar para of Maungdaw in Arakan. This song is a collaboration between Hafeza and Mojid Molla, a *tarana* producer from the same village who had also crossed the border into Bangladesh and shared similar experiences; the song is their way of 'remember[ing] that history of why and how a village like Shikdar para had to vacate'. According to Hafeza, 'This song is our song. For many years, people from Shikdar village experienced *julum* [persecution]. We are small people, could not resist [*ara bodala loi no pari*] them. After coming here we want to keep remembering that experience through songs.'

Song 1. In Shikdar Village

ARKANI ORIGINAL	ENGLISH TRANSLATION
Shikdar Para	***In Shikdar Village***
Shikdar parar Borma shitai ki kam joitaye *ator ekkhan Mossod vagi mondir banaye (II)*	*What have you done you Burmese in Shikdarpara!* *You built a mondir destroying a big mosque!*
Mogor poyan shunnoni *Arar kota raibani* *ator ekkhan Mossod vagi zati banaye*	*Will you listen to our plea* *Will you keep a word* *(why) You built a mandir (temple) destroying a big mosque!*
Bangladesh lo idori dori bondhu *baidhare gor feli* *Napi khaiya moger jala* *Rohingya vaiyor shorir kala* *Chinta-chintai jai omboi mori re Allah re* *Chinta-chintai jai omboi mori*	*We made Bangladesh abode* *Leaving behind our home* *Caused by Mogs' torture* *The bodies of Rohingya fellows turned black* *O God! we are dying helpless* *We are dying helpless like that.*
Burma Mulluk feil kone jai *Omboi Rohingya vai* *Burma mulluk felai kone jai?*	*Where should we go leaving behind Burma, O Rohingya fellows* *Where should we go leaving behind Burma?*
Shjoinna der shat torkari *Majoinnader dailor pani (II)* *Loke vukhe khai mare* *oma jaite no pari* *Akyab er o jibolkhanai* *oma thaikum ken kori*	*Shajons enjoy tasty dishes* *But majons get only lentil soup* *We die of starvation* *Yet we cannot escape* *How would we spend our life* *In the prison of this Akyab?*
Age jodi jantum ma re jibolkhanar duk *Nijor churi nije khaiya mone paitam shuk* *Akyab er o jibolkhanai* *oma thaikum ken kori*	*Had we known the taste of prison cell* *Would have gratified committing suicide ahead,* *How would we spend our life* *In the prison of this Akyab?*
Aung san jodi na morito *Sonar Burma santi hoito* *Baro bochor duk pailam,* *Baro bochor koshto pailam (II)*	*Had Aung San not been killed* *The golden Burma would have been a place of peace* *We felt pain for 12 years* *We suffered for 12 years*
Sharati duniyai ghuriya berai *Mon milenare manush milena re Kangal.* *Kangal boli more keo chine na re kangal*	*We wander around the world* *Friendless, without sympathy, oh, fate!* *Nobody pays attention to us* *Because we are enforced to adapt to nomadism, oh, fate!*

(Source: Mojid Molla, a tarana producer, and Hafeza Khatun, both undocumented Rohingya refugees who crossed into Bangladesh from Shikdar para of Maungdaw)

The song is a living record of refugee experiences, particularly those originating from Shikdar village. The words are significant because they illustrate how the villagers faced the destruction of their mosques, which were then replaced with *mondir* (temple), and ultimately, eviction. The lyrics boldly express that they were deeply wounded by the Burmese authorities' curt attitude and callous behaviour. The song is crying aloud for ears that would care to listen to their stories of suffering that illustrate why they were forced to leave behind their beloved 'homeland'.

The song also tells of the Mogs (Rakhines) capturing and torturing the Rohingyas, for which 'the bodies of the Rohingya fellows turned black'. The Rohingyas are portrayed as helpless, in fear of still more attacks, suffering severe food shortage ('only lentil soup') and many sleepless nights. Finally, hit with the realization that they could starve to death in their homeland, the Rohingyas decided that they had to leave home. The song recalls three instances in Akhiab (once the capital of Arakan) when life felt more like prison (*jibolkhanar*) to them, and how the taste of prison life often led them to thoughts of suicide. The song also asked listeners what they would do, or where they should go, if the suffering reached the extreme.

It then imagined a different scenario, one that could have occurred if their democratic leader, Aung Sun, had not been killed. In a way, it demonstrates their nationalism, and their long-lost hope for a 'golden Burma' that could have been achieved if Aung San were still alive and his liberal ethnic policy had prevailed in Burma. Now, the agony of a stateless life, being in a foreign country, and not being recognized by others as citizens of any sovereign state, turned them into beings not worthy of sympathy. The song seems to be a complete story in itself, of a Rohingya beggar and many others who could directly relate to it, which is probably why it has survived through the years.

Songs are often used to inspire deep feelings of patriotism to nations and communities. Lokman Hakim, aged forty, a registered refugee from the UNHCR Nayapara camp, shared Song 2, a patriotic song entitled *Arkanor Nowjoan*. He sang the song accompanied by traditional Rohingya musical instruments. According to him:

> This *tarana* is based on our experience of torture, beating and humiliation in Arakan. It is because Mogs and military beat us mercilessly for no reason. If someone is sick or refuses to go for unpaid labour for the military, they will beat us a lot . . . . Moreover, they humiliate our females, in front of our eyes to torture us more. We could not take it anymore . . . and had to leave. This *tarana* is all about that feeling.

This patriotic song illustrates the Rohingyas' perception of freedom and liberty. It points to their lack of rights in Arakan, which is why they are tortured by the Rakhines, and the torture and humiliation dealt to their 'mothers and sisters'. The experiences of rape and humiliation, of torture and death, of massacres and disappearances, have all deeply impacted individuals and been embedded in their collective imagination through a constant sense of fear and threats. Such humilia-

Song 2. The Young Brothers of Arakan

Rohingya

ARKANI ORIGINALDS	ENGLISH TRANSLATION
Arkanor Nowjoan	***The Young Brothers of Arakan***
Hara- hara aiyo O Arkanor nowjoan vai *Azadi korte mon thakhile jihad kora chai*	*O my young brothers of Arakan come faster* *If you want Independence then we need to fight*
Ma-boner julum dhekhile lojjai fati jai *Killa arar pran tai onole hijrot koro chai*	*We feel ashamed of torture on our mothers and sisters* *Why should we migrate to somewhere else while we are alive*
Imanor janda tuli loum vai *Arkan desh gorgoi hano hano hatot loiye* *Vam gan jona choli Oi Arkan* *Arkan desh goroi gor hano hano (II)*	*Bearing the standard of Iman (faith)* *Let's go to fight to free Arakan* *Let's march towards Arakan* *Let's go to fight to free Arakan (II)*

(Source: Md Mojid, a forty-six-year-old ordinary Rohingya singer and tarana producer from the Nayapara camp)

tions are a sensitive issue for any community. Therefore, the song calls on the Arakan youth, as their community's future, to take charge and free Arakan from these immoral acts.

It also urges fellow Rohingyas to come together to participate in a mission – to fight against all odds – and rebuild a new Arakan, where people are not persecuted because of their race and belief. Through this song, the heavy responsibility to save their land is handed over to the young; calling on the *Nowjoans* (young brothers) to be united in the cause. Although the song was produced in Arakan during a time when they were undergoing severe pain and suffering, it continues to circulate and be sung after all these years among ordinary Rohingyas as part of their collective memory. Such a song reflects a collective resistance to dominance and oppression. When an ordinary refugee considers their situation one where 'we are like people without knees, we are unable to protest against anyone, and hence, *taranas* are the only way to tell our sorrows and sufferings to another person', it indicates resistance by the people: a limiting case of James Scott's *Weapons of the Weak*, applied in a more extreme context. Scott's book focuses on more informal and alternative forms of resistance where disadvantaged and powerless groups tend to use informal means such as signs, symbols, and a vocabulary of exploitation to express themselves (Scott 1985:292). This non-conventional form of resistance is more humble, but nevertheless distinct in nature.

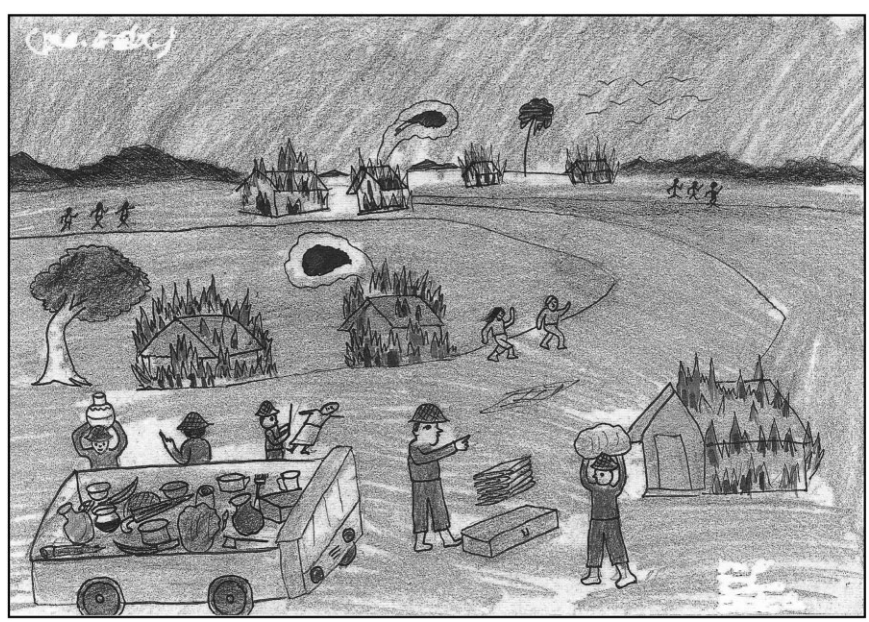
It appears that the Rohingya do not have a word in their language that means 'resistance'. Jobeda Begum (a refugee respondent) described their situation in Myanmar as 'whatever they want to do on us will do, we are not supposed to say anything, all have to be tolerated', and expressed the resentment Rohingyas feel for the discrimination they face in their own homeland. Lyrics such as this are cathartic for the displaced, and may demonstrate a form of resistance that does not directly confront the oppressors, but expresses a refusal to accept their refugee condition. Such songs are memories they carry and cherish in their everyday life, and help to bind them together through their shared experience of living within a displaced community.

Sketches as Visual Depictions of Life in Exile

Similarly to songs, Rohingya sketches of refugee life also illustrate their life in the past and present. Although not as widespread as songs due to Rohingyas' fear of direct confrontation with authority, individuals nonetheless use these privately in order to express themselves, pass along their memories to future generations, and inform outsiders about their situation. Drawing 1 is by Eman Ali, aged forty-five, a registered male refugee in Nayapara originally from the Maungdaw of Arakan.

This drawing illustrates the situation in his Arakan village, where the NaSaKa border security force surrounded their village from every corner and torched their houses. Thick black smoke is coming out of burning houses as people run for their lives. Security forces in vehicles confiscate the Rohingyas' property. Those who do

Drawing 1. Destruction of Rohingya Property in Arakan



(Source: Eman Ali, a refugee from UNHCR Nayapara camp)

Annex 228

I. Bantekas & L. Oette, *International Human Rights Law And Practice*
(Cambridge University Press 2016)



Victims' rights and reparation

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14.1 INTRODUCTION

International human rights law has for a long time focused primarily on standard-setting and the establishment of institutions tasked with promoting human rights and monitoring states' compliance with their obligations. Limited attention was paid to victims as rights-holders and to the availability of effective remedies for the vindication of rights. Yet, slowly, conceptual shifts and practices, beginning at the national level, changed prevailing perceptions of victims as largely passive beneficiaries, resulting in growing

calls for victims to play a more active role, particularly in the criminal justice process. The exclusion of victims and their lack of opportunity to participate effectively in proceedings that affect their rights were increasingly seen as an anomaly, raising the fundamental question of whose interests a justice system is supposed to serve.[1] This is reflected in the work of scholars and practitioners in the field of victimology and renewed interest in restorative justice.[2]

This change in thinking gained international currency initially with the 1984 United Nations General Assembly (UNGA) Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Victims' Declaration)[3] and more than twenty years later culminated in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles).[4] The impetus for victims' rights owes a lot to the increasing availability of regional and international complaints procedures. The growing recourse to these procedures has enabled, if not compelled, regional and international human rights treaty bodies to develop their jurisprudence and, to varying degrees, strengthen victims' rights in the process. More recently, the establishment of international(ised) criminal tribunals, in particular the International Criminal Court (ICC), has led to a keener appreciation of victims' rights, including the right to protection and the right to participation.[5] These developments are complemented by numerous attempts to take legal action in third countries, in particular on the grounds of universal jurisdiction, which assert and highlight the need for victims' rights in transnational proceedings. Taken together, these multiple efforts are testimony to how victims, supported by their representatives and advocacy organisations, have claimed their space in international human rights law and continue doing so in the face of a series of remaining obstacles to the vindication of their rights.

[1] J. Doak, *Victims' Rights, Human Rights and Criminal Justice, Reconceiving the Role of Third Parties* (Hart, 2008), 7–11. See further J. C. Ochoa, *The Rights of Victims in Criminal Justice Proceedings for Serious Human Rights Violations* (Martinus Nijhoff, 2013).

[2] See e.g., the work done by the World Society of Victimology, www.worldsocietyofvictimology.org; G. Johnstone, *Restorative Justice: Ideas, Values and Debates* (Willan, 2002); and, in the context of international crimes, R. Letschert, R. Haverman, A-M. de Brouwer and A. Pemberton (eds.), *Victimological Approaches to International Crimes: Africa* (Intersentia, 2011).

[3] UNGA resolution 40/34 (29 November 1985).

[4] UNGA resolution 60/147 (16 December 2006). See for developments at the regional level in particular, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

[5] See REDRESS, *The Participation of Victims in International Criminal Proceedings* (2012) and *Ending Threats and Reprisals against Victims of Torture and Related International Crimes: A Call to Action* (2009).

This emphasis on a victim-centred approach has not remained unchallenged. Critical observers argue that victims' politics lead to a 'privatisation' and individualisation of public concerns, feeding a growing 'victims' industry that serves to undermine the agency of individuals and groups to assert their rights as political actors.[6] These are valid concerns. However, it is important not to overlook the vital role that effective rights and remedies play for victims, considering in particular the realities of what it means to suffer serious human rights violations and grave injustices. These violations frequently have devastating consequences for the direct victim(s) and others. Torture, for example, often results in lifelong physical and psychological impairment, being aimed at the destruction of the personality of its victims. Family members experience anxiety while their relative is in custody and often suffer from diminished income following the release or even death of the victim. They also have to bear the brunt of caring for and dealing with victims' attempts to cope with the aftermath of torture, which may be volatile and ultimately 'unsuccessful', without any acknowledgement of their own suffering in the process. Communities, for their part, may be in a state of fear as to who will be next, stifling the freedom of expression and action of their members.

Victims' rights, whether they take the form of a procedural right of access to justice or participation, or a substantive right to reparation, fulfil a number of important functions. Ideally, they allow victims to assert their rights, redress power imbalances manifest in violations, provide a measure of justice and furnish the victim(s) with the means to cope and rebuild their lives. They may also lead to a public acknowledgement of wrongdoing that recognises unlawful suffering, demonstrates society's respect for, and solidarity with, the victim(s), and affirms the rule of law. In addition, victims' rights play an important role in contributing to prevention through deterrence (punishment and/or payment of damages or other forms of reparation) and systemic changes to counter violations, such as legislative and institutional reforms.

Notwithstanding the advancement of victims' rights and the strength of what may be called the victims' rights movement, a series of open questions and challenges remain. Do the rights granted in various treaties and declarations translate into a right to reparation under international law, and, if so, does this apply in relation to all or only some particularly serious human rights violations? Who are the rights-holders and what are their entitlements? Recent developments also raise questions of coherence and effectiveness in light of the proliferation of victims' rights in various bodies of international law, such as international human rights law, international humanitarian law and international criminal law, and of the different approaches taken by various

[6] See on 'victims' politics' below at 14.11.

adjudicative bodies. Finally, and crucially, has the growing international recognition of these rights been matched by their effective implementation and enforcement?

14.2 THE DEVELOPMENT OF THE RIGHT TO REPARATION

Reparation is a deep-rooted and vital component of any legal order that is central to the notion of justice. It is traditionally based on the understanding that measures need to be taken to restore the order that has been disturbed by the violation. Where this is not (fully) feasible, the wrongdoer(s) must undo the wrong as much as possible to remedy the breach, a principle articulated by the Permanent Court of International Justice (PCIJ) in the *Chorzów Factory* case:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[7]

The notion that a remedy is a corollary to a right is inherent in legal systems around the world.[8] Accordingly, the victim of a breach has an individual right – which can be of a collective nature in the case of a violation of group rights – to claim reparation for the harm suffered as a result. In traditional, state-centred international law, under the rules of state responsibility, reparation was primarily conceived as a secondary obligation owed by states to other states, not individuals, for a breach of a primary obligation. Even under the established rules of injury to aliens, according to which a state had to remedy a breach of an alien's rights (for example foreign investors), reparation was owed to the state of nationality, not the individual(s) whose rights had been violated.[9] This situation changed significantly after World War II with the recognition of a right to a remedy and reparation in various instruments, as well as reparation agreements, schemes and awards at the inter-state level for violations of human rights and humanitarian law. These parallel and to some degree mutually reinforcing developments have been instrumental in advancing the right to reparation. The latter has also been given fresh impetus by debates and measures taken in the context of political transitions. These are situations following the end of a dictatorship or a conflict that are frequently characterised by a large number of victims of gross violations committed over

[7] Case concerning the *Factory at Chorzów*, (PCIJ) (1928), 47.

[8] M. C. Bassiouni, 'International Recognition of Victims' Rights', (2006) 2 *Human Rights Law Review* 203, at 206–8, and D. Shelton, *Remedies in International Human Rights Law*, 2nd edn (Oxford University Press, 2005), 22–30.

[9] See Shelton, above note 8, 58–83.

a period of time, typically by multiple perpetrators often involving both state and non-state actors. Reparation fulfils a crucial role in these transitional processes. Besides vindicating rights, reparation can signal societal recognition that individuals or communities suffered wrongs, serve to restore civic trust and express solidarity with the victims.[10] Several states have provided at least some reparation in these situations, which contributes to state practice bolstering the right to reparation.[11]

14.3 THE RIGHT TO REPARATION IN INTERNATIONAL HUMAN RIGHTS LAW

14.3.1 Treaties and UN declarations

The right to an effective remedy for human rights violations was first recognised in article 8 of the Universal Declaration of Human Rights (UDHR): 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' In a similar vein, article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that 'any person whose rights ... are violated shall have an effective remedy'. The International Covenant on Economic, Social and Cultural Rights (ICESCR) has no comparable provision owing to reservations concerning the justiciability of the rights it protects.[12] Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) combines states parties' obligation to assure effective remedies against racial discrimination with 'the right to seek from such tribunals just and adequate reparation'. At the regional level, article 13 of the European Convention on Human Rights (ECHR) stipulates that '[e]veryone ... shall have an effective remedy' whereas article 25 of the American Convention on Human Rights (ACHR) provides for a right to judicial

[10] P. de Greiff, 'Justice and Reparations', in P. de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006), 451–77.

[11] See case studies in de Greiff, above note 10, and C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009), part VI. However, see Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. A/69/518 (14 October 2014), para. 6: 'Despite significant progress at the normative level in establishing the rights of victims to reparations and some important experiences at the level of practice, most victims of gross violations of human rights and serious violations of international humanitarian law still do not receive any reparation. Normative progress and even solid practice in some cases should not obscure the implementation gap, which can rightly be said to be of scandalous proportions.'

[12] However, see on the role of remedies, Committee on Economic, Social and Cultural Rights (CESCR), General Comment 9: The domestic application of the Covenant, UN Doc. E/C.12/1998/24 (3 December 1998) and further Chapter 9.6.

protection and recourse that the states parties need to guarantee in their domestic legal order. The African Charter on Human and Peoples' Rights (ACHPR) does not stipulate an explicit right to a remedy. However, the African Commission on Human and Peoples' Rights (ACmHPR) has read such a right into article 7(1)(a) ACHPR, according to which individuals have the right to appeal against acts violating their fundamental rights.[13] The right to an effective remedy is considered non-derogable.[14] In addition, several treaties provide for a right to compensation for specific violations, such as unlawful arrest or detention,[15] miscarriage of justice,[16] and the right to reparation for torture[17] and enforced disappearance, which includes an explicit right to truth.[18] Other human rights treaties also recognise the right to reparation, or elements thereof.[19]

Some authors have questioned whether an individual right to reparation has been recognised in international human rights law, arguing that relevant treaties primarily address procedural duties rather than stipulate substantive rights, and that any such right can only be exercised within existing proceedings before regional or international bodies.[20] However, there is a considerable body of regional and international jurisprudence in which treaty bodies and other courts have effectively interpreted the duty to grant an effective remedy as entailing that a state has to provide substantive reparation in the case of a breach of individual (or collective) rights. In addition, notwithstanding the discretionary powers of human rights treaty bodies, regional courts in particular have developed a consistent practice of awarding compensation particularly for serious violations and in the case of the Inter-American Court of Human Rights (IACtHR) other forms of reparation. The jurisprudence of the Human Rights Chamber of Bosnia and Herzegovina, a hybrid human rights court composed of national and international staff mandated to apply ECHR law, which was in operation from 1996 to 2003, is also noteworthy for its

[13] Art. 1 of the Resolution on the Right to Recourse and Fair Trial, adopted at the 11th Ordinary Session of the ACHPR in Tunis, Tunisia, in 1992.

[14] HRCtee, General Comment 29, States of Emergency (article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (31 August 2001), para. 14, and *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, (IACtHR) (1987), paras. 23 and 41.

[15] Art. 9(5) ICCPR and art. 5(5) ECHR.

[16] Art. 14(6) ICCPR and art. 3 Protocol no. 7 to the ECHR.

[17] Art. 14 CAT. See for an important elaboration of its contents, CtAT, General Comment 3: Implementation of article 14 by States parties, UN Doc. CAT/C/GC/3 (13 December 2012).

[18] Art. 24 CPED.

[19] See in particular, art. 39 Convention on the Rights of the Child (CRC) as well as art. 21 ACHPR (right of peoples to freely dispose of their wealth and natural resources) and art. 21 ACHR (right to property).

[20] C. Tomuschat, *Human Rights: Between Idealism and Realism*, 3rd edn (Oxford University Press, 2014), 399–419.

innovative and wide-ranging approach to ordering reparation measures.[21] The Human Rights Committee (HRCtee) has made it clear that '[w]ithout reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged'.[22] Regional human rights treaty bodies and courts have developed the nature, scope and content of the right to an effective remedy and reparation in their jurisprudence, and the IACtHR in particular has repeatedly affirmed that a right to reparation flows from the Convention.[23] In an important ruling, the International Court of Justice (ICJ) affirmed the right to reparation for violations of human rights in its *Israeli Wall* advisory opinion.[24]

The UNGA has recognised the right to reparation in two landmark declarations, namely the Victims' Declaration and the Basic Principles. The latter is the culmination of sustained efforts by core states, such as Chile, the two Special Rapporteurs, Professor Theo van Boven and Professor Cherif Bassiouni, and several non-governmental organisations (NGOs) to adopt an authoritative instrument that spells out and elaborates on international standards.[25] As an UNGA declaration, the Basic Principles are not binding as such. Indeed, the text stresses their declaratory nature. This apparently cautious approach notwithstanding, the Basic Principles are suffused with the language of rights and their detailed exposition of relevant standards must be seen as an important piece of state practice that strengthens the right to reparation. The Basic Principles already exert a pull-factor that influences perceptions of reparation, treaty-making and jurisprudence. This is particularly evident in the increasing use of the language of the Basic Principles in other instruments and jurisprudence, and reference to the forms of reparation stipulated therein. This is, for example, the case in article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and the

[21] See M. Nowak, 'Reparation by the Human Rights Chamber for Bosnia and Herzegovina', in K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (eds.), *Out of the Ashes: Reparations for Gross Violations of Human Rights* (Intersentia, 2006), 245–88.

[22] HRCtee, General Comment 31: Nature of the general legal obligation imposed on states parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 16.

[23] See for a recent example, *Ibsen Cárdenas and Ibsen Peña* v. *Bolivia*, (IACtHR) (2010), particularly para. 226 and part IX: Reparations.

[24] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian* Territory, (ICJ)(2004), paras. 152–3.

[25] T. van Boven, 'Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009), 19–40; Bassiouni, above note 8, 247–76; D. Shelton, 'The United Nations Principles and Guidelines on Reparations: Context and Contents', in K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (eds.), *Out of the Ashes: Reparations for Gross Violations of Human Rights* (Intersentia, 2006), 11–33.

HRCtee's General Comment 31. It is also apparent in the practice of human rights courts and treaty bodies, such as in the judgment of the African Court of Human and Peoples' Rights (ACtHPR) in *Zongo* v. *Burkina Faso*,[26] the decision of the Committee against Torture (CtAT) in *Guridi* v. *Spain*[27] and in the ICC context.[28]

The exercise of the right to reparation will in practice depend on the availability of legal avenues. However, this procedural challenge cannot obscure its recognition as an individual right in international human rights law, which is in principle not contingent on the existence of procedures for its enforcement.[29] This conclusion is supported by emerging practices at the inter-state and national level,[30] and applies in particular to gross violations of human rights as reflected in jurisprudence and the Basic Principles.[31]

14.3.2 Practice at the inter-state level

At the inter-state level, reparation for the most serious violations has its origins in war reparations.[32] German reparations to Israel and the victims of the Holocaust must count as the most important example of inter-state reparations, both in terms of the seriousness of the violations and their scale. Until the 1990s such inter-state reparations had been largely dealt with

[26] *Nobert Zongo and Others* v. *Burkina Faso*, (ACtHPR) (2015), para. 47.

[27] *Guridi* v. *Spain*, (CtAT) (2005), para. 6.8.

[28] See art. 75 ICC Rome Statute. See also *ICC Prosecutor* v. *Thomas Lubanga Dyilo* (*Decision on victims' participation*), (ICC) (2008), para. 92, and critical comments in Separate and Dissenting Opinion of Judge René Blattman, ibid., 49–50, paras. 4–5.

[29] See G. Echeverría, 'Do Victims of Torture and Other Serious Human Rights Violations have an Independent and Enforceable Right to Reparation?', (2012) 16 *The International Journal of Human Rights* 698; Report of Special Rapporteur, above note 11, paras. 14–18.

[30] Also H. Rombouts, P. Sardaro and S. Vandeginste, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights', in K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (eds.), *Out of the Ashes: Reparations for Gross Violations of Human Rights* (Intersentia, 2006), 345–503, at 365–70. See, however, the more cautious assessment in van Boven, above note 25, 27: 'It should be recognised, however, that as transpired from the German position referred to above, there appears not to be general consensus as to the existence of a customary international law governing individual reparation claims.'

[31] As pointed out by Bassiouni, above note 8, 251, 'the terms "gross violations of international human rights law" . . . should be understood to qualify situations with a view to establishing a set of facts that may figure as a basis for claims adjudication, rather than to imply a separate legal regime'. See also for a discussion of the significance of the reference to gross violations, van Boven, above note 25, 32–4, who highlights art. 26 of the Basic Principles: 'it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for all violations of international human rights law and international humanitarian law'.

[32] Note the difference in terminology: whereas reparation is frequently used to denote the various forms of reparation, the word reparations has traditionally been used in the context of payments and other measures to compensate/repair (for) war related damages.

bilaterally, with the understanding that individuals had no right to claim reparation for violations covered in these agreements. However, litigation in the United States (US) in Holocaust-related cases and in Switzerland in relation to German war crimes during World War II have strengthened the position of individuals and resulted in the setting up of reparation programmes for the benefit of victims, such as in respect of slave and forced labour.[33] This development is also evident in the setting up of compensation commissions and reparation programmes in cases of mass violations other than the Holocaust, such as the UN Compensation Commission (Iraq–Kuwait) and the Eritrea and Ethiopia Claims Commission (in relation to the 1998 war). Operating at an inter-state level through the UN or on the basis of bilateral agreements these commissions provide that the states (parties) may bring claims on their own behalf or on behalf of their nationals.[34]

Reparations for violations of human rights and humanitarian law have also been awarded in a growing number of inter-state cases. These include *Cyprus* v. *Turkey* before the European Court of Human Rights (ECtHR), the *Democratic Republic of Congo (DRC)* v. *Burundi, Rwanda and Uganda* before the ACmHPR, as well as *DRC* v. *Uganda* and *Republic of Guinea* v. *DRC* (*Ahmadou Sadio Diallo* case) before the ICJ.[35] In these cases, reparation was due to the state successfully claiming a violation of individual rights and/or of the obligations

[33] Foundation Remembrance, Responsibility and Future, www.stiftung-evz.de. See R. Bank, 'The New Programs for Payments to Victims of National Socialist Injustice', (2001) 44 *German Yearbook of International Law* 307. See also the case study on Holocaust and World War II reparations below at 14.12.

[34] The UN Compensation Commission, which operated from 1991 to 2007, received 'more than 2.6 million claims seeking a total of approximately US$368 billion', submitted by governments on behalf of nationals, corporations or themselves, and by UN agencies on behalf of other individuals. See www.uncc.ch, and L. A. Taylor, 'The United Nations Compensation Commission', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009), 197–214. The Eritrea-Ethiopia Claims Commission was based on a bilateral agreement signed in Algiers on 12 December 2000, pursuant to which the parties may bring claims on their own behalf and on behalf of their nationals (natural and juridical persons) before the Permanent Court of Arbitration against the government of (or entities controlled and owned by) the other party. See www.pca-cpa.org/showpage.asp?pag_id=1151. See further H. M. Holtzmann and E. Kristjánsdóttir (eds.), *International Mass Claims Processes: Legal and Practical Processes* (Oxford University Press, 2007).

[35] *Cyprus* v. *Turkey*, (ECtHR) (2014); case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda)*, (ICJ) (2005) and *Ahmadou Sadio Diallo, Republic of Guinea* v. *Democratic Republic of Congo (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)*, (ICJ) (2012). See also C. McCarthy, 'Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009), 283–311.

of the adversarial party. Significantly, the rulings by the ACmHPR in *DRC* v. *Burundi, Rwanda and Uganda* and the ECtHR in *Cyprus* v. *Turkey* specified that the victims of violations of human rights and humanitarian law should be the ultimate beneficiaries of any reparation made. The emerging jurisprudence is an important development. It may indicate a greater willingness of states to claim human rights violations (even though such claims may be politically motivated) and provide victims with an additional avenue. The 2012 ICJ judgment awarding compensation in the *Diallo* case sets an important precedent, albeit a series of open questions remain regarding the rights of victims in the course of such proceedings and at the enforcement stage.

14.3.3 State practice at the national and transnational level

Although state practice is far from uniform, most states recognise some form of constitutional or statutory right to reparation in cases amounting to violations of human rights. Individuals, and groups of victims, have been awarded compensation and other forms of reparation in various jurisdictions, for example in landmark cases such as *Nilabati Behera* v. *State of Orissa* in India for a violation of the right to life (death in custody).[36] In a more recent development a number of states have set up reparation schemes for violations of human rights (and humanitarian law) following the end of conflict or dictatorship.[37] An increasing number of suits brought by individuals in third countries, besides contributing to state practice, have raised the question of the jurisdictional reach of the right to reparation, namely whether it requires states to establish jurisdiction in such cases. The US Alien Torts Claim Act of 1789, though evidently not adopted for that purpose at the time, has become the most prominent legal basis for bringing human rights claims for wrongful acts committed in third countries.[38] This is ironic given that the USA entered a reservation to the effect that it understands article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) to 'provide a private right of action for damages only for acts of

[36] *Nilabati Behera alias Lalita Behera* v. *State of Orissa and Others*, (India) (1993).

[37] See for detailed case studies of reparation schemes in Argentina, Brazil, Chile and South Africa, de Greiff, above note 10, and in Colombia, East Timor, Guatemala and Sierra Leone, C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, 2012). See for an analysis of reparation programmes and selected problems, Report of the Special Rapporteur, above note 11.

[38] M. Swan, 'International Human Rights Tort Claims and the Experience of United States Courts: An Introduction to the US Case Law, Key Statutes and Doctrines', in C. Scott (ed.), *Torture as Tort: Comparative Perspectives on the Development of Transnational Tort Litigation* (Hart, 2001), 65–107. However, see the ruling in the case of *Kiobel* v. *Royal Dutch Petroleum*, (US) (2013), which emphasises the presumption of extraterritoriality, thereby seemingly limiting the applicability of the Alien Torts Claim Act. See Chapter 18.3.1.

torture committed in territory under the jurisdiction of that State Party'. It is open to question, in the absence of explicit treaty provisions, whether states have an obligation to establish jurisdiction that enables victims of violations to bring claims for wrongful acts committed in third countries. Several states and commentators have opposed such an interpretation of article 14 CAT on the ground that the obligations of states parties are confined to their jurisdiction unless otherwise indicated.[39] Yet the text of article 14 CAT could equally be read to apply to all torture victims and a teleological (purposive) interpretation of the Convention to this effect would be in line with its objective of combating torture worldwide. The CtAT considered in its General Comment 3 'that the application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party ... article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress'.[40] However, even where states provide for such jurisdiction, claimants frequently face state immunity as an often insurmountable barrier to holding states accountable.[41]

14.4 THE RIGHT TO REPARATION IN INTERNATIONAL HUMANITARIAN LAW

The right to reparation has a less clear standing in international humanitarian law. Article 3 of the Hague Convention (IV) of 1907 stipulates that belligerents are 'liable to pay compensation' for violations of its provisions. Article 91 of the 1977 Additional Protocol I to the 1949 Geneva Conventions similarly provides 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'. However, there are no provisions in humanitarian law treaties that explicitly stipulate a corresponding individual right. Nor is there any treaty body tasked with hearing complaints and recommending or awarding reparation. This turns the focus sharply to international customary law. Those sceptical of the existence of a right to reparation under international humanitarian law point to the limited jurisprudence, in particular the judgment of the German Federal Supreme Court in the *Distomo Massacre* case, which ruled out such a right.[42] The lack of explicit recognition in other sources is also

[39] See B. Fassbender, 'Can Victims Sue State Officials for Torture? Reflections on Rasul v. Myers from the Perspective of International Law', (2008) 6 *Journal of International Criminal Justice* 347.

[40] See CtAT, General Comment 3, para. 22.

[41] See e.g., *Jones and Others* v. *United Kingdom*, (ECtHR) (2014). See also the ICJ ruling on enforcement of claims against states in *Jurisdictional immunities of the state* (*Germany* v. *Italy: Greece intervening*), (ICJ) (2012).

[42] *Distomo Massacre* case, (Germany) (2003).

mentioned.[43] Proponents of such a right argue that international humanitarian law recognises the duty to provide reparation.[44] This has been upheld in the jurisprudence of several courts, in particular in the Netherlands, Greece and Italy.[45] The ICJ in the *Israeli Wall* advisory opinion and in *DRC* v. *Uganda* equally ruled that states have to provide reparation – 'to natural or legal persons' (*Wall* case) – for violations of international humanitarian law.[46] The fact that ad hoc claims commissions, such as the UN Compensation Commission (Iraq) and the Eritrea and Ethiopia Claims Commission, are set up for the benefit of individual victims is referred to as further evidence of the recognition of the right by the Co-Rapporteur of the International Law Association's (ILA) draft declaration of international law principles on compensation for victims of war.[47] The inclusion of the right to reparation for (serious) violations of international humanitarian law in the Basic Principles and the growing convergence of international human rights law and international humanitarian law in international jurisprudence constitute an important development. However, actual practice is still limited and some states continue to resist recognising an individual right to reparation for violations of international humanitarian law.

14.5 THE RIGHT TO REPARATION IN INTERNATIONAL CRIMINAL LAW

International criminal law has traditionally been concerned with the proscription, prosecution and punishment of crimes of international concern. Victims' rights were largely ignored until the adoption of the ICC Rome Statute. The sole provision of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) on reparation,

[43] According to Tomuschat, above note 20, 411–15, an individual right to reparation has not been recognised in international humanitarian law.

[44] See R. Bank and E. Schwager, 'Is there a Substantive Right to Compensation for Individual Victims of Armed Conflict against a State under International Law?', (2006) 49 *German Yearbook of International Law* 367; L. Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', (2003) 851 *International Review of the Red Cross* 497; R. Hofman, 'Draft Declaration of International Law Principles on Compensation for Victims of War (Substantive Issues)', in International Law Association, *Compensation for Victims of War* (Rio de Janeiro Conference, 2008), 2–20. See also Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council resolution 1564 of 18 September 2004 (UN, 25 January 2005), paras. 593–8. International Committee of the Red Cross (ICRC), CIHL Database, rule 150.

[45] See Hofman, above note 44, 9–11.

[46] *Legal Consequences of the Construction of a Wall*, 136, paras. 149–53, and *DRC* v. *Uganda*, para. 259.

[47] Hofman, above note 44, 11–12.

rule 106(c) of their respective Rules of Procedure and Evidence, provides that for the purpose of a claim made in national proceedings, to which the victims were referred, 'the judgment of the Tribunal shall be final and binding as to the criminal responsibility of the convicted person for such injury'. It very soon became clear that this rule was inadequate. Voices calling for the tribunals to play a greater role in awarding reparation were, in hindsight, prescient but premature.[48] It was only concerted efforts of international NGO coalitions and a greater willingness to acknowledge victims and their rights in proceedings that paved the way for the current ICC regime, which is a milestone as it anchors the right to reparation firmly in international criminal law.

The ICC's reparation regime differs from that of international human rights law in some important respects.[49] In contrast to violations of human rights, reparation is not owed by the state but the individual liable for the commission of international crimes falling within the ICC's jurisdiction. The Court may, pursuant to article 75(2) of the Rome Statute, 'make an order directly against a convicted person specifying appropriate reparation' or 'order that the award for reparations be made through the Trust Fund' for the victims of crime set up under article 79. The Trust Fund, which relies on voluntary contributions and fines collected, is an important structure within the Court's system. It can provide both financial assistance to victims of crimes and reparation in respect of a specific case as set out in article 75. The reparation regime is at its early stages.[50] The Court had the opportunity to address several important questions in its first ruling on reparation in the *Lubanga* case and the subsequent appeal. The Appeals Chamber stressed the need to distinguish between general principles governing reparations under article 75(1) and the reparations order in a specific case.[51] It emphasised the importance of holding the offender(s) to account and found 'that the legal framework clearly establishes that an order for reparations has to be issued in *all* circumstances against the convicted person. When appropriate, such

[48] See suggestions to this effect by Judge Jorda, the then President of the ICTY and Judge Pillay, the then President of the ICTR, in UN Doc. S/2000/1063 (3 November 2000) and Letter of 14 December 2000 of the UN Secretary-General, addressed to the President of the Security Council, UN Doc. S/2000/1198 (15 December 2000) respectively.

[49] See C. Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations', (2002) 15 *Leiden Journal of International Law* 667.

[50] See C. Ferstman and M. Goetz, 'Reparations before the International Criminal Court: the Early Jurisprudence on Victim Participation and its Impact on Future Reparation Proceedings', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009), 313–50, and REDRESS, *Justice for Victims: The ICC's Reparation Mandate* (2012).

[51] *ICC Prosecutor* v. *Lubanga Dyilo (Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012)*, (ICC) (2015), paras. 54–6. See also REDRESS, *Q & A – Conclusion of the appeals in the Lubanga case* (2015).

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an order for reparations can – *in addition* – be made through the Trust Fund.'[52] In contrast to the Trial Chamber, the Appeals Chamber held that 'indigence is not an obstacle to the imposition of liability for reparations on the convicted person'.[53] In the circumstances, it rejected challenges to the effect that the Trial Chamber should have awarded individual reparations, in addition to collective reparations.[54] This issue also featured prominently in the *Katanga* case and can be expected to be a recurring challenge given the large number of victims typically eligible in cases before the ICC. In addition, it held that the Trial Chamber must identify victims and 'clearly *define* the harms that result from the crimes for which the person was convicted'.[55] In the *Lubanga* case, this led the Appeals Chamber to exclude harm resulting from sexual violence from the scope of reparations as Lubanga had, controversially, not been charged with relevant crimes.

Only victims who suffer harm as a result of crimes for which a person has been convicted are eligible. Such harm includes material loss as well as physical and psychological suffering of direct and indirect victims. Importantly, if reparations are made to a 'community', the ICC must specify eligibility criteria so as not to exceed the scope of the convicted person's liability.[56]

Reparation under the ICC Rome Statute is owed by the individual and not the state or other entities even though the latter may bear responsibility under international law. This may lead to the individualisation of reparation and result in discrepancies in cases where state responsibility cannot be established in other fora. It also presents considerable practical challenges for the Court, particularly on how to provide reparation to a large number of victims of the most serious crimes with limited means available. However, the challenges also bear considerable potential for the Court and the Trust Fund to develop the right to reparation in the context of international criminal law and thereby contribute to further cross-fertilisation in the broader international law context.[57]

14.6 THE RIGHT TO REPARATION AND VIOLATIONS BY NON-STATE ACTORS

As a general principle, a state is not responsible for violations by non-state actors (who are themselves liable under national law or applicable legal

[52] *ICC Prosecutor* v. *Lubanga Dyilo*, para. 76 (emphasis in original). [53] Ibid., para. 103.
[54] Ibid., paras. 130–57. [55] Ibid., para. 184 (emphasis in original).
[56] Ibid., paras. 205–15.
[57] See further on relevant judicial developments on victim participation and reparation, I. Stegmiller, 'Legal Developments in Civil Party Participation at the Extraordinary Chambers in the Courts of Cambodia', (2014) 27 *Leiden Journal of International Law* 465.

regimes, such as international criminal law) unless it exercises effective control, colludes, acquiesces (in) or endorses such violations.[58] A state will, however, be responsible for a breach of its positive obligations in respect of acts committed by non-state actors, for example failing to investigate violations such as enforced disappearance where the identity of the perpetrators is unknown.[59] None the less, there will be situations where non-state actors, such as armed groups, have committed serious violations such as mass rape or killings but the state concerned will not incur liability and nor will the victims be able to obtain reparation from the perpetrators. It is with this constellation in mind that the Basic Principles exhort states to 'endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations'.[60]

14.7 THE RIGHT TO REPARATION FOR HISTORICAL INJUSTICES AND VIOLATIONS

The fact that international crimes and human rights, including the right to reparation for their violation, are relatively speaking latecomers to international law has thrown up particular challenges in relation to past injustices. Claims for reparation have in this context in particular been made for slavery and colonialism either as unjust practices in their own right or in relation to specific incidents. Examples of the latter are the massacres of the Herero by Germany in the first decade of the twentieth century and various violations attributed to the British forces in the context of the Mau Mau uprising in Kenya during the 1950s.[61] Although the documented facts of these cases appear to support reparation claims, there are a series of legal, policy, political and practical obstacles to be overcome. The acts committed were in many instances not recognised as international crimes or human rights violations at the time so that the law would have to be applied

[58] See in particular, arts. 4–11 ILC Articles on Responsibility of States for internationally wrongful acts (ARSIWA) and the provisions of human rights treaties, such as art. 1 CAT. Art. 10 ARSIWA provides for a further exception where insurgents become the new government or succeed in establishing a new state.

[59] *Velásquez Rodríguez* v. *Honduras*, (IACtHR) (1988), paras. 172–7.

[60] See Chapter 18 for the responsibility of non-state actors.

[61] J. Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century: The Socio-Legal Context of Claims under International Law by the Herero against Germany for Genocide in Namibia, 1904–1908* (Greenwood, 2009), and the Mau Mau reparations claims in the UK, see www.leighday.co.uk/International-and-group-claims/Kenya/The-Mau-Mau-claims.

retroactively, unless national law provides otherwise.[62] Even where responsibility of a particular state can be established, difficulties abound, especially identifying the rights-holders (beneficiaries). This is important if states were to be designated as recipients of any compensation so as to ensure that the descendants of victims or a people as a whole were to benefit.[63] In a noteworthy development, the Caribbean Community (CARICOM), in March 2014, endorsed a ten point plan of the CARICOM Reparations Commission aimed at securing reparations for victims of genocide, slavery, slave trading and racial apartheid. The plan, directed at former slave-owning nations of Europe, envisages a full formal apology, repatriation of 'descendants of stolen people', an indigenous peoples development programme, development of cultural institutions, alleviating the public health crisis, illiteracy eradication, carrying out an African knowledge programme, psychological rehabilitation, technology transfer and debt cancellation.[64] The plan identifies important components of reparations, such as the official recognition of the (historical) wrong and financial support for initiatives to redress legacies of injustice. However, its broad reach equally illustrates the challenge of establishing a sufficiently clear link between violations dating back a considerable time and the beneficiaries, as well as adequate forms of reparation.

The 2008 'deal' between Italy and Libya amply demonstrates the political dimension of initiatives purporting to address past injuries. Italy's move to pay Libya $5 billion and apologise for the damage inflicted during its colonial rule was widely seen as an opportunity for Italy to strengthen its strategic relationship with Libya and for the latter to obtain some benefits and enhance its international standing.[65] While remarkable, agreements of this kind appear to turn colonialism or slavery into a pretext that masks cruder current interests. It is indeed questionable to what degree, if at all, they address the nature and legacy of violations and provide acknowledgement and reparation to those whose ancestors suffered or who personally continue to suffer from the long-term effects of past injustices.

[62] See for a discussion of the legal challenges posed by retroactivity, M. Bossuyt and S. Vandeginste, 'The Issue of Reparation for Slavery and Colonialism and the Durban World Conference against Racism', (2001) 22 *Human Rights Law Journal* 341.

[63] See for a discussion of appropriate forms of reparations, M. Du Plessis, 'Reparations and International Law: How are Reparations to be determined (Past Wrong or Current Effects), Against Whom, and What Form should they take?', in M. Du Plessis and S. Peté (eds.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (Intersentia, 2007), 147–77.

[64] See www.leighday.co.uk/News/2014/March-2014/CARICOM-nations-unanimously-approve-10-point-plan.

[65] See Colonialism Reparation, *Italy-Libya* (undated), online at www.colonialismreparation.org/en/compensations/italy-libya.html.

QUESTIONS

1. In his critique of the findings of the International Commission of Inquiry on Darfur, Professor Christian Tomuschat argued that 'there is no customary international law rule governing individual reparation claims'.[66] What evidence is there to support or counter this assertion?
2. Do victims of violations have a right under international law to bring reparation claims in countries other than where the violation occurred?
3. Does state practice support the assertion that international law recognises the right to reparation for serious violations of international humanitarian law?
4. Can there be a right to reparation against the state where the violation has been committed by non-state actors?
5. Does the current international legal framework provide an adequate basis for arguing reparation claims for slavery and colonialism?

14.8 THE NOTION AND LEGAL SIGNIFICANCE OF THE TERM 'VICTIM'

In legal terms, the status of 'victim' confers certain entitlements, namely the right to a remedy and reparation. It is also frequently equated with standing to bring claims and exercise procedural rights.[67] By that token it demarcates legal boundaries. The term 'victim' distinguishes between those whose suffering is recognised as giving rise to the right to reparation, for example where it results from arbitrary detention, and others whose suffering does not entail the same legal consequences, as would normally be the case with persons suffering harm due to economic misfortune, riots or natural disasters. The notion of victim is associated with suffering and sacrifice. This understanding is reflected in legal definitions of 'victim', such as that found in the Basic Principles and the ICC Rules of Procedure and Evidence, which refers to persons who suffer harm as a result of a violation of his/her or their rights, or of having intervened to prevent victimisation (which is particularly important for human rights defenders).[68]

[66] C. Tomuschat, 'Darfur: Compensation for the Victims', (2005) 3 *Journal of International Criminal Justice* 579.

[67] See Chapter 7.2.1.1.

[68] Principle 8 of the Basic Principles: 'For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or

Such harm may consist of 'physical or mental injury, emotional suffering, economic loss or substantial impairment of ... fundamental rights' (Basic Principles), which may have been suffered in an individual or collective capacity, as well as by natural and, to some extent, legal persons.[69]

QUESTIONS

1. **What is the legal significance of the term 'victim'?**
2. **Does the determination of 'victim' status depend on subjective or objective criteria?**

14.9 THE PROCEDURAL RIGHT TO AN EFFECTIVE REMEDY

14.9.1 Overview

The right to an effective remedy requires that victims, individually or collectively, are able to have recourse to avenues, be they judicial or otherwise, capable of redressing the alleged violation as a means of vindicating their rights. In cases of serious violations a remedy has to be of a judicial nature.[70] This requirement is of particular importance when designing reparation mechanisms that may restrict recourse to courts.[71]

Available remedies 'must be "effective" in practice as well as in law, in particular in the sense that [their] exercise must not be unjustifiably hindered by acts or omissions by the authorities of the respondent State'.[72] This formula

dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.' Rule 85 of the 2002 ICC Rules of Procedure and Evidence: 'For the purposes of the Statute and the Rules of Procedure and Evidence: (a) 'Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.'

[69] Ibid. and Chapter 7.2.1.1. [70] *Bautista* v. *Colombia*, (HRCtee) (1995), para. 8.2.

[71] This is particularly important in the transitional context, Office of the High Commissioner for Human Rights (OHCHR), *Rule-of-law Tools for Post Conflict States: Reparations Programmes* (UN, 2008), 34–6. See also CtAT, General Comment 3, para. 20: 'While collective reparation and administrative reparation programmes may be acceptable as a form of redress, such programmes may not render ineffective the individual right to a remedy and to obtain redress.'

[72] *Aksoy* v. *Turkey*, (ECtHR) (1996), para. 95.

opens the door for a host of measures that states need to take in order to ensure the effective exercise of the right to a remedy, a task that constitutes a challenge for any legal system. Besides granting the right to pursue claims for violations, states must guarantee and protect the administration of justice, including an independent judiciary, without which remedies will not be effective. Equally, it requires the absence of laws and/or jurisprudence that hinder the exercise of remedies, such as amnesties or immunities that bar the lodging of claims against the individual perpetrators or the state, or both.[73] In addition, statutes of limitation must not be unduly short as victims often experience displacement, financial hardship, trauma or other circumstances that prevent them from seeking timely recourse to available remedies.[74] An example of such an unduly short time limit is Nepal's Compensation of Torture Act, according to which victims need to bring a claim within thirty-five days.[75] Moreover, the administration of claims relating to alleged violations must not be subject to undue delays and the legal system must ensure enforcement of any awards or decisions made.[76] Beyond this, states should take a range of additional steps, as specified in the Basic Principles. These involve disseminating information about available remedies and taking measures to minimise inconvenience and provide protection. They also encompass the provision of assistance and making available other legal, diplomatic and consular means, in case of foreign nationals and stateless persons, so that victims can have effective access to justice.[77] These measures are particularly important in respect of marginalised groups or victims such as women in cases of sexual violence, given that they are often unaware of their rights, impoverished, stigmatised, discriminated against and/or reluctant to exercise their rights in formal settings.[78]

[73] HRCtee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 18 and CtAT, General Comment 3, paras. 37–43.

[74] Ibid., HRCtee, General Comment 31, para. 18 and CtAT, General Comment 3, para. 40. See also *Mocanu and Others* v. *Romania*, (ECtHR) (2014), particularly concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić.

[75] Art. 5(1) Compensation for Torture Act, 1996.

[76] See further HRCtee, General Comment 32: Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32 (23 August 2007); REDRESS, *Waiting for Justice: The Politics of Delays in the Administration of Justice in Torture Cases: Practice, Standards and Responses* (2008).

[77] See in this regard in particular, *LaGrand* (*Germany* v. *United States of America*), (ICJ) (2001); case concerning *Avena and other Mexican Nationals* (*Mexico* v. *United States of America*), (ICJ) (2004), and *The Right to Information on Consular Assistance in the Framework of the Guarantee of the Process of Law*, (IACtHR) (1999). See also J. R. Dugard, Special Rapporteur, First Report on Diplomatic Protection, UN Doc. A/CN.4/506 (7 March 2000), in particular comments on draft art. 4, paras. 75–93. His proposal that there should be a right to diplomatic protection in cases of violations of *jus cogens* rights has not been endorsed by states to date.

[78] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/7/3 (15 January 2008), paras. 61–2.

The right to bring criminal complaints is an integral part of the right to an effective remedy. In practice, however, victims of human rights violations frequently encounter obstacles that hamper their right to pursue complaints effectively. To counter this, states have to put in place an effective legal and institutional framework with a view to investigating violations, which includes the establishment of effective oversight bodies. Conversely, states shall not take measures incompatible with their obligation to investigate serious violations effectively, such as amnesties, immunities and/or unreasonably short statutes of limitation.[79] There is often a close nexus between the two sets of remedies. The prospect of pursuing civil remedies and obtaining reparation is in many countries dependent on a criminal conviction, either by law or in practice. Where impunity is rife victims of violations are effectively deprived of any effective remedies. It is for this reason that victims should be able to pursue civil claims independently, and irrespective of the outcome of criminal proceedings, to ensure at least a measure of justice.

14.9.2 The nexus between civil and criminal proceedings: *Rajapakse* v. *Sri Lanka*

Mr Rajapakse, who claimed that he had suffered torture at the hands of the Sri Lankan police in April 2002, filed a fundamental rights petition before the Sri Lankan Supreme Court in May 2002.[80] The hearings before the Supreme Court had been repeatedly postponed up to the point when the HRCtee decided the case in March 2005:

> The Committee observes that, as the delay in the author's fundamental rights application to the Supreme Court is dependent upon the determination of the High Court [criminal] case, the delay in determining the latter is relevant for its assessment of whether the author's rights under the Covenant were violated. It notes the State party's argument that the author is currently availing himself of domestic remedies. The Committee observes that the criminal investigation was not initiated by the Attorney-General until over three months after the incident, despite the fact that the author had to be hospitalised, was unconscious for 15 days, and had a medical report describing his injuries, which was presented to the Magistrates Court on 17 May 2002.[81]

The HRCtee went on to find a violation of article 2(3) in connection with article 7 ICCPR:

> Under article 2, paragraph 3, the State party has an obligation to ensure that remedies are effective. Expedition and effectiveness are particularly important in the adjudication of cases involving torture. The general information provided by the State party on the workload of the domestic courts would appear to indicate that the High Court proceedings and, thus, the author's Supreme Court fundamental rights case will not be

[79] HRCtee, General Comment 31, para. 18. [80] *Rajapakse* v. *Sri Lanka*, (HRCtee) (2006).
[81] Ibid., para. 9.4. [82] Ibid., para. 9.5.

determined for some time. The Committee considers that the State party may not avoid its responsibilities under the Covenant with the argument that the domestic courts are dealing with the matter, when it is clear that the remedies relied upon by the State party have been prolonged and would appear to be ineffective.[82]

14.9.3 The right to property, and the choice between investment arbitration and human rights avenues

In some cases, the subject matter of a human rights violation may also be classified as a civil deprivation or breach of a contractual or other obligation. Both outcomes are unlawful and the entity deprived of its entitlement may seek reparation. A foreign company (an investor) has its assets expropriated in the host state, whether directly or indirectly (for example through discriminatory, hostile, taxes) whose only purpose is to make its operations non-profitable. Such an outcome violates the investor's right to property and the prohibition against discrimination (human right violations) but at the same time it constitutes unlawful expropriation under international law. The investor may seek remedies on the basis of the customary nature of the prohibition against unlawful expropriation or as a result of a multilateral or bilateral treaty, but equally he or she may seek remedies arising from a pertinent human rights treaty (deprivation of the right to property). Which is the more preferable option? Investment arbitration is more predictable and there is no need to exhaust local remedies; albeit, it may only be triggered by foreign investors and the host state must have agreed to it by means of existing contract, local law or treaty with the investor's home state.[83] Besides investment arbitration, such as under the International Centre for the Settlement of Investment Disputes (ICSID), expropriation claims have also been resolved by inter-state commissions, as is the case with the ongoing work of the Iran–US Claims Tribunal. In situations where the victim is not foreign, he or she has no access to investment arbitration, despite the fact that the same conduct would have amounted to a violation under international law if committed against a foreign investor. In the situation at hand, the victim may seek reparation through human rights or similar[84] mechanisms, after exhausting local remedies.

[82] Ibid., para. 9.5.

[83] See Chapter 18.3.2 for a discussion of the human rights dimensions of foreign direct investment.

[84] By way of illustration, the Court of Justice of the European Union (CJEU) has been criticised for its failure to declare that juridical double taxation should be prohibited as discriminatory, especially as regards its judgments in *Damseaux* v. *Belgium*, (CJEU) (2009), para. 27 and *Kerckhaert and Morres*, (CJEU) (2006), paras. 19–24. The result in these cases is a violation of the right to property, enshrined in art. 17 of the EU Charter of Fundamental Rights, by reason of confiscatory double taxation to which the parties are subjected (in this case cross-border inheritance).

In the *Yukos* case tax assessments made against the company in 2004 for the year 2000 fell outside a three-year statutory time-bar set out in Article 113 of the Russian Tax Code,[85] but because the tax assessments for the year 2000 were subject to criminal proceedings a 14 July 2005 decision by Russia's Constitutional Court changed the interpretation of the rules on statutory time limits to tax assessments.[86] The Russian authorities made use of attachment, seizure and freezing orders for the enforcement of Yukos's tax debt,[87] leading to the auction of the company's main production unit (OAO Yuganskneftegaz (YNG)) in bankruptcy proceedings, ultimately sold at a low price to a sham bidder.[88] The ECtHR found that the Russian authorities lacked flexibility in their enforcement of the tax debt[89] and 'given the pace of the enforcement proceedings, the obligation to pay the full enforcement fee and the authorities' failure to take proper account of the consequences of their actions', it also held that that the 'domestic authorities failed to strike a fair balance between the legitimate aims sought and the measures employed'.[90] The ECtHR found a violation of article 6 ECHR (right to a fair trial) and article 1 of Protocol I (right to property). By mid-2015 Russia seemed intent not to satisfy the award of 1.8 billion euros awarded by the ECtHR.

Overall, foreign investors do not prefer human rights mechanisms over investment arbitration and find no compelling reason to employ human rights arguments before investment tribunals.[91] This strategy is further justified by the fact that if human rights arguments are introduced by investors they will equally have to be admitted for the host states, which possess a much more compelling resonance particularly as regards the obligation of the state to uphold and protect socio-economic rights that are contrary to their foreign direct investment (FDI) obligations.



QUESTION

1. **Why are non-judicial remedies considered inadequate in cases of serious violations of human rights?**

[85] *Yukos* v. *Russia*, (ECtHR) (2012), paras. 561 and 564. [86] Ibid., para. 565.
[87] Ibid., para. 646. [88] Ibid., paras. 621 and 646. [89] Ibid., para. 656.
[90] Ibid., para. 657.
[91] The case before the ECtHR is exceptional. The claimants also pursued investment proceedings and in *Yukos Universal Ltd (Isle of Man)* v. *Russia*, (PCA) (2014); *Hulley Enterprises Ltd (Cyprus)* v. *Russia*, (PCA) (2014) and *Veteran Petroleum Ltd (Cyprus)* v. *Russia*, (PCA) (2014), Russia was ordered to pay over US $50 billion in compensation. At the time of writing it was reported that Yukos shareholders were pursuing enforcement proceedings in European jurisdictions based on these awards.

14.10 THE SUBSTANTIVE RIGHT TO REPARATION

14.10.1 State responsibility

Under the rules of state responsibility states have a secondary duty in case of a breach to cease the illegal conduct, offer assurances of non-repetition and 'to make full reparation for the injury caused by the internationally wrongful act'.[92] Such reparation 'shall take the form of restitution, compensation and satisfaction, either singly or in combination'.[93] These rules provide the broader legal framework within which the right to reparation for violations of human rights and humanitarian law has developed.

14.10.2 Liability

In a typical case, violations are committed by individual officials acting on behalf of the state (see 14.6 above for violations committed by non-state actors (NSAs)). This constellation gives rise to questions about the nature of liability of the offending individual and the state and the relationship between the two. Some legal systems provide for the primary if not sole liability of the individual official responsible.[94] This may be justified by arguing that the state (and the taxpayer) should not be burdened with expenses incurred because of the wrongdoing of its officials. The prospect of having to pay substantial amounts of reparation personally can also act as a deterrent for individual officials and thus have a preventive effect. The rationale for such individual liability is sound. However, the rule is disadvantageous to victims claiming reparation because individual officials are often not in a position to pay substantial compensation or may evade personal responsibility. The focus on individual liability also obscures the ultimate responsibility of the state on whose behalf individual officials act. A system that provides for primary state liability or vicarious liability is therefore better suited to address these concerns as it enables a victim of a violation to have recourse against the state. At the same time, the state would be entitled to claim back any reparation made from the individual official(s) concerned.[95]

14.10.3 Standard of reparation

The Basic Principles speak of 'full and effective' reparation. If read in light of the qualifying clause 'as appropriate and proportional to the gravity of the

[92] Art. 31 ARSIWA. [93] Art. 34 ARSIWA.

[94] See findings in the comparative study, REDRESS, *Reparation for Torture: A Survey of Law and Practice in Thirty Selected Countries* (2003), 47–8.

[95] Principle 15 of the Basic Principles.

violation and the circumstances of each case', it is clear that the standards provide states, adjudicative and other bodies with some latitude in determining reparation. This contextual nature of reparation is equally evident in the provisions vesting regional courts with discretionary power to award reparation.[96] The potential for arbitrariness of awards is in theory circumscribed by qualifying standards: reparation should as a general rule reflect the seriousness of the violation and be such that the violation is remedied as much as possible in the circumstances. They are also key principles safeguarding against inappropriate awards. Reparation should be victim-oriented and non-discriminatory, which has important implications for gender and reparation that need to be taken into consideration by courts and other bodies.[97]

14.10.4 Forms of reparation

Reparation is often equated and confused with compensation. Such a narrow view is misleading notwithstanding the undeniable importance of compensation. It ignores the distinctive but interrelated functions that the various forms of reparation may serve. A victim of a violation will need the financial means and access to services to cope with the harm suffered. He, she or they will also seek to restore the dignity and integrity infringed by the violation, which typically calls for acknowledgement of the wrongdoing and sanctions against the perpetrators.[98] Furthermore, victims and society as a whole have an interest in seeking prevention of similar violations, which requires measures aimed at non-repetition. The various forms of reparation can be distinguished into material and non-material (moral), remedial and preventive measures of an individual or collective nature. These distinctions can help to conceptualise the types and functions of reparation measures but should not distract from a broader understanding of reparation as a process and outcome that is both holistic and responsive to context. These considerations are reflected in the Basic Principles that recognise five forms

[96] See art. 41 ECHR; art. 63 ACHR and art. 27(1) of the ACHPR Protocol on the Establishment of an African Court on Human and Peoples' Rights, which stipulates that '[i]f the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'.

[97] A. Saris and K. Lofts, 'Reparation Programmes: A Gendered Perspective', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009), 79–100.

[98] See in this context, Y. Danieli, 'Massive Trauma and the Healing Role of Reparative Justice', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009), 41–77.

of reparation, namely restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

14.10.5 Restitution

Restitution is the classic form of reparation. Where restitution is feasible, namely where the harm inflicted by the violation can still be reversed, it may be sufficient to remedy a violation, together with an acknowledgement of wrongdoing (and/or compensation for any irreversible harm suffered). Restitution may consist in particular of the following measures:

1. restoration of liberty (release): where individuals have been arbitrarily detained (or wrongfully convicted, in which case the appropriate remedy may be either release or a retrial), such as in the ECtHR landmark case of *Assanidze* v. *Georgia*[99] and in the IACtHR case of *Loayza Tamayo* v. *Peru*.[100] As states have a primary duty to cease ongoing violations, remedial measures taken in such instances may strictly speaking not be classified as reparation. However, measures taken to end ongoing violations such as arbitrary detention serve a dual purpose, namely cessation and undoing a wrong, and are for this reason frequently included as forms of reparation;
2. restoration of employment: where political opponents have been deprived of their employment rights, such as for example during the dictatorships in Argentina and Chile, or workers have been dismissed in violation of their rights, such as in *Baena-Ricardo* v. *Panama*;[101]
3. restoration of identity and citizenship: where citizens have been expelled and/or stripped of their citizenship, for example in *Modise* v. *Botswana*;[102]
4. expunge public records: where individuals have been convicted in violation of their rights, for example a journalist for defamation in *Tristán Donoso* v. *Panama*;[103]
5. return to one's place of residence: where individuals and groups of persons have been forcibly displaced, for example in Darfur, Sudan, since 2002;[104]
6. return of property: where property has been expropriated or seized, for example in *Papamichalopoulos* v. *Greece*.[105] Restitution and/or compensation – where return of property is not feasible – for violations of the right to property are particularly important in former communist countries,

[99] *Assanidze* v. *Georgia*, (ECtHR) (2004), paras. 202–3.
[100] *Loayza Tamayo* v. *Peru*, (IACtHR) (1997), para. 84.
[101] *Baena-Ricardo* v. *Panama*, (IACtHR) (2001), para. 203.
[102] See Case Study 6.1.
[103] *Tristán Donoso* v. *Panama*, (IACtHR) (2009), paras. 193–5.
[104] Art. 21 of the Darfur Peace Agreement (5 May 2006): Urgent Programmes for Internally Displaced Persons (IDPs), Refugees and Other War-Affected Persons and Compensation for War Affected Persons; Chapter IV of the Doha Document for Peace in Darfur (14 July 2011).
[105] *Papamichalopoulos* v. *Greece*, (ECtHR) (1996).

as evident in the cases of *Brumărescu* v. *Romania* and *Broniowski* v. *Poland*,[106] as well as in Bosnia and Herzegovina and Kosovo;[107]

7. guaranteeing indigenous peoples' ownership of their land, for example by return of the territory, protection and granting title in *Xákmok Kásek Indigenous Community* v. *Paraguay*. [108]

14.10.6 Compensation

Compensation is in practice one of the most important forms of reparation. It is often seemingly taken for granted that compensation is beneficial and in the interest of victims, particularly where it provides the means to address the adverse consequences of violations. In economic terms, compensation makes violations costly for the perpetrators and may have a deterrent effect. However, victims often see compensation as an insufficient form of reparation where it is not accompanied by acknowledgement and/or accountability. Moreover, even where compensation is paid, the amount of compensation is frequently contested and perceived to be inadequate.

14.10.7 Types of damages

The components of compensation are similar to what is familiar in most domestic legal systems and can be said to constitute general principles of law. Compensation includes any economically assessable damages, comprising both material (pecuniary) and moral (non-pecuniary) damages. Material damages include, as specified in the Basic Principles: lost opportunities (including employment, education and social benefits); loss of earnings (including loss of earning potential); and costs required for legal or expert assistance, medicine and medical services, as well as psychological and social services. Non-material loss or moral damages are meant to compensate for harm, pain and suffering, including mental anguish, humiliation and a sense of injustice.

Punitive or exemplary damages known in particular in Anglo-American jurisprudence have not been expressly recognised by regional or international treaty bodies or courts.[109] Such damages, which go beyond compensating the

[106] *Brumărescu* v. *Romania*, (ECtHR) (2001); *Broniowski* v. *Poland*, (ECtHR) (2006).

[107] See in this context, C. Ferstman and S. P. Rosenberg, 'Reparations in Dayton's Bosnia and Herzegovina', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009), 483–514.

[108] *Xákmok Kásek Indigenous Community* v. *Paraguay*, (IACtHR) (2010), paras. 281–95.

[109] *Selçuk and Asker* v. *Turkey*, (ECtHR) (1998), para. 119 and *Velásquez Rodrigues* v. *Honduras*, (IACtHR) (1990), para. 38, but see also analysis of Judge Cançado Trindade in his 'reasoned' opinion, *Myrna Mack Chang* v. *Guatemala*, (IACtHR) (2003).

actual damage caused, are meant to express the public condemnation of the violation and to have a punitive and deterrent effect. However, the award of such damages does not neatly fit into the relationship between the violation and the harm caused as recognised in international law.[110] In addition, if bodies were to openly follow such practice it could be expected to meet considerable resistance from states parties. None the less, as emphasised in the concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić in *Cyprus* v. *Turkey*, 'the existence of punitive or exemplary damages under the Convention is a fact in the Court's practice' and that such damages 'are acknowledged in international practice and law'.[111] Clearly, punitive damages can be of symbolic and practical value as policy-oriented jurisprudence. In their concurring opinion, the two judges argued that such damages are essential under the ECHR 'in at least three cases: (1) gross violations of human rights ... (2) prolonged, deliberate non-compliance with a judgment of the Court ...; and (3) the severe curtailment, or threat thereof, of the applicant's human rights with the purpose of avoiding, impairing or restricting his or her access to the Court as well as the Court's access to the applicant'.[112]

The general principles governing the award of compensation are well developed in national, regional and international jurisprudence. However, determining the amount of compensation is still fraught with difficulties. This amount is highly charged. As the 'bottom line' it expresses the adjudicative body's valuation of the violation. It quantifies the suffering of the victim(s) and specifies the sum payable by the state. The ECtHR, the IACtHR and the ACtHPR (in 2015) are the regional human rights courts that have awarded specific amounts of compensation for both pecuniary and non-pecuniary harm.[113] The ECtHR and IACtHR have awarded material damages on an equitable basis where the applicants provided sufficient proof that costs or losses had been, or would be, incurred as a result of the violation. Moral damages have been awarded in particular for serious violations in respect of which a presumption applies that they cause harm and suffering.[114] In

[110] Although Rombouts, Sardaro and Vandeginste, above note 30, 390, rightly point out that 'the fact that human rights courts do take into account the gravity of the violation for quantifying the damages might suggest that damages have a purpose that is not merely reparative'.

[111] Concurring opinion of Judge Pinto de Albuquerque, joined by Judge Vučinić in *Cyprus* v. *Turkey*, paras. 12–13.

[112] Ibid., para. 18.

[113] In a noteworthy development, the ECOWAS CCJ has recently awarded specific amounts of compensation for human rights violations, namely in *Hadijatou Mani Koraou* v. *Niger*, (ECOWAS CCJ) (2008), for violation of the prohibition of slavery. See also *Manneh* v. *Gambia*, (ECOWAS CCJ) (2008), for violation of the right to liberty and security.

[114] *Caracazo* v. *Venezuela*, (IACtHR) (2002), para. 50(e); the jurisprudence of the IACtHR is referred to and endorsed by the ACtHPR in *Nobert Zongo and Others* v. *Burkina Faso*, para. 55.

determining quantum, courts have utilised factors such as the degree of suffering, the egregiousness of the violation(s), the number of violations as well as the characteristics (for example vulnerable children) and conduct of the parties concerned.[115]

It is difficult to quantify specific types of violations but the awards rendered provide an indication of the amounts commonly granted.[116] The ICJ, in its first judgment of this kind, awarded compensation for material and non-material injury for arbitrary detention and unlawful expulsion in *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo)*.[117] Treaty bodies such as the HRCtee and the ACmHPR have consistently held that respondent states parties responsible for violations should pay compensation without, however, specifying an amount.[118] Effectively, this practice refers the claimant back to the national system or a negotiated settlement, which has hampered enforcement of 'awards'.[119] For their part, most national legal systems and jurisprudence recognise at least some right of victims to claim compensation for human rights violations. However, practice differs widely. Deficient legislation, lack of compensation for non-pecuniary harm, small amounts of compensation and the difficulty of enforcement are some of the key challenges encountered by victims.[120]

14.10.8 *Proyecto de vida: Loayza Tamayo* v. *Peru*

The case of *Loayza Tamayo* illustrates starkly the personal consequences of serious violations which led the IACtHR to develop 'loss of enjoyment of life' *(proyecto de vida* – 'life plan') as a further category of reparation:[121]

[115] See Shelton, above note 8, 343–8, and Rombouts, Sardaro and Vandeginste, above note 30, 388–9.

[116] Non-pecuniary damages awarded by the IACtHR for violations such as arbitrary detention, torture, forced disappearances and extrajudicial killing may be a relatively paltry US $10,000 but may also amount to US $100,000 depending on circumstances. See C. Sandoval-Villalba, 'The Concepts of "Injured Party" and "Victim" of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009), 243–82, at 258–71. The jurisprudence of the ECtHR also varies considerably. It has awarded significant amounts of non-pecuniary damages in instances of serious violations, such as torture, e.g. €120,000 in *Mikheyev* v. *Russia*, (ECtHR) (2006), para. 163.

[117] *Ahmadou Sadio Diallo* v. *Democratic Republic of the Congo (Compensation)*, (ICJ) (2012), US $85,000 for material injury and US $10,000 for non-material injury.

[118] With the exception of *Egyptian Initiative for Personal Rights and Interights* v. *Egypt*, (ACmHPR) (2011), para. 275, where it endorsed the request of the complainants for EP 57,000 (around €6,600) for each of the victims.

[119] See e.g., REDRESS, *Submission to the Human Rights Committee on Implementation of its Views in the Philippines* (December 2011).

[120] REDRESS, above note 94, 47–9.

[121] *Loayza Tamayo* v. *Peru*, (IACtHR) (1998), particularly paras. 144–54.

She [Loayza Tamayo] has degrees in education and in social work. Prior to her detention, she was a law student and had taken a number of academic courses and seminars. She was 36 years old at the time of her detention. At the time of her detention on February 6, 1993, she was living with her children ... [and] was working at José Gabriel Condorcanqui High School, where her area of specialization was history ... She was definitively removed from her post on May 29, 1993, on the grounds that she had abandoned her post without just cause. At the time of her detention, she was working at the National School of Dramatic Arts ... [and] at the School of Management of the Universidad de San Martín de Porres ... At the time she was detained she was in the process of building a house ... During her detention and up to the present, she has received a monthly pension from the Ministry of Health. During her incarceration, and as a consequence of the cruel, inhuman and degrading punishment to which she was subjected, she suffered serious health problems, treatment of which necessitated outlays of an unspecified amount, all paid by her next of kin. Her confinement brought on severe physical and psychological health disorders; some may be relieved with prolonged therapy, although others may be irreversible. [After her release] [s]he filed several of [sic] requests to be reinstated in her former posts ... The outcome of these requests is unknown. She now resides in the city of Santiago, Chile, is not working, and is undergoing medical treatment financed by 'FASIC.' The so-called 'life plan' deals with the full self-actualisation of the person concerned and takes account of her calling in life, her particular circumstances, her potentialities, and her ambitions, thus permitting her to set for herself, in a reasonable manner, specific goals, and to attain those goals.

The IACtHR found that the violations of Ms Loayza Tamayo's human rights caused grave damage to her 'life plan'. However, it concluded that:

neither case law nor doctrine has evolved to the point where acknowledgment of damage to a life plan can be translated into economic terms. Hence, the Court is refraining from quantifying it. It notes, however, that the victim's recourse to international tribunals and issuance of the corresponding judgment constitute some measure of satisfaction for damages of these kinds.

The category of *proyecto de vida*, or life plan, which appears to have been conceived as being non-pecuniary in nature,[122] has attracted considerable interest but also reservations as it is viewed as unduly broadening the reach of compensation.[123] The *proyecto de vida* certainly bears the potential to

[122] According to the IACtHR, ibid., para. 151: 'it [reparation for damages to the "life plan"] most closely approximates the ideal of *restitution in integrum*'. However, see *Cantoral-Benavides* v. *Peru*, (IACtHR) (2001), para. 60, funding scholarship for studies in respect of a violation of the right to liberty and security and freedom from torture which 'prevented the victim from fulfilling his vocation, aspirations and potential, particularly with regard to his preparation for his chosen career and his work as a professional'.

[123] Rombouts, Sardaro and Vandeginste, above note 30, 385, with further references.

contribute to a more holistic understanding of the need to address the intangible long-term effects of harm caused by serious violations.[124]

POINTS TO CONSIDER

1. **What role can the *proyecto de vida* play in developing the concept of reparation so as to be responsive to the nature of violations?**
2. **Can it be translated into something more tangible within the accepted legal framework of the elements of compensation?**

14.10.9 Should previous conduct be taken into consideration when awarding compensation?

Individuals who become victims may, prior to the violation, have acted in a way seen as repugnant. This raises the vexing question whether such conduct justifies the denial of compensation. In *McCann* v. *United Kingdom*, for example, the ECtHR decided not to award compensation for a violation of the right to life to the relatives of three suspected IRA operatives who had planned a terrorist attack in Gibraltar but were confronted and killed by British forces.[125] National legal systems (in law, jurisprudence and compensation schemes) recognise that no one should benefit from a situation brought about by him- or herself.[126] This is reflected in article 8 of the European Convention on the Compensation of Victims of Violent Crimes, which stipulates that compensation may be reduced or refused on account of the victim's conduct, his or her involvement in violent or organised crimes or where it would be contrary to a sense of justice or to public policy.[127] However, there are no explicit provisions in any human rights treaties or instruments that rule out the award of compensation on account of previous conduct or public policy considerations. Not awarding compensation in such instances is problematic as it invokes the notion of an 'undeserving victim' and seems indirectly to validate a serious violation by not attaching pecuniary consequences to it. This is questionable from a policy perspective since the payment of

[124] However, see note on the lack of consistent application of the concept in the jurisprudence of the IACtHR by T. M. Antkowiak, 'Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond', (2008) 46 *Columbia Journal of Transnational Law* 351, at 371, fn. 101.

[125] *McCann and Others* v. *United Kingdom*, (ECtHR) (1996), para. 219.

[126] Critical in relation to the situation in the UK, Doak, above note 1, 228–9.

[127] Council of Europe, European Convention on the Compensation of Victims of Violent Crimes, opened for signature by Member States of the Council of Europe on 24 November 1983 (1983) 22 ILM 1021.

compensation for human rights violations can also have a deterrent impact. Adjusting the amount of compensation may in exceptional circumstances be contemplated where the victim has directly contributed to a violation through his or her criminal and harmful conduct. However, this rationale should not be applicable in cases of absolute rights, such as the prohibition of torture, where no circumstances can justify a breach, and policy considerations weigh generally in favour of awarding adequate compensation for harm suffered.

14.10.10 Rehabilitation

The right to rehabilitation, which is recognised in several human rights treaties,[128] addresses the multifaceted rehabilitative needs of victims caused by violations. Rehabilitation, which should be holistic and victim-centred, 'seeks to enable the maximum possible self-sufficiency and function for the individual concerned, and may involve adjustments to the person's physical and social environment'.[129] Its aim is 'to restore, as far as possible, [victim's] independence, physical, mental, social and vocational ability; and full inclusion and participation in society'.[130] According to the Basic Principles, '[r]ehabilitation should include medical and psychological care as well as legal and social services'. The state or others liable can provide such care and services either in kind or through money that enables victims to access rehabilitation. Rehabilitation appears to be most valuable if construed as an obligation of the state to establish and maintain a system that provides facilities and enables victims to access relevant services (on a priority basis where appropriate).[131] In national practice, provision and access to rehabilitation services are often either based on statutory schemes for victims of crimes or have been part of efforts to address the legacy of violations in transitional justice contexts.[132] However, practice is largely ad hoc, which may also be attributed to the lack of attention to detail and effective implementation of the right to rehabilitation in the practice of treaty bodies and NGO advocacy. CtAT's General Comment on article 14 CAT provided an important opportunity to address the multiple questions surrounding the nature, content and implementation of the right to rehabilitation.[133]

[128] See e.g., art. 14 CAT; art. 39 CRC and art. 24 CPED.

[129] CtAT, General Comment 3, para. 11. [130] Ibid.

[131] *Barrios Altos* v. *Peru*, (IACtHR) (2001), para. 40; *Nineteen Tradesmen* v. *Colombia*, (IACtHR) (2004), paras. 275–8; *'Juvenile Reeducation Institute'* v. *Paraguay*, (IACtHR) (2004), paras. 318–20; CtAT, Conclusions and Recommendations: Zambia, UN Doc. A/57/44 (SUPP) (25 September 2002), paras. 59–67, particularly at 66(g). See further REDRESS, *Rehabilitation as a Form of Reparation under International Law* (2009).

[132] Report of the Special Rapporteur, above note 11, paras. 35–7.

[133] CtAT, General Comment 3, paras. 11–15.

14.10.11 Satisfaction

The term satisfaction encompasses a plethora of largely symbolic measures. It also includes key components of justice, such as public acknowledgement, truth and accountability. Satisfaction is a recognised term of art in the draft articles on state responsibility,[134] the ECHR, which may include compensation or simply consist of a declaratory judgment finding a breach,[135] and the Basic Principles, with the latter being broadest in scope.[136]

Cessation of violations denotes measures taken to stop ongoing violations, such as refraining from exposing a detainee to inhuman detention conditions. Such measures correspond to states' primary obligations to respect rights and prevent violations, which raises the question whether they can or should be classified as reparation.[137]

Acknowledgement denotes accepting responsibility for the wrong done, which can take various forms, such as a public statement, or a declaration, including in the course of judicial proceedings, as in several cases before the IACtHR.[138] The acceptance of responsibility should also be reflected in official accounts of events, including in schoolbooks where appropriate. Acknowledgement serves an important function in 'setting the public record straight', and thereby to vindicate victims. It also acts as factual evidence that can be used to counter claims that certain violations never happened, for example the Holocaust.

Apologies are a related though conceptually distinct form of reparation.[139] They combine acknowledgement with an expression of remorse over someone's acts or omissions. Apologies have arguably been neglected as a form of reparation. This may be attributed to concerns over how genuine they are (although there are significant cultural differences – in Japan, for example, the inherent submission of making an apology may be considered sufficient whereas in Western countries greater emphasis is placed on the correspondence of the expression with the thinking and feelings of the person making the apology). There is also concern over whether a person can be judicially forced to apologise. However, the IACtHR has developed a jurisprudence of ordering

[134] Art. 37(2) ARSIWA: 'Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.'

[135] Art. 41 ECHR. [136] Principle 22 of the Basic Principles.

[137] Shelton, above note 8, 149. Also, van Boven, above note 25, 25.

[138] See on this point in particular, the critical assessment of J. Cavallaro and S. E. Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court', (2008) 102 *American Journal of International Law* 768, at 808–16.

[139] See in particular, C. Jenkins, 'Taking Apology Seriously', in M. Du Plessis and S. Peté (eds.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (Intersentia, 2007), 53–81.

states to apologise for violations.[140] Apologies to victims have also featured in official responses to violations in times of or following political transition.[141] This is a welcome development as apologies can constitute an important symbolic measure for victims and serve goals of restorative justice.

Truth is an integral part of acknowledgement but also a component of reparation in its own right. The IACtHR, as well as other international bodies and instruments, has recognised a distinctive right to truth, in particular in cases of enforced disappearances and extrajudicial killings.[142] The ECtHR has also referred to the right to truth in its recent jurisprudence.[143] This right entitles relatives to be informed about the fate and whereabouts of the victim(s), or their remains. It also encompasses access to factual and other relevant information concerning the violation, including archives.

Satisfaction comprises 'judicial and administrative sanctions against the persons liable for the violations'.[144] This category corresponds to the duty of states to investigate, prosecute and punish those responsible for serious violations.[145] Criminal accountability of the perpetrators is constitutive of adequate reparation, particularly in cases of gross violations.[146] Its opposite, i.e. impunity, leaves an important component of justice unaddressed and is prone to contribute to the perpetuation of violations.

Commemoration in the form of museums, plaques, naming streets after victims, ceremonies or educational materials combines elements of maintaining a public record of events with a recognition and restoration of the dignity of victims. Such symbolic measures form an integral part of the jurisprudence of the IACtHR.[147] They play an important role in affirming both the suffering and humanity of the victims and in empowering them to (re-)claim their place in society.

[140] See e.g., *Cantoral-Benavides* v. *Peru*, para. 81; *Moiwana Village* v. *Suriname*, (IACtHR) (2005), para. 216; *Gutiérrez-Soler* v. *Colombia*, (IACtHR) (2005), para. 59.

[141] Speech by Romania's President Traian Basecu in the Romanian Parliament (18 December 2006), online at www.icarfoundation.ro/index.php?option=com_content&task=view&id=29&Itemid=44.

[142] See *Rodríguez Vera et al. (The Disappeared from the Palace of Justice)* v. *Colombia*, (IACtHR) (2014). paras. 508–11, and, more broadly, IACHR, *The Right to Truth in the Americas*, OEA/Ser.L/V/II.152, Doc.2 (13 August 2014); *Selimovic and Others* v. *Republic Srpska*, (Human Rights Chamber for Bosnia and Herzegovina) (2003), paras. 211–12; art. 24(2) CPED; principle 1 of the Updated Set of Principles for the Protection and Promotion of Human Rights through action to combat Impunity, UN Commission on Human Rights Resolution 2005/81 (21 April 2005); principle 22(b) and (c) of the Basic Principles.

[143] *El-Masri* v. *The Former Yugoslav Republic of Macedonia*, (ECtHR) (2012), paras. 191–3; 175–9 (third party interveners) as well as Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller and Joint Concurring Opinion of Judges Casadevall and López Guerra.

[144] Principle 22(f) of the Basic Principles.

[145] See Chapter 2.3.4.

[146] See e.g., *Miguel Castro-Castro Prison* v. *Peru*, (IACtHR) (2006), paras. 436–41.

[147] Antkowiak, above note 124, 381–2.

14.10.12 Guarantees of non-repetition

Guarantees of non-repetition include measures such as protection but largely denote a range of forward-looking measures that typically go beyond the individual case at hand and seek to prevent the recurrence of certain violations, particularly by bringing about systemic changes. The measures identified in the Basic Principles draw on rule of law components aimed at strengthening the independence of the judiciary as well as legislative and institutional reforms, especially of law-enforcement agencies, with a view to ensuring observance of international standards.

14.10.13 Reparation for the violation of collective rights: *Saramaka People* v. *Suriname*

Providing compensation to groups of victims, be it for violations of collective rights or mass violations, presents a unique challenge for human rights treaty bodies. In cases of collective rights violations, such as the rights of indigenous peoples, the IACtHR has awarded collective damages in the form of a lump sum payable to a development fund for the benefit of the group concerned.[148] It has also ordered other collective measures of reparation, such as a housing programme and development programmes for communities whose members had been massacred.[149] Where a number of individuals have suffered similar violations, international compensation commissions, mass claims adjudication and the IACtHR have used categories of victims entitled to fixed amounts for certain types of violation.[150] The IACtHR has also awarded measures benefiting the members of targeted groups or communities in such cases.[151]

In *Saramaka People* v. *Suriname*,[152] the IACtHR found that Suriname had, by granting logging concessions to companies on Saramaka land, violated the rights of the Saramaka people, a tribal group, to judicial protection against violations of their right to property. The Court made a number of important findings on reparation: The group (Saramaka people) itself was entitled to compensation. The members of the community are the 'injured party' and 'beneficiaries of the collective forms of reparation'. Awards are for the benefit of the entire group. These include funds to provide 'educational, housing,

[148] *Aloeboetoe* v. *Suriname*, (IACtHR) (1993), paras. 101–2. See also *Caracazo* v. *Venezuela*, para. 137; *Suárez-Rosero* v. *Ecuador*, (IACtHR) (1999), para. 107; *'White Van' (Paniagua Morales et al.)* v. *Guatemala*, (IACtHR) (2001), para. 223; *Godínez-Cruz* v. *Honduras*, (IACtHR) (1990), para. 32.

[149] *Plan de Sánchez Massacre* v. *Guatemala*, (IACtHR) (2004), paras. 105–10.

[150] Holtzmann and Kristjánsdóttir, above note 34.

[151] *Massacres of El Mozote and Nearby Places* v. *El Salvador*, (IACtHR) (2012), paras. 180–81, 208.

[152] *Saramaka People* v. *Suriname*, (IACtHR) (2007).

agricultural, and health projects, as well as to provide electricity and drinking water' for the benefit of the community. Awards are made through trust funds. Three parties, namely representatives from each party and a third party agreed upon, are to decide about the use of the trust fund. This set-up was chosen to encourage parties to agree on the mode of implementation, and, in the context of international human rights jurisprudence, constitutes an innovative means of administering funds made for the benefit of a group.

POINTS TO CONSIDER

1. **What are the challenges of providing reparation for collective rights?**
2. **How satisfactorily has the IACtHR dealt with these challenges?**

14.10.14 A brief assessment and outlook

The adoption of the Basic Principles, the jurisprudence of national, regional and international bodies, particularly the IACtHR, as well as the work of individual experts, NGOs and victims movements worldwide have contributed to a better understanding of reparation and have strengthened the right of victims. However, several grey and under-developed areas remain. These apply in particular to adequate forms of reparation for violations of economic, social and cultural rights,[153] collective rights,[154] as well as a greater awareness of the gender dimensions of reparation.[155] One of the most serious challenges facing national systems as well as regional and international bodies is how to provide adequate reparation in instances of mass violations involving a large number of victims.[156]

[153] There is a dearth of jurisprudence in this respect, particularly at the supranational level. See, however, *The Social and Economic Rights Action Centre (SERAC) and the Centre for Social and Economic Rights (CESR)* v. *Nigeria* (*Ogoniland* case), (ACmHPR) (2001), in which the ACmHPR recommended a range of remedial measures for violations of economic, social and cultural rights. This situation is set to change after the Optional Protocol to the ICESCR has become operational and the Committee develops its jurisprudence.

[154] See Chapter 14.10.10 and F. Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008).

[155] See in particular the Nairobi Declaration on Women's and Girls' Rights to a Remedy and Reparation (2007). See also Report of the Special Rapporteur on violence against women: its causes and consequences, Rashida Manjoo, UN Doc. A/HRC/14/22 (23 April 2010), paras. 12–85.

[156] L. Oette, 'Bringing Justice to Victims? Responses of Regional and International Human Rights Courts and Treaty Bodies to Mass Violations', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009), 217–42;

QUESTIONS

1. **Should the state be responsible for paying reparation for the criminal conduct (such as rape in custody) of its officials?**
2. **What understanding of reparation has motivated victims to reject compensation, particularly the offer of money to settle a case in return for dropping all claims and complaints?**
3. **How does reparation tackle impunity?**

14.11 THE DOUBLE-EDGED SWORD OF VICTIMS' POLITICS

The status of 'victim' has gained prominence in political debates, where it has become a marker of identity and competing claims for public recognition and reparation.[157] The use of the term may in this context become a tactical weapon of choice, particularly to enhance the apparent legitimacy of claims. In this way, it puts the onus on governments or other entities to explain why they deny or neglect rights and/or contribute to 'victimisation'. The importance of the status of victim, both in terms of being entitled to reparation and having one's suffering recognised by society, is particularly apparent where groups of victims are excluded altogether. For example, the victims of systemic injustices of a collective nature characteristic of the pervasive regime of apartheid were not recognised in South Africa's official dealing with the past, in contrast to (individualised) victims of discrete gross violations.[158] Exploitation and poverty are often not portrayed in terms of violations, victim status, rights and remedies but characterised as economic or societal ills.[159] Such categorisation may result in charitable or humanitarian intervention that alleviates the suffering but will frequently have little effect on the status quo. Seizing victim status becomes, against this background, a highly

Report of the Special Rapporteur, above note 11; and 'Redress Trust observations pursuant to Article 75 of the Statute', *In the Case of The Prosecutor* v. *Germain Katanga*, (ICC) (15 May 2015).

[157] See in particular, in relation to violations related to World War II, J. Torpey, 'Victims and Citizens: The Discourse of Reparation(s) at the Dawn of the New Millennium', in K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (eds.), *Out of the Ashes: Reparations for Gross Violations of Human Rights* (Intersentia, 2006), 41–5.

[158] See M. Mamdani, 'Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC)', in M. Du Plessis and S. Peté (eds.), *Repairing the Past? International Perspectives on Reparations for Gross Human Rights Abuses* (Intersentia, 2007), 83–118.

[159] B. Hours, 'NGOs and the Victims Industry', *Le Monde Diplomatique*, English edition (November 2008).

politicised undertaking, with those who are able to influence the granting or denial of such status often acting as gatekeepers in public debates.

Referring to oneself or one's group as victims can be a means of staking claims in the course of debates about who should be entitled to reparation: 'I am/We are deserving of justice and reparation (but you/others aren't).' This may give rise to competition between victims of violations where one group of victims sees itself as more deserving than others (or the only group worthy of reparation). This applies in particular to those who suffered particularly egregious violations, such as torture, compared to, for example, 'mere' short-term wrongful imprisonment, and groups that have been specifically targeted. In the context of post-atrocity or conflict situations, such as in Rwanda or the Democratic Republic of the Congo, the public may find it difficult to understand why the legal status of victim attaches to certain 'violations' but not other forms of violence and/or hardship, as many people will have suffered and feel aggrieved in these circumstances.[160] Devising reparation programmes that do justice to the myriad forms of victimisation is therefore extremely challenging following a conflict or mass violations. In practice, this has often resulted in collective forms of reparation, such as building schools that may, however, be barely distinguishable from development measures and thereby defeat the purpose of reparation.[161]

The portrayal of suffering and representation of victims have raised concerns. The word 'victim' often carries negative connotations of passivity, helplessness and suffering. Describing someone as a victim or a group of persons as victims can therefore be seen as a form of labelling, confining those concerned into a bounded and static societal straitjacket, which ignores individuality and agency.[162] Notably, individuals who have suffered violations such as torture often prefer to refer to themselves as survivors. The difference in meaning and in connotation of such a term is apparent. However, there are limitations to its use in all circumstances. The term survivor implies that the violation was life-threatening, either actually or symbolically (as a fundamental attack on the personality of the victim), which will not necessarily apply to all violations (such as forms of arbitrary arrest and detention). Moreover, some individuals will not survive violations, such as extrajudicial killings or enforced disappearance. As a legal category, it may therefore be preferable to retain the use of the term victim as shorthand for 'anyone who

[160] N. Roht-Arriaza, 'Reparations, Decisions and Dilemmas', (2004) 27 *Hastings International and Comparative Law Review* 157, at 188.

[161] Ibid., 186–92 and Report of the Special Rapporteur, above note 11, paras. 38–42.

[162] See for a succinct overview of the debate with further references, M. Clapham and S. Marks, *International Human Rights Lexicon* (Oxford University Press, 2005), 404–5. See also chapter titled 'Trafficking in Hegemony' in C. Dauvergne, *Making People Illegal: What Globalization means for Migration and Law* (Cambridge University Press, 2008), particularly 69–83.

suffered harm as a result of a violation of his/her/their right(s)'. A plethora of people, in particular human rights defenders, speak about or on behalf of 'victims' and use the experience of suffering to pursue advocacy or other purposes. While this is often done with the best of intentions, the spectacle of suffering may easily be exploited. It also carries the risk of viewing and portraying victims as passive objects and of simultaneously appropriating their suffering and stifling their agency.[163] This is bound to create an unequal power relationship between those claiming to be able to alleviate and/or help to remedy the suffering and the individuals or groups portrayed as victims.[164] However, this risk can be mitigated through the involvement of victims. Many human rights organisations or movements are founded or actively supported by individuals who have themselves suffered violations, and often engage them in their work. The degree to which any individual or organisation speaking on behalf of victims actually has such direct links and mutual channels of communication is therefore an important yardstick of legitimacy.

A highly problematic aspect of victims' politics is its use as licence to justify violations. Such charges have been levelled against Israel and Rwanda, for example, and are by necessity highly contentious and fraught with difficulties. The perception of one's own victim status may have two consequences in this context. It may underpin a collectively shared fear, whether objectively justified or not, that a repetition or similar violations as the ones which caused the original victimisation may recur. This may result in an uncompromising outlook, militarisation and the willingness to use excessive force or legitimise human rights violations.[165] The victim status may also become the founding myth, *raison d'être* and legitimising factor of a state or a regime. This may be used to enshrine the latter's pre-eminence in national politics and provide justification for repression. It may also serve as a tool of neutralising political opposition that is portrayed as pursuing the agenda of the erstwhile perpetrators even where it formulates legitimate demands or grievances.[166]

This brief review of the notion and broader debates surrounding the politics of victimhood demonstrates that the term 'victim' is by no means unproblematic. Using it requires awareness and caution, and its use in any given context

[163] See Dauvergne, above note 162, on the United States' annual Trafficking in Persons report, and also in particular M. Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press, 2002), 27–39.

[164] Hours, above note 159.

[165] See also in this context, the controversial comparisons with, and charges of colonialism and apartheid, in Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, John Dugard, UN Doc. A/HRC/4/17 (29 January 2007).

[166] See e.g., S. Newton, 'Law and Power in the Shadow of the Genocide', (2007) 2 *Journal of Comparative Law* 151.

should be subject to critical interrogation as to its appropriateness and the motives of the user(s) for doing so.

14.12 NEGOTIATING, LITIGATING AND ADMINISTERING REPARATIONS: EXPERIENCES FROM THE HOLOCAUST AND WORLD WAR II REPARATIONS

Reparation costs money. In instances of mass violations, the overall amount of compensation in question is by definition substantial. It is for this plain truth that states (and others) are frequently reluctant to provide reparation of their own will. The question of reparation becomes in these circumstances often a highly politicised process. It depends on the influence, standing and efficiency of victims, and/or their advocates, the availability of effective legal avenues or other mechanisms, and a variety of factors that may persuade the state or others concerned that providing reparation is the right thing to do and/or in their best interest.

The Holocaust and World War II reparations are arguably the most instructive example given their scope and time span. The question of payments for victims came to the fore in the late 1940s. Many Jewish organisations claimed compensation and restitution as 'a small measure of justice for Jewish victims of Nazi persecution'.[167] The Federal Republic of Germany, for its part, had a political interest in gaining legitimacy by showing its willingness to bear responsibility, which was viewed as a precondition for becoming accepted by other Western states and others. However, the proposals made led to fierce opposition in Israel. Compensation was seen as blood money that denigrates the suffering of the victims, the Holocaust being such an unimaginable crime that it could never be compensated for in monetary terms. Significantly, even those Jewish survivors in favour of compensation used the word *Shilumim*, i.e. recompense, instead of the term reparations (*Wiedergutmachung*) favoured by Germany. In the end, after intense negotiations, Israel and Germany reached an agreement in 1952 that paved the way for the payment of tens of billions of German marks over the next decades.[168] Since then, three important challenges have resurfaced frequently. Who should be covered by reparations?

[167] G. Taylor, G. Schneider and S. Kagan, 'The Claims Conference and the Historic Jewish Efforts for Holocaust-Related Compensation and Restitution', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009), 103–14, at 103.

[168] See for a detailed account, A. Colonomos and A. Armstrong, 'German Reparations to the Jews after World War II: A Turning Point in the History of Reparations', in P. de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006), 390–419.

How should reparations be administered? And, can the forms of reparations available ever do justice to survivors and victims?

The official reparation schemes had significant omissions. One of the most glaring was the fact that many victims of slave labour and forced labour[169] had not received reparations and that some of the main beneficiaries thereof, in particular German companies, had not been held accountable. The victims of these violations and organisations working on their behalf, particularly the Conference on Jewish Material Claims Against Germany, employed a variety of strategies. They sought to negotiate terms with the German government and to persuade the relevant industries to provide compensation. This was complemented by resort to class action suits in the USA, i.e. legal action brought on behalf of a large number of victims who claim to have suffered common or similar harm, aimed at reaching a settlement for the benefit of all victims. In the Swiss settlement case,[170] '[Judge Koman] encouraged and actively participated in settlement negotiations, thereby facilitating the historic agreement that resolved the lawsuits and created the $1.25 billion settlement'.[171] A combination of factors, including international advocacy, political developments in Germany, the USA and Eastern Europe in the 1990s, and the threat of adverse judgments and consequences for the German companies that had benefited from slave/forced labour, provided the impetus for negotiations that resulted in the setting up of a foundation to compensate the victims of these violations.[172] Importantly, the payment of compensation was accompanied by an official note of apology from the German President, thus making acknowledgement an integral part of the reparations programme.

The setting up of reparations schemes resulting from advocacy, litigation and negotiations constituted an important victory for the individuals and organisations involved. However, legal and practical challenges in administering these reparations abound. How is an eighty-year-old woman living in an isolated part of the Ukraine to find out about the forced labour reparations programme? How can she prove that she was subjected to forced labour if she

[169] Slave labour referred to concentration camp labour whereas forced labour referred to other forms of labour, in particular for the German industry. The majority of survivors of slave labour were Jewish and of forced labour Eastern European.

[170] This concerned a lawsuit in which the plaintiffs alleged that the Swiss Banks in question had retained and concealed the assets of Holocaust victims, laundered Nazi loot and transacted in the profits of slave labour. See *In re Holocaust Victim Assets Litigation*, (US) (2000).

[171] J. Gribetz and S. C. Reig, 'The Swiss Banks Holocaust Settlement', in C. Ferstman, M. Goetz and A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Martinus Nijhoff, 2009), 115–42, at 118.

[172] J. Authers, 'Making Good Again: German Compensation for Forced and Slave Laborers', in P. de Greiff (ed.), *The Handbook of Reparations* (Oxford University Press, 2006), 420–48.

lost all her documents in the aftermath of the war? How does one calculate adequate compensation for her, if she was not only forcibly made to perform factory work but was also repeatedly raped by her 'employers'? Those responsible for administering reparation programmes tend to utilise a number of techniques to address these challenges. These include outreach, adequate time for submission of applications, relaxed standards of proof and standardised claims according to categories of violations. These techniques are used to enable as many genuine victims as possible to benefit from the scheme within a realistic time frame. By their nature, these techniques are developed and applied to respond to the exigencies of the situation concerned. This means that there is often an experimental element to their use. Nevertheless, over time, individuals and organisations have developed considerable expertise and means to administer reparation schemes that address some if not all of the challenges.[173]

Ultimately, a reparations scheme must go beyond efficient administration. Its success will in large part depend on its ability to provide reparation that is meaningful in a victim-oriented manner. This includes the role of the victim, the procedure applied and the form of reparation provided. All too often, victims have become disillusioned with bureaucratic schemes that are seen as insensitive to their experience. This is articulated in a lawyer's account of the administration of the German reparations laws of 1965:

> No one bothered to restore the survivor's dignity. On the contrary, the procedures inherent in some of the paragraphs of the [German] Restitution Laws, inflict indignities upon the claimants while at the same time German authorities are elevated to the status of superior beings who adjudge the claimant's veracity and honesty and classify them in accordance with the degree of their damage ... To receive payments, often sorely needed, the applicants had to subject themselves to the most humiliating and degrading, seemingly very correct legal type of reparations.[174]

14.13 REPARATION IN ACTION: LITIGATING HUMAN RIGHTS CASES

14.13.1 Litigation strategies

Human rights lawyers, victims' organisations and NGOs have been at the forefront of promoting victims' rights and pursuing claims on their behalf. Beyond seeking justice for individuals, human rights cases frequently serve broader objectives. This instrumental approach is known as strategic

[173] Holtzmann and Kristjánsdóttir, above note 34.

[174] M. Kestenberg, 'Discriminatory Aspects of the German Restitution Law and Practice', quoted in Danieli, above note 98, 41–78, at 57.

litigation. It seeks to identify cases that address key obstacles which, if successful, set a precedent that will benefit a large number of victims.[175] This may concern the recognition (and/or elaboration) of rights or fundamental principles, the availability of legal avenues and types of reparation. An example is the landmark case of *Hadijat Mani* v. *Niger*, in which the Economic Community of West African States Community Court of Justice (ECOWAS CCJ) ruled that Niger had to pay $19,000 compensation for failing to protect the applicant from slavery (which lasted over eight years).[176] This case resulted in the recognition of positive obligations on the part of the state to prevent slavery and set a regional precedent of awarding specific amounts of compensation.

Strategic litigation can be pursued before national, regional or international courts or bodies, or a combination thereof. It can take the form of representing claimants, public interest litigation or intervening as *amicus*, the so-called friend of the court where a third party is allowed to make submissions on legal issues if considered relevant to the case – this practice is increasingly utilised by NGOs, human rights law centres and others, often working in collaboration, as a means of seeking to influence court decisions on legal principles and legal policy issues.[177]

Public interest litigation is a particular type of strategic litigation. It has been used, often effectively, in several countries, such as India, South Africa, the USA and elsewhere with a view to bringing about broader changes to strengthen rights protection and social justice.[178] Initially, efforts largely focused on violations of civil and political rights. More recently, there has been an increasing emphasis on litigating cases of violations of economic,

[175] The NGO Interights, e.g., was well-known for its strategic litigation programme. See European Roma Center, Interights and Migration Policy Group, 'Strategic Litigation of Race Discrimination in Europe: From Principles to Practice' (2004), online at www.migpolgroup.com/public/docs/57.StrategicLitigationofRaceDiscriminationinEurope-fromPrinciplestoPractice_2004.pdf and www.interights.org.

[176] *Hadijatou Koraou Mani* v. *Niger*. See for further information on the case www.interights.org/niger-slavery.

[177] See e.g., Special Court of Sierra Leone in the Trial Chamber, *The Prosecutor against Morris Kallon, Amicus Curiae* Brief submitted by the Redress Trust, Lawyers Committee on Human Rights (now Human Rights First) and the International Commission of Jurists (on the legality of amnesties for international crimes) (24 October 2003), www. redress.org/case-docket/the-prosecutor-against-morris-kallon, and Brief of *Amici Curiae* International Human Rights Organizations Center for Constitutional Rights, Human Rights Watch and International Federation of Human Rights in support of petitioner, in the case of *Hamdan* v. *Rumsfeld* (concerning Guantánamo Bay and right of access to courts), (US) (6 January 2006), online at www.fidh.org/IMG/pdf/amicus012006a.pdf.

[178] See further C. R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998); S. A. Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change*, 2nd edn (University of Michigan Press, 2004).

social and political rights.[179] For example, in *People's Union for Civil Liberties* v. *Union of India and Others*,[180] the litigants successfully petitioned the Supreme Court of India to order the government of India to implement a series of food and benefit distribution schemes, as well as to provide access to information. Two of the lawyers involved in the case highlighted internal debates within the People's Union for Civil Liberties as to whether – given their policy nature – it would be worthwhile to pursue claims relating to the right to food before the Supreme Court. In the lawyers' analysis, the orders set an important precedent on the right to food and the entitlements flowing from it. They also point out the valuable lessons of how to break down broad economic, social and cultural rights into specific demands so as to turn them into claims which can be litigated and adjudicated upon.[181]

14.13.2 Pursuing reparation claims, with particular reference to litigating torture cases

Individuals who suffer from serious violations such as torture frequently struggle to rebuild their lives as best as possible. As put in 2005 by Leopoldo Garcia Lucero, a Chilean refugee who survived a sustained period of torture at the hands of the Pinochet regime in the 1970s:

> Now I am 73. I have been here [in the UK] for 30 years and every part of my body has problems. But my biggest problem is that my head injuries meant that I could never learn English. My three daughters have children but [when] they speak to me I can't understand what they are saying and I feel bad. If you cut a wound and you can't heal it, it gets bigger and bigger. That's what happened to me. Pinochet has never been put in prison so the wound gets bigger. I am not at peace. I want to go back to Chile, but it would be very difficult for me because they took everything . . .[182]

Seeking reparation may be part of the process of trying to rebuild one's life. It is also frequently driven by a series of other factors and objectives. Survivors may need financial and other help to cope with the consequences of violations. They may want to find answers, have a desire for acknowledgement, and/or retribution, and a deep-rooted quest for justice. Some survivors become highly motivated to bring about changes to the system and to enhance the protection of human rights, for example by calling for public inquiries into

[179] See V. Gauri and D. M. Brinks, *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press, 2010).

[180] *People's Union for Civil Liberties* v. *Union of India and Others*, (India) (2003).

[181] See B. Guha-Khasnobis and S. Vivek, *Rights-based Approach to Development: Lessons from the Right to Food Movement in India*, WIDER Research Paper (January 2007), online at www.wider.unu.edu/sites/default/files/rp2007-04.pdf.

[182] REDRESS, *Torture: Stories of Survival* (2005). See on his case, *Garcia Lucero et al.* v. *Chile*, (IACtHR) (2013).

violations. However, empirical research shows that survivors perceive reparation in different ways.[183] This means that it is difficult if not impossible to generalise in this respect – worse, generalising may ignore survivors' agency and fail to duly consider their needs and wishes. Whereas some survivors pursue reparation vigorously, even to the point that the process of so doing might become an end in itself, others prefer not to seek justice. This can be due to multiple factors. Survivors often have a high degree of traumatisation and fear of having to relive the trauma as part of an (alienating) legal procedure. Even where survivors decide to pursue reparation, it can be highly difficult because the process or outcome might not meet expectations or prove more strenuous than expected. These difficulties and challenges are often exacerbated where reparation is sought by a group of survivors. They have to agree on representation and strategies and will have to grapple with the inevitable group dynamics that such an undertaking entails. An example is the representation of victims of the Castro-Castro Prison massacre in Peru that ended in open disagreement before the IACtHR.[184]

Lawyers and others representing survivors of violations encounter different types of challenges. In many instances, it will take a considerable time for the full story to emerge, especially in relation to acts of sexual violence. Accounts of arrest, detention, torture and other violations may be patchy, and even seemingly contradictory, which can often be attributed to the disorientation caused by events or injuries. Survivors will also in many instances not have obtained other vital evidence in time, such as medico-legal reports, either because it was not feasible or because they did not have any or adequate legal representation or assistance at the time. Dealing with survivors therefore differs markedly from an ordinary lawyer–client relationship and requires a high degree of empathy and understanding of survivors' experiences, which have often been highly traumatic, and their consequences.



INTERVIEW 14.1

Litigation, advocacy and social change

(Basil Fernando)

Basil Fernando is a Sri Lankan lawyer. He left Sri Lanka in 1989 when the country was in the grip of a state-sponsored campaign of enforced disappearances and extrajudicial killings. At the time, he became a target of the death squads on account of taking up cases against the police and some powerful persons, and his human rights activism. Subsequently, he worked for the UN in

[183] See e.g., REDRESS, *Torture Survivors' Perceptions of Reparation: Preliminary Survey* (2001).
[184] *Miguel Castro-Castro Prison* v. *Peru*, para. 40.

post-genocide Cambodia as a Senior UN Human Rights Officer, before becoming the director of the Hong Kong based Asian Human Rights Commission (AHRC), one of the leading regional human rights organisations in Asia. Basil Fernando and the AHRC have championed a distinctive human rights approach with a strong focus on empowering people.[1] They have also worked vigorously towards strengthening the rule of law at all levels of society, particularly at the institutional level.[2]

What is distinctive about your approach to litigation?

We try to establish a different type of lawyer–client relationship than what usually exists in Sri Lanka. The reason for this is that torture victims and victims of human rights abuse in general come from socially extremely weak sections of society. They do not have the social skills of litigants who will approach lawyers in their chambers, adjust to the time schedules of lawyers, do the preliminary work of preparation such as finding documents and providing the lawyers with various materials and pay their fees. We have created a combination of a solidarity group consisting of people who are close to victims.

Another aspect we have to be careful of all the time is the protection of the victim and also the lawyers who work on these cases. Dangers are very real and there are some well-known cases where the victim has been assassinated or very seriously harassed. The lawyers themselves have faced serious attacks such as grenade attacks on their houses and arson in their offices. Further there are peculiar difficulties in dealing with human rights related cases. Often there are strong societal prejudices which need to be fought against slowly and attitude changes need to be brought about on issues such as the prevention of torture, extrajudicial killings and the like. In short each case is not only a legal case but a discourse with society on vital issues. Secondly, unless those who are involved in the litigation are motivated by other factors than pure economic factors, as is often involved in normal litigation, the kind of litigation that we are involved in cannot be consistently and perseveringly carried out.

What are you seeking to achieve through your case work?

This is a very interesting question. If you look at this problem from purely the standards of developed countries some may even perceive our work as an exercise in futility. When we undertake a case we are fully aware that if there is to be a positive outcome from a legal sense it will happen only many years later. The delay is so great that by the time a final outcome arrives it may have

[1] In 2014, Basil Fernando won the prestigious Right Livelihood Award, see www.rightlivelihood.org/fernando.html.

[2] See www.basilfernando.net and www.ahrchk.net.

lost most of its social significance. Besides that, except in very rare instances, the actual award may be insignificant. For example, after a successful outcome in a fundamental rights case before the Supreme Court on issues such as torture the award may be a paltry sum. In cases of criminal charges on torture, extrajudicial killing and the like, the likelihood of a successful outcome is very low. In a very few cases where there had been some sentencing of perpetrators the lengths of proceedings, which may take ten years or more, virtually deprives them of significance. The real deterrence value as it is now is low and the risks such as bodily harm, various types of long psychological harassment, demoralisation among the victims themselves and financial difficulties are all real problems.

However, introducing human rights remedies to a legal system where such remedies have not been a part, this initial stage has to be faced at some point or another. In this process we have to condition the minds of lawyers, litigants, judges, prosecutors and also police investigators into a new kind of thinking and habits. The ultimate success of introducing human rights redresses lies with winning over public opinion in favour of such redress. For many reasons the old mentalities support various types of repression by the state either directly or indirectly. For example the idea that torture by the police is a necessary condition for social security is a social prejudice that is quite inbuilt. Further, that torture victims are bad criminals is also a very hardened perception. We try to demonstrate that this kind of prejudice and perceptions are in fact contrary to reality, that law-enforcement without torture can create far better community spirit and that society benefits from a legal system where there are adequate remedies for violations.

That kind of social discourse cannot be carried out without practical participation in the litigation process. For example, by merely teaching human rights and law reform, it is not possible to introduce adequate remedies. The people have to go to court to demonstrate the difficulties involved in actually achieving these remedies. In this process many sectors of society and the state come to understand and appreciate the meaning of adequate remedies for human rights in terms of article 2 of the ICCPR.

Can you describe how you practically work on cases? How do you identify cases, who is involved, what are the challenges and how do you seek to address them?

In many of our cases torture victims or their relatives who have heard about the work of our groups approach them when they have a difficulty. Over many years these groups are now trained to interview victims in detail in order to record what they say and also to quickly get further information by way of verification and of gaining greater details about the actual incidents. With such information the victims are helped to make formal complaints to authorities about this incident.

For example a person may be still undergoing torture and illegal detention at the same time when a relative or a friend narrates the story. The group then immediately writes letters to the relevant authorities giving the details of the incident and seeking urgent intervention. The same material collected at the early stage of the incident is also used by the AHRC to create urgent appeals on behalf of the victims. These urgent appeals are sent to large networks and intervention is sought. Thereafter the lawyers associated with the groups interview the victims and witnesses, prepare the necessary papers and file applications for litigation. When finally the case comes to court the lawyers appear for victims and where necessary also get the intervention of senior counsel. Such interventions go from the lower courts up to the Apex court. Meanwhile studies are conducted into the circumstances and the background of the case. A constant discourse is conducted in the media of the circumstances surrounding torture and related problems within the criminal justice system.

Where there are reasons to be dissatisfied with the local litigation process when the defects of litigation can amount to human rights violations communications are also filed with the HRCtee. There have been some successful outcomes of such communications. Submissions are also made to the Human Rights Council (HRC), the CtAT and relevant UN rapporteurs on the basis of these cases. The intervention of all these agencies is sought in order to improve an adequate remedy for human rights violations.

The challenges are related to a slow legal process with enormous defects in the constitutional and criminal law, which constantly conflict with all attempts to find justice. The conflict between the defective legal system and frustrations relating to justice creates various types of mentalities which obstruct the internal public opinion making progress to have changes. We try to counteract demoralising negative experiences by a regional organisation based outside the local context constantly being in support of the local effort. This includes publicity generation, training, legal advice, and finding some financial resources for the work to create a combination that can at least to some extent address these challenges. It is a unique process of collaboration of victims, local solidarity groups, lawyers and other local agents together with people from outside who constantly back up the work of each other.

How does human rights litigation fit in with your advocacy work?

The litigation connects everyone who is involved into a very real legal and societal process where people find themselves as they seek an adequate remedy for human rights violations. It is the real world from which there is no escape. The advocacy based on the real information is powerful. It seems to be just generalisations on the basis of some accepted norms and standards. The application of international standards to real situations generates information which has a greater power to create strong impressions. A discourse

based on such impressions has a greater impact. A judge who is made to see many gruesome cases of torture may begin to challenge his own prejudices and open his mind into the validity of the advocacy that demands a more comprehensive remedy for abuse of rights. This happens to others too. This happens also to the international community. One of the great problems of international advocacy is that those who live in societies where rule of law and democratic systems are well established are unable to grasp the problems of countries with weak rule of law systems and various kinds of authoritarian political systems. When persons from such backgrounds are confronted with detailed information and analysis of this other situation they too are likely to look into the advocacy into these problems in a different manner.

What has been the impact of your work?

I think the impact has been very significant. There is a widespread acknowledgement of serious defects of the constitutional and criminal law system that frustrates the rule of law. In fact, there is a new language when talking about these matters. No one will challenge when it is said today that the policing system in Sri Lanka has completely collapsed. At the time when our work started such a statement would have been considered an exaggeration. This is also the case on issues such as torture and the abuse of police powers of arrest and detention for purely corrupt purposes. Like this a vast list of matters relating to inadequate remedies for human rights violations can be mentioned. All this is today very much accepted and often even regarded as an understatement rather than an exaggeration. There is greater appreciation of the problems at many levels. What prevents more rapid changes are political factors relating to the state which requires a greater political will to deal with. This is beyond the capacity of a human rights group or those involved in human rights litigation alone. However, as and when these political problems are addressed the issues of adequate remedies for human rights violations will not be lost in the debate. Sufficient public attention has been paid to these issues and there are more people who are deeply committed to pursuing this advocacy.

Can you think of any cases that stand out as a particular success or setback?

There are several cases which are simply unforgettable. Take the case of Gerard Mervyn Perera. He was arrested on mistaken identity and beaten up inside a police station to such an extent that he suffered renal failure. After two weeks in a coma he recovered and later with the help of our group filed a fundamental rights application at the Supreme Court. The case was heard in a relatively short time and the judgment is a strong case on torture. The three-bench court ordered the highest amount of compensation awarded up to then and also made some significant recommendations for the prevention of torture. After

this award by the Supreme Court the Attorney-General filed a criminal action against several police officers under the CAT Act, no. 22 of 1994. The torture victim was to give evidence before the High Court in this trial. After many warnings to alter his evidence or not to appear in court, which the victim refused, he was fatally wounded while he was travelling to work. Several years later at the High Court in the torture trial the accused were acquitted on the basis that the torture victim was not there to identify the perpetrators. This judgment has since been appealed and the Court of Appeal has given leave to proceed.[3] This case expresses all the contradictions of litigation relating to torture and other human rights violations in Sri Lanka.

Then there is the case of Sugath Nishantha Fernando. Mr Fernando was a complainant in a bribery case and a torture case. Once the Commission for Bribery and Corruption filed a case against a police officer attached to the Negombo police station he received death threats demanding that he not give evidence in court. When he refused to comply, about twenty officers surrounded his house and attacked his wife, two children and himself. Later he filed a fundamental rights case before the Supreme Court regarding the torture and was granted leave to proceed. In that case he named twelve officers as respondents. Then he received death threats to withdraw the fundamental rights application within twenty-four hours or he would be assassinated. He made complaints to the Inspector General of Police and all other authorities for protection. However, no protection was provided. Later he was assassinated in broad daylight by two unidentified persons. One year has passed after this incident and no one has been arrested for the murder. The family suspect the police officers who are respondents in the above mentioned cases as having organised the murder. The widow and the two children have been receiving death threats ever since and are living in hiding, even having had to flee to a neighbouring country for some time. As the local system of litigation and protection has failed they filed a communication before the HRCtee, which admitted the communication and requested the Sri Lankan government to provide protection to the family. However, Sri Lanka has not complied with this recommendation.[4]

The case generated an enormous amount of publicity and discussion. However, within a political context where the criminal justice system has been suppressed the case has manifested the enormous problems involved in the system to achieve an adequate remedy for human rights violations.

[3] The torture case was pending in June 2015 but there had been a conviction in the murder trial; see Asian Human Rights Commission, 'Sri Lanka: Sub-Inspector and his Assistant Convicted, Sentenced to Death for Murder' (24 June 2015), online at www.countercurrents.org/ahrc240615.htm.

[4] See for the final views, *Pathmini Peiris* v. *Sri Lanka*, (HRCtee) (2011), finding that Sri Lanka had breached a number of its obligations under the ICCPR.

POINTS TO CONSIDER

1. What are the most significant aspects of the recent phase of reparations for violations committed by Nazi Germany, and what are the strategies that have been used by claimants and Jewish organisations to seek and obtain reparation?
2. Consider the following fictional press release: 'The victims of industrial operations, pollution and land degradation committed by the company x with the support of government y in country z are many. They are faceless but real. These victims need our help to obtain justice. You can support our work to advocate victims' rights by donating $10 per month.' What concerns does it raise in terms of victims' politics?
3. Consider having to advise an individual claiming to have suffered prolonged arbitrary detention and ill-treatment in detention. The detention was justified by security legislation that allows detention without judicial review and access to a lawyer for ninety days. The individual is in financial difficulties and wonders whether to pursue a claim or to accept the settlement offered by the authorities on condition that he refrains from pursuing any civil claims, criminal complaints or other remedies in the matter. What is the dilemma posed, what are the criteria that should be taken into consideration, and what might be possible solutions?

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15 The application of human rights in armed conflict

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15.1 INTRODUCTION

This chapter discusses the development and application of international humanitarian law (IHL) and its interrelationship with human rights law. It further examines this special relationship, which is of particular importance for the protection of civilians, especially where the applicability of IHL is contested or where IHL constitutes an exception to certain rights, such as the right to life, or fails to prevent and/or provide effective remedies for violations. The chapter seeks to identify the scope of application of IHL and demonstrate the degree to which the two can be reconciled. Moreover, a special case is made for the law applicable in situations of military occupation whereby human rights are subordinate to IHL. Despite this subordination, in practice because international human rights tribunals are not mandated to apply humanitarian law they necessarily interpret and enforce the rights of the victims on the basis of the rights found in their respective statutes. As a result, the jurisprudence of human rights tribunals is not always consistent with IHL. Yet, such tribunals are hard pressed to accept jurisdiction over situations

Annex 229

Ronan Lee, 'The Dark Side of Liberalization: How Myanmar's Political and Media Freedoms Are Being Used to Limit Muslim Rights' (2016) (27)(2) Islam and Christian-Muslim Relations 195

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The Dark Side of Liberalization: How Myanmar's Political and Media Freedoms Are Being Used to Limit Muslim Rights

Ronan Lee

Faculty of Arts and Education, Deakin University, Burwood, Australia

ABSTRACT

This article describes how divisive groups have taken advantage of Myanmar's new political and media freedoms to pursue an agenda that will limit the civil and political rights of the country's Muslim population. The article argues that enforcement of the four Protection of Race and Religion Laws will disadvantage Myanmar's already politically marginalized Muslim residents by creating a de facto religious test for full Myanmar citizenship rights. The article examines both the positive and negative aspects of Myanmar's liberalizations, the nature of the 'Protection of Race and Religion' legislative package and how this will interact with Myanmar's citizenship laws.

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Myanmar; Islamophobia; Buddhist extremism; religious conflict; citizenship

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Introduction

Divisive groups have taken advantage of Myanmar's much lauded new political and media freedoms to pursue an agenda that will limit the civil and political rights of the country's Muslim population. This article examines how extremist groups such as the Ma Ba Tha have exploited these new political and media freedoms and analyses the policy agenda they have pursued. The article argues that the enforcement of the four Protection of Race and Religion Laws will disadvantage Myanmar's already politically marginalized Muslim residents by creating a de facto religious test for full Myanmar citizenship rights.

Despite considerable evidence that Myanmar's democratization process has stalled (Anguelov 2015; Eck 2013; Irrawaddy 2014; Kingsbury 2015; Sifton 2014), the country has nonetheless liberalized more during the last five years than throughout the previous five decades of direct military rule (Hlaing 2012; Renshaw 2013; Ware 2012; Zin and Joseph 2012). This article examines the freedoms that have accrued to Myanmar's residents since the country's 2010 national elections began a transition to a notionally civilian administration. It will briefly describe the nature of these freedoms and the opportunities they have provided for the country's long-suppressed pro-democracy groups to organize and engage with the political process. However, the darker consequences of these freedoms will be addressed as well. It will be shown that increased freedoms to express political opinions, combined with a growing, less censored media landscape and ready access to the Internet and mobile phones, have provided opportunities for divisive voices to

CONTACT Ronan Lee ronan@deakin.edu.au Faculty of Arts and Education, Deakin University, Burwood, Victoria 3125, Australia

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enflame religious and ethnic tensions and promote discriminatory policies, often to the detriment of Myanmar's Muslim population (Freedom House 2013; Holland 2014; Trautwein 2015).

Myanmar's military junta changed the country's name in 1989. Since that time, names have often become an indicator of political allegiance (Steinberg 2010). These debates are beyond the scope of this article, which uses the name 'Myanmar' to refer to the country from the time of its official name change. In reference to the country's history prior to this, the name 'Burma' is used. However, this naming convention is far from universally followed and many, including the governments of the USA, UK and Australia, still refer to the country as Burma. The same is true of some sources that refer to contemporary Myanmar as 'Burma' and the country's inhabitants as 'Burmese'. This article makes efforts to preserve the meaning of these sources. Similarly, the article seeks to preserve meaning and consistency with sources when using Myanmar's naming conventions. The honorific 'Ashin' is applied to monks, 'Daw' to women, and 'U' to men in senior positions.

Policy changes since the transition to a notionally civilian form of government in 2011 have resulted in significantly greater economic, political and media freedoms for the people of Myanmar (International Monetary Fund 2013; Kulczuga 2013; Shobert 2014; Trautwein 2015), including allowing for the participation and victory of the country's political opposition in the 2015 general election (BBC 2015c; Ware and Lee 2015). However, the consequences of these liberalizations have not always been positive. Economic liberalization has led to criticisms that workers are frequently exploited as cheap labour in a global supply chain (Hobbes 2015), while political and media freedoms have provided opportunities for divisive voices to stoke religious and ethnic tensions previously held in check by the country's military government (Holland 2014). Groups such as the 969 Movement, the Association for the Protection of Race and Religion known as the Ma Ba Tha and the political activist monk Ashin Wirathu have made ready use of Myanmar's new political and media freedoms to argue that it is in Myanmar's national interest to protect the Buddhist religion from a perceived Muslim threat, and they have called for restrictions on Muslims' political and civil freedoms (Fisher 2015; Mizzima 2015).

Ethnic relations in Myanmar have been a long-standing source of domestic conflict (International Crisis Group 2013). Ethnicity can be a test for citizenship and ethnic identity is often closely linked with religion. Communal conflict between elements of the country's Buddhist majority and the Muslim minority since 2012 have exposed previously suppressed staunch anti-Muslim voices from within the Buddhist community (International Crisis Group 2013). This article suggests that the success of Ashin Wirathu and the Ma Ba Tha's political agenda, and the enforcement of the Protection of Race and Religion Laws that they champion, would add another layer of complexity to how Myanmar's citizenship laws operate, since existing citizens would have their rights restricted on the basis of religion. Because of the nature of Myanmar's citizenship arrangements, these policies, if enforced, would lead to a two-tier national citizenship, with full freedoms and rights reserved for some on the basis of their religion or gender (Amnesty International 2015; Burma Citizenship Law 1982; Human Rights Watch 2015b; Republic of the Union of Myanmar 2008; Zaw 2015b).

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How has Myanmar liberalized?

Attitudes towards Myanmar's liberalization have been mixed. There has been a positive response from some Western political leaders, including US President Barack Obama, who visited Myanmar in 2012 and welcomed and encouraged the country's changes, declaring, ' … a dramatic transition has begun, as a dictatorship of five decades has loosened its grip. Under President Thein Sein, the desire for change has been met by an agenda for reform' (2012). However, in the latter half of 2014, President Obama acknowledged some slowing of the pace of reform (Landler 2014) and, since the November 2015 national elections were held without any significant constitutional changes taking place, there is now increasing acknowledgement that Myanmar's democratization process has indeed stalled (Anguelov 2015; Democracy Digest 2014; Eck 2013; Kingsbury 2015; Sifton 2014).

Critics, including opposition leader Daw Aung San Suu Kyi, in 2014 described the government's reform process as presenting a 'veneer' of democracy to cover continued authoritarian control. She has said: 'Everybody has been talking about the tremendous reforms that have come to our country, but I think it all has been overstated' (quoted in Aikman 2014) and in 2015 she told the *Washington Post*, 'We do worry that the reforms will turn out to be a total illusion, and we think that we need more concrete steps to ensure that the democratization process is what it was meant to be' (Hiatt 2015).

While in-depth discussion of whether Myanmar's political changes represent an ongoing movement towards a democracy is beyond the scope of this article, there is evidence of significant policy liberalization, particularly related to certain aspects of politics, the economy and the media.

Increased political freedoms have allowed for the registration as an official political party of the long-banned National League for Democracy (NLD), as well as scores of other political parties, and the participation and success of Daw Aung San Suu Kyi and the NLD in the April 2012 parliamentary by-elections (BBC 2013a; Burma News International 2012; International Crisis Group 2015; Jones 2014). Aung San Suu Kyi and the NLD were able to participate freely in the national elections held on 8 November 2015, which she described as 'largely' free (BBC 2015c). The party emerged as the overwhelming election winner and both the outgoing President, U Thein Sein, and Myanmar's military chief, Senior General Min Aung Hlaing, have stated that they will respect the election outcome (BBC 2015b; Voice of America 2015).

Describing Myanmar's economic liberalization, the World Bank (2014) explains that, since 2011:

> [Myanmar's] government has embarked on an ambitious economic, political and governance reform program. It has begun a series of reforms to remove economic distortions, such as floating the currency, new fiscal regulations to rationalise personal income tax and reduce consumption tax, liberalizing the telecommunications sector, reforms aimed at developing the private sector and stimulating direct foreign investments, a review of the financial sector, promotion of access to finance, and creating an environment conductive to job creation. These reforms are paying off …

Meanwhile, despite post-publication censorship continuing (Watkins 2012), two significant liberalizations of Myanmar's media landscape have been the 2012 decision to end

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the country's pre-publication press censorship (Pidd 2012) and the 2011 decision to unblock access to exile media. Of this decision Renshaw (2013) explains:

> On Democracy Day, 15 September 2011, the government unblocked many previously censored international news sites, including the BBC, Democratic Voice of Burma (DVB), and Burmese language broadcasts of Radio Free Asia and Voice of America.4 These moves followed an earlier relaxation of blocks on Skype, Yahoo! and YouTube. In 2011, it was possible to display and sell pictures of Aung San Suu Kyi, an activity that would have risked a jail sentence a short time beforehand.

With this decision, Myanmar's residents gained ready access not only to foreign news sources but also to previously blocked social media channels.

The rise in the use of social media for communication and to spread political messages has dovetailed neatly with Myanmar's economic liberalization. The opening of the mobile telephone market has transformed the way Myanmar's residents communicate and access the Internet. In 2010, mobile telephones were a luxury with the cost of a SIM putting their use well beyond the reach of the vast majority of Myanmar's residents (Gowan 2014; Kulczuga 2013). Mobile phone use in Myanmar was so low that, 'Only North Korea had fewer cell phones per capita' (Motlagh 2014). The opening of this market to international carriers and a significant reduction in the price of SIMs have led to huge growth in the penetration of mobile phone technology in recent times. Myanmar's Ministry of Communications and Information Technology believes that the mobile phone penetration rate has grown to beyond 50% and that it will reach 80% of the population during the 2015–2016 fiscal year (Matsui 2015).

The dark side of liberalization

However, Myanmar's new freedoms have not always led to positive outcomes. The removal of media censorship, combined with greater access to communication technologies and social media, has given a long-denied platform to incendiary political opinions that can enflame ethnic and religious tensions (Beech 2013). While pro-democracy political groups have taken the opportunity to organize and promote their message, so too have Myanmar's more divisive political figures such as activist monk Ashin Wirathu, the 969 Movement and the Ma Ba Tha (BBC 2015a; Hodal 2013; Holland 2014; Pinnock 2013).

Since 2010, long-suppressed tensions between elements of the country's Buddhist majority and the Muslim minority have erupted into violence, most terribly during 2012 in Rakhine State (Center for Diversity and National Harmony 2015; Human Rights Watch 2012, 2013; International Crisis Group 2013). This violence has exposed previously suppressed staunch anti-Muslim voices within the Buddhist community. Most prominent among these is Ashin Wirathu, who has made ready use of Myanmar's new media freedoms and is a particularly active user of social media channels, including YouTube and Facebook, to promote his sermons (Wirathu 2015a, 2015b). 'As government rules relaxed, he became more active on social media … spread his message by posting his sermons on YouTube and on Facebook where he currently has more than 37,000 followers … ' (BBC 2015a). By early 2016, this figure had reached 129,000 (Wirathu 2016). While Ashin Wirathu's attitudes and activities have been known in Myanmar for some time, it was the deadly 2012 violence in Rakhine State between Muslims and Buddhists

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that brought him to the attention of the international media. He has actively enflamed religious tensions, blaming Muslims for this violence and regularly repeating 'unsubstantiated claims about [Muslim] reproduction rates … He also claims that Buddhist women are being converted by force … ' (BBC 2015a).

Ashin Wirathu's sermons about religion, particularly his extreme negative views on Islam, landed him a 25-year jail sentence for inciting anti-Muslim hatred in 2003, when the country was under military rule (Hodal 2013). He was released under a 2010 general amnesty for political prisoners (BBC 2015a). Since then, his incendiary sermons on Islam have earned him a *Time* magazine cover page with the headline 'The Face of Buddhist Terror', as well as the moniker 'Burmese Bin Laden' (Beech 2013). An ardent Buddhist nationalist, Ashin Wirathu fears that Myanmar's Buddhist population is under threat of a takeover by the country's Muslim population (Fitzgerald 2014). Muslims are estimated to comprise 4–5% of Myanmar's population (CIA 2013). Underscoring the nationalist nature of Ashin Wirathu's sermons, the BBC (2015a) suggests a typical sermon begins with his words, 'Whatever you do, do it as a nationalist.' Ashin Wirathu argues that Myanmar's national interest requires the protection of Buddhism as the majority religion from a threat posed by other religions such as Islam. In a widely publicized 2013 *Time* interview, he told Beech (2013): '[Muslims] are breeding so fast, and they are stealing our women, raping them … They would like to occupy our country, but I won't let them. We must keep Myanmar Buddhist.' Beech goes on to say that, according to Ashin Wirathu, about 90% of Muslims in Burma are 'radical, bad people'.

Ashin Wirathu's sermons simultaneously echo and increase community fears about the threat to Buddhism and the Myanmar nation because of the growth of Islam. This message echoes unease expressed by many in the country about the influence of Islam at home and abroad (Holland 2014; Perria 2015; Trautwein 2015). It also taps into a narrative that is 'rooted in dissatisfaction at unchecked immigration from the sub-continent during the colonial period. Large numbers of Indians moved to Myanmar as part of the colonial administration; in commerce and moneylending; and as low-income migrants' (International Crisis Group 2013, 2).

These colonial-era migrants were seen as gaining an economic advantage at the expense of Burma's predominantly Buddhist, indigenous population. Charney (2009, 23–24) explains:

> Burmese feelings of exclusion were bolstered by immigrant dominance in commerce, industry, and administration. Hindustani, for example, emerged as the lingua franca of the colonial capital and Europeans in government (and often in commercial) service were required to pass exams in this language and not Burmese.

This colonial-era migration remains a considerable contributor to ethnic and religious tension within contemporary Myanmar (Charney 2009; International Crisis Group 2013; Steinberg 2010). So too are perceptions among Myanmar's Bamar Buddhist majority that Rakhine State Muslims and other Indians, by their support of the British rather than the Japanese during the Second World War, were disloyal to Burmese aspirations for an independent state (International Crisis Group 2014). Despite the eventual decision of Burmese leaders to change sides and help the British defeat the Japanese (Smith 2008; Steinberg 2010), perceptions that Indians and Muslims were disloyal to the cause of Burmese nationhood have persisted and, for many, these colonial-era wounds have

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been slow to heal (Berlie 2008; Egreteau 2011; Rogers 2012). Lingering doubts about Muslim loyalty to the nation and the historic reality of Islam's growth in the region over the centuries have in recent times coalesced into a concern among many that Buddhism and the Myanmar nation are 'under siege' by Islam (Beech 2013).

This moral panic has been a key publically stated motivator for the political actions of Ashin Wirathu (Zaw 2015b), who has argued, with considerable success within Myanmar's new democratic processes, for government policies to restrict the political and civil freedoms of non-Buddhist religions (BBC 2015a; Zaw 2015b). Working towards similar objectives to Ashin Wirathu and benefitting from the existence of the political consistency he has cultivated through his media activity, the Committee for the Protection of Nationality and Religion, more commonly known as the Ma Ba Tha, has been particularly active in promoting a collection of laws known as the 'Protection of Race and Religion' package (Amnesty International 2015; Human Rights Watch 2015b; Min 2014; Radio Free Asia 2015; Zaw 2015a).

What is the 'Protection of Race and Religion' legislative package?

The 'Protection of Race and Religion' legislative package that has been promoted by the Ma Ba Tha is comprised of four parts: the Population Control Health Care Law (Dinmore and Myint 2015), the Religious Conversion Bill, the Myanmar Buddhist Women's Special Marriage Bill and the Monogamy Bill (UNHCR 2015). Elements of each part of the package are discriminatory and, taken as a whole, these proposals represent significant restrictions of religious freedom.

In a joint statement, 180 Myanmar civil society organizations asserted that, if they were to become law, these proposals could 'destroy the stability' of Myanmar society by "inciting hatred, discrimination, conflict and tension" within religious communities (Radio Free Asia 2015). There have been strong criticisms too from the US government, the UN (UNHCR 2015) and human rights organizations (Amnesty International 2015; Human Rights Watch 2015b). US Deputy Secretary of State Antony Blinken described the law as likely to exacerbate ethnic and religious tensions (Dinmore and Myint 2015).

However, none of this prevented Myanmar's new parliament, the Pyidaungsu Hluttaw, during May 2015, from endorsing the first part of the package, the Population Control Health Care Law (Perria 2015). This law will allow Myanmar's central government to impose 'birth spacing' regulations on women in communities where population growth leads to 'unbalanced resources' (Dinmore and Myint 2015). How it is to be enforced is not yet clear but, given Myanmar's poor human rights record (BBC 2013b; Rogers 2012; Steinberg 2010; Ware 2011), the law has understandably raised serious red flags for human rights advocates, just as it has raised serious concerns among the international community and among civil society activists within Myanmar. While the Population Control Health Care Law is considered by many to be a direct attack on perceived high birth rates among Myanmar's Rohingya Muslim population, its provisions can be applied to any population nationwide. Ashin Wirathu's explanation as told to *The Irrawaddy* is that the law's dual purpose is to protect women's health and 'stop the Bengalis' (Zaw 2015b), a pejorative name he often applies to the Muslims of Rakhine State who call themselves 'Rohingya' (Kaplan 2015).

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In the months prior to Myanmar's November 2015 general election, the politically charged nature of these laws was highlighted by the timing of President U Thein Sein's decision to enact the Population Control Health Care Law (Lee 2015). The president signed it at a time when the international community was captivated by the crisis of irregular migration within the Bay of Bengal (Albert 2015; Macnamara 2015; McKirdy and Mohsin 2015). This migration was caused in large part because of Myanmar's Rakhine State Muslims fleeing by boat from appalling conditions within Myanmar (Jikkham 2015). Despite concerned nations from throughout the region, and the USA, preparing to meet in Bangkok to seek solutions to a humanitarian crisis widely believed to be largely of Myanmar's making, the president chose this time to sign a law described by the UNHCR as 'highly discriminatory against ethnic and religious minorities as well as against women' (2015).

The remaining three parts of the legislative package have been similarly criticized as discriminatory by civil society groups, the UN and human rights organizations, yet they were passed by the national parliament during July and August 2015 (Caster 2015). The Religious Conversion Law, for instance, would mandate that those wishing to change their faith first obtain local authority permission (BBC 2015a). According to the UNHCR (2015), the proposed system would establish a state-regulated process for religious conversion, 'involving justification, registration, interview, study and approval' and would be contrary to the protection of the right of conversion under human rights law. It is also contrary to the provisions of Article 18 of the International Declaration of Human Rights, which states:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. (United Nations 1948)

In addition, the Myanmar Buddhist Women's Special Marriage Bill aims to 'protect' Buddhist women marrying non-Buddhist men. Emna Aouij (UNHCR 2015), head of the UNHCR Working Group on discrimination against women explains: 'The Bill discriminates against women by restricting the right to marry for Buddhist women and placing restrictions only on Buddhist women who wish to marry outside their faith.' It is feared that this Bill would, in practice, actively discourage interfaith marriage by 'imposing disproportionate penalties on non-Buddhist men' seeking to marry Buddhist women. Furthermore:

> under the Bill, a cohabiting couple where the female partner is Buddhist and the male is not, is de facto deemed 'married'. If one or both parties do not wish to marry, they may be forced into marriage by a Court, which interferes greatly with the right to enter into marriage only with free and full consent.

The fourth Bill, the Monogamy Bill, criminalizes polygamy while also prohibiting extramarital affairs. While the polygamy ban is described by the UNHCR as being consistent with international human rights requirements, other aspects of the Bill are of concern, notably the 'restrictive and discriminatory approach' it takes to the regulation of marriage (2015). The Bill refers to 'non-Buddhist persons' and ignores other types of marriage that are discriminatory against women, such as early and forced marriages. Emna Aouij

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outlines her concern with this aspect of the legislative package: 'Enforcement of laws criminalizing adultery often leads to discrimination and violence against women. Experience shows that, in practice, adultery legislation imposes disproportional criminal liability on women' (UNHCR 2015).

The UN Special Rapporteur on the situation of human rights in Myanmar, Yanghee Lee, explains that these bills 'risk deepening discrimination against minorities and setting back women's rights in Myanmar' (UNHCR 2015). The Special Rapporteur on minority issues, Rita Izsák, suggests that '… these bills particularly discriminate against ethnic and religious minorities and have the potential to fuel existing tensions in the country' (UNHCR 2015).

However, while a substantial element of civil society, human rights organizations, the US government and the UN have expressed grave concerns about the discriminatory nature of these proposals and the threats that they will likely pose to Myanmar's fragile peace and nascent democracy, Ashin Wirathu's perspective is, not surprisingly, diametrically opposed: 'Taking care of our own religion and race is more important than democracy', he says (Beech 2013). Yet this attitude has not prevented Ashin Wirathu, the Ma Ba Tha and their supporters from making active use of Myanmar's new democratic systems and the country's liberalizations to pressure lawmakers to enact the laws they want. While the media activity, political organizing and engagement with lawmakers that have been undertaken to support the Ba Ma Tha's political case would likely have been impossible under the military junta, it is still worth considering whether other changes that have taken place during Myanmar's recent transition, besides liberalization, might have created this political space.

Some, including Green (2013) and Selth (2013a), suggest that anti-Muslim attitudes have been a long-term feature of life in Myanmar and that liberalization should not be held to blame for recent outbreaks of religion-motivated violence or an agenda of discriminatory policies. Green (2013, 25) cites Selth's (2013a) argument:

> Full rights for Muslims were enshrined in the 1947 constitution, but in 1960 Buddhism was made Burma's state religion and after the 1962 coup the military regime tended to equate Muslims with colonial rule and the exploitation of Burma by foreigners. Muslims were not permitted to run for public office, join the security forces or work as civil servants. The number of mosques was restricted, some Muslim cemeteries were destroyed and a number of madrassas were closed.

In Myanmar, Selth (2013a) continues, 'Religious tensions have never been far from the surface.'

While it is certainly the case that religious tension has rarely been far from the surface of Myanmar life and that the military junta's policies were frequently discriminatory on the basis of both religion and race (Rogers 2012), it is difficult to ignore the fact that Ashin Wirathu and the Ma Ba Tha are quite obviously making successful use of Myanmar's new media and political freedoms to advance their agenda. No doubt there were religious tensions and discriminatory policies before, but contemporary political avenues to promote discriminatory attitudes and policies appear to be much wider than they were under the military junta, as evidenced by the parliament's endorsement of the Race and Religion Package.

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Could constitutional change, rather than liberalizations be to blame?

In addressing questions of what might have facilitated this push for discriminatory laws, it is worth considering whether a changed constitutional attitude towards freedom of religion might be the cause. Issues of constitutional change in Myanmar have been to the fore of politics since the country began its transition away from direct military rule (Allchin 2011; Radio Free Asia 2013; Selth 2013b). Debate about the rights that the national constitution provides to some citizens and not others to stand for the office of president has rarely been far from the public eye. Constitutional change is a key stated objective of opposition leader Daw Aung San Suu Kyi and her party the NLD (Irrawaddy 2014; Myint 2015). In these circumstances, it is reasonable to consider whether the new constitution, endorsed as it was in controversial circumstances during the aftermath of the Cyclone Nargis disaster, might be the cause or part of the cause of Myanmar's recent religious tensions (*The Economist* 2008; Larkin 2010).

Since Independence from Britain, Myanmar has had three constitutions, 1947, 1974 and 2008. They each share a similar 'attitude' towards religion and the right of citizens to religious freedom, including freedom from discrimination on the basis of religious belief. Each constitution provides for religious freedom, consistent with public order, and they oppose the abuse of religion for political purposes. They each use similar language when describing citizens' rights to religious freedom.

The 1947 Constitution provided for all persons to have 'the right freely to profess and practise religion subject to public order, morality or health … ' (Union of Burma 1947, s20) and stated that 'The State shall not impose any disabilities or make any discrimination on the ground of religious faith or belief' (s21.3). Similarly, the 1974 Constitution makes a number of references to the rights of citizens to profess the religion of their choice. These include Article 153(b), which acknowledges the right of every citizen to 'profess the religion of his choice. The exercise of this right shall not, however, be to the detriment of national solidarity and the socialist order which are the basic requirement of the entire Union' (Socialist Republic of the Union of Burma 1974). Article 153(c), however, explains that, notwithstanding this clause, 'acts which undermine the unity and solidarity of the national races, national security or the socialist social order are prohibited'.

Missing from the 1974 Constitution but returning in the 2008 version is the explicit recognition of the 'special position' of Buddhism. The 1948 Constitution states: 'The State recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union' (Union of Burma 1947, s21.1). Again, omitted from the 1974 Constitution is the 1948 Constitution's statement that 'The State also recognizes Islam, Christianity, Hinduism and Animism as some of the religions existing in the Union at the date of the coming into operation of this Constitution' (s21.2).

These rights are returned in the 2008 Constitution, which states in Section 361: 'The Union recognizes special position of Buddhism as the faith professed by the great majority of the citizens of the Union' and in Section 262: 'The Union also recognizes Christianity, Islam, Hinduism and Animism as the religions existing in the Union at the day of the coming into operation of this Constitution' (Republic of the Union of Myanmar 2008, s362). The 2008 Constitution similarly mirrors the statements of the two previous constitutions about the use of religion for political purposes. Section 364 forbids the use of religion for political purposes and bans 'any act which is intended or is likely to promote

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feelings of hatred, enmity or discord between racial or religious communities or sects is contrary to this Constitution. A law may be promulgated to punish such activity'. Myanmar's three post-Independence Constitutions can be collectively described as supporting religious freedom consistent with public order, and standing in opposition to the use of religion for political ends.

This examination of Myanmar's three post-Independence constitutions shows considerable consistency between them when it comes to matters of religious freedom. Far from the 2008 Constitution representing a dramatic shift in attitude towards religion, its attitude towards religion and religious freedom is noteworthy for how little it differs from that of the country's two preceding constitutions. This suggests that factors other than constitutional alternations have contributed to and must be the cause of the recent rise in religious tensions. It is reasonable to suggest that we need to look no further than the elements of Myanmar's liberalization already described.

Why Myanmar's citizenship laws are important

Any assessment of whether Myanmar is moving closer to a religious test for full citizenship requires some examination of how Myanmar currently determines citizenship. Myanmar's 2008 Constitution provides no guarantee of citizenship (Republic of the Union of Myanmar 2008, s346). These matters are determined by the Burma Citizenship Law of 1982, which spells out the criteria for Myanmar citizenship. The Citizenship Law provides for three broad categories of citizenship and the key provisions of the law are based on ethnicity. Steinberg (2010, 72–73) describes the 1982 Citizenship Act as:

> establishing a three-tiered system of citizenship. Full citizens were those who were Burman or a member of one of the indigenous ethnic/linguistic groups or those who could prove they were descendants of residents who had lived in what was Burma in 1823 … associate citizens, such as Indians and Chinese, were those who were born in the country after that time. The third group was comprised of naturalized citizens …

While this law came into effect during the time when Myanmar was ruled by the military (Oberoi 2006), there has been little domestic political momentum for it to change when compared with other constitutional provisions such as those related to the qualifications for the Presidency or the role of the military in the legislature (Irrawaddy 2014; Myint 2015). There has been considerable international and human rights-led criticism (Constantine 2012; Human Rights Watch 2015a) of the law's reliance on potentially arbitrary notions of ethnicity as well as of the provision that declares, 'The Council of State may decide whether any ethnic group is national or not' (Burma Citizenship Law 1982, s4). This aspect of Myanmar's citizenship arrangements has been the cause of considerable debate, particularly as it relates to the government decision to deny the Muslims of Rakhine State who call themselves 'Rohingya' the status of an ethnic group and with it the collective right to citizenship (Cheung 2012; Lee 2014; NPR 2015).

While the detail of this debate is beyond the scope of this article, the Rohingya's situation still serves to underscore the point that Myanmar's citizenship laws are controversial, complex and based on ethnicity, and that citizenship rights can accrue because of seemingly arbitrary government decisions about whether to recognize or refuse a claim to ethnic group status. The question of just how Myanmar's government determines

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whether a particular group of residents is entitled to be known as an ethnic group and to acquire the resultant citizenship rights is highly controversial. Taylor (2015, 3) explains:

> Ethnicity, compounded by religion, has been the dominant motif of Myanmar's politics for a century or more. Since the cusp of the country's independence in 1948, the issue of ethnicity, or 'race', has been conflated with a debate over the question of the alleged rights of so-called 'national races', and those who reside in the country but are not included within the rubric of 'national races'. The notion of national races was devised as means of recognising the existence of various ethnic groups within the territory of the Myanmar state, i.e. 'races of the nation', underscoring the confusing rhetoric the issue generates.

Taylor (2015, 3 n. 1) goes on to explain how language clouds and confuses this issue even more:

> The confusion over ethnicity and race in Myanmar is compounded by the fact that one word, *lumyo*, is normally used to express both concepts. Literally, *lumyo* means variety or kind of human. The *Myanmar-English Dictionary* (Yangon: Myanmar Language Commission, 4th printing, 1994) defines the term as '1. race, nationality, 2. nation, 3. type (of people); character.' There is a separate term for ethnic group, *lumyosu,* but it is little used.

These matters become even more challenging because, as Walton (2013, 4) writes, people in Myanmar 'often perceive ethnicity as something inborn, unchangeable and, in some cases, determinant of an individual's very nature'. This creates an obvious difficulty for those wishing to make a claim of ethnicity based on newer or less familiar ethnic descriptors, as is the case for the Muslims of Rakhine State who call themselves 'Rohingya' (Human Rights Watch 2015a; Taylor 2015). Taylor provides an up-to-date and worthy analysis of how Myanmar's government might have come to compile its list of ethnic groups entitled to citizenship. In noting the possibility that the government might have made use of British-era colonial census records, Taylor (2015, 8) states: '67 years after independence, people are still discussing a nearly hundred year old list created by British colonial officials and amateur linguistics [*sic*] and ethnographers.' The problems with such an approach are manifold and there are obvious criticisms (see eg Ferguson 2015) that such data may have been compiled by enumerators who lacked a thorough understanding of the country they were surveying, or were biased towards recording ethnicities with which they were already familiar.

Ethnic identity represents a belonging to a social group with shared characteristics or history. Distinct ethnic groups frequently share, for the most part, a common religion. With regard to the situation in Myanmar, where citizenship rights are determined by parliamentary law rather than by constitutional right, and where these citizenship rights accrue because of membership of a common ethnic group (and as a result often because of a shared religion), the impact of religious discrimination in the laws should be considered most carefully. Since Myanmar determines citizenship, in part, on the basis of an individual's membership of a distinct ethnic group, the membership of which often includes a common religious affiliation, this means there should be strong cause for concern about recent laws discriminatory against non-Buddhists.

Conclusion: the dark side of liberalization

An examination of the 'Protection of Race and Religion' legislative package shows it to be racially discriminatory. These proposals, when considered in the context of Myanmar's

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Citizenship Law, create a situation where some citizens have full citizenship rights, while others, because of their religion (or possibly ethnicity), will suffer discrimination and have their rights limited. This, in practice, represents another layer of citizenship rules and creates a nation where full citizenship rights are only guaranteed to some Buddhist citizens. This outcome is in line with the rhetoric of Ashin Wirathu and the Ma Ba Tha, who expect the Protection of Race and Religion Laws to be targeted at Myanmar's Muslim population. This article has shown how divisive groups such as the Ma Ba Tha have taken advantage of Myanmar's new political and media freedoms to pursue their agenda aimed at restricting the civil and political rights of the country's Muslim population. It argues that the enforcement of the Protection of Race and Religion laws amounts to the creation of a de facto religious test for full Myanmar citizenship rights and that this is a test designed to limit the rights of Myanmar's Muslims.

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Annex 230

Matt Schissler, Matthew J. Walton & Phyu Phyu Thi, 'Reconciling Contradictions: Buddhist-Muslim Violence, Narrative Making and Memory in Myanmar' (2017) 47(3) Journal of Contemporary Asia 376

RECONCILING CONTRADICTIONS: BUDDHIST-MUSLIM VIOLENCE, NARRATIVE MAKING AND MEMORY IN MYANMAR

Matt Schissler*, Matthew J. Walton** and Phyu Phyu Thi***

* Department of Anthropology, University of Michigan, Ann Arbor, Michigan, United States

** (corresponding author) St Antony's College, University of Oxford, 62 Woodstock Rd. Oxford OX2 6JF, United Kingdom
Email: matthew.walton@sant.ox.ac.uk

*** Myanmar ICT for Development Organization, Yangon, Myanmar

Abstract
Myanmar has been the site of serious violence between Buddhist and Muslim communities. This article presents findings from a research project convened to better understand the production of this violence. Based on interviews with 78 residents of six cities, we find a narrative that presents Islam in general and Muslims in Myanmar as an existential threat to "race and religion" and a personal threat to individuals and communities. This narrative is reinforced by three inter-related sets of arguments that refer to international events, events within Myanmar, and personal experiences. Drawing on these findings, we explore the ways in which Muslims in Myanmar are constructed as a "fearsome Other," thus justifying discrimination and violence. However, we also identify alternative narratives that contest the production of violence. These narratives are generated through articulated senses of contradiction between contemporary antagonisms and memories of inter-religious coexistence. We argue that understanding these narratives is one necessary part of much larger efforts to promote peace and reconciliation.

Keywords
Myanmar, Buddhism, Islam, narratives, memory, violence

In recent years, Myanmar has been the site of serious violence between Buddhist and Muslim communities, particularly in Rakhine State, where at least 146,000 persons have been displaced since riots in June 2012 (UNOCHA 2015). This violence has been the subject of international English-language media coverage as well as responses by diplomats and the United Nations (UN), including a closed-door briefing on Myanmar at the Security Council (*Reuters*, May 28, 2015). International attention has tended to focus on the situation for Muslims who seek to be recognised as ethnic Rohingya, periodic riotous violence, and the extreme anti-Muslim rhetoric of some Buddhist leaders. As far

[6] A very small number of Muslims in Rakhine State have been granted citizenship if they identify as "Bengali" and can provide documentation to demonstrate that they meet the requirements defined in Myanmar's 1982 citizenship law. Yet even this population has not been allowed the freedom of movement and other rights that go along with citizenship (see *The Irrawaddy*, June 16, 2015).

[7] In Burmese, *Mye myo ywè lu myo ma pyôk lu myo hma lu myo pyôk mè.* Note that, although *lu myo* can be translated as "nation," "ethnicity" or "people," here we understand it to refer to "nation."

[8] There is no consistent doctrinal position within Myanmar Buddhism regarding the consumption of beef. However, cows are revered by many and, for some Buddhists (and all Hindus), beef is taboo (see *Myanmar Now*, August 3 2015).

[9] Interview subjects are identified by (Sex, Age, Religion, Ethnicity, Location, Date). Designations for religion and ethnicity are presented as stated by the narrators, even where they do not correspond to identifications recognized by the Myanmar government. (For example, many of our interviewees gave their ethnicity as "Myanmar," which is technically a designation of national identity.)

[10] Here the narrator is referring to the fact that many Buddhists in Myanmar traditionally have a shrine in the east their home—the head of the home (*ein gaung yin*); the complaint is that Muslims sleep with their feet pointing to the east, which is felt to be deeply disrespectful by people for whom feet are culturally dirty.

[11] The word *kalar* is controversial. Most contemporary Burmese language dictionaries list the primary definition as "person from South Asia." But the term's etymology is contested, with two primary interpretations. First, that *kalar* is derived from Pali *ku-la*, where *ku* indicates "crossing maritime space" and *la* indicates "to come." Thus foreigners arriving via the ocean were identified as *ku-la*, which would include both foreigners from South Asia as well as Arab traders. Consistent with this is the fact that "kalar" has been used to refer to both people of apparently South Asian descent as well as light skinned foreigners (*kalar phyu,* or "white kalar" as well as *Ingaleit kalar*, or "English kalar") who would also have arrived via the sea. In contrast, foreigners arriving from China or Thailand—both land routes rather than sea—are never referred to as "kalar." A variant of this is that *kalar* in Pali scriptures is used to mean "noble" or "pure," in relation to the Buddha's lineage, originating in present-day India. The second interpretation is that *kalar* is derived from the Sanskrit word for "black," used in both Hindi and Urdu, and was thus adopted to refer to persons with dark skin. For a summary of these debates (Egreteau 2011, 46–48). See also Chakravarti (1971, 11); Desai (1954, 37–38); Taylor (2015, 4). Etymological controversies aside, while many feel that the term is not intrinsically pejorative others feel that current usage is and strongly so. Dr Maung Zarni, for example, uses the American English word "n---er" as a translation that emphasises the negative rhetorical force of the word and while the appropriateness of such a choice might be debated it is consistent with other scholarship that has drawn comparisons between racial politics in the United States and dynamics between Burman and non-Burmans in Myanmar (See Walton 2013). One Muslim narrator in Mawlamyine, meanwhile, offered the following reflection on being referred to as "kalar": "Since I was studying… if you're small, they'd call you *kalar lay* ('small kalar'), if you're strong and big, you'd be called

kalar gyi (‘big kalar’). There weren’t many Muslims at my school, only a couple Muslims in one class. We had some good [non-Muslim] friends but there were also naughty ones, however there was nothing like being badly discriminated or something. I still felt something when I was called ‘*kalar*’. But I can understand them because it’s a habit for them, calling us ‘*kalar*.’ However, they don’t know how we feel” (Man, 34, Muslim, “Pathi,” March 2015, Mawlamyine).

[12] In this case, the “they” she refers to throughout the interview she defines as “Bengalis,” which is the way many in Rakhine—and across Myanmar—refer to people who are seeking to be recognised as Rohingya. This is also the terminology used by state officials, who have steadfastly maintained that those seeking recognition as Rohingya are illegal immigrants from Bangladesh.

[13] In 1938, for example, riots in Rangoon and across lower and middle Burma left at least 1,284 dead or injured, many of who were Muslim (Government of Burma 1939, 281). In a passage that could describe contemporary Myanmar, Smith (1965, 110).described a scene at Shwedagon Pagoda before the riots: “Over 10,000 people, including 1,500 monks, passed a resolution demanding that the author [of a book insulting Buddhism] be punished, warning that if the government should fail to take necessary action ‘steps will be taken to treat Muslims at enemy No. 1 who insult the Buddhist community and their religion, and to bring about the extermination of the Muslims and the extinction of their religion and language’.”

[14] Published under the name *Disappearance of the Race is a Thing to Fear (A-myo pyauk hma so kyauk saya)*, this booklet (sometimes broken into a series of smaller volumes)

Annex 231

Nick Cheesman, 'How in Myanmar "National Races" Came to Surpass Citizenship and Exclude Rohingya' (2017) 47(3) Journal of Contemporary Asia 461



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How in Myanmar "National Races" Came to Surpass Citizenship and Exclude Rohingya

Nick Cheesman

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These cards are, as their name suggests, clearly intended under paragraph 13 of the 1951 Union Residents Registration Rules only as interim documentation. They were never intended as alternative documents for non-citizens; in that case, the person should be issued with a certificate under the Registration of Foreigners Rules, 1948. Nevertheless, white cards were, from the early 1990s, treated as proxy permanent identification documents for some 700,000 people to whom they were issued (UNHRC 2011, 12).[16]

Thus, the process of rendering stateless hundreds of thousands hitherto identified or self-identifying as Rohingya but now officially designated "Bengali" was not *de jure* but *de facto*. It was not achieved by complying with the terms of the Citizenship Law per se, even though the law's contents were in their general intentions inimical to the interests of this population, but through their deliberate breach and selective application.

Because *taingyintha* identity had surpassed citizenship to become the gold standard for membership in the political community "Myanmar," the place of people belonging to non-national-race groups would remain precarious. Meanwhile, those people excluded juridically from Myanmar but living within its territory now had to find a way back in to the political community. And the only way available to them politically, as a collectivity, is to submit to the politics of domination inherent in the national races project, and insist that they too are *taingyintha*. This is exactly what Rohingya advocates have done, causing them to become the targets of much anger from the members of other communities.

Reproducing the Truth Regime

In mid-2012 then-President U Thein Sein told the visiting head of the United Nations (UN) High Commission for Refugees that with regard to people who had fled from recent attacks into Bangladesh his government would "take responsibility for our *taingyintha*, but under no circumstances would accept illegally entering non-*taingyintha* 'Rohingya'" (*Weekly Eleven*, July 12, 2012, in Burmese). The following year media reported the then-speaker of the national assembly as saying that any failure to protect *taingyintha* from the exceedingly large Bengali populace in Rakhine State would precipitate the end of Myanmar itself (*Voice Daily*, September 30, 2013). And in 2014 when the UN Secretary General visited the country and called on the government to "ensure humanitarian access to Rohingya living in vulnerable conditions" he met with an outcry (*Irrawaddy*, November 13, 2014). An organiser of one of many public gatherings to condemn the UN chief for his use of the term "Rohingya" mapped national-race politics back onto the call for humanitarianism:

> In referring to Rohingya, who are not Myanmar *taingyintha*, Ban Ki-Moon has created an opening [for people to come from Bangladesh]. If we say that there are Rohingya, can we just accept anyone from over there who comes calling themselves Rohingya? In reality, they are not genuine *taingyintha* (*Tomorrow*, December 2, 2014, in Burmese).

While the Secretary General was struggling to respond sensibly to so much offence caused by saying so little, for those working according to the pervasive logic of the *taingyintha* truth regime, the reason for indignation was obvious. By this time, national-race identity was functioning to represent the integrity of the nation and exclude interlopers claiming to

be members of the political community "Myanmar." It is for this reason that, as Leider (2014, 221) has observed, the Rohingya claim "to be a separate ethnic group" is more than anything else what has caused such resentment and generated conflict with their counterparts (see also Thawnghmung 2016). Seen from inside the *taingyintha* truth regime, any claim to be Rohingya is not only to insist upon a falsehood, but also to be at once dangerous and illegal: it is an identity that is both politically and juridically unacceptable. Those people who accept that they are "Bengali" are entitled to present their credentials for citizenship on a case-by-case basis. But any assertions of a collective right to political membership by virtue of being *taingyintha* will not be tolerated, not for any logical reason but because according to the truth regime it must be so. The truth regime is self-validating. It does not invite questions about the reasons for inclusion or exclusion, and to ask after its reasons for the inclusion of some groups and exclusion of others would be to mistake happenstance for design.[17]

However, the present-day political imperatives of the national-races truth regime have to be reconciled with its juridical arrangements, which do allow for the possibility that groups who are not yet recognised as national races can become *taingyintha*. Section 4 of the Citizenship Law stipulates that cabinet has the authority to determine whether or not a group constitutes a national race.[18] Furthermore, paragraph 9 of the 1983 procedures recognises that apart from the eight national races listed in the law, "Many other races and ethnic groups that are *taingyintha* remain," hence the need to make determinations on which groups are *taingyintha* and which are not. In sum, people seeking to participate in the political community "Myanmar" are legally encouraged if not compelled to make claims that they too are national races, and the law implies that a process must for the adjudication and administration of such claims.

Consequently, rather than question the ambiguities and inconsistencies inherent in the national-race truth regime, the advocates of marginalised or excluded groups bypass them. Instead of challenging *taingyintha* they embrace the idea, and insist that they too deserve to be recognised as national races (Thawnghmung 2016, 534; see also Cheesman 2015b). They do not oppose the truth regime itself but rather the proposition that Rohingya are "not included in over 100 national races of the Union of Myanmar" (*New Light of Myanmar*, January 30, 2009). By engaging the state on questions of entitlement according to the terms it has itself laid down, rather than critiquing or challenging those terms, they rehearse the state's own logic (Herzfeld 1992, 109). By acquiescing to the national-race truth regime, they recognise that the surpassing symbolic and juridical power of *taingyintha* is at once their problem and their solution.

Rohingya advocates make their claim to be *taingyintha* in two parts: one evidentiary, establishing the existence of "Rohingya," the other typological, situating Rohingya as a category in the national races schema. The first part, aimed at demarcating the Rohingya as a distinctive linguistic and cultural group deserving of a category in the schema, emerged out of political and ideological struggle in the same period that *taingyintha* grew in stature, from the 1930s or 1940s onwards (Leider 2014, 211; Tonkin 2015, 7–10). Like the arrangements that produce and reproduce the national-race idea, the project to establish the category "Rohingya" advances historical claims based on an admixture of readings and interpretations from manuscripts, coins and engravings to rebut those "narrow-minded racists lacking Union Spirit [who] have fabricated allegations that Rohingya nationals are Chittagonian Indians or forest Indians, Bangladeshi foreigners and so on" (NHRDP 1990, n.p.). The project

is not concerned with establishing a claim that people designated "Bengali" have any rightful claim and place in the political community "Myanmar." Rather, the case for Rohingya as *taingyintha* aims to represent them as a distinctive and unique group that does not wish to be confused with the Bengali any more than any of the other national races, and that this discrete group's claim is legitimate (see Leider 2016).

Whatever their status today, Rohingya had been advocating for recognition and making some headway prior to Ne Win's Union Day address in 1964. By 1960, at least six groups were promoting the Rohingya cause (Yegar 1972, 102). The national encyclopedia refers to Rohingya as comprising some 75% of the population in the region bordering then East Pakistan (Burma Translation Society 1964, 90). At least one military publication carried an article sympathetic to the Rohingya agenda for recognition (in NHRDP 1990, 64). And, in 1961 the Deputy Chief of Defence, Brigadier General Aung Gyi told audiences that the government recognised Rohingya as an ethnic group in the union, and was committed to ensuring that they would obtain citizenship as promptly as possible (Aung Gyi 1961a, 1961b; NHRDP 1990, 49–50). He later wrote that the name Rohingya was agreed upon as official usage for the administration of a special frontier region which ran for six years from 1959, observing that as other races in the country that had once been known by one name had in modern times become known by another, no difficulty had arisen with the choice of term (Aung Gyi 1992, 8).

The second part of the claim is in some respects more difficult to establish, because when explicit references were being made to Rohingya in official and public records, the "national races" truth regime had not yet emerged. That Rohingya were not identified specifically as *taingyintha* when the term denoted different ideas from today and was not yet a term of state *par excellence* is not surprising. Nevertheless, it means that advocates of Rohingya claims to be *taingyintha* must work inferentially and establish their credentials consistent with the conditions that attach to being members of the national races in official histories published since. To write history for this purpose of establishing the existence of Rohingya is to rely upon the official history-writing project and the claim that "national races" also exist. It is to engage in a box-ticking exercise: national races have lived in the territory now designated Myanmar anterior to 1823, and so have Rohingya; national races lived together amicably prior to the British invaders' arrival, and so did Rohingya; national races fought together against the imperialists from the time of their incursion until the time of national independence, and Rohingya also laid down their lives for this cause (see Aung Khin 2012; Kyaw Min 2013, 2015; NHRDP 1990).

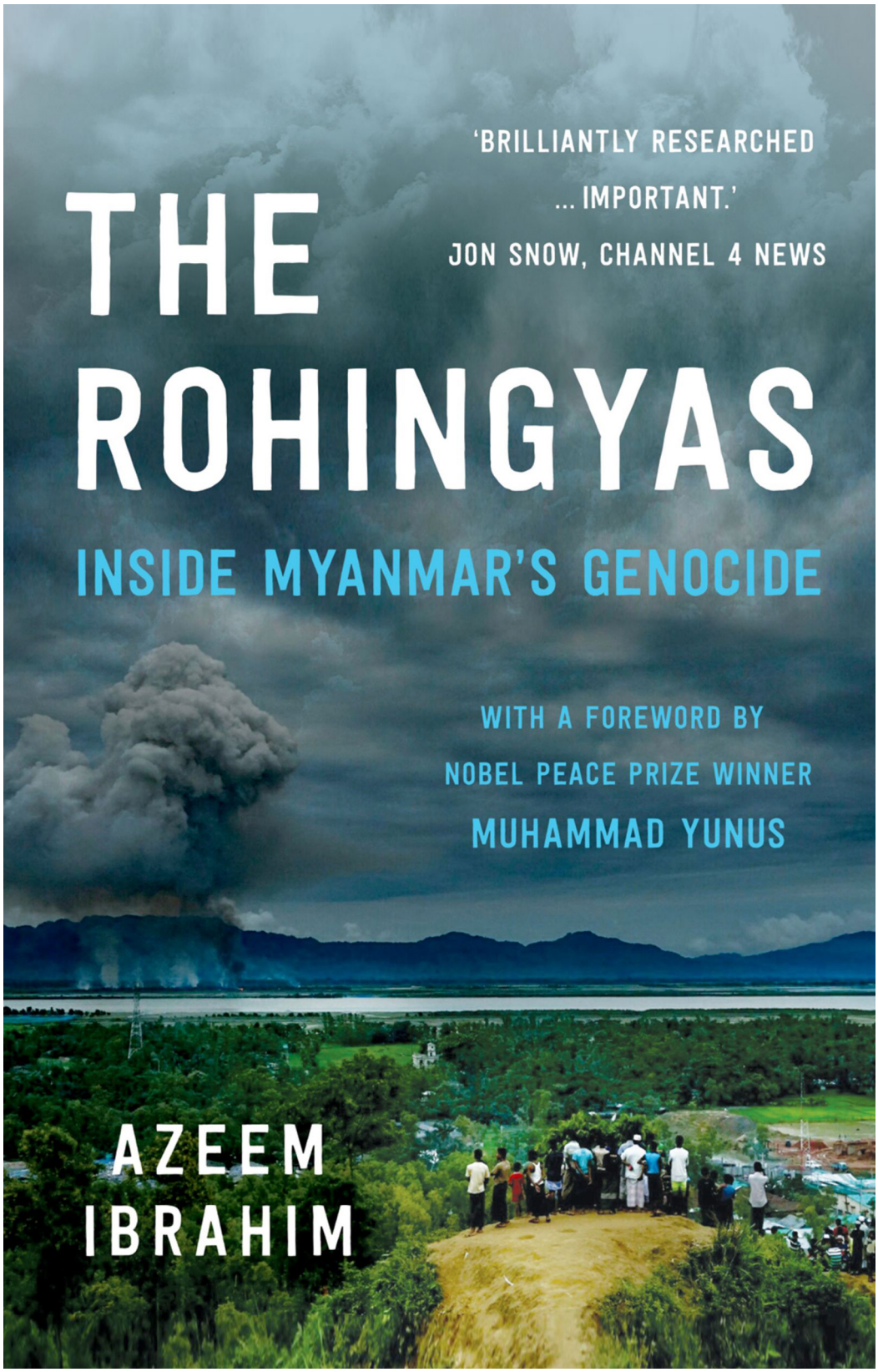
Thus, the alternative history that Rohingya advocates articulate, while being a history told "from within the shadows," is not a counter-history of subjugated knowledge of the sort that Foucault (2003, 70) envisages because although it aims to bring out historical contents that are buried and disqualified and contest some premises of the truth regime, it does not question the premises of the regime itself, or its underlying "truths." Far from releasing anyone from the *taingyintha* truth regime by virtue of their articulations, Rohingya advocates reproduce it.

Conclusion

In his discussion of Myanmar's "citizenship crisis," Holliday (2014, 416) expresses concern at the tendency to focus "largely on the question of whether Rohingya are an indigenous or national minority," urging instead for attention to be directed towards

Annex 232

Azeem Ibrahim, *The Rohingyas, Inside Myanmar's Genocide* (Hurst & Company 2018)


'BRILLIANTLY RESEARCHED
... IMPORTANT.'
JON SNOW, CHANNEL 4 NEWS
THE ROHINGYAS
INSIDE MYANMAR'S GENOCIDE
WITH A FOREWORD BY
NOBEL PEACE PRIZE WINNER
MUHAMMAD YUNUS
AZEEM IBRAHIM

live in their own country—Bangladesh. This argument is widely believed in Myanmar and is one reason why the persecution of the Rohingyas is now so much worse than that of other ethnic minorities. Those groups may have sought to overthrow the state or have a history of armed resistance stretching over forty years but, oddly, there is no doubt that they are entitled to live within the geographical boundaries of the modern state (even if the regime does seek to steal their land and exploit and monopolise its mineral wealth).

What started out primarily as a scapegoating exercise by the military regime has unfortunately been absorbed by the Myanmar public. Discriminatory thinking against the Rohingyas gradually took root more generally, and today it has become deeply engrained. After 1962, the military junta in effect[1] created a new logic whereby only Burman Buddhists could really be loyal citizens (and if not ethnically Burmese then it was even more essential that they were Buddhists). This view has caught on. The Rohingyas, visibly 'alien' in the colour of their skin, in their language, and most of all in their religion, have borne the brunt of this discriminatory mode of thinking, even though they have not, historically, been the only minority ethnic group in Myanmar to suffer at the hands of the military. The approach that the successive military regimes took to build a new sense of nationhood in Burma resulted in a great degree of fear of outsiders, whether they were within or outside Burma's borders, and created a gnawing sense that other ethnic or religious groups form a constant and real threat to the viability of the country.[2]

The argument that the Rohingyas are really Bengali migrants who entered Burma during the period of British rule is widely repeated by Burmese officials in order to claim that the Rohingyas are not really Burmese.[3] Such officials, who quite unselfconsciously echo this colonial-era myth, include Ye Myint Aung, the Burmese envoy in Hong Kong, who described the Rohingyas as being as 'ugly as ogres' and as not sharing the 'fair and soft' skin of other Burmese ethnic groups.[4] Not quite the language one would expect to hear from a diplomat, but a common enough part of the discourse among the extremists and their apologists.[5]

Correcting the historical record

Chapter 1 discusses Burma's pre-1948 history in detail, but it is useful to set out the broad themes here. The first point to stress, and this is critical to any understanding of the Rohingyas' situation, is that until 1784 the histories of Arakan (now called Rakhine) and Burma were largely separate.[6] This matters

importance over time. Buddhism was first recorded from around 500 AD. The Pyu occupied a region that also sat astride an important trade route between India and China and this may have given them access to wealth and exposure to external influences, but it also left them vulnerable to their more powerful neighbours.[11] The Pyu city states eventually fell after being weakened in a series of wars with the Chinese in the ninth century AD, leading to an incursion from Tibet of Burmese tribes taking advantage of ethnic ties and the weakening of the Pyu. The evidence for this period is partial and complicated, but one plausible explanation for this incursion is that the northernmost Pyu cities were already inhabited by people of Burman ethnicity as early as 900 AD.[12] In effect, this was less a process of conquest from Tibet and more one of two closely related groups intermingling as their relative power shifted.

In the ninth century these minor cities coalesced into the Pagan Kingdom,[13] during which time the Burmese peoples spread along the Irrawaddy Valley following the collapse of the Pyu city states. Burmese language and culture absorbed local influences from India and from the Mon in particular, but also derived linguistic and cultural elements from the wider region, from neighbouring states, and traders and settlers.[14]

Arakan

The earliest settlers in Arakan were probably closely related to aboriginal cultures that existed across South East Asia, Indonesia and Australia.[15] However, the earliest settled kingdoms that left an archaeological record were Indo–Aryan groups who arrived from the Ganges Valley as early as 3000 BC.[16] At the time of their arrival, minorities such as the Mru, Sak, Kumi and other Chin ethnic groups were already living in the region[17] and continued to do so in the remote hilly regions.

The nineteenth-century British historian H.H. Wilson suggested that the dominant culture in Arakan was Indian up to the tenth century AD, and that only then did growing interaction with Burmese culture begin.[18] Pamela Gutman[19] follows Wilson in arguing that the only way to understand the history of Arakan up to this point is to see it as a region of India rather than part of the Burmese world. In particular, the high coastal mountains and difficult terrain made overland interaction with the rest of contemporary Myanmar much harder than forging links across the Bay of Bengal.

Gutman suggests that whoever was in Arakan before the ninth century AD had ethnic links to Indian groups, rather than to groups in what is today

Myanmar. The Rohingyas, whose language is Indo–Aryan,[20] from the Bengali–Assamese branch, may well descend from these pre-ninth-century inhabitants of the region, whereas the Rakhine did not arrive until the ninth century. The Indo–Aryan roots of the Rohingyas are manifested in inscriptions from the Hindu temples at Anandra Chandra (eighth century AD), which display close similarities to similar inscriptions and buildings in India.[21]

The earliest rulers of Arakan were mostly Hindus,[22] reflecting the links to India. However, Islam arrived in the seventh century via trading links to India and Arabia, but the region remained multi-confessional, with Hindus, Buddhists and Muslims living together.[23] Under these influences, the Rohingyas' language evolved from its early roots with the adoption of Arabic and Persian words, and the script adapted to more closely resemble that of Bengali. Equally, as an ethnic group, the Rohingyas absorbed Arab and Persian elements in the period up to 1000 AD. Later, the close links with Bengal meant absorbing both Bengali and Mughal ethnic influences as part of the regular interaction with northern India.

As Burmese power consolidated in the central Irrawaddy region, the degree of interaction between Arakan and the Burmese kingdoms increased. The Rakhine ethnic group crossed the Arakan Mountains and settled in the region in around 1000 AD, and this was followed by a period of relative domination of the region by the Burmese Pagan Kingdom. In effect, from 1000 AD Arakan came to interact as much with the rest of Burma as it did with Bengal and northern India.

From 1000 to 1824

Burma

Burman ethnic groups steadily gained more influence in central Burma, and by 1100 they had conquered the Mon. This led to emergence of the powerful Burmese Pagan Kingdom[24] and this was probably the first largely ethnic-Burman state in Myanmar. As a consequence, many later rulers have sought to trace their lineage to this era, so as to claim legitimacy in ruling over the whole of Burma. Even the military regimes of the past sixty years have been very keen to stress the importance of this period, and have invested substantially in rebuilding pagodas that dated from the Pagan era.[25]

The Pagan Kingdom unified the areas previously divided between the Mon and Pyu under the first king of the dynasty, Anawrahta (1044–77 AD). The new regime adopted Theravada Buddhism as the state religion, built a

the Pagan Kingdom fragmented,[40] Arakan regained its independence and engaged in almost six centuries of war, dispute and trade with its neighbours in both Burma and Bengal. From the thirteenth to the end of the seventeenth centuries there were periods of Burmese dominance, periods when Arakan was independent and even brief periods when the regional kings conquered sections of modern-day Bangladesh.

During this time the Mrauk-U dynasty ruled Arakan, presiding over a multi-ethnic mix of the various Chin ethnic groups (Mru, Sak, Kumi), the Rohingyas and Rakhine, and a multi-religious mix of Hindu, Muslim and Buddhist beliefs. Islam was already significant in the region and during the Mrauk-U dynasty it became dominant among the descendants of the earlier Indo–Aryan settlers (that is, it seems, the Rohingyas), even as the Rakhine retained their Buddhist identity.

The court increasingly looked to Bengal and India, and most rulers of the dynasty were Muslims. Many court officials were recruited from northern India. Equally, many mercenaries from Muslim regions served either in the local army or in those of its Bengali rivals. The Muslim group now known as the Kamans arrived in the 1660s as mercenaries recruited from Afghanistan. After their military power was broken they adopted a local dialect and are now, unlike the Rohingyas, one of the accepted ethnic groups within Myanmar. However, it seems likely that the Rohingyas were an important part of the ethnic mix of Arakan in this era. Nineteenth-century British reports make reference to how the local Muslims called themselves 'Rovingaw' or 'Rooinga' (see Appendix 1, which reproduces the title page of one such work).[41] More importantly, as early as 1799 Francis Buchanan made reference to 'Rooinga' in the area.

Buchanan suggested in 1799 that the natives of Arakan were either 'Yakein' or 'Rooinga' and he indicates there are two main communities. One is the 'Mohammedans who have long settled in Arakan and who call themselves Rooinga, or natives of Arakan'.[42] The other are the 'Rakhing ... who adhere to the tenets of Buddha'.[43] He also notes that due to fewer external interactions the Rakhing 'language is consequently purer than that of the Burmeses, who sustained several revolutions'.[44] This strongly suggests that after the arrival of the Rakhine in Arakan around 1000 AD the ethnic mix of the province remained static with relatively little interaction with the outside world. In turn, the *Classical Journal* of 1811 has a comparative list of numbers in many East and Central Asian languages and identifies three languages spoken in the 'Burmah Empire', including a direct reference to 'Rooinga':

2. Languages of Burma, 1811 (*Classical Journal*, 'Numbers in 200 Tongues', No. 535, London: 1811, p. 107)

Three in the Burmah Empire.

Rooinga	*????*	*Banga*	*Myanman or Burmah*	*A few Chrisitans in Siam or Taimay*	*Taiyay*	*Tailong*
1 awg	aik	ak	teet	noong	noo	aning
2 doo	doo	de	hueet	so	sang	sonng
3 teen	teen	teen	thoum	sam	sam	sam
4 tchair	tsar	sa-ree	lay	see	shee	shee
5 pan-so-ee	paus	pas	ngaw	haw	haaw	haw
6 saw	tso	tsoe	kiouk	hoc	hook	hook
7 sat	sat	hat	kuhneet	kyaet	sayt	seet
8 aw-ton	as-to	awt	sheet	payt	payt	paet
9 no-naw	no	no	ko	ka-wo	kaw	kau
10 dus-so-a	dos	dos	tazay	seet	sheet	ship
20						
100						

An 1815 German compendium of languages of the wider region by J.S. Vateri also mentions the existence of the Rohingyas as an ethnic group (in this case spelt as 'Ruinga') with a distinct language.[45]

Thus there is plentiful evidence for the existence of the Rohingyas in Arakan by the early nineteenth century in a sequence of works published at the time. None of these sources had any partial political interest in the ethnic makeup of the region: none of them had any reason to invent the existence of a group such as the Rohingyas any more than they had an interest in suppressing such groups, and all clearly point to the fact that there was a major ethnic group in the region with a distinct language at the time, clearly identifiable as the Rohingyas. Notably, all three (Buchanan, Vateri and the *Classical Journal*) were produced during the brief period of Burmese control between 1784 and 1824, a time when other evidence points to an outflow of Muslims fleeing persecution.[46]

By the late eighteenth century, the Konbaung Dynasty of the central Burmese Kingdom had been strengthened by success in its wars with Siam.[47] Taking advantage of the weakness of the Bengali kingdom, it expanded into Arakan. One motivation for the Burmese attack was to ensure the Buddhist purity of Arakan and to reduce what were seen as dangerous ties to Islamic states to the west. In reality, the conquest created major tensions with British India.[48]

Annex 233

Clara Sandoval, 'The Legal Standing and Significance of the Basic Principles and Guidelines on the Right to a Remedy and Reparation' (2018) 78 ZaöRV 565

The Legal Standing and Significance of the Basic Principles and Guidelines on the Right to a Remedy and Reparation

Clara Sandoval[*]

I. Introduction

The Basic Principles were adopted by the General Assembly in 2005 without a vote,[1] after fourteen years of work by *Theo van Boven*, *Cherif Bassiouni*, various States, Intergovernmental Organizations (IGOs) and Non-Governmental Organizations (NGOs). When they were finally adopted, they evolved from being about three key forms of reparation (restitution, compensation and rehabilitation) to 13 Principles and Guidelines of a more general and comprehensive nature dealing with the right to a remedy and reparation for gross human rights violations and for serious violations of international humanitarian law.

I consider the Basic Principles to be a pivotal instrument that has changed, in various ways, the landscape of reparation for victims of gross human rights violations and serious violations of humanitarian law.

II. Are They Legally Binding?

The preamble of the Basic Principles clearly states that they

> "do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law".[2]

However, a closer look at the Basic Principles invites reflection on their status under international law.

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[*] Professor of Law at the Law School/Human Rights Centre at the University of Essex and Director of the Essex Transitional Justice Network.

[1] UN General Assembly, 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, Resolution 60/147, 16.12.2005.

[2] Basic Principles … (note 1).

ZaöRV 78 (2018), 565-568

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I would argue that any discussion about whether the Basic Principles reflect current international law should not take place in general terms. Various principles are included in the document, some of them developed with great detail, which would need to be studied, one by one, to arrive at a conclusion about their legal status. Further, it will also be necessary to consider whether the scope of certain standards drawn by the Basic Principles really matches their scope under international law. Therefore, two distinctive pieces of work are needed: one looking at the legal status of each principle and the other considering their scope. Discussion on these issues is far from settled and they constitute areas where academic work can shed light.

The Basic Principles also reflect an important consensus between relevant stakeholders including States. They began as the work carried out by two experts (*van Boven* and *Bassiouni*) with the input from civil society organisations. However, particularly during the last five years of negotiations, States' views became increasingly influential under the Chilean leadership. Even Germany, which contested the legal standing of the right to reparation, participated during the drafting process and made explicit its views. Furthermore, the point of departure for the drafting process was "existing international human rights norms on compensation and judgements by courts, decisions and views of international human rights organs and bodies".[3] The fact that States were involved in the drafting process could be indicative of the legal nature of some principles but also of emerging international law on reparation.

Equally, it can hardly be contested that some of the principles incorporated in the document are legally binding under international law. So is the case of the right to an effective remedy that is contained in all relevant international human rights treaties as well as the principle related to the recognition of different forms of reparation. Questions can be asked, for example, in relation to whether there is a right to reparation under humanitarian law, a field of law that has not evolved at the same pace as international human rights law despite all the pressing needs of those affected by or involved in armed conflict (including in non-international ones).

III. Why Are the Basic Principles Significant?

The Basic Principles have made a significant contribution to the right to a remedy and reparation of victims of gross human rights violations and seri-

[3] Sub-Commission on Prevention of Discrimination and Protection of Minorities, Res. 1989/13, E/CN.4/Sub.2/1989/58, 13.8.1989, 3.

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ous violations of humanitarian law even if their binding nature can be disputed. Let me offer some reasons. First, they marked the culmination of an important stage in the evolution of the right to reparation as they served as the catalyst that brought together the views of victims, civil society, the United Nations (UN), regional organisations and States that were being expressed in different places: from countries undergoing transitions to international tribunals dealing with international crimes or with human rights violations. They brought that momentum together into one single document.

Second, they put together a comprehensive understanding of the right to a remedy and reparation by distinguishing the procedural (remedy part) and substantive (forms of reparation) dimensions they involve. This simple distinction has provided important tools for stakeholders to advocate more coherently for these rights in front of States and other relevant bodies.

Third, the Basic Principles have also helped to understand who can claim to be a victim, as well as to understand that while human rights law might be a branch of public international law, the nature of the harm suffered by victims requires the recognition of forms of reparation that are not adequate to redress States for breaches of international obligations as is the case of rehabilitation.

Fourth, the Basic Principles have triggered behaviour according to their standards – even if their binding nature can be disputed. They have generated new behaviour on remedy and reparation, including State behaviour that has triggered norm creation at the domestic or international level as well as greater awareness about these rights beyond those directly affected by the violations. Consider for example its impact in the incorporation of the right to reparation in Art. 26 of the UN Convention for the Protection of All Persons from Enforced Disappearances (2006), or during the discussions at the International Criminal Court of the principles on reparation in the *Lubanga* Case.[4] Also, the Basic Principles have helped treaty-monitoring bodies to engage with reparation as part of their mandates as illustrated by the Committee against Torture and its General Comment on reparation and rehabilitation.[5] The impact of the Basic Principles has also been felt in various countries and across State institutions – take a look for example at various countries around the world undergoing processes of transi-

[4] See for example, ICC, Trial Chamber I, *Situation in the Democratic Republic of the Congo, in the case of The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 7.8.2012, paras. 21, 27, 85, 185.

[5] The only footnote in General Comment 3 is the one to the Basic Principles. Committee against Torture, General Comment N. 3, Implementation of Article 14 by States parties, CAT/C/GC/3, 19.11.2012.

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tion such as Sierra Leone (in particular the report of its truth commission)[6] or the Colombian Domestic Reparation Programme (Victims and Land Restitution Law as well as the decisions of the Colombian Constitutional Court).[7]

IV. Conclusions

The Basic Principles mark a key moment in the evolution of the right to a remedy and reparation. Their attempt to reflect existing international law and incorporate a victim-friendly approach is welcome. They might not be the last word on the subject. Indeed, despite their comprehensive approach, they include gaps (as in relation to collective reparation or the role of non-state actors). Yet, they changed the language of engagement on these issues by providing clarity about the right to a remedy and reparation, and about how to best articulate them. They have certainly generated a new dynamic that has brought about new cases, international standards, emerging standards and important behaviour advocating for these rights in and outside courts, and more importantly, they have had a significant impact on the way victims experience their claims for redress and ultimately, reparation.

[6] It is significant that the Basic Principles were used by the Truth and Reconciliation Commission (TRC) to support its views when they were still a draft. Sierra Leone, Truth and Reconciliation Commission, Final Report, Chap. 4, paras. 16-21 in particular, November 2004, available at: <http://www.sierraleonetrc.org>.

[7] Ley de Victimas y Restitucion de tierras, Ley 1448/2011, and Constitutional Court, C-330/16, Magistrate: Maria Victoria Calle Correa, 23.6.2016, paras. 54.2 and 58.

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Annex 234

Guénaël Mettraux, *International Crimes: Law and Practice, Volume 1: Genocide* (OUP 2019)

Oxford Public International Law

9 Establishing Genocidal Intent

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Guénaël Mettraux

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(p. 223) 9 Establishing Genocidal Intent

9.1 Evidential Challenges

Lon Fuller pointed out that 'if intention is a fact, it is a private fact inferred from outward manifestations'.[1] External manifestations of intent might be particularly rare and hard to detect in a criminal context where those concerned have an interest in keeping their acts and their intentions shielded from view.[2] 'This is the reason why', the *Akayesu* Trial Chamber found, 'in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact'.[3]

The evidential challenge generally involved in establishing an accused's intent is accentuated in the case of genocide by a number of factors specific to that offence. First, the requisite genocidal intent is eminently specific and evidentially demanding. It requires proof of three discrete sub-elements: an intent, to destroy, a group as such. In effect, these three elements imply not *one* level of special intent, but *two*—one in regards to the ultimate target of his action, the group, and one in regards to the intended fate of the group, that is, its physical or biological destruction.[4] This double level of special intent itself comes in addition to the necessary 'general intent' that the accused must have possessed to commit the underlying act which forms the basis of the charges.[5]

Second, an intent to destroy a group of human beings is rarely publicized and is often dissimulated by the perpetrators. In such cases, the culpable intent will have to be inferred from what might have trickled from the words and actions of the accused (p. 224) and others involved in the commission of the crime.[6] The available evidential indicators will often offer a variety of possible narratives, some of which might be criminal but not necessarily genocidal. These narratives will have to be reduced to a single one that dispels any ambiguity regarding the state of mind of the accused and leaves no reasonable doubt about his intentions.[7] This challenging exercise has been well summarized by a Judge of the Yugoslav Tribunal:

> Proving intent, in particular intent to destroy a part of a protected group, is difficult. Evidence of utterances of the physical perpetrators suggesting such intent is rare. There is an inherent and complex evidentiary issue with regard to establishing the intent vis-à-vis the fate of the group as such, where the physical perpetrators act in a limited geographic area and at a relatively low level of hierarchy and responsibility. As is often the case when analysing *mens rea*, the mental state of the physical perpetrators must be determined based on inferences from their acts and omissions. In this respect, it is insufficient to rely on the fact that the physical perpetrators committed murder, extermination, or persecution. The acts as established by the Trial Chamber were horrendous, widespread, and systematic. However, the only question here is whether the only reasonable inference to be drawn from their acts and omissions is that the physical perpetrators intended to physically or biologically destroy a part of the protected group as such.[8]

9.2 Standard of Proof and Drawing of Inferences

In the absence of direct evidence of genocidal intent, the special intent of the accused may be circumstantially inferred from his actions and words.[9] However, because of (p. 225) the

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presumption of innocence, an inference based on circumstantial evidence must be the only reasonable inference that can be drawn from the evidence.[10]

(p. 226) 9.3 Holistic Approach to Assessment of Evidence

9.3.1 Evidence to be considered as a whole and in context

To evaluate whether the accused possessed the requisite *mens rea*, the court must consider the overall factual picture within the context in which the accused's acts occurred, rather than each individual incident or alleged genocidal act.[11] Said differently, when assessing the evidence of genocidal intent, one should consider whether 'all of the evidence, taken together, demonstrates a genocidal mental state', instead of considering whether the accused intended to destroy a protected group through each of the separate relevant acts that form the basis of the charge.[12] This assessment will require the court to consider the acts and words of the accused, not in isolation, but (p. 227) within the context of the overall criminal picture to which they belong or with which they are associated.[13]

9.3.2 Nature and quality of the evidence

What evidence may be relevant to establishing the accused's genocidal intent will vary from case to case. The law of genocide does not limit the kind of evidence that could be relevant to that determination, although practice has now identified certain categories of evidence that are *a priori* relevant to establishing such intent.[14] In particular, a finding that the accused possessed the requisite genocidal intent may, in principle, be established by evidence of what occurred either before, during, or after the commission of the crime relevant to the charges.[15] It might be based on evidence of various degrees of reliability, but the totality of the evidence must in all cases meet the (p. 228) requisite standard of proof. That the accused did not possess the same level of information about a genocidal venture than his fellow participants would thus not exclude a finding that he possessed the requisite *mens rea* if this can otherwise be established from the totality of the evidence.[16]

9.3.3 Genocidal intent and reasoned opinion

When fulfilling its obligation to render a reasoned opinion in relation to charges involving allegations of genocide, a court must be mindful of the critical nature of its finding regarding the requirement of genocidal intent. Thus, the court is expected to ensure that it makes clear and detailed findings in relation to that 'touchstone issue'.[17]

9.4 Basis for Inference and Relevant Evidential Factors

9.4.1 General considerations

Where the accused is allegedly responsible for genocide, the prosecution must show that the accused possessed the requisite genocidal intent when he committed the underlying conduct relevant to the charges.[18] A number of factors have been identified that are *a priori* relevant to—albeit not necessarily *conclusive* of—the question of whether an accused possessed the necessary genocidal intent.[19] These factors include the following:(p. 229)

(p. 230)

- deeds and utterances of the person to whom genocidal intent is attributed; [20]
- the general context in which the acts were carried out; [21]
- the accused/perpetrator's personal circumstances, education, and position; [22]
- the accused's physical presence at relevant locations, in particular the crime scene;
- evidence of acquiescence with criminal acts;

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- statements or acts inciting or encouraging the commission of crimes; [23]
- evidence of national, racial, religious, or ethnic bias or prejudice;
- evidence of personal involvement in relation to certain actions central to the commission of the crimes; [24]

(p. 231) • the perpetration of other culpable acts systematically directed against the same group; [25]

- the scale and nature of the atrocities, including their general occurrence in a region or a country; [26]
- proof of the accused's state of mind with respect to the commission of the underlying acts; [27]
- knowledge of other people's genocidal intent; [28]
- the repetition of violent and discriminatory acts directed at the relevant community of individuals; [29]
- attacks on religious and cultural objects and symbols; [30]
- acts of deportation and forcible transfer of members of the targeted community; [31]
- subjection of members of the group to inhumane living conditions; [32]

(p. 232) • opportunistic killings; [33]

- the prominence of the targeted individuals within their community; [34]
- a 'pattern of purposeful action'; [35]

(p. 233) • the systematic targeting of victims on account of their membership of a particular group and *modus operandi*; [36]

- the fact that members of other groups were spared; [37]
- the existence and repetition of discriminatory acts and practices;
- the number of people killed in absolute terms and relative to the overall size of the group; [38]
- an awareness of incidents of mass killings; [39]
- the means and methods used to carry out the crimes, in particular, the systematic and organized manner in which it was carried out; [40]
- the methodical planning that went into the crimes and their implementation; [41]
- the type and number of weapons employed to commit the crimes; [42]

(p. 234) • the extent of bodily injuries caused; [43]

- the use of derogatory language towards members of the group; [44]
- the targeting of property belonging to members of the group; [45]
- the area in which the perpetrator was active; [46]
- the fact that the perpetrator may have targeted the same group during the commission of other criminal acts; [47]
- the perpetrator's demonstrated intent to kill his victims; [48]
- the gravity of the act; [49]
- the general political doctrine which gave rise to the acts; [50]

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- the fact that the crimes in question otherwise 'violate the very foundation of the group'; [51]
- statements or utterances by the accused/perpetrator relating to the fate of the group or the victims have used to help establish his criminal state of mind; [52]
- efforts to dissimulate the crimes; [53]

(p. 235) • steps taken to erase the existence of members of the group; [54]

- the systematic detention of members of a group and associated death rate; [55]
- the commission by physical perpetrators of other culpable acts; [56]
- connections between physical perpetrators in terms of time, location, and composition of their group; [57]
- proof of the existence of a plan or policy to commit the crimes; [58]
- the display of genocidal intent through public speeches [59] or at meetings. [60]

Acts which might not qualify as acts of genocide per se because they fail to meet the elements of one of the recognized categories of genocidal crimes could still be relevant as evidence of the specific intent of a perpetrator if these acts provide indications of the perpetrator's state of mind.[61] This could be the case, for instance, of acts of forcible expulsion[62] or attacks on cultural objects.[63]

Other considerations could also be relevant insofar as they might, depending on the circumstances, provide evidence militating *against* a finding of genocidal intent. This category of evidence could include, for instance, the following: evidence of good (p. 236) deeds towards members of the targeted group;[64] selectivity in the killing, which might suggest that considerations other than a genocidal intent determined the scope of victimhood;[65] the crimes committed were neither widespread nor systematic; the crimes charged were not backed by an organization or a system;[66] evidence of a disturbed personality which might explain the conduct of the perpetrator;[67] randomness and contradictory nature of the acts of violence attributable to the accused;[68] indications that the perpetrators had a different intention than the destruction of a group (e.g., the elimination of rebels or political opposition);[69] the fact that the perpetrator(s) made no effort to eradicate surviving members of the group, thereby suggesting an absence of destructive mindset towards the group as such;[70] conditions of life and treatment of victims incompatible with an intent to destroy;[71] humanitarian efforts carried out to assist the concerned population;[72] evidence that the acts were motivated only by goals other than the destruction of a group;[73] absence of sufficient connections or affiliations between the disparate physical perpetrators of different crimes;[74] surrounding facts and circumstances (including the relatively small number of victims from each prohibited act); insufficient evidence to determine the scale of the other culpable acts committed by the same perpetrators;[75] speeches and statements reasonably understood to be propaganda or directed at a military enemy, rather than an expression of a genocidal intent,[76] including speeches and statements reasonably consistent with a desire to separate communities rather than destroy one of them;[77] evidence of an intent which falls short of an intent to destroy (such as an intent to displace or create (p. 237) ethnically homogeneous locations);[78] isolated nature of the acts;[79] and indications that the perpetrators intended to punish rather than destroy members of a group.[80]

The factors listed above are by no means exhaustive. Which factors are ultimately relevant in a particular case will depend on the specifics of that case.[81] The assessment of all relevant circumstances would determine whether the only reasonable inference is that of

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genocidal intent, or not.[82] A number of particularly important factors are considered in more detail in the following.

9.4.2 Evidence of conduct and statements of the accused

The accused's participation in, and contributions to, acts of killing and other forms of abuse or mistreatment of members of a targeted group[83] would provide critical (p. 238) indicia regarding the possible presence of the requisite intent.[84] The accused's role in planning, organizing, or implementing a murder operation or other types of violence against such individuals would be particularly relevant in that context.[85] The number of incidents in which the accused was involved,[86] as well as the continuous nature of his involvement in the commission of crimes against members of a group would also be relevant to such an inference.[87]

(p. 239) However, the mere fact of an accused's involvement in an operation in which acts of genocide were committed would not necessarily be sufficient, on its own, to draw the necessary inference that he possessed the genocidal intent.[88] The scope and nature of his participation, as well as the information that would have been available to him as a result of his role, would be directly relevant to drawing an inference on that point.[89] His position and function in such an operation would also be an important factor.[90]

Proof that the accused had the requisite intent to commit the underlying offence with which he is charged (killing, for example), may also serve as evidence from which to draw 'the further inference that the accused possessed the specific intent to destroy [one of the protected groups]'.[91] In other words, the commission of the *actus reus* of a crime of genocide could be relevant, though not necessarily conclusive, evidence of his having acted with the requisite *dolus*.[92] The two elements of *mens rea*—that attaching (p. 240) to the underlying crime and the genocidal intent—are legally distinct, however, and both must be established in each case in relation to the accused.

Statements and utterances of the accused (in whatever form) might also be relevant.[93] Orders to commit crimes or inciting and encouraging words intended to lead to the commission of crimes would provide relevant evidence of the accused's state of mind.[94] Implied calls to kill members of the targeted group could also constitute evidence of genocidal intent.[95] The accused's use of derogatory language to describe the targeted group or its member might also be relevant evidence of genocidal intent.[96]

(p. 241) Similarly, the presence of the accused at relevant sites, particularly when combined with words or other forms of encouragement, could provide evidence from which the requisite intent could be inferred.[97] However, mere presence at the scene of a crime would not in and of itself necessarily allow for the drawing of such an inference.[98]

Evidence of acts and decisions attributable to the accused could also be relevant insofar as it would contradict the suggestion that he possessed the requisite intent. For instance, evidence of his refusal to carry out criminal orders or to take part in acts of killing could militate against an inference of genocidal intent.[99]

9.4.3 Genocidal intent of third parties

An inference that the accused possessed the requisite genocidal intent will often be based on what he is shown to have known about other people's state of mind.[100] (p. 242) Particularly important in that context is proof that the accused had knowledge that the perpetrators of underlying acts, for which he is allegedly responsible, possessed the requisite genocidal intent.[101] This could be the case, for instance, in relation to subordinates of the accused, individuals above him in the hierarchy,[102] or third parties operating 'horizontally' alongside him.[103] In the context of a single hierarchical structure, such as a military hierarchy, the involvement of individuals who serve at different levels of

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the hierarchy in killing operations could also provide circumstantial evidence of genocidal intent of those involved.[104]

The accused's knowledge of other people's genocidal intent might not be enough in all cases for the court to draw an inference that the accused possessed the requisite intent, although he might have acted alongside perpetrators who possessed that intent.[105] (p. 243) What inference may ultimately be drawn from the accused's knowledge of the acts and state of mind of others will ultimately depend on the nature, extent, and detail of what he knew and what he personally did.[106] In every case, however, the special intent must be established in relation to the accused or perpetrator of the crime.[107]

9.4.4 Motives and inference of special intent

Proof that the accused acted pursuant to certain motives may, in some circumstances, be relevant to drawing inferences regarding his intentions.[108] Thus, for instance, proof of racist motivations or his support for an extremist political agenda may support a finding (p. 244) that the accused possessed the requisite genocidal intent if it can be shown that these motivations are consistent with or indicative of the accused's genocidal intent.[109] In contrast, motives or, rather, an explanation for why the accused may have acted in a particular way, could rebut the suggestion that he possessed the requisite *dolus specialis*.[110] In all cases, however, the fact that the accused may have had certain reasons to commit a crime is not in itself conclusive of his having had the required *mens rea*.[111] Conversely, the fact that the accused may have had particular motives unrelated to a genocidal enterprise, such as a desire to avenge some old family feud or to eliminate political or military resistance,[112] does not necessarily negate the presence of such intent.[113]

(p. 245) 9.4.5 Method used

The method by which the crime is carried out is not, in principle, determinative of the question of whether genocide has been committed or whether the perpetrator acted with genocidal intent.[114] The fact, for instance, that a perpetrator did not choose the most efficient of means to carry out his deeds is not dispositive of the question of whether he acted with genocidal intent.[115] Even where the method selected proves incapable of implementing the perpetrator's goal of group destruction, a court may still find that he acted with that intention.[116] It is the case, however, that certain methods—such as mass killings—might provide strong evidence of the possible presence of such an intent.[117] It should be reiterated that there are a number of ways to seek to physically destroy a group or a part thereof, and even though the killing of members of the group is the most direct way towards achieving that goal, there are other methods which, individually or in combination, could contribute to that result and which may reflect a genocidal intent.[118] This is already reflected in the variety of punishable acts recognized under Article II of the Genocide Convention, which includes not just acts of killing but also other forms of non-lethal violence towards members of the group.[119]

9.4.6 Initial steps in a genocidal process

An intent to destroy a group might not be immediately apparent from the initial steps taken by the perpetrators towards that goal. The adoption of discriminatory laws or discriminatory practices such as the compulsory wearing of identifiable signs might not, at the time, have been clear indications of an intent to destroy a group.[120] When considered in context, however, such acts could provide evidence of just such an intention. Similarly, the creation of inhumane living conditions or the systematic denial (p. 246) of rights on discriminatory grounds to members of a particular group could be indications of the presence of genocidal intent towards this group.[121] To determine the evidential relevance of certain actions for the purpose of inferring the presence of genocidal intent, one must therefore look beyond the immediacy which may exist between a particular conduct and the

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consequences of that conduct upon the targeted group or its members.[122] This state of affairs is now formally acknowledged by the *Elements of Crimes*, which provide that the term 'in the context of' would include 'the initial acts in an emerging pattern'.[123]

Also relevant in this context is the inchoate crime of conspiracy to commit genocide.[124] One of the principal reason for the inclusion of this notion in the Genocide Convention was to provide an important normative tool capable of criminalizing the early stages of a genocidal process.[125]

9.4.7 Other contextual factors

A great many contextual factors could be relevant to establishing the presence of genocidal intent and many have been mentioned earlier. This section will address only a few of these factors.

9.4.7.1 Scale and number of crimes committed

An important contextual factor is the scale, scope, nature, and intensity of the criminality directed at members of a particular group.[126] Proof of widespread criminality (p. 247) aimed at members of a particular group would be relevant to at least two aspects of an accused's *mens rea*.[127] First, large-scale violence directed at members of a given group would weaken an accused's claim that he had no knowledge of the commission of these crimes. Second, this sort of criminal occurrence would almost necessarily reflect a commonality of goals by different actors, which would at least be consistent with the purpose of destroying the group, though not necessarily conclusive. The fact, however, that crimes are committed on a wide scale and that the accused participated in their planning or commission does not necessarily result in the necessary conclusion that the crimes were driven by an intent to destroy a group or that the accused possessed that intent.[128]

Conversely, the small number of members of a particular group who were targeted relative to the size of the group might militate against a finding of genocidal intent.[129] The fact that incidents are few or isolated may also weigh against the suggestion that genocide was intended.[130] One should, however, guard against a suggestion that the limited number of crimes is always and necessarily an indication of the absence of genocidal intent as destruction only needs to be *intended* and genocide can be, and often is, an evolving process where crimes targeting members of a group might increase over time.[131]

(p. 248) 9.4.7.2 Unrealistic goals

That the destructive aim of the perpetrators might have been unrealistic does not necessarily negate the fact that the conduct in question might have been genocidal in character. Rather, that fact would be relevant to establishing whether it was truly carried out with the requisite intent.[132]

9.4.7.3 Attacks on cultural and religious objects

The Genocide Convention prohibits the intended physical and biological destruction of a group, not attacks on cultural or religious objects or symbols of the group.[133] However, while such actions cannot constitute the underlying acts of genocide, they may, in the circumstances of a given case, be considered evidence of an intent to physically destroy the group.[134] The destruction, for instance, of religious buildings can (p. 249) help demonstrate genocidal intent on the part of those carrying out such acts insofar as this may illustrate the perpetrators' efforts at erasing all traces of its existence.[135] Ultimately, however, it is the intent to destroy the group physically or biologically which must be established so that a mere intent to erase a group's culture or symbols would be insufficient to meet this requirement.

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9.4.7.4 Acts of forcible displacement

Acts of forcible displacement alone are not sufficient to demonstrate an intent to destroy a group but, depending on the circumstances, might provide evidence relevant to establishing such intent.[136]

(p. 250) 9.4.7.5 Discriminatory acts

Evidence of discriminatory acts, which would not themselves be sufficient to constitute the *actus reus* of genocide, may constitute evidence relevant to establishing the presence of genocidal intent.[137] However, discrimination against members of one group, even when implemented through the commission of serious criminal offences, does not necessarily imply that such acts were carried out with genocidal intent.[138] They might, for instance, reflect the existence of an intent to deny rights otherwise guaranteed to others or to enforce discriminatory policies towards members of a particular community.[139] Such acts could amount to persecution.[140] Evidence of discrimination or discriminatory policies is thus not enough on its own to infer an intent to destroy, but it would be relevant, in principle, to establishing the presence of such an intent.

9.4.7.6 Plan or policy to commit crimes

Proof of the existence of a plan or policy underlying the acts is not a necessary legal ingredient of the crime of genocide.[141] Nor will knowledge of such a plan or policy necessarily be sufficient to infer the presence of genocidal intent.[142] Such an awareness will, however, be highly relevant to such an inference.[143]

(p. 251) 9.4.7.7 Commission of genocidal acts

Whilst one must take care not to fall for the temptation of hindsight, the fact that 'a genocide' has taken place in a particular area would be relevant to the inference that the court may be able to draw in relation to the acts of a particular defendant.[144]

9.4.7.8 Mental disorder

That an accused suffered at the time of the events from a mental disorder will not, in principle, negate the possibility that he might have possessed the requisite intent.[145] Thus, in relation to the accused Goran Jelisić, a lowly Bosnian-Serb camp guard whose mental fitness to stand trial had been questioned, the International Criminal Tribunal for the former Yugoslavia (ICTY) took the view that:

> [There is] no *per se* inconsistency between a diagnosis of immature, narcissistic, disturbed personality on which the Trial Chamber relied and the ability to form an intent to destroy a particular protected group. Indeed, as the prosecution point[ed] out, it is the borderline unbalanced personality who is more likely to be drawn to extreme racial and ethnical hatred than the more balanced modulated individual without personality defects.[146]

Jelisić was, nevertheless, acquitted of the charge of genocide because there was insufficient evidence to establish that he possessed the requisite intent.

9.4.7.9 'Good deeds'

The fact that the accused saved or treated certain members of the targeted group humanely will not necessarily negate a finding that he possessed the genocidal *mens rea*, particularly where other reasons might explain his conduct.[147] Similarly, statements of (p. 252) the accused that not *all* members of the targeted group are bad would not necessarily negate a finding that the accused possessed the genocidal intent.[148]

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Genocide might be committed by different individuals with varying degrees of commitment to the overall purpose of destroying another group. It is not necessary to establish that the accused was among the 'hardline' supporters of such a genocidal enterprise.[149] It is sufficient to show that he adhered to the purpose of destroying a particular group and that he contributed thereto.

Finally, the fact that a number of members of the targeted group were spared and exchanged rather than killed does not necessarily negate a finding that acts of genocide were committed against members of their group.[150] Instead, as is apparent, for instance, from both genocidal activities during the Second World War and during the Bosnian conflict, the physical removal of people from a particular geographical area could contribute to the perpetrators' overall intent to destroy the group or the part of a group from that particular geographical area, and thus constitute evidence of the perpetrator's overarching goal of destruction.[151]

Footnotes:

1 Lon L Fuller, *The Morality of Law (Storr's Lectures on Jurisprudence)* (rev edn, Yale University Press 1977) (hereafter Fuller, *Morality of Law*), 72.

2 *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1, Judgment, 1 June 2001 (*Kayishema & Ruzindana* Appeal Judgment), para. 159 ('[E]xplicit manifestations of criminal intent are, for obvious reasons, often rare in the context of criminal trials.').

3 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998 (hereafter *Akayesu* Trial Judgment), para. 523.

4 See, e.g., *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004 (hereafter *Milošević* Decision on Motion for Judgment of Acquittal), para. 119 (footnote omitted) ('[F]or the enumerated acts proscribed in Article 4(2) of the Statute to constitute genocide, it has to be proved that, in addition to the criminal intent accompanying the underlying offence (e.g., killing), the perpetrator also intended to destroy, in whole or in part, a protected group.').

5 For each of the underlying acts charged against an accused—for example, killing or causing serious bodily or mental harm—the prosecution will have to prove the *mens rea* attached to each of the particular underlying crimes charged. See, generally, *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment, 7 June 2001 (hereafter *Bagilishema* Trial Judgment), para. 58; *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999 (*Kayishema & Ruzindana* Trial Judgment), paras 103–104; ICJ *Bosnia-Serbia* 2007 Judgment (n 30) para. 186 (noting that acts of 'killing' must be intentional, as must 'causing serious bodily or mental harm' and that such acts are, in the words of the ILC, 'by their very nature conscious, intentional or volitional acts'). See, also, *supra*, 8.1.

6 See, for instance, *Milošević* Decision on Motion for Judgment of Acquittal (n 4) paras 120–122; *Prosecutor v. Karadžić* Rule 98*bis* Oral Decision, Transcript, 28 June 2012, 28751 (hereafter *Karadžić* Rule 98*bis* Oral Decision):

> In relation to the accused's challenge as to the lack of genocidal intent of the physical perpetrators of the killings in Srebrenica, the Chamber recalls that the specific intent of such perpetrators by its nature is not usually susceptible to direct proof but can be inferred from various factors, including the general context of the case, the numerical size of the atrocities committed, the repetition of destructive

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and discriminatory attacks, or the existence of a plan or policy to commit the underlying offence.

See also *Prosecutor v. Karadžić*, Case No. IT-95-5/18-AR98bis.1, Judgment, 11 July 2013 (hereafter *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal), paras 80–81.

7 For an illustration of the challenge, see generally *Prosecutor v. Stakić*, Case No. IT-97-24-A, Judgment, 22 March 2006 (hereinafter *Stakić* Appeal Judgment), para. 56.

8 *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment, Partially Dissenting Opinion of Judge Alphons Orie, 22 November 2017 (hereafter *Mladić* Trial Judgment, Orie Partial Dissent), para. 5219 (footnote omitted).

9 See, e.g., *Kayishema & Ruzindana* Appeal Judgment (n 2) para. 159 ('[E]xplicit manifestations of criminal intent are, for obvious reasons, often rare in the context of criminal trials. In order to prevent perpetrators from escaping convictions simply because such manifestations are absent, the requisite intent may normally be inferred from relevant facts and circumstances.'); *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgment, 26 May 2003 (hereafter *Rutaganda* Appeal Judgment), paras 525–530; *Prosecutor v. Karadžić & Mladić*, Case No. IT-95-5-R61 & IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence, 11 July 1996 (hereafter *Karadžić & Mladić* Rule 61 Review), paras 94–95; *Prosecutor v. Sikirica et al.*, Case No. IT-95-8-T, Judgment on Defense Motions to Acquit, 3 September 2001 (hereafter *Sikirica et al*. Judgment on Defense Motions to Acquit), paras 61 and 46; *Prosecutor v. Stakić*, Case No. IT-97-24-T, Decision on Rule 98 *bis* Motion for Judgment of Acquittal, 31 October 2002 (hereafter *Stakić* Decision on Rule 98 *bis* Motion for Judgment of Acquittal), para. 17; *Milošević* Decision on Motion for Judgment of Acquittal (n 4) para. 120 ('While it is not impossible to have express evidence of the required intent, most usually the intent will have to be inferred from the evidence.'); *Prosecutor v. Mladić*, Case No. IT-09-92-T, Judgment, 22 November 2017 (hereafter *Mladić* Trial Judgment), para. 3440; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) paras 80 and 88–99 (in relation to the application of these factors in the concrete case); *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Judgment, 10 June 2010 (hereafter *Popović et al.* Trial Judgment), para. 823 (and references cited therein); *Prosecutor v. Popović et al.*, Case No. IT-05-88-A, Judgment, 30 January 2015 (hereinafter *Popović et al.* Appeal Judgment), para. 468; *Prosecutor v. Jelisić*, Case No. IT-95-10-A, Judgment, 5 July 2001 (hereafter *Jelisić* Appeal Judgment), para. 47; *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment, 19 April 2004 (hereafter *Krstić* Appeal Judgment), para. 34; *Hategekimana v. Prosecutor*, Case No. ICTR-00-55B-A, Judgment, 8 May 2012 (hereafter *Hategekimana* Appeal Judgment), para. 133; *Prosecutor v. Tolimir*, Case No. IT-05-88/2-T, Judgment, 12 December 2012 (hereafter *Tolimir* Trial Judgment), para. 745; *Stakić* Appeal Judgment (n 7) para. 55; *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, 25 February 2004 (hereafter *Vasiljević* Appeal Judgment), paras 120 and 128; *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgment, 17 July 2008 (hereafter *Strugar* Appeal Judgment), para. 333; *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, 15 March 2002 (hereafter *Krnojelac* Trial Judgment), para. 83; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, 6 December 1999 (hereafter *Rutaganda* Trial Judgment), paras 63 and 399–400; *Kayishema & Ruzindana* Trial Judgment (n 5) paras 93 and 527; *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003 (hereafter *Semanza* Trial Judgment), para. 313; *Akayesu* Trial Judgment (n 3) paras 478 and 523; *Bagilishema* Trial Judgment (n 5) para. 63; *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentence, 1 December 2003 (hereafter *Kajelijeli* Trial Judgment), paras 804–807 and 819–828; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-T, Judgment and Sentence, 3 December 2003 (hereafter *Nahimana et al.* Trial Judgment), paras 957–969; *Prosecutor v. Ndindabahizi*, Case No. ICTR-01-71-T,

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Judgment and Sentence, 15 July 2004 (hereafter *Ndindabahizi* Trial Judgment), para. 454; *Prosecutor v. Gatete*, Case No. ICTR-00-61-T, Judgment and Sentence, 31 March 2011 (hereafter *Gatete* Trial Judgment), para. 583; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Judgment and Sentence, 18 December 2008 (hereafter *Bagosora et al*. Trial Judgment), para. 2116; *Prosecutor v. Seromba*, Case No. ICTR-01-66-A, Judgment, 12 March 2008 (hereafter *Seromba* Appeal Judgment), para. 176; *Prosecutor v. Seromba*, Case No. ICTR-01-66-T, Judgment, 13 December 2006 (hereafter *Seromba* Trial Judgment), para. 320; *Prosecutor v. Nahimana et al.*, Case No. ICTR-99-52-A, Judgment, 28 November 2007 (hereafter *Nahimana et al.* Appeal Judgment), paras 524–525; *Prosecutor v. Simba*, Case No. ICTR-01-76-A, Judgment, 27 November 2007 (hereafter *Simba* Appeal Judgment), para. 264; *Gacumbitsi v. Prosecutor*, Case No. ICTR-01-64-A, Judgment, 7 July 2006 (hereafter *Gacumbitsi* Appeal Judgment), paras 40–41; *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgment, 20 May 2005 (hereafter *Semanza* Appeal Judgment), paras 262 and 264; *Kayishema & Ruzindana* Appeal Judgment (n 2) paras 147–148 and 159; *Prosecutor v. Rukundo*, Case No. ICTR-01-70-T, Judgment, 27 February 2009 (hereafter *Rukundo* Trial Judgment), para. 557; *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgment and Sentence, 28 April 2005 (hereafter *Muhimana* Trial Judgment), para. 496; *Stakić* Appeal Judgment (n 7) paras 53–57; *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-T, Judgment, 28 September 2011 (hereafter *Munyakazi* Appeal Judgment), para. 142; *Prosecutor v. Al Bashir*, (Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir) [2009] ICC-02/05-01/09-3 (hereafter *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest), paras 153–161 (and references cited therein). See also, UN Security Council, Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) ('Yugoslavia'), UN Doc. S/1994/674, 27 May 1994 (hereafter Final Report on the former Yugoslavia), para. 97.

10 *Prosecutor v. Tolimir*, Case No. IT-05-88/2-A, Judgment, 8 April 2015 (hereafter *Tolimir* Appeal Judgment), para. 601; *Tolimir* Trial Judgment (n 9) paras 745 and 1161; *Prosecutor v. Lukić & Lukić*, Case No. IT-98-32-1-A, Judgment, 4 December 2012 (hereafter *Lukić & Lukić* Appeal Judgment), para. 149; *Jelisić* Appeal Judgment (n 9) paras 47–48; *Munyakazi* Appeal Judgment (n 9) para. 142; *Gacumbitsi* Appeal Judgment (n 9) paras 40–41 ('the inferential approach does not relieve the Prosecution of its burden to prove each element of its case, including genocidal intent, beyond reasonable doubt. Rather, it is simply a different means of satisfying that burden.'); *Kayishema & Ruzindana* Appeal Judgment (n 2) para. 159; *Krstić* Appeal Judgment (n 9) para. 37. For an illustration of that evaluation, see, e.g., *Popović et al*. Appeal Judgment (n 4) paras 525–528. See also *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) paras 158–159 ('[T]he Majority considers that, if the existence of a [Government of Sudan's] genocidal intent is only one of several reasonable conclusions available on the materials provided by the Prosecution, the Prosecution Application in relation to genocide must be rejected as the evidentiary standard provided for in article 58 of the Statute would not have been met.') and 205. The standard of 'beyond reasonable doubt' was later considered inapposite by the Appeals Chamber in relation to the issuance of an arrest warrant. See, generally, *Prosecutor v. Al Bashir* (Judgment on the Appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir') [2010] ICC-02/05-01/09-73 (hereafter *Al Bashir* Warrant Application Appeal Judgment), paras 33–39.

11 See, e.g., *Stakić* Appeal Judgment (n 7) para. 55 ('The Appeals Chamber agrees with the Prosecution that the Trial Chamber's compartmentalised mode of analysis obscured the proper inquiry. Rather than considering separately whether the Appellant intended to destroy the group through each of the genocidal acts specified by Article 4(1)(a), (b), and (c), the Trial Chamber should expressly have considered whether all of the evidence, taken together, demonstrated a genocidal mental state. Nonetheless, it does not appear that the

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Trial Chamber's piecemeal approach had any effect on its conclusion. The reasons it gave with respect to Article 4(1)(b) and (c) simply cross-referenced its analysis of mental state with respect to Article 4(1)(a), in which it concluded that there simply was no evidence in the record (including, for example, the Appellant's statements) that proved that the Appellant sought to destroy the Muslim population. In reaching this conclusion, it must be assumed, the Trial Chamber was obviously aware of its own factual findings, but found them insufficient to establish intent beyond a reasonable doubt.'); *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) paras 56–60, in particular, para. 56 (footnote omitted) ('The Appeals Chamber recalls that, in the context of assessing evidence of genocidal intent, a compartmentalised mode of analysis may obscure the proper inquiry. Rather than considering separately whether an accused intended to destroy a protected group through each of the relevant genocidal acts, a trial chamber should consider whether all of the evidence, taken together, demonstrates a genocidal mental state. Thus, in the context of Rule 98 *bis* of the Rules, a trial chamber must both consider the evidence at its highest and assess all of the evidence as a whole.'). See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) (Judgment of 3 February 2015) [2015] ICJ Rep 3 (hereafter ICJ *Croatia-Serbia* 2015 Judgment), para. 148 ('[T]o state that, "for a pattern of conduct to be accepted as evidence of […] existence [of genocidal intent], it [must] be such that it could only point to the existence of such intent" amounts to saying that, in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question.').

12 *Stakić* Appeal Judgment (n 7) para. 55; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Judgment, 24 March 2016 (hereinafter *Karadžić* Trial Judgment), para. 550. See also *Tolimir* Appeal Judgment (n 10) paras 246–247 (footnotes omitted):

> 247. The Appeals Chamber notes that the Trial Chamber made findings concerning the existence of genocidal intent in this case after assessing 'all of this evidence, taken together', an approach that, according to the Trial Chamber, 'is in line with the fluid concept of intent'. The Trial Chamber thus considered a variety of factors as a whole—including, but not limited to, the circumstances under which the actions constituting the *actus reus* of genocide were carried out—and concluded that the acts of Article 4(2)(a)-(c) of the Statute were perpetrated with the *dolus specialis* required for genocide. This holistic approach is consistent with the Tribunal's jurisprudence. As the Appeals Chamber has recently stated:
>
> in the context of assessing evidence of genocidal intent, a compartmentalised mode of analysis may obscure the proper inquiry. Rather than considering separately whether an accused intended to destroy a protected group through each of the relevant genocidal acts, a trial chamber should consider whether all of the evidence, taken together, demonstrates a genocidal mental state.
>
> Tolimir himself acknowledges that 'it is a good approach to consider whether "all of the evidence, taken together, demonstrated a genocidal mental state".' Since Tolimir fails to show any reason why the Trial Chamber's holistic analysis of the relevant evidence was erroneous or why the Appeals Chamber should depart from its settled case law in that regard, his arguments as to the approach adopted by the Trial Chamber are rejected.

See also *Mladić* Trial Judgment (n 9) para. 3435; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) paras 56 (footnotes omitted) ('The Appeals Chamber recalls that, in the context of assessing evidence of genocidal intent, a compartmentalised mode of analysis may obscure the proper inquiry. Rather than considering separately whether an accused intended to destroy a protected group through each of the relevant genocidal acts, a trial chamber should consider whether all of the evidence, taken together,

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demonstrates a genocidal mental state.') and 59 (referring to the need for a 'holistic analysis' rather than an incident or infraction-by-infraction analysis of the matter); *Stakić* Appeal Judgment (n 7) para. 55; *Popović et al*. Appeal Judgment (n 4) para. 492; *Popović et al*. Trial Judgment (n 10) para. 820 (footnote omitted) ('Whether there was genocidal intent is assessed based on "all of the evidence, taken together".'), and fn 2939 ('The inquiry concerning genocidal intent should not be compartmentalized into separately considering whether there was specific intent to destroy through each of the genocidal acts specified at Article 4(1)(a), (b), and (c).'). See also ICJ *Croatia-Serbia* 2015 Judgment (n 11) para. 419 (stating that the ICJ would examine 'the context in which the acts constituting the *actus reus* of genocide within the meaning of subparagraphs (a) and (b) of [Article II of] the Convention were committed, in order to determine the aim pursued by the authors of those acts').

13 For an illustration, see, e.g., *Prosecutor v. Jević*, No. X-KR-09/823-1, Verdict, 22 August 2012 (hereafter *Jević et al*. Trial Judgment), para. 946 (footnote omitted) ('The Panel concludes that all the killed men, nearly 7000 of them, including all the prisoners killed in the Kravica Farming warehouse (at least 1000 of them) whose killing is the subject of this criminal proceedings, were killed in the same murder operation following the take-over of Srebrenica. Their killing by itself, but also in combination with the transfer of the remaining Srebrenica Muslim population, had a significant impact on that group of Bosnian Muslims as a whole.').

14 See, *infra*, 9.4.

15 See, e.g., *Nahimana et al*. Appeal Judgment (n 9) paras 560–561, 575; *Tolimir* Appeal Judgment (n 10) paras 564–577, in particular, para. 565 ('Tolimir's related actions in the months preceding the Indictment period are clearly relevant and probative to the inquiry into his genocidal intent. In this context, the Appeals Chamber finds that the Trial Chamber did not abuse its discretion by relying on Tolimir's actions prior to the Indictment period to establish his *mens rea* for the crimes committed during that period.'). See also *Tolimir* Appeal Judgment (n 10) para. 569, finding that:

> Insofar as Tolimir suggests that *ex post facto* evidence cannot support an inference of genocidal intent, the Appeals Chamber reiterates that, as a general principle, it is not an error of law to rely on material originating from outside the time period of the Indictment, so long as it has probative value.

16 See, e.g., *Prosecutor v. Kos et al*., No. S1 1 K 003372 10 Krl, Verdict, 15 June 2012 (hereafter *Kos et al*. Trial Judgment), para. 618 ('It is important to note that there is no rule which, in terms of quality, prescribes the required level of knowledge on the part of the Accused during the incriminated time period. In other words, the Defense's argument that the Accused should be exculpated of the perpetrated crime only because they did not have the same level of knowledge about the general plan or policy as their superiors is unacceptable.').

17 See, generally, *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) para. 85 ('[T]he Appeals Chamber considers that, particularly when addressing the touchstone issue of genocidal intent, clearer and more detailed reasoning in the Judgment of Acquittal would have been preferable.').

18 See, *supra*, Chapter 8. For an illustration in the context of a joint criminal charge, see, e.g., *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) para. 82 (footnotes omitted) ('The Appeals Chamber notes that the Trial Chamber's analysis makes one explicit reference to evidence of the genocidal intent of the "physical perpetrators of the crimes". However, the Trial Chamber also expressly considered evidence concerning Karadžić himself and. other alleged JCE members. Moreover, in reaching its conclusions as to genocidal intent, the Trial Chamber did not state that its

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holdings concerned the genocidal intent of the physical perpetrators alone but instead described the absence of evidence of genocidal intent more broadly. In these circumstances, the Appeals Chamber is not persuaded that the Trial Chamber's conclusions on genocidal intent were restricted to the physical perpetrators of the underlying genocidal acts or that it failed to assess Karadžić's genocidal intent and that of other alleged JCE members.').

19 For discussions of these factors in general terms, see, e.g., *Popović et al*. Trial Judgment (n 10) paras 856–863, for an application *in concreto*, in particular, para. 856; *Mladić* Trial Judgment (n 9) paras 3440 and 3457 ('[W]here direct evidence of specific intent is absent, the specific intent may be inferred from the surrounding facts and circumstances which may include: the general context; the perpetration of other culpable acts systematically directed against the same group; the scale of the atrocities committed; the systematic targeting of victims on account of their membership in a particular group; proof of the mental state with respect to the commission of the underlying acts; the repetition of destructive and discriminatory acts; or the existence of a plan or policy.'), and 3456–3536, in particular, paras 3503–3526 (regarding the Chamber's findings in relation to the prosecution's allegation that the specific intent of the perpetrators was revealed both by the concerted attack on the very foundation and fabric of the protected group to prevent it from continued existence in the Count 1 municipalities through the prohibited acts and other culpable acts, as well as by direct evidence of intent found in the statements of Mladić, Karadžić, and other alleged members of the alleged JCE); *Jelisić* Appeal Judgment (n 9) paras 47–48; *Stakić* Appeal Judgment (n 7) para. 55; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) paras 80 and 99; *Karadžić* Rule 98*bis* Oral Decision (n 6) 28768 ('As mentioned earlier, the Chamber notes that in the absence of direct evidence that the physical perpetrators of the crimes alleged to have been committed in the municipalities carried out these crimes with genocidal intent, the Chamber can infer specific intent from a number of factors and circumstances, including the general context of the case, the means available to the perpetrator, the surrounding circumstances, the perpetration of other culpable acts systematically directed against the same group, the numerical scale of atrocities committed, the repetition of destructive and discriminatory acts, the derogatory language targeting the protected group, or the existence of a plan or policy to commit the underlying offence.'); *Popović et al*. Appeal Judgment (n 4) paras 430, 440, and 468; *Tolimir* Appeal Judgment (n 10) paras 246, 248, and 253; *Karadžić* Trial Judgment (n 12) para. 550; *Hategekimana* Appeal Judgment (n 9) paras 133–134; *Krstić* Appeal Judgment (n 9) para. 34; *Prosecutor v. Zigiranyirazo*, Case No. ICTR-01-73-T, Judgment, 18 December 2008 (hereafter *Zigiranyirazo* Trial Judgment), para. 398; *Kayishema & Ruzindana* Appeal Judgment (n 2) para. 159; *Rutaganda* Appeal Judgment (n 9) paras 525 and 528; *Ndindabahizi* Trial Judgment (n 9) para. 454; *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-T, Judgment and Sentence, 6 December 2010, para. 669; *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Judgment, 11 February 2010 (hereafter *Muvunyi* Trial Judgment II), para. 29; *Gatete* Trial Judgment (n 9) para. 583; *Bagosora et al.* Trial Judgment (n 9) para. 2116; *Seromba* Appeal Judgment (n 9) para. 176; *Seromba* Trial Judgment (n 9) para. 320; *Nahimana et al.* Appeal Judgment (n 9) paras 524–525; *Simba* Appeal Judgment (n 9) para. 264; *Gacumbitsi* Appeal Judgment (n 9) paras 40–41; *Semanza* Appeal Judgment (n 9) paras 261–262 (citing *Jelisić* Appeal Judgment (n 9) para. 47); *Kayishema & Ruzindana* Appeal Judgment (n 2) paras 147–148; *Rukundo* Trial Judgment (n 9) para. 557; *Muhimana* Trial Judgment (n 9) par 496; *Prosecutor v. Muvunyi*, Case No. ICTR-00-55A-T, Judgment and Sentence, 12 September 2006 (*Muvunyi* Trial Judgment), para. 480; *Prosecutor v. Ndahimana*, Case No. ICTR-01-68-T, Judgment and Sentence, 30 December 2011, para. 804; *Prosecutor v. Simba*, Case No. ICTR-01-76-T, Judgment and Sentence, 13 December 2005 (hereafter *Simba* Trial Judgment), paras 413 and 415; *Prosecutor v. Karera*, Case No. ICTR-01-74-T, Judgment and Sentence, 7 December 2007 (hereafter *Karera* Trial Judgment), para. 534; *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Judgment, 11 September 2006, para. 8. However, the inference must be the

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only available reasonable inference which can be made from the evidence. *Prosecutor v. Munyakazi*, Case No. ICTR-97-36A-T, Judgment and Sentence, 5 July 2010 (hereafter *Munyakazi* Trial Judgment), para. 494; *Prosecutor v. Nchamihigo*, Case No. ICTR-01-63-T, Judgment and Sentence, 12 November 2008 (hereafter *Nchamihigo* Trial Judgment), paras 331, 333–335; *Prosecutor v. Bizimungu*, Case No. ICTR00-56B-A, Judgment, 30 June 2014 (hereafter *Bizimungu* Appeal Judgment), fn 571; *Popović et al*. Appeal Judgment (n 4) paras 503–505; *Tolimir* Trial Judgment (n 9) para. 745 (and references cited therein); *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgment, 1 September 2004 (hereafter *Brđanin* Trial Judgment), paras 969–971 (taking into consideration four primary factors: the extent of actual destruction and number of victims; evidence of the existence of a genocidal plan or policy; the perpetration and/or repetition of other destructive or discriminatory acts committed as part of the same pattern of conduct; the utterances of the Accused—with the Trial Chamber concluding, on the basis of the evidence presented in this case, that it could not beyond reasonable doubt that genocide was committed in the relevant ARK municipalities, in April to December 1992). See also *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) paras 153–161, in particular, para. 164 (listing the nine evidential factors advanced by the prosecution as being relevant to inferring the requisite genocidal intent) (footnote omitted) ('In the Majority's view, they can be classified into the following categories: i. the alleged existence of a [Government of Sudan—GoS] strategy to deny and conceal the crimes allegedly committed in the Darfur region against the members of the Fur, Masalit and Zaghawa groups; ii. some official statements and public documents, which, according to the Prosecution, provide reasonable grounds to believe in the (pre) existence of a GoS genocidal policy; iii. the nature and extent of the acts of violence committed by GoS forces against the Fur, Masalit, and Zaghawa civilian population.'). See also Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/64, 24 August 2018 (hereafter UN Myanmar Report), paras 85 ('Factors pointing at such intent include the broader oppressive context and hate rhetoric; specific utterances of commanders and direct perpetrators; exclusionary policies, including to alter the demographic composition of Rakhine State; the level of organization indicating a plan for destruction; and the extreme scale and brutality of the violence.'), and 86 (regarding a statement to the effect that the attack on the Rohingya was intended to carry out the 'unfinished job' of 'solv(ing) the long-standing Bengali problem').

20 See, e.g., *Muhimana* Trial Judgment (n 9) para. 496. See also references, *infra*, 9.4.2. See also *Prosecutor v. Al Bashir*, ICC-02/05-01/09-3, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Separate and Partly Dissenting Opinion of Judge Anita Ušacka [2009] ICC-02/05-01/09-3 (hereafter *Al Bashir* Decision on Warrant Application, Ušacka Dissent), para. 37 (and references cited therein).

21 See, e.g., *Prosecutor v. Mitrović*, No. X-KR-05/24-1, First Instance Verdict, 4 February 2009 (hereafter *Mitrović* Trial Judgment) 49–50 (referring as factors relevant to such inference to: (i) the general context of events in which the perpetrator acted; (ii) the perpetrator's knowledge of that context; and (iii) the specific nature of the perpetrator's acts); *Prosecutor v. Trbić*, No. X-KR-07/368, First Instance Verdict, 29 April 2010 (hereafter *Trbić* Trial Judgment), paras 197 ('Evidence of the context of the alleged culpable acts may help to determine the intention of the accused, especially where the intention is not clear from what that person says or does. It is to be noted that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the accused.'), 198, and 202 (for *in concreto* assessment). See also, *infra*, 9.4.7.

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22 See, e.g., *Tolimir* Trial Judgment (n 9) paras 1161, 1172 (finding that the accused possessed the requisite genocidal *mens rea* in consideration of 'the Accused's education, his experience as an officer, his general capabilities especially with respect to his duties and responsibilities stemming from his specific professional position' together with 'the facts that in his position as Chief of the Sector for Intelligence and Security Affairs the Accused had knowledge of the large-scale criminal operations on the ground, that he knew of the genocidal intentions of the JCE members, that he actively contributed to the JCEs to Forcibly Remove and to Murder, that the Accused freely used derogatory and dehumanising language, and that the Accused proposed to destroy groups of fleeing refugees […].'); *Tolimir* Appeal Judgment (n 10) paras 560–562; *Popović et al*. Appeal Judgment (n 4) para. 515; *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) para. 39 (suggesting that 'the Accused's position of power or authority can be relevant to support an inference that an accused not only knew of a genocidal plan, but also that he or she shared the genocidal intent of the members of the plan').

23 See, e.g., *Prosecutor v. Nuon Chea et al.*, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010 (hereafter *Nuon Chea et al.* 2010 Closing Order), paras 1345–1346 (noting that killings of Vietnamese were committed in the context of statements commenting on the objective to physically destroy the group in its entirety).

24 See also, for an illustration in relation to the ICTY accused Beara, *Popović et al*. Trial Judgment (n 10) paras 1310–1318; *Popović et al.* Appeal Judgment (n 9) paras 480 (pointing to Beara's position as well as 'his walk through Bratunac on the night of 13 July, his personal visits to the various execution [sites] and the extensive logistical challenges he faced throughout to support the finding that he had detailed knowledge of the killing operation'), and 490 (referring to the following 'decisive' factors: (i) the scale and scope of the killing operation carried out with Beara's knowledge, pursuant to his instructions and under his supervision; (ii) his extensive and forceful participation in all components of the killing operation; (iii) his demonstrated determination to kill as many Bosnian-Muslims as possible; and (iv) his vital contribution in overcoming hurdles and challenges to effective implementation and also pointing to Beara's 'destructive and discriminatory acts and his words' as evidence of his genocidal intent).

25 *Mladić* Trial Judgment (n 9) para. 3457; *Karadžić* Rule 98*bis* Oral Decision (n 6) 28768; *Tolimir* Appeal Judgment (n 10) paras 246 and 253–254; *Tolimir* Trial Judgment (n 9) para. 748; *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) para. 48.

26 See, e.g., *Popović et al*. Appeal Judgment (n 4) para. 503 (footnote omitted) ('It is clear that the Trial Chamber was aware of the massive scale of crimes being committed, and had recalled that this would be a relevant consideration in determining genocidal intent.'). See also *Trbić* Trial Judgment (n 21) para. 198 ('Intent may be inferred from […] the repetition of destructive and discriminatory acts.'); *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) paras 51–52 (and references cited therein). Regarding the relevance of the number of victims, see also *Nuon Chea et al*. 2010 Closing Order (n 23) paras 1342 ('Although there is no numeric threshold of victims necessary to establish genocide, the evidence from the Case File shows that the portion of the Cham population killed during the acts of destruction targeting the Cham group is strong evidence of the intent to destroy the group, in whole or in part: following the Demographic Expert Report, 36% of the Cham people in Cambodia died during the regime, which is compared to the average rate of Khmer deaths being an estimated 18.7%.'), and 1349.

27 See, e.g., *Nchamihigo* Trial Judgment (n 19) paras 331, 333–335; *Karera* Trial Judgment (n 19) para. 539.

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28 See, *infra*, 9.4.3.

29 See, e.g., *Nuon Chea et al*. 2010 Closing Order (n 23) paras 1341 and 1348 (regarding a campaign of discriminatory/persecutory acts); *Trbić* Trial Judgment (n 21) para. 198; *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) para. 46 (footnotes omitted) ('Additionally, indicia such as (i) the existence of execution lists targeting the protected group; (ii) the dissemination of extremist ideology; and (iii) the screening and selection of victims on the basis of their membership in the protected group may also be relevant to show the formation of intent. Moreover, the existence of a plan or project to create an ethnically homogenous state, along with evidence of an intent to exclude non-members by violence and evidence that the targeted group could not lay claim to any specific territory, has been held to support an inference that the plan contemplates the destruction of the non-member ethnic groups.'), para. 73 (footnotes omitted) ('Various types of evidence support an inference that an intent to destroy the group as such existed. Direct evidence could include statements by the perpetrator implying an intent to destroy, while circumstantial evidence might include, inter alia: (i) evidence of widespread systematic violence against the targeted group; (ii) evidence of a general campaign of persecution against the targeted group; and (iii) evidence of members of the targeted group being separated or classified according to their membership in the targeted group prior to the commission of the crime.'), and paras 74–76.

30 See, e.g., *Nuon Chea et al*. 2010 Closing Order (n 23) para. 1341 ('The CPK Centre directed a country-wide suppression of Cham culture, traditions and language, and forcibly moved Cham communities in an effort to break them up.'); Application of The Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment of 26 February 2007) [2007] ICJ Rep 43 (hereafter ICJ *Bosnia-Serbia* 2007 Judgment), para. 344. See also, *infra*, 9.4.7.3.

31 See, *infra*, 9.4.7.4. See also ICJ *Croatia-Serbia* 2015 Judgment (n 11) paras 162 and 434; ICJ *Bosnia-Serbia* 2007 Judgment (n 30) para. 190; Prosecutor v. Karadžić, Case No. MICT-13-55-A, Judgement, 20 March 2019. (*Karadžić* Appeal Judgment), paras 717ff.

32 *Tolimir* Appeal Judgment (n 10) para. 251 (regarding the inference to be drawn from the denial of a humanitarian corridor). See also *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) pars 178–189 (concerning the issue of hindrance of medical and humanitarian assistance and finding the evidence on that point inconclusive); ICJ *Bosnia-Serbia* 2007 Judgment (n 30) paras 324–328. See also, for an illustration concerning inhuman conditions of detention, *Stakić* Appeal Judgment (n 7) para. 48 (footnotes omitted) ('Moreover, the Trial Chamber's reference to deportation in this paragraph does not suggest that it thought that the only relevant "conditions of life" were the acts of deportation themselves. Indeed, as the Prosecution itself observes, the Trial Chamber's own factual findings elsewhere in the Judgment illustrate that it was well aware of the evidence demonstrating the terrible conditions in the camps and on deportation buses. It can be assumed that the Trial Chamber took this evidence into account when it considered the *mens rea* question, even if it made no specific reference to it. The Prosecution's related argument that this evidence, in combination with the other evidence adduced at trial, required an inference of genocidal intent will be considered in Section F below.').

33 *Tolimir* Appeal Judgment (n 10) para. 249 (footnotes omitted) ('The Appeals Chamber also dismisses Tolimir's argument regarding the Trial Chamber's reliance on opportunistic killings as an indicator of genocidal intent. As Tolimir acknowledges, opportunistic killings may be used to infer such intent on a limited basis—by placing the mass killings in their proper context. This is exactly what the Trial Chamber did, relying on the opportunistic killing of one Bosnian Muslim man on 13 July 1995 as a part of its consideration of the circumstances under which the separation of the men at Potočari occurred on 12 and 13

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July 1995 and the capture of thousands of Bosnian Muslim men from the column on the same day, i.e. 13 July 1995, which it found to be "telling of the intent of the Bosnian Serb Forces". The Appeals Chamber finds no error in this analysis.'); *Tolimir* Trial Judgment (n 9) 329 fn 3131 ('Similarly, the Appeals Chamber has determined that, analysed solely in connection with forcible transfer, "opportunistic killings" by their very nature constitute a very limited basis for inferring genocidal intent.') (citing *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, Judgment, 9 May 2007 (hereafter *Blagojević & Jokić* Appeal Judgment), para. 123).

34 See, e.g. *Tolimir* Appeal Judgment (n 10) paras 261 (footnote omitted) ('[T]he Trial Chamber correctly stated that the prominence of the targeted portion of the protected group is a relevant factor in determining whether the perpetrator intended to destroy at least a substantial part of the protected group. Indeed, as the Trial Chamber held, "genocidal intent may […] consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have on the survival of the group as such".'), 262–63 ('[S]elective targeting of leading figures of a community may amount to genocide and may be indicative of genocidal intent […].' and 'The Appeals Chamber is not persuaded that the commission of genocide through the targeted killings of only the leaders of a group suggests that the leaders of the group are subject to special, stronger protection than the other members of the group, as Tolimir suggests. Recognising that genocide may be committed through the killings of only certain prominent members of the group "selected for the impact that their disappearance would have on the survival of the group as such" aims at ensuring that the protective scope of the crime of genocide encompasses the entire group, not just its leaders.'), and 264 (footnotes omitted) ('For a finding of genocide it suffices that the leaders were "selected for the impact that their disappearance would have on the survival of the group as such". Genocide may be committed even if not all leaders of a group are killed—even though targeting "the totality [of the leadership] per se may be a strong indication of genocide regardless of the actual numbers killed".'); *Tolimir* Trial Judgment (n 9) paras 749 and 777; *Jelisić* Trial Judgment (n 8) paras 82–83; *Sikirica et al*. Judgment on Defense Motions to Acquit (n 9) paras 77 and 84–85; *Krstić* Appeal Judgment (n 9) para. 12 ('If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the ICTY Statute].'). See also, Final Report on the former Yugoslavia (n 9) para. 94 (cited with approval in *Jelisić* Trial Judgment (n 8) para. 82; *Tolimir* Appeal Judgment (n 10) paras 262–263); *Brđanin* Trial Judgment (n 19) para. 703 (footnotes omitted) ('The Trial Chamber further notes that according to the jurisprudence of the Tribunal, the intent to destroy a group may, in principle, be established if the destruction is related to a significant section of the group, such as its leadership. The Appeals Chamber has stated that "[p]roperly understood, this factor is only one of several which may indicate whether the substantiality requirement is satisfied".'). And see, for an illustration, *Tolimir* Appeal Judgment (n 10) paras 265–269.

35 *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, 31 July 2003 (hereafter *Stakić* Trial Judgment), para. 526; *Kayishema & Ruzindana* Trial Judgment (n 5) para. 93. See also, ICJ *Croatia-Serbia* 2015 Judgment (n 11) paras 413 (noting that 'of the 17 factors suggested by Croatia to establish the existence of a pattern of conduct revealing a genocidal intent, the most important are those that concern the scale and allegedly systematic nature of the attacks, the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity, the specific targeting of Croats and the nature, extent and degree of the injuries caused to the Croat population') and 414–418 (for consideration of these factors).

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36 See, e.g., *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) paras 48 (footnotes omitted) ('The general context of the perpetration may also support an inference that the perpetrator had formulated intent. For example, where it is demonstrated that acts of a consistent character have been systematically directed against a protected group, such acts may support an inference that intent has been formulated. Such evidence may include, in particular, evidence of killings perpetrated in a systematic manner, evidence tending to show that types of weapons and methods employed by the attackers were consistent across attacks, and evidence of a consistent *modus operandi* across attacks.'), and 49 (finding that evidence submitted by the Prosecution in relation to the contextual elements of crimes against humanity, as well as in relation to the crime of extermination, is relevant as evidence of killings perpetrated in a systematic manner as underlying acts of genocide).

37 *Muvunyi* Trial Judgment II (n 19) para. 29; *Akayesu* Trial Judgment (n 3) para. 523; *Karadžić & Mladić* Rule 61 Review (n 9) para. 92.

38 See, e.g., *Mitrović* Trial Judgment (n 21) 108 (footnotes omitted):

> Likewise, the number of victims, though relevant, is not dispositive. The Appeals Chamber in *Seromba* convicted the Accused of committing genocide with respect to the murder of 1,500 Tutsis; whereas the Trial Chamber of the ICTR in *Ndinibahizi* concluded the existence of genocidal intent in the killing of a single individual at a roadblock. In concluding that the principal perpetrators of that killing committed the killing with genocidal intent, the Trial Chamber specifically noted, 'The fact that only a single person was killed on this occasion does not negate the perpetrators' clear intent, which was to destroy the Tutsi population of Kibuye and of Rwanda, in whole or in part.' The Trial Chamber instead looked at all the facts, including the broader context of events, and concluded that the perpetrators of that single killing committed the killing with genocidal intent.

See also, for an illustration, ICJ *Croatia-Serbia* 2015 Judgment (n 11) para. 437.

39 See *Jević et al*. Trial Judgment (n 5) para. 988 (referring to the *Krstić* Trial Judgment (n 10)); *Prosecutor v. Vuković & Tomić*, No. X-KR-06/180-2, Verdict, 2 July 2010 (hereafter *Vuković & Tomić* Trial Judgment), para. 574; *Prosecutor v. Vuković & Tomić*, No. S1 1K 006124 11 Kžk, Verdict, 22 June 2012 (hereafter *Vuković & Tomić* Appeal Judgment), paras 462–488.

40 The fact that a perpetrator did not choose the most efficient method to destroy the targeted group is not necessarily dispositive of a lack of genocidal intent. See *Tolimir* Trial Judgment (n 9) para. 748; *Krstić* Appeal Judgment (n 9) para. 32. See also *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) para. 78.

41 *Muhimana* Trial Judgment (n 9) para. 496.

42 *Jević et al*. Trial Judgment (n 5) para. 960; *Trbić* Trial Judgment (n 21) paras 193–198; *Prosecutor v. Stupar et al*., No. X-KR-05/24, First Instance Verdict, 29 July 2008 (hereafter *Stupar et al.* Trial Judgment), pp 58ff; *Prosecutor v. Pelemiš & Perić*, No. S 11 K 003379 09 Krl, Verdict, 31 October 2011 (hereafter *Pelemiš & Perić* Trial Judgment), paras 449–452; *Mitrović* Trial Judgment (n 21) 108–09; *Akayesu* Trial Judgment (n 3) paras 523–524; *Kayishema & Ruzindana* Trial Judgment (n 5) paras 93–94 and 527; *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgment and Sentence, 27 January 2000 (hereafter *Musema* Trial Judgment), para. 166; *Jelisić* Appeal Judgment (n 9) para. 47; *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) paras 48.

43 Ibid.

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44 Ibid. See also references, *infra*, in fn 96.

45 *Tolimir* Trial Judgment (n 9) para. 746. See also, ICJ *Bosnia-Serbia* 2007 Judgment (n 30) para. 344; ICJ *Croatia-Serbia* 2015 Judgment (n 11) paras 386–390. See also, *infra*, 9.4.7.3.

46 *Krstić* Appeal Judgment (n 9) paras 13 and 17; *Popović et al.* Trial Judgment (n 9) para. 832; *Karadžić* Appeal Judgment (n 31) para 727 (footnote omitted) ('The Appeals Chamber recalls that the intent to destroy a group as such is circumscribed by the "area of the perpetrators' activity and control" and the "extent of [the perpetrators'] reach".'); *Mladić* Trial Judgment (n 9) paras 3528 and 3535; *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) para. 146; *Brđanin* Trial Judgment (n 19) para. 702; *Krstić* Trial Judgment (n 10) para. 590; *Sikirica et al.* Judgment on Defense Motions to Acquit (n 9) para. 75.

47 See, e.g., *Nchamihigo* Trial Judgment (n 19) para. 331.

48 See, *inter alia*, *Jelisić* Appeal Judgment (n 9) para. 47; *Akayesu* Trial Judgment (n 3) para. 523; *Jelisić* Trial Judgment (n 8) paras 73–77; *Karadžić & Mladić* Rule 61 Review (n 9) paras 94–95; *Krstić* Appeal Judgment (n 9) paras 12–14 and 21; *Milošević* Decision on Motion for Judgment of Acquittal (n 4) paras 246 and 288; *Kayishema & Ruzindana* Trial Judgment (n 5) para. 93; *Kajelijeli* Trial Judgment (n 9) para. 806 (and cases cited therein).

49 *Prosecutor v. Nikolić*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, para. 34.

50 *Karadžić & Mladić* Rule 61 Review (n 9) para. 94; *Muvunyi* Trial Judgment II (n 19) para. 29 ('[T]he political doctrine which gave rise to the acts referred to […].'); *Trbić* Trial Judgment (n 21) para. 198 ('Intent may be inferred from the totality of the circumstances, including the general political doctrine which gave rise to the genocidal acts.').

51 *Trbić* Trial Judgment (n 21) para. 198. For an illustration as to how this intent is inferred in practice, see, e.g., *Musema* Trial Judgment (n 42) paras 931–934.

52 See, e.g., *Jelisić* Trial Judgment (n 8) para. 73.

53 *Tolimir* Appeal Judgment (n 10) paras 567–569 ('All of Tolimir's actions to conceal the crimes that were part of the common plan of the JCE to Murder, therefore even if the 22 February 1997 letter was ex post facto in time, constructively it was contemporaneous with the murder operation. The Appeals Chamber therefore finds that the Trial Chamber did not abuse its discretion by relying on the 22 February 1997 letter as additional evidence in support of its finding that Tolimir possessed genocidal intent.'). See, *contra, Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) para. 165 ('In relation to the alleged existence of a GoS strategy to deny and conceal the alleged commission of crimes in Darfur, the Majority considers that, even if the existence of such strategy was to be proven, there can be a variety of other plausible reasons for its adoption, such as the intention to conceal the commission of war crimes and crimes against humanity.').

54 See, for an illustration, *Tolimir* Appeal Judgment (n 10) para. 248 (referring to the following as a basis for its finding of genocidal intent of the perpetrators: the destruction by Bosnian-Serb Forces of the identification documents of the Bosnian-Muslim men from Srebrenica who were detained for the purpose of being executed, the inhumane conditions of detention of those men, the large number of Bosnian-Muslim men killed, and the burial and reburial of the victims killed).

55 See *Trbić* Trial Judgment (n 21) para. 198 ('Intent may be inferred from […] the placing members of the group in concentration camps where death rate is very high.').

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56 *Mladić* Trial Judgment (n 9) para. 3440.

57 Ibid.

58 Ibid., *Karadžić* Trial Judgment (n 12) para. 555; *Tolimir* Appeal Judgment (n 10) para. 246; *Popović et al*. Appeal Judgment (n 4) paras 430, 440, 468; *Hategekimana* Appeal Judgment (n 9) para. 133; *Jelisić* Appeal Judgment (n 9) paras 47–48; *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) paras 80 and 99; *Tolimir* Trial Judgment (n 9) para. 745. See also ICJ *Croatia-Serbia* 2015 Judgment (n 11) paras 143–148, in particular, paras 143 and 145 (pointing to the evidential importance of a state's policy, if none is established); *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) paras 42–47 (noting that whilst the existence of a genocidal plan or policy has not been considered a legal element of the crime of genocide, proof of such a plan or policy has been deemed relevant to the formation of intent), and 44 (finding that evidence tending to show that preparations for genocide, such as the mobilization of civil defence forces or militia groups and the distribution of weapons to civilians, would also support an inference that a genocidal plan existed); *Nuon Chea et al.* 2010 Closing Order (n 23) paras 1339–1340 (regarding the killing of members of the Cham group) and para. 1347 (in relation to Vietnamese). See also ICJ *Croatia-Serbia* 2015 Judgment (n 11) para. 145.

59 *Gacumbitsi* Appeal Judgment (n 9) para. 43; *Karadžić* Trial Judgment (n 12) para. 555; *Kajelijeli* Trial Judgment (n 9) para. 531; *Tolimir* Trial Judgment (n 9) para. 745.

60 *Kamuhanda v. Prosecutor*, Case No. ICTR-99-54A-A, Judgment, 19 September 2005, paras 81–82. See also, *Tolimir* Trial Judgment (n 9) para. 745; *Karadžić* Trial Judgment (n 12) para. 555; *Karera* Trial Judgment (n 19) para. 542.

61 See, e.g., *Krstić* Trial Judgment (n 10) para. 580; *Tolimir* Appeal Judgment (n 10) paras 230 and 254; *Blagojević & Jokić* Appeal Judgment (n 33) para. 123; *Krstić* Appeal Judgment (n 9) paras 33, 133; *Mladić* Trial Judgment (n 9) para. 3435. See also, for an illustration, *Prosecutor v. Nyiramasuhuko et al*., Case No. ICTR-98-42-A, Judgment, 14 December 2015 (hereafter *Nyiramasuhuko et al*. Appeal Judgment), paras 541–549 and related trial findings (finding that the distribution of condoms to perpetrators of rapes with a view to contribute to the commission of such crimes did not constitute evidence of direct and public incitement to crime but could constitute evidence of the accused's genocidal *mens rea*).

62 See, *supra*, 8.2.3 and, *infra*, 9.4.7.4.

63 See *infra*, 9.4.7.3.

64 See *infra*, 9.4.7.9. See also *Karadžić* Appeal Judgment (n 31) para. 727 (noting that the fact that more members of a targeted group could have been killed but were not may indicate a lack of the *dolus specialis* required to prove such intent).

65 See, e.g., UN International Commission, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, UN Doc. S/2005/60, 25 January 2005 (hereafter UN Report on Darfur), para. 513 ('[T]here are other more indicative elements that show the lack of genocidal intent. The fact that in a number of villages attacked and burned by both militias and Government forces the attackers refrained from exterminating the whole population that had not fled, but instead selectively killed groups of young men, is an important element.') and para. 516. See, also, *infra*, 9.4.7.9; and *Jelisić* Trial Judgment (n 8), para. 106.

66 *Jelisić* Trial Judgment (n 8) paras 100–101.

67 Ibid, para. 105. See also, *infra*, 8.1.6.

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68 *Jelisić* Trial Judgment (n 8), para. 106. See, however, *supra*, 8.5.2.2.

69 UN Report on Darfur (n 65) para. 514.

70 See, e.g., UN Report on Darfur (n 65) para. 515 ('Another element that tends to show the Sudanese Government's lack of genocidal intent can be seen in the fact that persons forcibly dislodged from their villages are collected in IDP camps. In other words, the populations surviving attacks on villages are not killed outright, so as to eradicate the group; they are rather forced to abandon their homes and live together in areas selected by the Government. While this attitude of the Sudanese Government may be held to be in breach of international legal standards on human rights and international criminal law rules, it is not indicative of any intent to annihilate the group.').

71 Ibid (regarding living conditions in IDP camps in which Darfuris were relocated).

72 Ibid.

73 Ibid., para. 517 (in this case, the desire to appropriate cattle belonging to the inhabitants of the village).

74 *Mladić* Trial Judgment (n 9) paras 3504–3505.

75 Ibid., paras 3506–3507.

76 Ibid., para. 4235. See also ICJ *Croatia*-Serbia 2015 Judgment (n 11) paras 504–507 (regarding the ICJ's discussion of the meaning and purport of the *Brioni* transcript).

77 *Mladić* Trial Judgment (n 9) para. 4235. See also, *Karadžić* Trial Judgment (n 12) paras 2596–2597.

78 *Mladić* Trial Judgment, Orie Partial Dissent (n 8) para. 5220. See also *Karadžić* Trial Judgment (n 12) paras 2596, 2603 and 2605.

79 See, e.g., ICJ *Croatia-Serbia* 2015 Judgment (n 11) para. 139:

> Since it is the group, in whole or in part, which is the object of the genocidal intent, the Court is of the view that it is difficult to establish such intent on the basis of isolated acts. It considers that, in the absence of direct proof, there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership to a particular group, but also to destroy the group itself in whole or in part.

80 See, e.g., ibid., para. 430; *Prosecutor v. Mrkšić et al*., Case No. IT-95-13/1-T, Judgment, 27 September 2007 (hereafter *Mrkšić et al*. Trial Judgment), para. 535.

81 Before the ICJ, Croatia had come up with a list of seventeen factors, which it claimed was relevant to the drawing of an inference of genocidal intent. See ICJ *Croatia-Serbia* 2015 Judgment (n 11) para. 408. See also, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*) (Judgment of 3 February 2015, Separate Opinion of Judge Keith) [2015] ICJ Rep 3 (hereafter ICJ *Croatia-Serbia* 2015 Judgment, Keith Separate Opinion). See also, *Jević et al*. Trial Judgment (n 5) para. 960; *Trbić* Trial Judgment (n 21) paras 193–198 (listing various factors relevant to such an inference), and 202 (listing the following as factors relevant to establishing the accused's intent: (i) the general context of events in which the perpetrator acted including any plan to commit the crime; (ii) the perpetrator's knowledge of that plan; and (iii) the specific nature of the perpetrator's acts including the following: (a) no acts to the contrary for genocidal intent; (b) single-mindedness of purpose; (c) efforts to overcome resistance of victims; (d) efforts to overcome the resistance of other perpetrators; (e) efforts to bar escape of victims; (f) persecutory cruelty to victims; (g) ongoing participation within the act itself; (h) repetition of destructive acts, i.e. more than one act or site; (i) the acts themselves (The Kravica test): (*i*) the number of victims; (*ii*) the use of derogatory language toward members

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of the targeted group; (*iii*) the systematic and methodical manner of killing; (*iv*) the weapons employed and the extent of bodily injury; (*v*) the methodical way of planning; (*vi*) the targeting of victims regardless of age; (*vii*) the targeting of survivors; and (*viii*) the manner and character of the perpetrator's participation); *Stupar et al.* Trial Judgment (n 42) 58ff; *Pelemiš & Perić* Trial Judgment (n 42) paras 449–452 (relying on the same ten factors to evaluate the state of *mens rea* of the accused and finding that the perpetrated acts, given the totality of circumstances surrounding the case, were not of such intensity and significance to indicate beyond a doubt that the accused intended to kill the prisoners at Pilica, let alone destroy the Muslim population of Srebrenica); *Kos et al.* Trial Judgment (n 16) paras 609–611, 623–646 (and references cited therein).

82 Regarding the necessarily 'holistic' approach to the evaluation of the evidence, see, *supra*, 9.3.

83 Regarding the accused's order to commit rape and her aiding and abetting such crimes as a basis for the inference that the relevant Chambers drew in relation to her genocidal *mens rea* see *Nyiramasuhuko et al.* Appeal Judgment (n 61) paras 508, 738–745, 986, 1012–1014, and 1031 ('Turning to Nyiramasuhuko's submission that her order to rape Tutsi women could also be reasonably explained by a willingness to take revenge on these women rather than by the specific intent to destroy, in whole or in part, the Tutsi group, the Appeals Chamber finds that Nyiramasuhuko fails to demonstrate that the Trial Chamber erred. Indeed, the Appeals Chamber finds that a reasonable trier of fact could have concluded on the basis of the totality of the circumstantial evidence that the only reasonable inference was that Nyiramasuhuko possessed genocidal intent, especially in light of the fact that, during the distribution of condoms, she also uttered that, "after having raped [the Tutsi women,] they should kill all of them" and stated "Let no Tutsi woman survive". Her submission regarding another possible inference is therefore also dismissed.'). See also *Nyiramasuhuko et al.* Appeal Judgment (n 61) para. 546; *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-98-42-T, Judgment and Sentence, 24 June 2011 (hereafter *Nyiramasuhuko et al.* Trial Judgment), paras 5870, 5871, 5940, and 6018, where the Trial Chamber relied on its finding that the accused distributed condoms to those encouraged to rape Tutsi women as circumstantial evidence of the accused's genocidal intent.

84 See, generally, *Popović et al.* Trial Judgment (n 9) paras 1400–1413; *Popović et al.* Appeal Judgment (n 9) paras 504–506; *Tolimir* Appeal Judgment (n 10) paras 571–572 (concerning a document authored by the accused); *Jević et al*. Trial Judgment (n 5) paras 962 (footnote omitted) ('The problems in establishing the genocidal intent occur because "intent is a mental factor which is difficult, if not impossible, to determine, but, on a case-to case basis, it can be inferred from the documentary evidence submitted to the Panel". In practice, the determination that the accused had a genocidal intent often seems only as a conclusion inferred from the hard evidence on the participation in the commission of the criminal offense, coupled with the knowledge that members of the group were massively killed or ill-treated. Therefore, the accused willingly decided to participate in the criminal campaign, aware of what was going on (an enemy group being destroyed or was designated as a group to be destroyed), so it can be concluded that the accused who participated in that campaign undoubtedly had the intention to destroy the group.') and 995–996; *Vuković & Tomić* Trial Judgment (n 39) para. 574. For an illustration, see, e.g., *Seromba* Appeal Judgment (n 9) paras 177–182.

85 See, e.g., *Prosecutor v. Kanyarukiga*, Case No. ICTR-02-78-T, Judgment, 1 November 2010, para. 653 (footnote omitted) ('The Chamber recalls that genocidal intent may be inferred from the facts. In this case the Accused attended a meeting at which the demolition of the Nyange Church was discussed, that he suggested to others that the church should be destroyed and that he was present during the attacks on the Tutsi on the morning of 15 April 1994, including when Ndahimana instructed the assailants to start working, which

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was understood to mean “kill the Tutsi”. The Accused was also seen repeatedly on 15 and 16 April 1994 in the presence of individuals such as Ndahimana, Kayishema and Ndungutse, who were overseeing and directing the attacks. Having considered the totality of the evidence, the Chamber finds it established beyond reasonable doubt that Kanyarukiga acted with the special intent to destroy the Tutsi ethnic group, either in whole or in part.’). See, also, *Muhimana v. Prosecutor*, Case No. ICTR-95-1B-A, Judgment, 21 May 2007 (hereafter *Muhimana* Appeal Judgment), para. 31 (and references to factors and evidence relevant to the Trial Chamber’s finding on that point); *Muhimana* Trial Judgment (n 9) paras 515–518; *Munyakazi* Appeal Judgment (n 9) para. 142 (footnotes omitted) (‘The Trial Chamber established Munyakazi’s intent to participate in the crimes based on his personal participation and leadership role in attacks, which resulted in the death of thousands of mostly Tutsi civilians. The Appeals Chamber can identify no error in this approach. The Appeals Chamber has held that an accused’s intent to participate in a crime may be inferred from circumstantial evidence, including his active participation in an attack. Indeed, contrary to Munyakazi’s suggestion, “[t]he inquiry is not whether the specific intent was formed prior to the commission of the acts, but whether at the moment of commission the perpetrators possessed the necessary intent.” The lack of evidence concerning Munyakazi’s personal views about Tutsis does not undermine the reasonableness of the Trial Chamber’s findings. Furthermore, the evidence of his active participation in the killing of thousands of Tutsi civilians at two parishes reasonably demonstrates that he possessed both genocidal intent and the requisite intent for extermination as a crime against humanity, that is, the intent to kill on a large scale with awareness that the crimes formed part of a widespread and systematic attack against Tutsi civilians.’); *Munyakazi* Trial Judgment (n 19) paras 496–500; *Karera* Trial Judgment (n 19) paras 541–543.

86 See, e.g., *Mitrović* Trial Judgment (n 21) 108 (‘It is not necessary that the perpetrator participated in multiple events or incidents in order to establish that the perpetrator had genocidal intent.’).

87 *Trbić* Trial Judgment (n 21) para. 790 (regarding the mass killing of detained persons) (‘While this suffices for intent as to the underlying offense of both killing and serious bodily or mental harm, the Panel also reaches the same conclusion as to the standard for genocidal intent as found below. Any doubt as to his intentions is clearly eliminated when one realizes he participated in the continuous nature of the act for hours and hours until all the prisoners were believed to be dead.’).

88 See, e.g., *Kos et al.* Trial Judgment (n 16) paras 621 (regarding the events of Srebrenica of July 1995) (‘Therefore, based on the presented evidence the Panel failed to establish beyond a reasonable doubt that the Accused acted with genocidal intent when executing detainees in the Branjevo farm, that is, one of the essential elements of the criminal offence of Genocide set forth in Article 171 of the CC of BiH has not been proven.’), 622 (‘The Accused could not have been found guilty of aiding and abetting genocide, because the Prosecution failed to prove that at the time of the execution of men in Branjevo they knew of the mass executions of Bosniak men from Srebrenica in other locations in the area of responsibility of the Bratunac and Zvornik Brigade, that is, that at the time of perpetration they knew of the genocidal intent of principal perpetrators from the VRS military and civilian leadership, who have not been named under the Indictment.’), and 623–646 (finding that the accused did not know of the perpetrator’s genocidal intent). See also *Prosecutor v. Kuvelja*, No. S1 1 K 004050 13 Kri, First Instance Verdict, 26 April 2013 (hereafter *Kuvelja* Trial Judgment), paras 484–504 (for an illustration of a case where it was found that the accused, whilst involved in acts of killing and forcible transfer, was not aware of a plan or intent on the part of others involved in the operation to destroy a group in whole or in part as such); *Prosecutor v. Kuvelja*, No. S1 1 K 004050 13 Krž 15, Second Instance Verdict, 19 November 2013 (hereafter *Kuvelja* Appeal Judgment), paras 111–117 (pointing, in

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particular, to the Accused's young age, the lack of military training and experience, the selected information that he received before he went to the Srebrenica territory, and after his arrival in Srebrenica).

89 See, for an illustration, *Popović et al.* Appeal Judgment (n 9) para. 517 (regarding the accused Nikolić).

90 For an illustration, see, e.g., *Popović et al*. Appeal Judgment (n 4) paras 509–510 and 515 (regarding the accused Nikolić). See also, *Jević et al*. Trial Judgment (n 5) para. 987 and 990; *Vuković & Tomić* Trial Judgment (n 39) para. 572; *Trbić* Trial Judgment (n 21) para. 200; *Kos et al.* Trial Judgment (n 16) para. 614 (suggesting that the level of knowledge about the details of the plan or policy for the perpetration of genocide depends on the position of the perpetrator in the civilian hierarchy or military chain of command).

91 *Krstić* Appeal Judgment (n 9) para. 20. See, for an illustration, *Mitrović* Trial Judgment (n 21) 108–09 (footnote omitted) ('The underlying criminal act of killing co-perpetrated by the Accused constitutes probative evidence from which the Accused's genocidal intent can be inferred beyond doubt when viewed in light of his exposure to the broader context of the events of Srebrenica, and his basic knowledge of the genocidal plan. In considering the inferences that can be drawn from the act of killing, the following factors, inter alia, have been identified by other Tribunals as relevant to this analysis: the number of victims; the use of derogatory language toward members of the targeted group; the systematic and methodical manner of killing; the weapons employed and the extent of bodily injury; the methodical way of planning; the targeting of victims regardless of age; the targeting of survivors; and the manner and character of the perpetrator's participation.'). The *Mitrović* Trial Judgment was overturned on appeal based on the view that no reasonable trier of fact could conclude that the accused Petar Mitrović indeed had a genocidal intent to destroy a protected group, in whole or in part. *Prosecutor v. Mitrović*, No. S 1 K 014264 13 Krž, Second Instance Verdict, 22 January 2014 (hereafter *Mitrović* Appeal Judgment), paras 209, 216 and 221.

92 For an illustration, see *Nyiramasuhuko et al.* Appeal Judgment (n 61) paras 1029–1031. See also, *Tolimir* Appeal Judgment (n 10) para. 253 (footnotes omitted):

> The Appeals Chamber further rejects Tolimir's argument that the Trial Chamber erred by basing its mens rea analysis on the very acts constituting the *actus reus* of genocide, thereby double-counting those acts as indicators of genocidal intent. Tolimir misunderstands the Trial Chamber's analysis. The Trial Chamber did not consider the underlying genocidal acts themselves (i.e., the mass killings, the acts causing serious mental harm or leading to conditions of life designed to bring about the Bosnian Muslims' destruction as a group) as proof of the *dolus specialis*. It only relied on the circumstances under which such acts were committed, as well as the mental state of the perpetrators. The Appeals Chamber recalls that genocidal intent may be inferred from 'the general context' of the commission of the underlying genocidal acts, 'the perpetration of other culpable acts systematically directed against the same group', or 'proof of the mental state with respect to the commission of the underlying act' of genocide. This was the approach followed by the Trial Chamber in this case. The Appeals Chamber finds no error in the Trial Chamber's analysis.

93 See, e.g., *Nahimana et al.* Appeal Judgment (n 9) para. 567 ('The Trial Chamber found on the basis of Witness LAG's testimony that the Appellant stated at Bucyana's funeral that "if Habyarimana were also to die, we would not be able to spare the Tutsi". Appellant Ngeze does not explain how these remarks were taken out of context and could not be relied upon in determining his genocidal intent.'); *Nizeyimana v. Prosecutor*, Case No. ICTR-00-55C-A, Judgment, 29 September 2014, paras 120–122; *Karadžić* Appeal Judgment on Rule 98 *bis*

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Motion for Judgment of Acquittal (n 6) paras 84 (referring to the Trial Chamber's finding at Transcript, 28 June 2012, 28769), and 88, 95 and 97–98; *Karadžić* Appeal Judgment (n 31) paras 588ff, 712ff and 738ff; *Stakić* Appeal Judgment (n 7) paras 49–52; *Stakić* Trial Judgment (n 35) para. 554. Proof of genocidal intent does not, however, require specific statements or admissions by the perpetrator describing his intent. *Stupar et al.* Trial Judgment (n 42) p 58; *Mitrović* Trial Judgment (n 21) 49. See, also, references *supra* in fn 19.

94 See, for an illustration, *Nchamihigo* Trial Judgment (n 19) paras 331 and 333–335 (regarding the accused's own words and deeds). See also *Karera* Trial Judgment (n 19) para. 539 ('Karera's orders to kill Tutsis demonstrate his genocidal intent. He was aware of the dangerously unstable environment, having evacuated his family from Nyamirarnbo for safety reasons (IL7), and knew that his order would lead to killings. His order to destroy houses of Tutsis as well as the destruction of the houses of Kahabaye and Felix Dix (11.4.5) also illustrate his intent. The Chamber sees no need to take into account Karera's anti-Tutsi statement concerning school-children in Zaire in December 1994 (11.8.2).').

95 See, generally, for an illustration, *Nahimana et al.* Appeal Judgment (n 9) paras 568–569.

96 See, generally, *Popović et al*. Appeal Judgment (n 4) paras 470, 506 (footnote omitted) ('The Appeals Chamber notes that the Trial Chamber did explicitly discuss Nikolić's use of derogatory language as a relevant factor in inferring genocidal intent but concluded that "there is nothing to suggest this was [something] other than a reflection of an unacceptable but common practice". The Prosecution has failed to present any cogent argument why this conclusion was one that no reasonable trier of fact could have made.'); *Tolimir* Appeal Judgment (n 10) paras 573–576; *Tolimir* Trial Judgment (n 9) paras 1161, 1168–1169 and 1172; *Popović et al*. Trial Judgment (n 10) para. 1177; *Stakić* Trial Judgment (n 35) para. 554 ('Even though Dr. Stakić helped to wage an intense propaganda campaign against Muslims, there is no evidence of the use of hateful terminology by Dr. Stakić himself from which the *dolus specialis* could be inferred. Statements made by Dr. Stakić do not publicly advocate killings and while they reveal an intention to adjust the ethnic composition of Prijedor, the Trial Chamber is unable to infer an intention to destroy the Muslim group.'); *Stakić* Appeal Judgment (n 7) para. 52 (footnote omitted) (relating to the Trial Chamber's conclusion that Stakić's derogatory statements were not evidence of a genocidal *mens rea*, but only revealed his ethnic bias and bigotry):

> The Trial Chamber thus clearly considered the Appellant's derogatory statements and propaganda, and the Appeals Chamber concludes that its assessment of them was reasonable. Evidence demonstrating ethnic bias, however reprehensible, does not necessarily prove genocidal intent. It is true, as the Prosecution suggests, that utterances might constitute evidence of genocidal intent even if they fall short of express calls for a group's physical destruction; a perpetrator's statements must be understood in their proper context. In the context of events such as those occurring at Prijedor, ethnic slurs and calls for ethnic cleansing might reasonably be understood as an implied call for the group's destruction. But it is for the Trial Chamber in the first instance to draw factual inferences from indirect evidence. On the facts of this case, the Prosecution has not demonstrated that no reasonable Trial Chamber could fail to conclude that the Appellant's utterances demonstrated his genocidal intent beyond a reasonable doubt. The Appeals Chamber will consider the implications of the utterances in combination with the remainder of the evidence in the following section.

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97 See, e.g., *Nyiramasuhuko et al*. Appeal Judgment (n 61) paras 984–987. See also *Gatete* Trial Judgment (n 9) paras 589–590 (in regard to a case of involvement in a joint criminal enterprise); *Kos et al*. Trial Judgment (n 16) paras 611 and 613; *Jević et al*. Trial Judgment (n 5) paras 961 (footnote omitted) ('[T]he statements and/or testimony of the accused, showing his attitude towards the fate of the group or victims, can be taken into account to possibly examine his state of mind at the moment of perpetration of the criminal offense.') and 965; *Trbić* Trial Judgment (n 21) paras 193 and 197.

98 *Kos et al*. Trial Judgment (n 16) para. 640, finding that the mere presence of the accused Kos at the Kravica warehouse where executions took place did not prove that at any point he became aware of the genocidal intentions and plans of the leaders of the Main Staff of the army after the fall of Srebrenica.

99 See, e.g., *Trbić* Trial Judgment (n 21) paras 803–807; *Stupar et al*. Appeal Judgment (n 4) paras 553–556 and 572; *Kos et al*. Trial Judgment (n 16) para. 620 ('The assignment given to a few members of the 10th Sabotage Detachment on the 16 July included unlawful acts directed at the killings of a large number of people selected only on their ethnic, national and religious background, so the Accused cannot fully avoid their responsibility for those actions. However, at the same time it is undisputed that after their assignment in Branjevo they refused to participate in the execution of men in the Pilica Dom, which also shows that they did not have the intent to destroy, in whole or in part, the Muslim population as a group, because if they had had such a motive, they would have certainly continued with the execution of those men.').

100 See, generally, *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) paras 40–41. See also, *Jević et al*. Trial Judgment (n 13) paras 963 (footnote omitted) ('The Panel holds that the knowledge of the Accused about the genocidal intent of others is relevant since it shows his certain genocidal *mens rea*. However, the existence of genocidal intent within the meaning of Article 171 of the CC of BiH must be the only reasonable conclusion from the evidence and must be established beyond a reasonable doubt.'), 968–969 (highlighting that such knowledge is not necessarily sufficient to infer the presence of genocidal intent, even when the accused participated in the commission of crimes with those possessing that intent), and 983–1061 (for related legal and factual findings); *Vuković & Tomić* Appeal Judgment (n 39) paras 462–488; *Mitrović* Trial Judgment (n 21) 96 ('Of course, the consequences of the principal perpetrator's actions are a relevant evidentiary consideration with respect to genocidal intent, but proof that the principal perpetrators, by their acts alone, did not or could not achieve the destruction in whole or in part of the protected group is legally irrelevant.'); *Kos et al*. Trial Judgment (n 16) para. 612.

101 See, for instance, *Bizimungu* Appeal Judgment (n 19) paras 199 (footnotes omitted) ('The Trial Chamber also made no finding with respect to the *mens rea* for genocide. However, Witness DBJ, whose evidence the Trial Chamber accepted as credible, testified that the soldiers selected Tutsis to be taken away after checking their identity cards. The only reasonable inference available from this evidence, taken in conjunction with the widespread killing of Tutsis in Rwanda at the time, was that the soldiers who participated in these killings acted with genocidal intent. Furthermore, in light of the Trial Chamber's finding that Bizimungu knew or had reason to know of the involvement of soldiers of the Rwandan army in the killings of Tutsi civilians at the Josephite Brothers compound, the only reasonable inference is that he also knew of their genocidal intent.'), 275 (footnotes omitted) ('The Trial Chamber also made no finding with respect to the *mens rea* for genocide. However, the Trial Chamber considered the testimony of Witness EZ, whose evidence it accepted as credible, that Jean-Paul Akayesu, the bourgmestre of Taba Commune, and Sixbert Ndayambaje, the former bourgmestre of Runda Commune, visited the ESI bearing lists of names and that Akayesu removed some refugees whose names featured on those lists. This evidence, when taken together with the regular and repeated nature of the crimes and the finding that Tutsis were victims, indicates that the killings and

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rapes were targeted against Tutsis. The Appeals Chamber finds that the only reasonable inference available from this evidence, taken in conjunction with the widespread killing of Tutsis in Rwanda at the time, was that the soldiers who participated in these killings and rapes acted with genocidal intent. Furthermore, in light of the Trial Chamber's finding that Bizimungu knew or had reason to know of the involvement of soldiers of the Rwandan army in the killings and rapes of Tutsi civilians at the ESI, the Appeals Chamber finds that the only reasonable inference is that he also knew of their genocidal intent.'), 312 and 346. See also *Tolimir* Trial Judgment (n 9) paras 769–773; *Tolimir* Appeal Judgment (n 10) para. 246 (footnotes omitted) ('The Appeals Chamber recalls that "[a]s a specific intent offense, the crime of genocide requires proof of intent to commit the underlying act and proof of intent to destroy the targeted group, in whole or in part". However, "by its nature, genocidal intent is not usually susceptible to direct proof". As correctly stated by the Trial Chamber, "in the absence of direct evidence, genocidal intent may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, the repetition of destructive and discriminatory acts, or the existence of a plan or policy".'); *Karadžić* Appeal Judgment on Rule 98 *bis* Motion for Judgment of Acquittal (n 6) paras 80 and 83 (and authorities referenced therein); *Ngirabatware* Appeal Judgment (n 50) para. 158.

102 See, e.g., *Stakić* Trial Judgment (n 35) para. 547 ('Having heard all the evidence, the Trial Chamber finds that it has not been provided with the necessary insight into the state of mind of alleged perpetrators acting on a higher level in the political structure than Dr. Stakić to enable it to draw the inference that those perpetrators had the specific genocidal intent. As a consequence, the Trial Chamber is unable to draw any inference from the vertical structure that Dr. Stakić shared the intent.').

103 See, e.g., *Stakić* Trial Judgment (n 35) para. 555 (footnotes omitted) ('The Trial Chamber has considered whether anyone else on a horizontal level in the Municipality of Prijedor had the *dolus specialis* for genocide by killing members of the Muslim group but concludes that there is no compelling evidence to this effect. Simo Drljača, head of the Prijedor SJB, clearly played an important role in establishing and running the camps, and was portrayed by the evidence as being a difficult or even brutal person, but the Trial Chamber is not satisfied that Drljača pulled the Crisis Staff into a genocidal campaign.').

104 *Tolimir* Appeal Judgment (n 10) paras 246 and 252.

105 See, e.g., *Mitrović* Appeal Judgment (n 91) para. 225 ('The Accused's knowledge of the genocidal plan and someone else's genocidal intent, however, is insufficient to find the Accused guilty of the criminal offense of Genocide. Rendering a convicting verdict for this gravest crime against the whole humanity requires a proof that he was not only aware that others had such an intent, but rather that the Accused himself shared the same genocidal intent too.'). See also, references *supra* in fn 100.

106 See, e.g., *Blagojević & Jokić* Trial Judgment (n 10) paras 786–787 and 797; *Blagojević & Jokić* Appeal Judgment (n 33) paras 121 (noting that the Trial Chamber based its finding that Blagojević knew of the genocidal intent of the principal perpetrators on the following facts: (i) his knowledge that the purpose of the Krivaja 95' operation was to create conditions for the elimination of the Srebrenica enclave; (ii) his knowledge that the Bosnian-Muslim population was driven out of Srebrenica town in its entirety to Potočari; (iii) his knowledge that Bosnian-Muslim men were separated from the rest of the population; (iv) his knowledge that Bosnian-Muslim women, children, and the elderly were forcibly transferred to non-Serb held territory; (v) his knowledge that Bosnian-Muslim men were detained in inhumane conditions in temporary detention centres pending further transport; (vi) his knowledge that the Bratunac Brigade contributed to the murder of Bosnian-Muslim

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men detained in Bratunac town; and (vii) his knowledge of and participation in an operation to search the terrain with the purpose of capturing and detaining Bosnian-Muslim men from the column so as to prevent them from reaching territory under Bosnian-Muslim control), and 123. See also, *Stakić* Appeal Judgment (n 7) para. 40 ('In context, however, it is clear that the Trial Chamber did not suggest that genocidal intent on the part of others was a prerequisite to convicting the Appellant for genocide. Rather, it simply considered whether the apparent intentions of others—such as other members of the Crisis Staff—could provide indirect evidence of the Appellant's own intentions when he agreed with those others to undertake criminal plans. The Trial Chamber also considered the direct evidence of the Appellant's mental state, including his statements, and found it insufficient to establish genocidal intent. The Appeals Chamber sees no error in this approach.'); *Krstić* Appeal Judgment (n 9) paras 99 and 100; *Mladić* Trial Judgment (n 9) para. 3457 (explaining its approach to evaluating whether perpetrators possessed the requisite *mens rea* and what inference could be drawn therefrom in relation to the accused).

107 The approach taken by the Pre-Trial Chamber in the *Bashir* case, whereby it adopted a *collective* approach to the question of genocidal intent is particularly troubling and unprecedented. Such an approach, which attributes the requisite intent to a collectivity of individuals without legal existence, finds no support in the Convention or under customary international law. See *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) paras 147ff, in particular, paras 150–151 and 159 (referring to 'the [Government of Sudan's] genocidal intent' as opposed to President Bashir's genocidal intent). Such a collective approach to the establishment of genocidal intent is unsupported as a matter of law or practice. It has the effect of collectivizing responsibility by attributing an element of the offence, not to the accused or suspect, but to an abstract entity (made of unspecified members of the Government of Sudan or those sharing control over the 'apparatus' of the State). In so doing, the Chamber *assumes* that members of this entity must have a uniform state of mind and *presumes* that what could be established in relation to this collective entity would necessarily be true of any of its members (including the accused/suspect himself). The law does not provide for such an approach nor for the presumption underlying it. See also H-P Kaul, 'The International Criminal Court and the Crime of Genocide' in C Safferling and E Conze (eds), *The Genocide Convention Sixty Years after its Adoption* (TMC Asser Press 2010), 195, in particular, 205ff.

108 The line between intent and motive is sometimes rather thin from the perspective of the tribunals, who must draw evidential inferences. For example, the Trial Chamber of the ICTY addressed this narrow distinction in the following manner:

> In relation to 'killing members of the group' the Trial Chamber is not satisfied that Dr. Stakić possessed the requisite *dolus specialis* for genocide, but leaves open the question whether he possessed the *dolus eventualis* for killings which may be sufficient to satisfy the subjective elements of other crimes charged in the Indictment. While the Trial Chamber is satisfied that the common goal of the members of the SDS in the Municipality of Prijedor, including Dr. Stakić as President of the Municipal Assembly, was to establish a Serbian municipality, there is insufficient evidence of an intention to do so by destroying in part the Muslim group. The Trial Chamber believes that the goal was rather to eliminate any perceived threat, especially by Muslims, to the overall plan and to force non-Serbs to leave the Municipality of Prijedor. Security for the Serbs and protection of their rights seems to have been the paramount interest. As one member of the ECMM delegation which visited Prijedor Municipality in late August 1992 pointed out, 'the conclusion to be drawn from what we have seen is that the Muslim population is not wanted and is being systematically kicked out by whatever method is available.' Had the aim been to kill all Muslims, the structures were in place for this to be accomplished. The Trial Chamber notes that while approximately 23,000 people

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> were registered as having passed through the Trnopolje camp at various times when it was operational and through other suburban settlements, the total number of killings in Prijedor municipality probably did not exceed 3,000.

Stakić Trial Judgment (n 35) para. 553 (footnotes omitted). See also, *supra*, 8.1.5.

109 *Kayishema & Ruzindana* Appeal Judgment (n 2) para. 160. The presence of odious or sadistic instincts does not preclude the conclusion that the required *mens rea* has been met. For instance, the fact that an individual took pleasure in committing crimes does not preclude the finding that he intended to commit a genocidal crime. *Jelisić* Appeal Judgment (n 9) para. 71.

110 The Appeals Chamber of the ICTY noted the following:

> With regard to the Prosecution's argument that the Trial Chamber erred in law by considering that Nikolić's possible motive for participating in the genocidal plan undermined his genocidal intent, the Appeals Chamber does not construe the Trial Chamber's assertion that '[a]nother reasonable inference is that Nikolić's blind dedication to the Security Service led him to doggedly pursue the efficient execution of his assigned tasks in this operation, despite its murderous nature and the genocidal aim of his superiors' to mean that the Trial Chamber confused intent and motive or that it concluded that the existence of a motive would be incompatible with genocidal intent. The Appeals Chamber considers that the Trial Chamber held that the Prosecution had not established genocidal intent beyond reasonable doubt.

Popović et al. Appeal Judgment (n 9) para. 516 (footnotes omitted).

111 See, *supra*, 8.1.5.

112 For an illustration, see *Al Bashir* Decision on Warrant Application, Ušacka Dissent (n 20) paras 22 (noting that attacks on the Fur, Masalit, and Zaghawa population appeared to be the result of a perception of an affiliation between the Fur, Masalit, and Zaghawa and the rebel groups, rather than driven by a genocidal intent), 64 ('The focus of the destructive intent required for genocide must also be distinguished from the intent to destroy rebels and sources of support for rebels to the extent that they are considered combatants. Within the framework established by customary international law, however, the suppression and targeting of rebel groups and their supporters is legal only to the extent that the targeted persons are combatants. Civilians, by contrast, do not lose their protected status and become legitimate targets until they participate in hostilities to the extent that they become combatants. For example, it would not be permissible to make a blanket assumption that members of a protected group are, by definition, rebels or rebel supporters and to target or seek to destroy them accordingly.'), and 65–66 (suggesting that even if some evidence indicates that some members of the 'African tribes' were assisting rebels, this would not per se legitimize the suggestion that the entire group of 'African tribes' was a 'lawful target').

113 *Jelisić* Appeal Judgment (n 9) para. 49. See also *Krstić* Trial Judgment (n 10) para. 597 (concerning the impact of strategic or military ends to a finding that the accused possesses the genocidal *mens rea*). See also, *supra*, 8.1.5.

114 In his appeal, Clément Ruzindana claimed that the Trial Chamber had omitted to conduct an analysis of the circumstances and means whereby he was alleged to have carried out his acts of genocide. See *Kayishema & Ruzindana* Appeal Judgment (n 2) para. 167. The Appeals Chamber held that there was no necessary relationship between the manner in which genocide is carried out and the personal circumstances of an accused; nor does genocide require proof that the accused possessed certain means to prepare or commit genocide. Ibid., para. 169. See also *Krstić* Appeal Judgment (n 9) para. 32 ('While this [genocidal] intent must be supported by the factual matrix, the offence of genocide

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does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected will not implement the perpetrator's intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent.').

115 *Tolimir* Trial Judgment (n 9) para. 748; *Krstić* Appeal Judgment (n 9) para. 32.

116 *Krstić* Appeal Judgment (n 9) para. 32.

117 See, e.g., *Mitrović* Trial Judgment (n 21) 108; ICJ *Croatia-Serbia* 2015 Judgment (n 11) 3 para. 437. See also, *infra*, 9.4.7.

118 See *Ivanović* Appeal Judgment (n 35) para. 46; *Stupar et al*. Trial Judgment (n 42) 57.

119 See, *infra*, Chapter 10. Acts that do not themselves constitute genocidal acts could provide evidence of the perpetrator's genocidal intent. See, e.g., *Karadžić* Appeal Judgment, para. 728 (footnotes omitted) ('The Trial Chamber recalled that conduct not constituting acts of genocide may be considered when assessing. genocidal intent. Furthermore, when assessing the mens rea for genocide, the Trial Chamber extensively detailed criminal conduct committed against Bosnian Muslims and Bosnian Croats that resulted in both immediate physical destruction as well as the remaining conduct which the Prosecution argues would have impacted the long-term survival of the targeted groups.').

120 See *Krstić* Trial Judgment (n 10) para. 547.

121 See *Judgment of the Supreme Court of the Republic of Latvia Concerning Genocide*, Case PAK-269 (Sup Ct Latvia 4 November 1996) (hereafter Latvia Supreme Court *Judgment Concerning Genocide*) (suggesting that acts of genocide against members of a targeted group were carried out by killing them, inflicting serious physical injuries, 'as well as deliberately creating such living conditions that led to their physical destruction or decrepitude, in whole or in part, or by depriving people of their economic, political and social rights or restricting these').

122 See Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944) (hereafter Lemkin, *Axis Rule in Occupied Europe*), 79, 87–89.

123 Assembly of States Parties to the Rome Statute of the International Criminal Court, 1st Sess, part II.B, UN Doc. ICC-ASP/1/3, 3–10 September 2002 (hereafter ICC *Elements of Crimes*), art. 6(a).

124 See *infra*, 11.3.

125 See *infra*, 11.3.2. See also See also, *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, Judgment, 22 June 2009 (hereafter *Kalimanzira* Trial Judgment), para. 510.

126 See references *supra*, 9.4.1. See also, for illustrations, *Nyiramasuhuko et al*. Appeal Judgment (n 61) para. 3308 (footnote omitted) ('The Appeals Chamber notes that the Trial Chamber found that the individuals responsible for the killing of the abducted Tutsi women and girls had genocidal intent based on "the widespread killing of Tutsis throughout Rwanda as well as the fact that the assailants who abducted Nambaje came to a house claiming to look for Tutsis".'); *Muhimana* Trial Judgment (n 9) paras 515–518, in particular 516 ('Factors such as the sheer scale of the massacres, during which a great number of Tutsi civilians died or were seriously injured, and the number of assailants who were involved in the attacks against Tutsi civilians, lead the Chamber to the irresistible conclusion that the massacres, in which the Accused participated, were intended to destroy the Tutsi group in whole or in part.'); *Mladić* Trial Judgment (n 9) paras 3511, 3513, 3515, 3519, 3524 and 3526; *Rukundo* Trial Judgment (n 9) paras 568 ('Considering the general context of mass ethnic killing in Gitarama préfecture and in Kabgayi, and, specifically, the systematic targeting of Tutsi at St. Joseph's College and the Accused's reference to the Rudahunga family as Inyenzi, the Chamber is satisfied that Madame Rudahunga, her two

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children and the two other Tutsi civilians were targeted because they were Tutsi. Under these circumstances, the Chamber finds beyond reasonable doubt that Rukundo, when committing these crimes, possessed the intent to destroy, in whole or in part, the Tutsi ethnic group.'), and 572 and 575; *Semanza* Appeal Judgment (n 9) para. 262 (regarding the genocidal intent of the principal perpetrators); *Simba* Trial Judgment (n 19) paras 415–419.

127 See, generally, *Krstić* Trial Judgment (n 10) para. 590 ('Although the perpetrators of genocide need not seek to destroy the entire group protected by the [Genocide] Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such. A campaign resulting in the killings, in different places spread over a broad geographical area, of a finite number of a protected group might not thus qualify as genocide, despite the high total number of casualties, because it would not show an intent by the perpetrators to target the very existence of the group as such resulting in a lesser number of victims, would qualify as genocide if carried out with intent to destroy the part of the group as such located in this small geographical area. […] In this regard, it is important to bear in mind the total context in which the physical destruction is carried out.'). See also *Sikirica et al*. Judgment on Defense Motions to Acquit (n 9) para. 75.

128 For an illustration of that state of affair, see the findings of the *Mladić* Trial Chamber in relation to 'other municipalities' (i.e., other than Srebrenica). *Mladić* Trial Judgment (n 9) paras 3504–3505. See also *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) paras 193–201 (listing factors militating against a finding of genocidal intent), in particular, para. 201 ('As a result, the Majority considers that the existence of reasonable grounds to believe that the [Government of Sudan—GoS] acted with genocidal intent is not the only reasonable conclusion of the alleged commission by GoS forces, in a widespread and systematic manner, of the particularly serious war crimes and crimes against humanity mentioned above. Whether a different conclusion is merited when assessed in light of the other materials provided by the Prosecution in support of the Prosecution Application shall be analysed by the Majority in the following section.').

129 See, e.g., *Stakić* Appeal Judgment (n 7) paras 34–35. See also *Sikirica et al*. Judgment on Defense Motions to Acquit (n 9) para. 75.

130 ICJ *Croatia-Serbia* 2015 Judgment (n 11) para. 139 ('Since it is the group, in whole or in part, which is the object of the genocidal intent, the Court is of the view that it is difficult to establish such intent on the basis of isolated acts. It considers that, in the absence of direct proof, there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership to a particular group, but also to destroy the group itself in whole or in part.').

131 See, e.g., *Nuon Chea et al*. 2010 Closing Order (n 23) para. 1341 ('[T]he intention of the senior leaders of the CPK is inferred from the fact that the genocide of the Cham occurred in the general context of an escalating persecutory attack against the Cham directed by the CPK Centre.') and para. 1348.

132 See, e.g., *Mitrović* Trial Judgment (n 21) 96–97:

> One act, if the perpetrator performed it with the aim to destroy the protected group, is theoretically sufficient, even if the aim was an unrealistic one. On the other hand, whether or not the aim could be realistically achieved is relevant in determining whether the act was committed with such an aim. The killing of several hundred Bosniak men in isolation could in fact be committed with the aim to destroy the protected group of Srebrenica Bosniaks, depending on the other evidence adduced. However, if the killing was committed in the context of a larger plan to destroy the group by transferring the women, children, and the elderly and killing all of the men, and the perpetrators were aware of that context, the killings would constitute a realistic contribution to the goal of the plan and render the goal more

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achievable. It would also be a relevant, although not decisive, factor in considering the intent of the perpetrators.

See also *Prosecutor v. Mpambara*, Case No. ICTR-01-65-T, Judgment, 11 September 2006, fn 7 ('The perpetrator of a single, isolated act of violence could not possess the requisite intent based on a delusion that, by his action, the destruction of the group, in whole or in part, could be effected.').

133 See, *supra*, 8.4.1. See also *Krstić* Appeal Judgment (n 9) para. 25; *Karadžić* Trial Judgment (n 12) para. 553.

134 *Tolimir* Appeal Judgment (n 10) para. 230 (finding that the Trial Chamber erred in concluding that the destruction of mosques was an additional act of genocide under Article 4(2)(c) of the Statute); *Krstić* Trial Judgment (n 10) para. 580; *Karadžić* Trial Judgment (n 12) pars 553; *Popović et al*. Trial Judgment (n 9) para. 822; *Tolimir* Trial Judgment (n 9) para. 746 (footnote omitted) ('Although an attack on cultural or religious property or symbols of the group would not constitute a genocidal act, such an attack may nevertheless be considered evidence of an intent to physically destroy the group.'); *Prosecutor v. Krstić*, Case No. IT-98-33-A, Partial Dissenting Opinion of Judge Shahabuddeen, 19 April 2004 (hereafter *Krstić* Appeal Judgment, Shahabuddeen Partial Dissent), paras 53−54; Latvia Supreme Court *Judgment Concerning Genocide* (n 121); ICJ *Bosnia-Serbia* 2007 Judgment (n 30) para. 344 ('[T]he destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II of the Genocide Convention. At the same time, it also endorses the observation made in the *Krstić* case that "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group" […].'); ICJ *Croatia-Serbia* 2015 Judgment (n 11) paras 386–390 (affirming that the destruction of cultural property cannot qualify as an act of genocide under any of the categories of Article II of the Genocide Convention, even if such acts may be taken into account to establish genocidal intent) (cited with approval in *Tolimir* Appeal Judgment (n 10) fn 664). See also United Nations War Crimes Commission, 'Trial of Hauptsturmführer Amon Leopold Göth: Notes on the Case: Genocide' in *Law Reports of Trials of War Criminals*, vol. 7 (HM Stationery Office 1948), 8–9 (footnote omitted) ('According to Lemkin genocide does not necessarily mean the immediate destruction or a nation or of a national group, except when accomplished by mass killings of all its members. It is intended to signify also a co-ordinated plan of different actions aiming at the destruction of the essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.'); United Nations War Crimes Commission, 'Notes on the Trial of Ulrich Greifelt and Others,' in *Law Reports of Trials of War Criminals*, vol. 13 (HM Stationery Office 1949) 37 ('The detailed objectives of such an action are directed towards the "disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups".').

135 See, e.g., *Krstić* Appeal Judgment, Shahabuddeen Partial Dissent (n 134) paras 53−54 (holding that the deliberate destruction of the principal mosque belonging to members of the targeted group could be considered as evidence of intent to destroy the group).

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136 See references, *supra*, 8.2.3, and 12.3.6. See also, *Krstić* Appeal Judgment (n 9) paras 33 and 133 (holding that Krstić harboured no genocidal intent as '[H]is own particular intent was directed to a forcible displacement. Some other members of the VRS Main Staff harboured the same intent to carry out forcible displacement, but viewed this displacement as a step in the accomplishment of their genocidal objective. It would be erroneous, however, to link Krstić's specific intent to carry out forcible displacement with the same intent possessed by other members of the Main Staff, to whom the forcible displacement was a means of advancing the genocidal plan (footnotes omitted).'); *Karadžić* Trial Judgment (n 12) para. 553; ICJ *Bosnia-Serbia* 2007 Judgment (n 30) para. 190 ('Neither the intent, as a matter of policy, to render an area "ethnically homogeneous", nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is to "destroy, in whole or in part," a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group […].') (referring to *Stakić* Trial Judgment (n 35) para. 519); *Tolimir* Appeal Judgment (n 10) para. 254 (footnotes omitted) ('The Appeals Chamber rejects, for similar reasons, Tolimir's argument that the Trial Chamber erred in law by holding that evidence of the intent to forcibly remove may also constitute evidence of genocidal intent when considered in connection with other culpable acts systematically directed against the group. The fact that the forcible transfer operation does not constitute, in and of itself, a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of those individuals involved. The Appeals Chamber therefore finds no legal error in the Trial Chamber's holding. For the same reasons, the Appeals Chamber finds no merit in Tolimir's related argument that forcible transfer can only be considered as evidence of genocidal intent if the affected members of the group are transferred to a place where they are subjected to conditions leading to their death or destruction. As noted, a trial chamber may rely on the act of forcible transfer as evidence of genocidal intent, regardless of the destination of the transfer. Tolimir's argument is thus dismissed.'); *Blagojević & Jokić* Appeal Judgment (n 33) para. 123; *Popović et al.* Trial Judgment (n 9) para. 824 (footnotes omitted) ('Forcible transfer alone is an insufficient basis from which to infer the intent to destroy. The intent to displace a group from a given area is distinct from the intent to destroy, and forcible transfer may evince intent to displace rather than destroy. However, forcible transfer is nonetheless a relevant consideration when assessing genocidal intent.'); *Tolimir* Trial Judgment (n 9) para. 748 ('While evidence of intent to forcibly remove is not necessarily indicative of an intent to destroy a group, it may nevertheless constitute evidence of the latter when considered in connection with "other culpable acts systematically directed against the same group".'); and, *infra*, 12.3.6.

137 See references, *supra*, 8.2.3. Genocide is in the category of discriminatory crimes but the element of discrimination against members of a particular group is combined with an intent to destroy that group as such. See *Milošević* Decision on Motion for Judgment of Acquittal (n 4) para. 123 (footnote omitted) ('Genocide is a discriminatory crime in that, for the crime to be established, the underlying acts must target individuals because of their membership of a group. The perpetrator of genocide selects and targets his victims because they are part of a group that he seeks to destroy.').

138 See, e.g., *Al Bashir* Decision on the Prosecution's Application for a Warrant of Arrest (n 9) para. 167 (footnote omitted) ('In the Majority's view, the first three documents (the 1992 NIF Secret Bulletin, the 1994 Decree and 1995 Local Reform) do not provide, by themselves, any indicia of a GoS's genocidal intent. In this regard, the Majority considers that they provide, at best, indicia of the GoS's intent to discriminate against the members of the Fur, Masalit and Zaghawa groups by excluding them from federal government and

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implementing political arrangements aimed at limiting their power in their homeland (Darfur).'). See also, *supra*, 8.2.3, and *infra*, 12.3.3.

139 In some cases, such acts could constitute the crime against humanity of persecution rather than genocide. See, generally, Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (OUP 2005), 182ff.

140 Regarding the overlap and differences between persecution and genocide, see, *infra*, 12.3.3.

141 See, *supra*, 3.3.2.4 and 7.1.2.

142 See, e.g., *Mitrović* Trial Judgment (n 21) 103 ('Knowledge of the genocidal plan cannot alone support the inference that the accused possessed genocidal intent.').

143 See, e.g., *Kayishema & Ruzindana* Trial Judgment (n 5) paras 91, 94, 276, and 528–545; *Krstić* Trial Judgment (n 10) para. 572; *Kambanda* Trial Judgment (n 10) para. 16; *Pelemiš & Perić* Trial Judgment (n 42) para. 446 (footnotes omitted) ('[T]he accused's knowledge of the genocidal plan and of the genocidal intent of others, as well as their participation in their implementation is not on its own sufficient to infer that the accused possessed the genocidal intent themselves […].' and '[N]ot all persons who contributed to the furtherance of the genocidal plan acted with the identical state of mind or the same level of intention.'); *Stupar et al.* Trial Judgment (n 42) 133; *Stupar et al.* Appeal Judgment (n 4) para. 548 and p. 97; *Vuković & Tomić* Trial Judgment (n 39) para. 574 ('[I]t does not automatically logically follow that [their] participation in the plan—on the orders of their superiors—means that they had the requisite genocidal intention themselves').

144 See, e.g., *Nahimana et al.* Appeal Judgment (n 9) paras 707–709, in particular, para. 709 (footnote omitted):

> The Appeals Chamber is not persuaded that the mere fact that genocide occurred demonstrates that the journalists and individuals in control of the media intended to incite the commission of genocide. It is, of course, possible that these individuals had the intent to incite others to commit genocide and that their encouragement contributed significantly to the occurrence of genocide (as found by the Trial Chamber), but it would be wrong to hold that, since genocide took place, these individuals necessarily had the intent to incite genocide, as the genocide could have been the result of other factors. However, the Appeals Chamber notes that paragraph 1029 of the Judgment concludes that the fact that 'the media intended to [cause genocide] is evidenced *in part* by the fact that it did have this effect'. The Appeals Chamber cannot conclude that this reasoning was erroneous: in some circumstances, the fact that a speech leads to acts of genocide could be an indication that in that particular context the speech was understood to be an incitement to commit genocide and that this was indeed the intent of the author of the speech. The Appeals Chamber, notes, however, that this cannot be the only evidence adduced to conclude that the purpose of the speech (and of its author) was to incite the commission of genocide.

145 One would have to reserve situations in which the accused's condition might provide him with a defence of 'insanity'.

146 *Jelisić* Trial Judgment (n 8) para. 70.

147 See, e.g., *Nahimana et al*. Appeal Judgment (n 31) para. 571 (footnotes omitted) ('The Trial Chamber then concluded that the Appellant's "role in saving Tutsi individuals whom he knew does not, in the Chamber's view, negate his intent to destroy the ethnic group as such". The Appellant has failed to demonstrate that these findings were unreasonable. In the opinion of the Appeals Chamber, it was reasonable for the Trial Chamber to find that the Appellant had a genocidal intent while also recognizing that he had saved Tutsi.'). See also

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Muhimana Appeal Judgment (n 85) paras 30–32; *Rutaganda* Appeal Judgment (n 9) para. 537 (‘[T]he Appeals Chamber holds the view that a reasonable trier of fact could very well not take account of some of the illustrations [of assisting Tutsi] provided by the Appellant, which appear immaterial within the context of the numerous atrocities systematically and deliberately perpetrated against members of the Tutsi group, owing to their being members of thereof.’); *Prosecutor v. Kvočka et al*., Case No. IT-98-30/1-A, Judgment, 28 February 2005, paras 232, 233 (referring to persecution as a crime against humanity, which is also a specific intent crime); *Nahimana et al*. Trial Judgment (n 9) para. 968; *Karadžić* Appeal Judgment (n 31) para 629 (footnotes omitted) (‘The Appeals Chamber notes that Karadzic's first submission challenges the Trial Chamber's conclusion that his agreement to allow the local staff of UNPROFOR, which included Bosnian - Muslim males, to leave the UN compound did not raise any doubt regarding his intent that all Bosnian Muslim males in Bosnian Serb custody be killed. The Trial Chamber noted in this respect that the reason proffered by the Bosnian Serb forces for separating and taking custody of, Bosnian Muslim males in Potocari, namely that they were to be screened for involvement in war crimes, would not have applied to the local staff of UNPROFOR. Karadzic maintains that his decision allowing such local staff to leave demonstrates that he did not intend that every able-bodied Bosnian Muslim male from Srebrenica be killed. In this respect, 'the Appeals Chamber reiterates that evidence of limited and selective assistance to a few individuals does not preclude a trier of fact from reasonably finding the requisite intent to commit genocide. Moreover, the. Appeals Chamber considers reasonable the Trial Chamber's view that the pretext of screening for war crimes would not have applied to UNPROFOR staff. Consequently, the Appeals Chamber finds that Karadzic fails to show that the Trial Chamber erred in finding that allowing the local UNPROFOR staff to leave the UN compound did not raise doubt regarding his intent that all Bosnian Muslim males in Bosnian Serb custody be killed.’). See also references, *supra*, 19.4.1 (with regard to the possible ‘randomness’ of the accused’s conduct); and *Jelisić* Trial Judgment (n 8), para. 106.

148 See *Nahimana et al*. Appeal Judgment (n 9) para. 572 (‘Lastly, the Appellant cites no evidence in support of his claim that he went on record many times to say that not all Tutsi were bad. In any event, the Appeals Chamber is of the opinion that, even if this were true, it would not be sufficient to raise a reasonable doubt in regard to the Appellant’s genocidal intent as established by the Prosecution evidence. This ground of appeal cannot succeed.’).

149 See, e.g., *Simba* Trial Judgment (n 19) para. 417 (‘There is no clear evidence that Simba was among the adherents of a hard line anti-Tutsi philosophy. It cannot be excluded that he participated in the joint criminal enterprise, as a former career military officer and public servant, out of a misguided sense of patriotism or to ensure the protection of himself and those in his are.’); *Simba* Appeal Judgment (n 9) para. 267.

150 See, e.g., *Popović et al*. Appeal Judgment (n 9) para. 460; *Popović et al*. Trial Judgment (n 9) paras 590–596 and 838.

151 See references *supra*, in particular, 8.2.3, 9.4.7.4, and 12.3.6.2 (and references cited therein).

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Annex 235

D.B. Subedi & Johanna Garnett, ‘De-mystifying Buddhist religious extremism in Myanmar: confrontation and contestation around religion, development and state-building’ (2020) 20(2) Conflict, Security & Development 223

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De-mystifying Buddhist religious extremism in Myanmar: confrontation and contestation around religion, development and state-building

D. B. Subedi and Johanna Garnett

School of Humanities, Arts and Social Sciences, University of New England, Armidale, Australia

ABSTRACT

Myanmar's path to democracy, freedom and development has been marred by emerging Buddhist religious extremism targeted against the Rohingya Muslims. This article examines the rise of Buddhist religious extremism in Myanmar. Its core focus is on the political economy of state-building and development, and the structural and social conditions that have produced violence. We argue that contested state-society relations, negotiated by the discourse of state-building and development rather than religion and religious ideologies alone, can better explain the current dynamics of extremist violence in Myanmar. We show that hegemonic state-building processes (that have been ongoing since Myanmar became independent in 1948) and exploitative development serve as a site for inequalities and discriminatory policies. These policies and their manipulation for political and developmental gains have had multiple social effects: they have radicalised a section of Buddhists, resulting in the rise of violent religious extremism, and marginalisation and double victimisation of the Rohingya Muslims, targeted by the State security forces as well as Buddhist extremist groups.

KEYWORDS

Buddhist extremism; violence; conflict; security; state-building; Myanmar

Introduction

Myanmar's faltering transition from decades of military rule to peace and democracy has seen the rise of Buddhist religious extremism.[1] The radical Buddhist groups such as the 969 Movement and the Committee for the Protection of Nationality and Religion (widely known as Ma Ba Tha) have emerged as key factors of Buddhist religious extremism.[2] Recently, they have targeted Rohingya Muslims in Northern Rakhine state, a group that has been portrayed as the principal enemy and a primary source of an existential threat to the survival of Buddhists, the ethnic majority group in Myanmar.[3] The Rohingya Muslims have suffered from a 'double victimisation'[4] in that, in addition to being targeted by Buddhist religious extremists, between 2012 and 2017, they were also heavily persecuted by the state. This has occurred in the political discourse of post-independence state-building in which the identity of the Rohingya Muslims has been deeply contested, differently interpreted and systematically marginalised.[5]

CONTACT D. B. Subedi dbsubedi1@gmail.com

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conversion, put legal restrictions on interfaith marriage, and empower authorities to put stringent measures for birth control.[49] When the Four Bills were submitted to the parliament, Ma Ba Tha conducted a nation-wide campaign to collect signatures to support the Bills and was able to collect a total of 1.3 million signatures.[50] Ma Ba Tha claims that the laws have been well accepted by the majority Buddhists, who according to Ma Ba Tha, were overwhelmingly present to celebrate Ma Ba Tha's victory in passing the Laws.[51] This also indicates a symbiotic relationship between Buddhism and ultra-nationalist politics that the military governments have promoted in the past.

Within the Bamar Buddhist communities, the extremist outfit of Ma Ba Tha has been effectively masked by its philanthropic activities locally. By organising philanthropic activities such as distribution of food, shelter and medicines to poor, sick and elderly people, Ma Ba Tha seems to be doing well in winning people's hearts and minds in Burman Buddhist communities. Outside of the Burman Buddhist communities, Ma Ba Tha has, however, became infamous for inciting anti-Muslim violence which has been subject to widespread criticism.

With the change in government in 2016, Ma Ba Tha has come under the National League for Democracy government's scrutiny. In July 2016, the Sangha Maha Nayaka Committee (Ma Ha Na) outed Ma Ba Tha as an unlawful association of monks.[52] This decision was followed by Ma Ha Na banning Wirathu from delivering sermons for a year in March 2017, arguing that Wirathu, who is known for the use of hate speech against Muslims, violated the rules in the code of conduct for Theravada Buddhist monks. As Ma Ba Tha continued to engage in inciting religious tensions using Buddhist teaching and philosophies, Ma Ha Na ultimately banned its activities in May 2017, ordering Ma Ba Tha chapters to remove all signboards of the organisation. Aung San Suu Kyi and her government have been cautious in dealing with Buddhist ultra-nationalist organisations such as Ma Ba Tha. At a time when the NLD-led government received mounting criticisms internationally for its inaction to curb racial violence, to some extent, Ma Ha Na's ban on Ma Ba Tha helped the NLD government to pacify the criticisms.

Following the ban, Ma Ba Tha chapters rebranded as Buddha Dhamma Parahita (or Philanthropic). Meanwhile Ma Ba Tha's new affiliate, Dhamma Vansanurakhitta Association (the Buddha Dhamma Philanthropy Foundation) – a lay organisation founded before the 2017 Ma Ha Na order as a complement to Ma Ba Tha – reorganised as a political party. In 2017 Maung Thway Chun announced the 135 Myochit Unity Party, which is a political face of Ma Ba Tha although the electoral authorities denied a registration to the Party. It is in this context that we argue that Buddhist religious extremism in Myanmar, could not have emerged and survived without religious ultra-nationalism, a political and ideological template of state-building.

State-building, violence and construction of the Rohingya as 'social others'

In Myanmar, 88 per cent of the total population are Buddhists, practising mostly Theravada Buddhism. Muslims make up only 4.3 per cent, of which the Rohingya formed a small section, numbering around 1.3 million before their exodus to Bangladesh. The majority of Rohingya live in the north and north-west of Rakhine state where they comprise up to 90 per cent of the population (compared to around 20 per cent in the

south).[53] Even though they have their own dialect, (*Rohingya* or *Ruaingga*), have lived in Myanmar over centuries and were granted voting rights in the past, the presence of Rohingya in Myanmar and their political identity is deeply controversial. Politically, the Rohingya are not considered to be a part of the national races of Myanmar, the *taing-yin-tha*. They are not recognised as one of the country's 135 official ethnic groups and subsequently do not have citizenship rights.[54] Within Myanmar, they are officially referred to as 'Bengalis'; the term 'Rohingya' is banned in the country.[55]

The literature suggests that Muslims lived in Myanmar before the British colonial period. Michael Charney, for example, states that by the end of the 17th century, at least 60,000 Muslims were living in, what was then called, Northern Arakan state.[56] In a British colonial report in 1871, Rohingyas were categorised as 'Arakanese Mussulman'[57]; a term commonly used to identify Muslims in Bangladesh, India, Pakistan and Myanmar. Jacques Leider, however, argues that a group of Muslims in northern Rakhine have claimed culturally distinct ethnic identity since the 1950s, identifying themselves with the name of 'Rohingya'; thus, Rohingya is a recent term used after Myanmar's independence.[58]

Drawing on existing literature, many scholars note that there has been a relatively long peaceful co-existence between the Rohingya and Buddhists in Rakhine state which has been, historically, largely isolated from the rest of Myanmar.[59] Ware and Laoutides warn, however, of a reductionist view, arguing that, although there were long periods of relative calm before 2012, and many examples of ongoing positive inter-communal relationships, the conflict has been long and bloody.[60] They do recognise that this is a multi-polar conflict with complex socio-political dynamics.[61] Schissler, Walton and Phyu Phyu Thi seek to understand the post-2012 violence as 'the sustained policies and practices of discrimination'.[62] They find that violence did not characterise these communities prior to 2012, noting many stories and memories of co-existence.

Our study also finds that Buddhist-Muslim relations had been relatively peaceful in Rakhine state. This is despite the structural violence, and political, economic and social constraints placed on people by an authoritarian and militarised state that we will discuss later. One author was told similar stories of growing up with social harmony in Rakhine exemplified by a farmer interviewed in Rakhine State who said:

> I stayed there [in their village], they [Rohingya] stayed with us and even most of the Bengali people come and do farm work with us. I have been working for around four years with one of the Bengali people together; I was farming with my family. So it's OK …. So I have been living for months in a Bengali village and I work with many people together with their home township, very close together – they are really nice people actually.[63]

To understand how this relatively peaceful co-existence declined over time and why the Rohingya have become the victim of both Buddhist extremist groups and the state, a critical reflection on the state-building process is necessary.

Mary P. Callahan in her book, 'Making Enemies: War and Statebuilding in Burma', notes that post-independence state-building in Myanmar has been inherently violent.[64] Callahan explains how the military was successful in maintaining political power and domination for more than four decades. She argues that the extraordinary durability and equally popular form of the military, characterised by centralisation of power and massive exercise of political violence and coercion, was made possible through war and

organised violence.[65] Following Callahan's argument, we maintain that the Rohingya crisis of today is one of the most recent iterations of the interface between organised violence and state-building. Buddhist religious ideology and Buddhist nationalism have been appropriated by military elites and ultra-nationalists to mask the political violence which victimised the Rohingya.

Religion, state-building and political violence

As shown in the discussion above, the military government, formed after the 1962 military coup, began to manipulate religion (especially Buddhism) to consolidate religious nationalism as the mighty force to homogenise the nation-state. Buddhism also provided the military (the *Tatmadaw*) with power and legitimacy to subvert political dissents mostly coming at that time from people with non-Buddhist and non-Burman ethnic backgrounds.[66] By appropriating Buddhist religious nationalism as a unifying force, the military authorities were able to co-opt Buddhist monks by promoting Buddhist religious revivalism as discussed earlier in this paper. The interface between religious nationalism and Buddhist revivalism paved the way for what has ultimately become a source of Buddhist extremism. Yet the imperatives of protecting nationalism was used by the military to abuse state power and resources under state socialism which ultimately resulted in economic decline during the military regime.

Ethnic and national identity and social othering of Rohingya

One area where the state exercised structural violence, with far-reaching consequences, is the way ethnic identities were recognised by the state. This process was significant in the framing of the Rohingya as 'social others' in the public discourse. Ironically, for a long time since Myanmar's independence, the official definition of ethnic groups was elusive. For instance, a new Constitution was promulgated in 1974 but it failed to specify the number of ethnic minority nationalities.[67]

In Myanmar, national identity and belonging to the state are officially defined by the notion of 'national people'. The term 'national people' and its closest Burmese translation *taingyintha* are mentioned in the preamble of the 1974 Constitution.[68] As Cheesman states, the term *taingyintha* is situated in the Constitution to officially define the narratives of state formation but the Constitution also 'puts *taingyintha* over and ahead of citizenship, addressing the political community not as an aggregation of 'citizens' but as 'national races'.[69] Because the essence of the term 'national people' is different from 'national races', ironically not all those are considered to be citizens and national people are national races according to the spirit of the preamble of the Constitution. It was only in 1990 that military authorities started iterating that 135 national (races) groups reside in Myanmar.[70] As Ferguson contends, the basis on which the national (races) groups were identified was not explained and, therefore, remained mysterious.[71] It was an ambiguous process which selectively excluded some national people or citizens, and resulted in making 800,000 Rohingya stateless, although the vast majority had been living in Myanmar for generations.

In the 1960s the military junta adopted a policy to suppress and oust the Rohingya from the country by outlawing all Rohingya activities and sociocultural organisations.

A notable event here is Operation Dragon King, officially known as Operation Nagamin, in northern Rakhine state (then Arakan).[72] While the operation aimed to register citizens in that area, and drive out foreign immigrants before the upcoming national census,[73] it was what we call the 'social engineering' of the hegemonic state-building processes which tacitly targeted the Rohingya.[74] It is estimated that approximately 200,000 to 250,000 refugees, mostly Rohingya Muslims, fled to neighbouring Bangladesh within the first few months of the operation.[75] Martin Smith supports this argument, telling us that the (then) Burmese army forcibly evicted Rohingya Muslims calling them 'illegal immigrants', and that human rights abuses were widespread due to alleged army brutality, rape and murder.[76]

In 1982, the military government introduced a new Citizenship Law, which ultimately replaced the Union Citizenship Act. The new Law concentrated on race status and noted that only pure-blooded nationals would be entitled to citizenship, but the Rohingya do not qualify for full citizenship.[77] Section 6 of the 1982 Law states that individuals who obtained citizenship under the 1948 Act would retain their citizenship status. Accordingly, the Rohingya who held the old National Registration Cards, were ordered to hand in their cards when they made an application for citizenship under the new law. However, the government neither provided a new citizenship card nor did it return the old national registration cards. In the 1990s, the military authority issued temporary occupants with recognisable proof cards, known as 'white cards' issued to Muslims; both Rohingya and non-Rohingya. The white cards allowed restricted rights, but were not perceived as evidence of citizenship. In 2015, the then President, Thein Sein, cancelled the white cards; thus, the Rohingya were stripped of the voting rights they had, making them much more vulnerable to atrocities by the Buddhist extremist groups. Since then, the Rohingya's rights to education, employment, movement, marriage, religion, and health have been, and continue to be, restricted.

As a result of the social engineering of state-building leading to social othering of the Rohingya, the social fabric that determined Buddhist-Muslims relations began to rupture. The situation became worse due to the interventionist approach by the military regime, and was further exacerbated when Buddhist extremism began to rise after 2010. Concerning the state's interventionist approach, it must be noted that following Operation Dragon, the *Tatmadaw* increased its presence in northern Rakhine State, reportedly subjecting the Rohingya to compulsory labour, forced relocation, rape, summary executions, and torture.[78] Efforts made for state-building through what is called 'national integrity' have created social and political spaces in which Buddhist extremism plays out and is directly and indirectly linked to the politics of how the Rohingya's belonging to the state is contested. As Buddhist religious extremism complemented the state's behaviour towards the Rohingya, political violence – produced by the state authorities – and religious violence by the Buddhist extremist groups appeared to overlap.

The hegemonic state-building process could not survive, however, without manipulating economic modernisation and development in favour of a few political and military elites. At the societal level, the so-called modernisation and development program led by the state have also become discriminatory, deepening inter-religious and inter-ethnic tensions in Rakhine, ultimately giving traction to rising extremism.

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Elliott Prasse-Freeman & Kirt Mausert, 'Two Sides of the Same Arakanese Coin: "Rakhine", "Rohingya", and Ethnogenesis as Schismogenesis' in Prasse-Freeman, Chachavalpongpun & Strefford (eds), *Unraveling Myanmar: Critical Hurdles to Myanmar's Opening Up Process* (Kyoto University Press 2020)

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Two Sides of the Same Arakanese Coin: 'Rakhine,' 'Rohingya,' and Ethnogenesis as Schismogenesis

Elliott Prasse-Freeman and Kirt Mausert

"Bengalis do not have any characteristics or culture in common with the ethnicities of Myanmar."
- Senior General Min Aung Hlaing, 19 March 2018[i]

"The patterns of behavior associated with elimination of other groups may be assimilated into their culture so that they are impelled to eliminate more and more."
- Gregory Bateson, 1935[ii]

Introduction: A Theory of *Longue Duree* Ethnogenesis

In the wake of ongoing cycles of ethnic cleansing of Myanmar's Rohingya minority, the most recent of which saw over 700,000 driven out of Myanmar's Rakhine State into Bangladesh beginning in August 2017, the world has been searching for answers to what has motivated these brutal pogroms. Journalistic and academic accounts have generally characterized the violence as deriving from some mixture of internecine conflict (between Buddhist Rakhine and Muslim Rohingya) and state-sponsored military cleansing operations. Although the modality of violence is quite different across these explanations, what they have in common is reducing the conflict to Buddhists versus Muslims, or the autochthonous Rakhine (with backing of their co-religionists, the Bamar, amongst other 'national races' of Burma) versus the putatively allochthonous Rohingya.

The problem with these accounts is that while religion and indigeneity have certainly proven to be potent discourses for mobilizing the violence, an exclusive focus on them ultimately obscures factors that would illuminate deeper motivations of the conflict. Specifically, while both folk and academic histories draw on particular interpretations of official British colonial records and Arakanese royal chronicles to present the Rakhine and Rohingya as unrelated ethnic groups – a division that has allowed elites of both to make political claims to autonomy within Myanmar – re-examination and retheorization of historical sources, linguistic patterns, archaeological records, and anthropological data casts doubt upon that conclusion and the very epistemological stance that insists upon such a project of categorization. Instead, we suggest that beginning after the migration of the Mranma people to Arakan around the 9th century,[iii] processes of schismogenesis[iv] (creation through differentiation) have been underway which have resulted today in the binary Rakhine/Rohingya, with the former considered "native" and the latter "foreign" to Arakan. We suggest here that both *emblems* of identity in fact are intimately related to one another rather than either preceding the other in a meaningful sense.

Draft – consult authors for most up-to-date version

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Part V – Theorizing Ethnogenesis

Contemporary accounts of the nature of the ongoing ethnic cleansing in Rakhine State typically skip the genealogy outlined above that shows increasing schismogenesis over time, to implant their interpretations exclusively in the British era (1824-1947). Such accounts emphasize how the British colonial project altered the ethnic relationships that existed in Arakan state - and indeed the entire country - due to the British endeavor to classify the peoples it subjugated according to a theory of race and ethnicity with roots in European anthropology. This theory attempted to establish the existence of distinct races of humans (of which White Europeans were claimed to be the most superior). Indeed, the Tatmadaw's "national races" ideology arguably owes its ideological foundations to the British colonial project and the conception of race it depended on.

Much has been made of colonization's putative impact on ethnicity in Myanmar. Anthropologist Michael Gravers is emblematic of many scholars when he argues that "culture and ethnicity became reified and bounded, based on absolute differences in race, religion and mentality."[lxxxii] But Gravers also notes another, often overlooked, aspect of the colonial system that compels us to reassess his own 'reification thesis': namely that "ethnic groups were bound together by the market economy and by the colonial administration."[lxxxiii] Donald Horowitz, scholar of ethnic conflict, elaborates this point in his seminal comparative volume: "What the colonialists did that was truly profound, and far more important for ethnicity, was to change the scale of the polity by several fold."[lxxxiv] This new scale meant that ethnicities were *produced*, as localized identities were aggregated and amalgamated into supra-local categories more capable of participating efficaciously in the colonial (and ultimately post-colonial) state political economy.[lxxxv] The question of what happens to those *local* identities after they are aggregated into larger ones is a function of the forms and degrees of intensity of states' respective governmentalities[lxxxvi]: strong states either obliterate local identities altogether or displace them to marginal domains ('cultural' or 'folklore'); but when state projects are weak, inconsistent, or desultory (as with the British colonizers, whose ethnic categorization project was woefully confused[lxxxvii]), to then become occasionally despotic but infrastructurally unsophisticated (as with the post-colonial regime[lxxxviii]), we have a situation such as Burma's, where 'transvestite' identities[lxxxix] can coexist. In other words, the reification thesis often implies *exhaustative* ascriptive categorization, ignoring the evidence of people retaining the ability to maneuver within the field of ethnic categorization, holding multiple identities at different scales simultaneously, and fractionally.

Tellingly, various forms of identification are still being generated and renegotiated in Myanmar today.[xc] We have found in our fieldwork that not only do Burmese persons often inhabit multiple ethnicities at once, but new identifications may presently be in the process of being formed: people often describe how their *lu-myo* (their race or "type of person") is "Buddhist,"[xci] for instance, an identity that does not neatly fit the schema described above by those such as Gravers.

Fortunately, ethnographic and theoretical research on Burma has long provided us with powerful tools for thinking about this kind of ethnic mutability and mutation. Edmund Leach's pathbreaking study of the Kachin/Shan oscillatory system demonstrates how the 'unstable equilibria' that define ethnic relations allow singular individuals to embody *multiple* ethnic

identities, being "simultaneously Kachin and Shans," for instance.[xcii] F.K. Lehman's observation that ethnicity in Burma must be conceptualized as 'reticulate' – such that a given ethnicity's "connection with Burma proper was systematically mediated by some third [ethnicity]"[xciii] – helps us understand that ethnicities take diverse meanings in different contexts depending on how they nest within broader networks and emerge under various circumstances.

Given these foundations, common dismissals of Rohingya claims to an authentic ethnicity appear less valid. For instance, Leider argues that, "Contemporary Rohingya writers claim that a local Rakhine Muslim identity to be called 'Rohingya' has existed for centuries, because they argue for the recognition of distinct ethnic credentials. But at the same time, they point to the great diversity of ethnic origins and social backgrounds of Muslims during the pre-modern period which makes the hypothesis of a single identity rather unlikely."[xciv] But if identities are *not* mutually exclusive, as Leach stresses, there is no reason why there cannot be a diversity of ethnicities *and* a super-ordinate ethnicity (eventually called 'Rohingya') that brings them together under certain conditions.

This is particularly relevant when we consider Mandy Sadan's research on the problematic nature of the exonym 'Kachin.' Sadan begins by identifying the now classic, but still regularly (willfully) ignored, fact that domineering textual cultures often define oral ones without their consent or participation[xcv] – relevant for those who spuriously find in the absence of evidence of the ethnonym Rohingya in colonial records the evidence of the non-existence of the people who came to see themselves as Rohingya. Sadan then explains a double-bind for those Kachin who recognize that "Kachin" "has so singularly failed to attain status as an indigenous form" for people labeled Kachin,[xcvi] even as the term is politically expedient, even *necessary*, for Kachin autonomy projects in the context of a de facto imperial state that has demonstrated preference for ruling through division.[xcvii] Relevant for our Rohingya discussion is that Sadan shows that those labeled "Kachin" have searched for an indigenous term, finding some success in "Wunpawng," which Sadan calls "a relatively recent innovation… derived from a nationalist interpretation of archaic oral tradition."[xcviii] The (potential) conceptual parallels between "Wunpawng" and "Rohingya" are apparent: both groups have been labeled ("Kachin" in the former case, "Bengalis" in the latter case) in ways they reject. The critical difference, of course, is that "Kachin," imperfect as it might be, confers legitimate belonging in the polity as *taing-yin-tha*. "Bengali," of course, does not.

The task becomes to consider the empirical data vis-à-vis Rohingya given these theoretical tools. It is commonly asserted that the British installment of a system of migrant agricultural labor into Arakan, a region which remains relatively underpopulated compared to the neighboring Irrawaddy valley and the Bengal delta, imported the 'Bengalis' who would eventually become those who claim to be 'Rohingya' identity today. Indeed, even those historians who acknowledge the existence of Muslims before this period assert, albeit without evidence, that the mass migration facilitated by the colonial agricultural machine effectively overran previous Muslim society and culture, replacing it with Chittagonian Bengali: "in the three decades that proceed the First World War… the local Muslims seem to have been largely absorbed by the newly immigrant Chittagonian Bengalis."[xcix]

Yet the community of Muslims east of the Naf river spoke and continue to speak a different dialect than Chittagonian,[c] and have aggressively denied that they are precisely the same as those on the Chittagonian side of the border. Colonial records, for instance in the 1923

census, tell us as much: "the race of Arakan-Mahommedans, numbering 24 thousands… object to being classed with their co-religionists the Chittagonians, and consider themselves much more closely related to the Arakanese Buddhists amongst whom they live."[ci] Later the census writers elaborate further: "Although so closely connected with Chitagonians racially the Arakan-Mahomedans do not associate with them at all; they consequently marry almost solely among themselves and have become recognised locally as a distinct race."[cii] It seems that in the 1920s, after most of the British-facilitated immigration, the local Arakanese Muslims (the proto-Rohingya) thought of themselves as distinct. Given that the Rohingya of today speak a different dialect and continue to differentiate themselves from Chittagonian Bengalis, it seems a slow process of ethnogenesis was occurring even amidst mass immigration, and that this migration may even have fed into the complementary schismogenic process of differentiation between Rakhine and Rohingya, as contrastive icons are accumulatively subordinated under each emblem.

The post-colonial period has only seen more schismogenesis, with Rakhine and Rohingya differentiation proceeding along both spatial and social-institutional forms. In regards to the former, Leider shows how inter-communal violence under the Japanese occupation in 1942 effectively led to a project of mutual ethnic cleansing, sending Rakhine Buddhists south, and Rohingya north to areas bordering Bangladesh.[ciii] Regarding sociocultural appropriation, everything from coins, to flags, to wrestling has been rendered exclusively Rakhine. For example, de Mersan's study of Rakhine spirit cults shows how Rakhine are in the process of 'writing out' the Chittagonian from their myths, re-construing a historically linked world as divided.[civ] 'Rakhine traditional wrestling' is increasingly restricted to Rakhine people, even though Rohingya had long participated in it;[cv] our interviews reveal that some Rohingya insist that Rakhine 'stole' it from them, and similar forms of wrestling culture exist in Chittagong.[cvi] Finally, for all the insistence on ethnic impregnability, intermarriage continues: Wade presents Rohingya 'becoming' Rakhine',[cvii] while our interviews have found that both Rakhine men and women have crossed the ethnic threshold the other direction. Finally, while more research must be done on the extent of the dialectal differences along the continuum connecting Rohingya with Chittagongian Bengali, the issue of dialectal differentiation is important for the Rohingya's claims to distinctiveness as an ethnic group. To wit, while the fact of dialectal variation alone does not *prove* that a sociologically meaningful ethnic distinction exists, it is held up by Rohingya themselves as a way of marking difference, as a way of generating, constituting, and defending ethnic identity.

Part VI: Post-colonial Struggles for Recognition

Ultimately, rather than imagining ethnicities as billiard balls - impregnable and rigid, such that when they smash together ('Chittagonian Muslim' meets 'Arakanese Muslim'), one breaks the other - we consider the possibility of the production of hybridity, particularly considering their intermingled pasts. In general this orientation is necessary in the context of a multi-ethnic social setting in which many ethnic groups share co-ethnics across national borders (and who should not 'lose' status as 'belonging' because of complex histories of intercourse across those cartographic lines). This is not to dismiss the possibility of complete absorption by 'Chittagonians' and the eradication of Arakanese Muslim (Rohingya) traces, but this is

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Theo van Boven, 'Victims' Rights to a Remedy and Reparation: the United Nations Principles and Guidelines' in Ferstman & Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making* (Brill 2020)

CHAPTER 1

Victims' Rights to a Remedy and Reparation: the United Nations Principles and Guidelines

Theo van Boven

A Introduction*

1 *The Victims' Perspective*

In this essay the perspective of the victim is a central point of orientation. It is obvious that in the human rights discourse the victims' perspective cannot be seen in isolation from the perspective of various organs of society. Thus, governments may be guided by claims of sovereignty; peoples pursue their aspirations in terms of self-determination and development; religions entertain value systems; political and social institutions look for a normative basis in order to attain their objectives. The perspectives of these various actors may be human rights related but often differ depending on status and power positions. They have to a greater or lesser extent the means at their disposal to promote and defend their interests. However, victims often find themselves in vulnerable situations of neglect and abandonment and are in need of the care, the interest and active recognition of the human rights promotion and protection systems. The position of victims, at least the most destitute among them, was aptly characterised by a former Director-General of UNESCO in a publication marking the 20th anniversary of the Universal Declaration of Human Rights:

> The groans and cries to be heard in these pages are never uttered by the most wretched victims. These, throughout the ages, have been mute. Whenever human rights are completely trampled underfoot, silence and immobility prevail, leaving no trace in history; for history records only the words and deeds of those who are capable, to however slight degree, of ruling their own lives, or at least trying to do so. There have been – there still are – multitudes of men, women and children who, as a result of poverty, terror or lies, have been made to forget their inherent dignity, or to give up the efforts to secure recognition of that dignity by others.

* The text of this paper is based on a series of lectures delivered by the author at the 37th annual study session of the International Institute of Human Rights (Strasbourg, July 2006).

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> They are silent. The lot of the victim who complains and is heard is already a better one.[1]

If victims are at all in a position to speak, they often express themselves in similar terms. Consequently, one may learn more about the essence and the universality of human rights from the voices of victims than from the views of secular or religious leaders. Concepts of human rights are better translated from the perspective of victims than from demands of the powerful.

Without defining in this introductory paragraph the notion of victim and the right of victims to a remedy – these issues will be dealt with later – it is apparent that victims of systematic breaches of the law and of flagrant deprivation of rights find themselves in many different settings and situations, armed conflicts: situations of violence including domestic violence, as objects of crime and terror, or stricken by the misery of poverty and deprivation. As human beings entitled to enjoy the basic human rights and freedoms enshrined in the Universal Declaration of Human Rights and other international human rights instruments, victims are, more often than not, experiencing the gap between entitlements and realities. Domestic legal and social orders disclose *legal* shortcomings such as inadequate laws, restrictions in legal scope and content, impediments in getting access to justice and restrictive attitudes of courts; *political* obstacles in the sense of unwillingness of the authorities and the society to recognise that wrongs were committed; *economic* setbacks as a result of shortage or unjust distribution of resources; and *under-empowerment* of victims themselves because of lack of knowledge and capacity to present and pursue their claims.[2] All these factors are compounded by the vulnerability of categories or groups of victimised persons, notably women, children, members of specific racial, ethnic or religious groups, the mentally and physically disabled and many others.

2 *Evolutions in International Law*

In traditional international law, states were the major subjects and insofar as wrongful acts were committed and remedies instituted, this was a matter of inter-state relations and inter-state responsibility. The leading opinion in this

1 René Maheu, in: Preface to *Birthright of Man*, an anthology of texts or human rights prepared under the direction of Jeanne Hersch, UNESCO, 1968.

2 See further, Theo van Boven, Special Rapporteur, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* (final report), UN Doc. E/CN.4/Sub.2/1993/8, chapter VI (National Law and Practice).

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regard was set out in the often-cited judgment of the Permanent Court of International Justice in the *Chorzow Factory* case: 'It is a principle of international law that the breach of an engagement involves an obligation to make a reparation in an adequate form'.[3] For long, when internationally protected human rights were not yet proclaimed, wrongs committed by a state against its own nationals were regarded as essentially a domestic matter and wrongs committed by a state against nationals of another state may only give rise to claims by the other state as asserting its own rights and not the rights of individual persons or groups of persons. It was only since World War II with the recognition that human rights were no more a matter of exclusive domestic jurisdiction and that victims of human rights violations had a right to pursue their claims for redress and reparation before national justice mechanisms and, eventually, before international fora, that remedies in international human rights law progressively developed as a requirement to obtain justice. As the result of an international normative process the legal basis for a right to a remedy and reparation became firmly anchored in the elaborate corpus of international human rights instruments, now widely ratified by states. Further, in a fair amount of case law developed by international (quasi-) judicial bodies, including the European and Inter-American Courts of Human Rights, the meaning and significance of access to effective remedies at national and international levels was given concrete shape.

This chapter will deal with developments towards the recognition of the right to an effective remedy as laid down in international instruments, with emphasis on the normative content of this right. Special attention will be given to the United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation for the Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted in their final form by the UN General Assembly in 2005[4] and marking a milestone in the lengthy process towards the framing of victim-orientated policies and practices. While the gap between entitlements and realities still persists in the light of the requirements of remedial justice, the Basic Principles and Guidelines coincide with an increasing awareness of the prevalence of victims' rights. This tendency is illustrated by the granting of standing to victims to participate in their own right in proceedings before the International Criminal Court and by the prominent attention given to victims of past and contemporary practices of racism and racial discrimination in the documents adopted

3 Permanent Court of International Justice, Ser. A, No. 9, 21 (1927).

4 United Nations General Assembly resolution 60/147, 16 December 2005.

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by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, September 2001).

B The Right to a Remedy and Reparation in International Instruments

1 *Effective Remedies; Various Dimensions*

The basic right to effective remedies has a dual meaning.[5] It has a *procedural* and a *substantive* dimension. The *procedural* dimension is subsumed in the duty to provide "effective domestic remedies" by means of unhindered and equal access to justice. The right to an effective remedy is laid down in numerous international instruments widely accepted by states; the Universal Declaration of Human Rights (article 8), the International Covenant on Civil and Political Rights (article 2), the International Convention on the Elimination of All Forms of Racial Discrimination (article 6), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 14), the Convention on the Rights of the Child (article 39), the International Convention for the Protection of All Persons from Enforced Disappearance (article 24), as well as in regional human rights treaties: the African Charter on Human and Peoples' Rights (article 7), the American Convention on Human Rights (article 25), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 13). Also relevant are instruments of international humanitarian law: the Hague Convention of 1907 concerning the Laws and Customs of War on Land (article 3), the Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts (Protocol I, article 91) and the Rome Statute of the International Criminal Court (article 68 and 75).

The notion of "effective remedies" is not spelled out in detail in these international instruments. However, international adjudicators, in particular when faced with complaints about gross violations of core rights such as the right to life and the prohibition of torture, increasingly and insistently underlined the obligation of States Parties to give concrete content to the notion of effective remedies, with emphasis on the requirement that remedies must be effective. Thus, while the European Court of Human Rights was for quite some time not very forthcoming in its interpretation of the effective

5 See in particular Dinah Shelton, *Remedies in International Human Rights Law* (2nd edition, Oxford, 2005), 7 ff.

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remedy provision in article 13 of the European Convention, the Court evolved its position when dealing with complaints about gross violations of human rights relating to article 2 (the right to life) and article 3 (prohibition of torture or cruel, inhuman or degrading treatment or punishment). For instance, in a landmark case involving serious ill-treatment against a member of the Kurdish minority in South East Turkey while in police custody, the European Court gave particular weight to the prohibition of torture and the vulnerable position of torture victims and the implications for article 13. Consequently the notion of an "effective remedy" entails, according to the European Court, an obligation to carry out a thorough and effective investigation of incidents of torture and, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including access for the complainant to the investigatory procedure.[6] The European Court followed the same reasoning in a case of alleged rape and ill-treatment of a female detainee and the failure of the authorities to conduct an effective investigation into the complaint of torture.[7] The Inter-American Court of Human Rights adjudicated many cases involving gross violations of human rights, notably killings and disappearances. In this context the Court ruled that article 25 of the American Convention on the right to judicial protection and effective domestic recourse is 'one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in terms of the Convention'.[8]

The trend to give concrete content and to emphasise the crucial importance of "effective remedies" in any human rights protection system is not only apparent in the jurisprudence of regional human rights adjudicators, it is equally manifest in the case law developed by global human rights adjudicators, notably the Human Rights Committee. Analysis of case law pertaining to the right to life and the prohibition of torture (article 6 and 7 of the International Covenant on Civil and Political Rights) bears out that the Human Rights Committee expressed in numerous cases the view that States Parties are under an obligation to take such measures under article 2(3) of the Covenant as to investigate the facts, to take actions thereon as appropriate, to bring to justice persons

6 *Aksoy v. Turkey*, ECtHR, Judgment of 18 December 1996, Reports of Judgments and Decisions of the ECtHR, 1996-VI, para. 98.

7 *Aydin v. Turkey*, ECtHR, Judgment of 25 September 1997, Reports of Judgments and Decisions of the ECtHR, 1997-VI, para. 103.

8 *Castillo Paez v. Peru*, IACtHR, Judgment of 3 November 1997, 19 Human Rights Law Journal (1998), 219–229.

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found responsible and to extend to the victim(s) treatment in accordance with the provisions of the Covenant.[9]

The essence of the procedural dimension of the right to an effective remedy and the corresponding duties of states to respect and to guarantee this right is also reflected in the Updated Set of principles for the protection and promotion of human rights through action to combat impunity,[10] endorsed by UN Commission on Human Rights resolution 2005/81. Principle 1 containing the General Principles of States to take Effective Action to Combat Impunity reads as follows:

> Impunity arises from a failure by States to meet their obligations to *investigate* violations; to take appropriate measures in respect of *perpetrator*, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide *victims* with *effective remedies* and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to *know the truth* about violations; and to take other necessary steps to *prevent the recurrence* of violations (italics added).

In fact, in many situations where impunity is sanctioned by the law or where de facto impunity prevails, victims are effectively barred from seeking justice by having recourse to effective remedies. Where state authorities fail to investigate the facts and to establish criminal responsibility, it becomes very difficult for victims or their relatives to carry on effective legal proceedings aimed at obtaining just and adequate redress and reparation.

2 *Substantive Dimension*

The substantive dimension of the right to an effective remedy is essentially reflected in the general principle of law of wiping out the consequences of the wrong committed. In this respect, having regard to the obligation of states, it is appropriate to rely on the doctrine of state responsibility elaborated by the International Law Commission in a set of articles which were

9 See also in the study (n 2), para. 56 and Dinah Shelton (n 5), 184–186.

10 See 'Report of the independent expert to update the set of principles to combat impunity', Diane Orentlicher, UN Doc. E/CN.4/2005/102 and Add.1. See generally, Frank Haldemann and Thomas Unger (eds), *The United Nations Principles to Combat Impunity: A Commentary* (Oxford, Oxford University Press 2018).

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commended in 2001 to the attention of Governments by the United Nations General Assembly.[11]

The ILC Articles indicate that there is an internationally wrongful act of a state when conduct consisting of an action or omission: (a) is attributable to the state under international law; and (b) constitutes a breach of an international obligation of the state (article 2). For present purposes, in connection with the substantive dimension of the right to an effective remedy, the ILC Articles provide useful guidance, in particular in the description of the obligation to cease the wrongful act and offer appropriate assurances of non-repetition (article 30) and the obligation to make full reparation for the injury caused by the internationally wrongful act (article 31). Further, the Articles spell out the different forms of reparation to be afforded either singly or in combination as restitution, compensation and satisfaction (articles 34–37). Later in this paper, when more detailed attention will be paid to the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, the various forms of reparation will be further discussed. At this stage it should be noted that, while the Basic Principles and Guidelines list guarantees of non-repetition under the forms of reparation for harm suffered, the ILC Articles consider the obligation of cessation and assuring non-repetition as a separate and distinct legal consequence of the internationally wrongful act.[12] Equally, the updated principles to combat impunity[13] treat separately guarantees of non-recurrence of violations which may include reform of state institutions, the repeal of laws that contribute to or authorise violations of human rights and civilian control of military and security forces and intelligence services, from the right to reparation (principles 35–38, and 31–34).

The obligation of states to afford reparation is also stressed by the Human Rights Committee in its General Comment 31 interpreting the meaning and significance of article 2 of the International Covenant on Civil and Political Rights.[14] Marking the importance of the effective remedy provision in article 2(3) of the Covenant, the Committee stated that 'without reparation to individuals whose Covenant rights have been violated, the obligation to provide

11 UN General Assembly resolution 56/83, Annex, *Responsibility of States for Internationally Wrongful Acts*.

12 See also, Dinah Shelton, (n 5) at 149, who correctly states that cessation is not part of reparation but part of the general obligation to conform to the norms of international law.

13 See n. 10 above.

14 Human Rights Committee, General Comment 31, adopted 29 March 2004; (UN Doc. HRI/ GEN/1/Rev, 8 233–238). See in particular paras. 15–17.

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effective remedy, which is central to the efficacy of article 2(3), is not discharged.' The Committee further noted that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.

C The Law of State Responsibility as a Legal Basis for the Right to Remedy and Reparation

In the foregoing section of this chapter the ILC Articles on State Responsibility were referred to as setting out legal consequences in terms of obligations of a state to stop wrongs attributable to that state and to repair the harm done to injured parties. It is true that, as argued by those who are critical of relying on the Law of State Responsibility as a basis for the right to a remedy and reparation in cases of human rights violations,[15] that the ILC Articles were drawn up with inter-state relations in mind. Does this mean that in so far as states violate the human rights of individual persons or groups, causing serious harm to their life, integrity and dignity, the Law of State Responsibility would not apply? It is submitted here that construction of the concept of state responsibility to the inter-state context only, ignores the historic evolution since World War II of human rights becoming an integral and dynamic part of international law as evidenced by numerous widely ratified international instruments for the promotion and protection of human rights. It also ignores that the duty of affording remedies for governmental misconduct is so widely acknowledged that the right to an effective remedy of violations of human rights may be regarded as forming part of customary international law.[16]

The evolution in the traditional state responsibility concept in the light of the emergence of human rights as a matter of international concern and the proclamation of human rights at universal, regional and national levels since the adoption of the United Nations Charter in 1945, was aptly set out in the Report of the International Commission of Inquiry on Darfur, chaired by Antonio Cassese, to the UN Secretary-General pursuant to Security Council Resolution

15 See statement by Germany at the 61st session of the UN Commission on Human Rights in an explanation of vote concerning the Basic Principles and Guidelines on the Right to a Remedy and Reparation, 19 April 2005.

16 See Dinah Shelton (n 5), 28–29.

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1564.[17] In suggesting the establishment of a Compensation Commission on behalf of the victims of war crimes and crimes against humanity, in particular the victims of rape, the Commission of Inquiry argued 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. The Commission stated that these provisions may now be construed as obligations assumed by states not only towards other states but also vis-à-vis the victims who suffered from war crimes and crimes against humanity.[18] In this context the Commission of Inquiry also quoted a former President of the International Criminal Tribunal for the Former Yugoslavia who stated in a letter of 12 October 2000 to the UN Secretary-General:

> The emergence of human rights under international law has altered the traditional State Responsibility concept, which focused on the State as the medium of compensation. The integration of human rights into State Responsibility has removed the procedural limitation that victims of war could seek compensation only through their own governments, and has extended the right to compensation to both nationals and aliens. There is a strong tendency towards providing compensation not only to States but also to individuals based on State Responsibility. Moreover, there is a clear trend in international law to recognise a right to compensation in the victim to recover from the individual who caused his or her injury.[19]

In all fairness, the authorities referred to above speak in terms of trends and tendencies as regards the duty of states to provide effective remedy and reparation to victims as a legal consequence of the concept of state responsibility. This is not yet a fi rm acquis but an emerging duty that finds a consistent basis in human rights instruments cited in the preceding section of this chapter. This emerging duty is also confirmed, as the Inter-national Commission of Inquiry acknowledged, in the *UN Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) and in the (draft and since then adopted) *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* (2005). It should be recognised, however, that as transpired from the German position referred to above, there appears not to be general consensus as to existence of a customary international law

17 UN Doc. S/2005/60, 11 February 2005.
18 Ibid, para. 597.
19 UN Doc. S/2000/1063, p. 11, Annex para. 20.

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governing individual reparation claims.[20] It should also be noted that the Security Council, when acting upon the recommendations of the Darfur Inquiry Commission, did refer the situation of Darfur to the International Criminal Court for criminal investigation and action pursuant to article 13(b) of the ICC Statute but the Security Council did not act upon the recommendation to establish a Compensation Commission. This leaves, however, unaffected the right of victims in the Darfur situation to claim in appropriate cases reparations, including restitution, compensation and rehabilitation pursuant to article 75 of the ICC Statute.

D The Process towards a Comprehensive International Instrument[21]

1 *Background*

The years marking the end of the Cold War (late eighties and early nineties) opened up new potentials and new perspectives. Democratic structures were introduced or reintroduced in various continents, notably in Central and Eastern Europe and in Latin-America. In many countries institutions and mechanisms were established with the purpose to set out a process of truth and reconciliation, prominently also in South Africa. It was in the same period that the struggle against impunity and the call for reparative justice took shape. It was also in this climate that claims for criminal and reparative justice, having their origin in World War II, became more visible and vocal. The victim's perspective, often overlooked and ignored, was lifted up from the stalemate of the Cold War. Thus, civil society groups in East Asia, Australia and Europe demanded reparations for the comfort women (sex slaves of the Japanese Imperial Army) and for the victims of Japanese forced labour schemes. Their demands had for long received hardly any resonance. In the same climate the right to reparation for victims of brutal repression by Latin American dictatorships became a persistent claim.

It was against this background, stressing the importance of criminal and reparative justice as a condition for reconciliation and democracy, that the then

20 Note in particular Christian Tomuschat, 'Darfur – Compensation for the Victims,' (2005) 3 J Intl Crim J 579, where the author criticised the underlying arguments of the proposition of the Darfur Inquiry Commission to establish a Compensation Commission.

21 This section is largely based on the text of a paper the present author wrote in preparation of a report published by the International Council on Human Rights Policy together with the International Commission of Jurists and the International Service for Human Rights, *Human Rights Standards: Learning from Experience*, Versoix, Geneva, 2006.

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UN Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted in 1989 the present author, as one of its members, with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms – with a view to exploring the possibility of developing some basic principles and guidelines in this respect.[22] The study had to take into account relevant existing international human rights norms on compensation and relevant decisions of international human rights bodies. The study and the draft principles and guidelines as they evolved demonstrated that the gaps in human rights protection were less legal than political and that a new instrument was not supposed to entail new international or domestic legal obligations but rather to identify mechanisms, modalities, procedures and methods for making existing legal obligations operational.

2 *Description of the Process and Its Form and Nature*

The Special Rapporteur of the Sub-Commission included in his 1993 final report a set of proposed basic principles and guidelines which he drew up with the assistance of non-governmental experts from various continents, notably from countries that had been facing and living through gross violations of human rights.[23] On the basis of comments received and as a result of deliberations in a workshop, co-organised by the International Commission of Jurists and the Maastricht Centre for Human Rights, the Special Rapporteur made the draft basic principles subject to several revisions. The revised text reached the Commission on Human Rights in 1997.[24] From thereon the process moved from the expert and non- governmental sphere to the inter-governmental arena, with considerable involvement, though, of non-governmental and independent expertise but also with input of the views of governments. At the Commission level the process stretched over a considerable number of years, with repeated requests for comments but with little substantive discussion in the Commission itself. The process received, however, new impetus with the appointment of an Independent Expert of the Commission Mr. M. Cherif Bassiouni who, after consultations with governmental and non-Governmental experts, added new dimensions to the draft principles and guidelines in particular with reference to international humanitarian law.[25] The process was also advanced by

22 Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1989/13.

23 UN Doc. E/CN.4/Sub.2/1993/8, chapter IX.

24 UN Doc. E/CN.4/1997, Annex.

25 UN Doc. E/CN.4/2000/62.

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the organization, on the basis of Commission resolutions, of a series of open-ended consultations under the leadership of the delegation of Chile (Chile being an early proponent of the draft principles and guidelines), with the assistance of the former Special Rapporteur of the UN Sub-Commission and the former Independent Expert of the Commission, and with the participation of governmental representatives and non-governmental experts. As a result, the draft principles underwent a series of revisions and clarifications with the aim of reaching consensus without reducing the text to the lowest common denominator level. This process under the Commission's authority and stretching over quite a number of years was important for political and psychological reasons. It signified the indispensable element of inter-governmental ownership and interest in the process, without however losing close links with essential quarters of civil society. The process was not following a pre-conceived plan. It was made up of an evolving pattern, entailing non-governmental expertise and, progressively, intergovernmental participation and input.

3 *Actors of the Process*

The initial actors were expert members of the Sub-Commission, joined by a number of active human rights NGO's, such as the International Commission of Jurists, Amnesty International, Redress Trust, and a good number of governmental representatives and experts. The political backing in the process came largely from a number of Latin American countries, with Chile in a leadership role, and to a lesser extent from West European countries. In the consultative process organised under the authority of the Commission on Human Rights, delegates acted not so much as members of regional groups but rather individually. As a result, the discussions had an open character and were not fixed in advance. They reflected by and large the willingness to reach acceptable solutions.

4 *Other Influencing Factors*

The process – and this is a common feature of many projects on the UN human rights agenda – was in competition with many other items and sub-items of an overloaded agenda. As a result the Commission on Human Rights and even its Sub-Commission provided little substantive guidance and feedback. The human rights policy bodies were mainly involved in taking procedural decisions so as to advance the process (with moderate speed). In this connection it must be noted that the subject matter of redress and reparation enjoyed broad sympathy – the procedural resolutions of the Commission received wide sponsorship – but by and large the political interest was not strong among the membership of the United Nations. This limited political interest may also reflect

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the reticence of many states to accept and implement domestically the consequences of victim-oriented policies of reparative justice.

In the course of the proceedings relating to the substance, a number of politico-legal issues came up that complicated the process and that were difficult to solve by way of consensus. One such issue was whether the document under preparation should only deal with *gross* violations of international human rights law or with *all* violations of human rights. Further, disagreement arose as to whether the basic principles and guidelines should only focus on violations of human rights law or, in addition, deal with serious violations of international humanitarian law. Another issue was whether the basic principles and guidelines should extend, in addition to violations committed by states, to violations committed by non-state actors and further deal with the duty of the latter to provide compensation. An issue giving rise to much debate was the question whether the notion of victims applies to individual human beings or also to collectivities.

During the process, in the years 2000 and 2001, there was glimmering at the background, in the political process leading to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban, South Africa (31 August – 8 September 2001), a highly politicised issue that deeply divided states and that was relevant to the substance of the basic principles and guidelines. It related to the duty to repair historical wrongs connected with practices of slavery and colonialism.[26] If this issue would have been introduced in the standard-setting process, it could have substantially complicated the process. This did not happen. Apparently no delegation wished to pursue such a hazardous course. At the same time, and understandably so, the process lingered in those years with minimal speed in order to avoid disruptive influences. In later years the road towards the adoption of the basic principles and guidelines was paved by a series of open-ended consultations held under the authority of the UN Commission of Human Rights, which culminated in their endorsement by consensus of the UN General Assembly.[27]

26 See on this issue paras. 98–106 of the Declaration adopted by the Durban Conference, in particular para. 100 which reads: 'We acknowledge and profoundly regret the untold suffering and evils inflicted on millions of men, women and children as a result of slavery, the slave trade, the transatlantic slave trade, apartheid, genocide and past tragedies. We further note that some States have taken the initiative to apologise and have paid reparation, where appropriate, for grave and massive violations committed.' UN Doc. A/CONF. 189/12.

27 UN General Assembly resolution 60/147, 16 December 2005.

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5 *Implementation*

It is worth noting that the draft basic principles and guidelines as they were emerging over the years had already a certain influence on national law and practice, on international jurisprudence and on other standard-setting activities. One could consider these developments as implementation "*avant la lettre*." Thus, several Latin American countries, in drawing up legislation on reparation for victims, have taken the draft principles and guidelines into account. The InterAmerican Court on Human Rights referred in its jurisprudence several times to the draft principles and guidelines. Last but not least, the Statute of the International Criminal Court, notably article 75 dealing with reparation to victims, bears in its intent and wording, the imprint of the basic principles and guidelines. Since the Basic Principles and Guidelines are adopted by the UN General Assembly, their implementation is crucial for the advancement of reparative justice. Therefore, the General Assembly recommended that states take the Basic Principles and Guidelines into account, promote respect thereof and bring them to the attention of the executive bodies of Government, in particular law enforcement officials and military and security forces, legislative bodies, the judiciary, victims and their representatives, human rights defenders and lawyers, the media and the public in general.[28]

E The Nature, Scope and Content of the Basic Principles and Guidelines[29]

For the purpose of the present chapter it is not envisaged to review in detail all the provisions of the Basic Principles and Guidelines. The focus will be on a

28 Ibid, oper. para. 2.

29 The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law have been extensively commented upon by: REDRESS, *Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, London, 2006, 1–42; Dinah Shelton, 'The United Nations Principles and Guidelines on Reparations: Context and Contents,' in K. De Feyter, S. Parmentier, M. Bossuyt and P. Lemmens (eds), *Out of the Ashes, Reparation for Victims of Gross and Systematic Human Rights Violations* (Antwerpen-Oxford, 2005) 11–33; Marten Zwanenburg, 'The Van Boven/ Bassiouni Principles: An Appraisal,' (2006) 24 Neth Q Hum Rts 641; International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: a Practitioners' Guide*, Geneva, December 2006 and Bogotá, Colombia, June 2007 (authors Cordula Droege and Frederico Andreu-Guzmán).

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number of general issues relating to the nature and the scope of the document as well as to its structure and substantive content.

1 *Normative Value*

When the Basic Principles and Guidelines were adopted by the UN General Assembly a number of speakers pointed out that the document was not a legally binding document. Reference was made in this context to the seventh preambular paragraph to the effect that the Principles and Guidelines do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law. While the Basic Principles and Guidelines are therefore not intended to create new or additional obligations, they are meant to serve as a tool, a guiding instrument for states in devising and implementing victim-oriented policies and programmes. They also serve as guidance to victims themselves, collectively and individually, in support of claims to remedy and reparation. They may further be referred to or invoked by domestic and international adjudicators when faced with issues of victims' rights and reparations. In fact, the Inter-American Court of Human Rights and the International Criminal Court were already mindful of the Basic Principles and Guidelines as a source of reference before they received final approval by the UN General Assembly. It is worth recalling that the Basic Principles and Guidelines are the outcome of a lengthy process of consideration and review by non- governmental and governmental experts and that the significance of the document was considerably enhanced by its adoption by the UN General Assembly without a dissenting vote. Thus, good reasons can be advanced to consider the text as declaratory of legal standards in the area of victims' rights, in particular the right to a remedy and reparation.[30]

2 *Gross and Serious Violations*

A second aspect relating to the nature and scope of the Basic Principles and Guidelines is intrinsic in the terms gross violations and serious violations. These qualifying words have a restrictive effect on the scope of the Basic Principles and Guidelines and were the subject of much discussion as it was argued that all violations entail a duty to afford remedies and reparations. The initial study carried out under the mandate of the Sub-Commission on Prevention of

30 See in this regard Marc Groenhuijsen and Rianne Letschert, 'Reflections on the Development and Legal Status of Victims' Rights Instruments,' in *Compilation of International Victims' Rights Instruments* (Tilburg/Nijmegen, 2006) 1–18.

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Discrimination and Protection of Minorities referred to victims of "gross violations of human rights and fundamental freedoms" and the Special Rapporteur who, in the absence of an agreed definition of the term "gross violations", was called upon to give further guidance on this issue relied on a number of relevant sources. In this connection he mentioned the draft Code of Crimes Against the Peace and Security of Mankind drawn up by the International Law Commission, common Article 3 of the Geneva Conventions of 12 August 1949 and the Third Statement of the Foreign Relations Law of the United States (section 702). He also noted that the word "gross" qualifies the term "violations" and indicates the serious character of the violations but that the term "gross" is also related to the type of human rights that is being violated.[31] Against this background the Special Rapporteur in his first set of proposed basic principles and guidelines included the following text as general principle 1:

> Under international law, the violation of any human right gives rise to a right of reparation for the victim. Particular attention must be paid to gross violations of human rights and fundamental freedoms, which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture or cruel, inhuman or degrading treatment or punishment; enforced disappearances; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender.[32]

While over the years diverging views persisted whether or not the Basic Principles and Guidelines should be restricted to "gross violations", with the evolving opinion that the document should also explicitly cover serious violations of international humanitarian law, the view prevailed that the focus of the Basic Principles and Guidelines should be on the worst violations. The authors had in mind the violations of international humanitarian law constituting international crimes under the Rome Statute of the International Criminal Court. On this premise a number of provisions were included in the Basic Principles and Guidelines spelling out legal consequences that are contingent, according to the present state of international law, to international crimes. Such provisions affirm the duty of states to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish (article 4). They also

31 Final report of the Special Rapporteur, supra note 2, UN Doc. E/CN.4/Sub.2/1993/8, paras. 8–13.

32 Ibid, para. 137.

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include the duty to make appropriate provisions for universal jurisdiction (article 5) as well as references to the non-applicability of statutes of limitation (articles 6–7).

It remains true, however, that the terms "gross violations" and "serious violations" are not formally defined in international law. It must nonetheless be understood that in customary international law "gross violations" include the types of violations that affect in qualitative and quantitative terms the core rights of human beings, notably the right to life and the right to physical and moral integrity of the human person. It may generally be assumed that the non-exhaustive list of gross violations cited in the above mentioned General Principle 1 of the first version of the Basic Principles and Guidelines falls in this category. But also deliberate, systematic and large-scale violations of economic and social rights may amount to gross violations of human rights and serious violations of international humanitarian law.[33] It should further be noted that the concept of "serious violations" is to be distinguished from "grave breaches" in international humanitarian law. The latter term refers to atrocious acts defined in international humanitarian law but only in relation to international armed conflicts (Third and Fourth Geneva Conventions of August 12, 1949, and the 1977 Protocol I additional to the Geneva Conventions). The term "serious violations" stands for severe violations that constitute crimes under international law, irrespective of the national or international context in which these violations are committed.[34] The acts and elements of these crimes are reflected in the Rome Statute of the International Criminal Court under the headings of genocide, crimes against humanity and war crimes (ICC Statute, articles 6, 7 and 8).

As pointed out, in various stages of the development of the Basic Principles and Guidelines reservations were expressed regarding the limitation to "gross violations" and "serious violations" with the argument that as a general rule all violations of human rights and international humanitarian law entail state responsibility and corresponding legal consequences. This was generally acknowledged but did not preclude opting for a narrower approach: "gross" and

33 See in particular the statement by the UN High Commissioner on Human Rights, Louise Arbour, at the New York University School of Law on *Economic and Social Justice for Societies in Transition*, 25 October 2006. Note her following words: 'In crises like the one we now witness in Darfur, the systematic burning of houses and villages, the forced displacement of the population and the starvation caused by the restrictions on the delivery of humanitarian assistance and destruction of food crops are deliberately used along other gross human rights violations – such as murder or rape – as instruments of war.'

34 See also REDRESS, Handbook (n 29), 14.

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"serious" violations. However, in order to rule out any misunderstanding on the matter, the following phrase was included in article 26 on non-derogation: '– it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of *all* violations of international human rights law and international humanitarian law' (italics added).

3 *The Notion of Victims*

In situations which are characterised by systematic and gross human rights violations large numbers of human beings are affected. They are all entitled to reparative justice. Problems do arise, however, because of the tension between the huge number of persons involved and the limited capacity to afford reparations. A firm principle is that of non-discrimination, emphasised in article 25 of the Basic Principles and Guidelines. But in order to devise and apply fair and just criteria for the rendering of reparative justice in terms of personal and material entitlements, it is crucial to define the notion of "victim." A great variety of views were expressed in the consultations and deliberations on this issue. Objections were raised to include collectivities in the definition. Reservations were also expressed against mentioning legal persons as possible victims. At the end of the day it was proposed and decided to base the notion of victims, as reflected in articles 8 and 9, on the terms used in the generally accepted Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power earlier adopted by the UN General Assembly.[35] Thus, for the purposes of the interpretation and application of the Basic Principles and Guidelines the following elements can be distinguished:[36]

– a person is a victim if he/she suffered physical or mental harm or economic loss as well as impairment of fundamental rights, regardless of whether a perpetrator is identified[37] or whether he/she has a particular relationship with the perpetrator;
– there are different types of harm or loss which can be inflicted through acts or omissions;

35 UN General Assembly resolution 40/34, 29 November 1985.

36 These elements were aptly summarised in REDRESS, Handbook (n 29), 15–16.

37 There are situations where individual perpetrators are identified and such perpetrators can be held liable to provide reparations to victims. Note article 15 of the Basic Principles and Guidelines: 'In cases where a person, a legal person, or other entity is found liable for reparations to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparations to the victim.' In other situations perpetrators may not be identified. Whichever is the case, there remains an obligation on the part of the State to provide reparation to victims for acts or omissions which can be attributed to it, irrespective of whether a natural or legal person has been found liable.

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– there can be both direct victims as well as indirect victims such as immediate family members or dependents of the direct victim;
– persons can suffer harm individually or collectively.

It is noteworthy that the above description only mentions natural persons and not legal persons. This does not mean that legal persons cannot qualify as victims. In fact, in the context of international criminal law, notably the International Criminal Court, victims are defined in the Rules of Procedure and Evidence for the purpose of the Statute as (a) natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court, and (b) including organizations or institutions that have sustained direct harm to any of their property, which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.[38]

A huge problem faced by national authorities and, as the case may be an institution like the International Criminal Court, is the large number of people victimised by systematic and widespread violations of human rights and humanitarian law. The types of situations referred to the International Criminal Court – Uganda, the Democratic Republic of Congo and Darfur (Sudan) – all involve systematic and widespread attacks against civilian populations, affecting many thousands, if not hundreds of thousands of women, men and children. The reparative capacities of the Court and its Trust Fund for Victims will be complex as regards the demarcation of beneficiaries and the entitlements to and modalities of reparation. As a matter of fact such a complex issue was the subject matter of an early significant decision relating to the Situation in the Democratic Republic of Congo in a ruling by Pre-Trial Chamber I of the ICC on the applications from six victims asking the right to participate in the proceedings. The Prosecutor considered such participation premature before defendants had been identified and arrest warrants had been issued. In the opinion of the Prosecutor the admission of the applications from six victims could instigate many thousands of persons, in view of the massive scale of alleged criminality in the DRC and finding themselves in a similar situation as the six applicants, to claim the same right. In his view a distinction had to be made between a class of "situation victims" and a victim who had been personally affected by a "case" and the accused in such a case. In its decision the Pre-Trial Chamber analysed in detail the relevant provisions of the ICC Statute and Rules of Procedure and Evidence. It took also into account the UN *Basic*

38 Rule 85 of the ICC Rules of Procedure and Evidence. See also Article 8(2)(b)(ix) and article 8(2)(e)(iv) of the ICC Statute on the war crime of attacking protected objects.

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Principles of Justice for Victims of Crime and Abuse of Power and the UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law* and decided, after assessing the specific circumstances of each victim, to grant the applications.[39] Consequently, in determining the category and the scope of victim's participation in ICC proceedings and victim's entitlement to reparation, the 1985 UN Basic Principles and the 2005 UN Basic Principles and Guidelines may provide useful guidance. Both instruments determine that a person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.

4 *Link with Impunity*

For many years work on combating impunity for perpetrators of human rights violations and reparation for victims followed parallel tracks in the UN Sub-Commission and Commission on Human Rights. As Special Rapporteur the present author concluded in his final report submitted in 1993:

> – that in a social and political climate where impunity prevails, the right to reparation for victims of gross violations of human rights and fundamental freedoms is likely to become illusory. It is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards gross misconduct of perpetrators.[40]

The process leading to a completion of two comprehensive instruments on reparation and on impunity ended in 2005 with the adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation by the UN General Assembly and the endorsement of the Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity by the UN Commission on Human Rights.[41] The Impunity Principles and the Remedy and Reparation Principles and Guidelines are largely

39 Situation in the Democratic Republic of the Congo, 'Decision of the Pre-Trial Chamber I on the Application of Participation in the Proceedings', ICC-01/04, 17 January 2006.

40 Final report of the Special Rapporteur, (n 2), UN Doc. E/CN.4/sub.2/1993/8, para. 130.

41 Commission on Human Rights resolution 2005/81; See Report of the independent expert to update the Set of Principles to Combat Impunity, Diane Orentlicher, UN Doc. E/CN.4/2005/102 and Add. 1.

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complementary in setting out the principles and prescriptions of punitive and reparative justice. Principle 1 of the Impunity Principles succinctly describes the general obligations of states to take effective action to combat impunity with emphasis on the duty (i) to investigate violations, (ii) to meet out justice to perpetrators, (iii) to provide effective remedies and reparations to victims, (iv) to ensure the inalienable right to know the truth about violations, (v) to take steps to prevent recurrence of violations. The comprehensive document, consisting of a preamble, definitional explanations and 38 principles, is structured along the lines of three principal elements: the right to know, the right to justice and the right to reparation/guarantees of non-recurrence.

The Impunity Principles provide, from the perspective of the right to an effective remedy and reparation, additional insights and policy directives in conjunction with other justice measures, particularly in societies in transition. In dealing with reparation procedures (principle 32), they do not only highlight the right of all victims to have access to a readily available, prompt and effective remedy in the form of criminal, civil, administrative or disciplinary proceedings, but they also draw attention to setting up reparation programmes, based upon legislative or administrative measures, funded by national or international sources, addressed to individuals and to communities. The latter element implying that reparation should not only be secured through litigation and adjudication but first and foremost through the design and implementation of reparation programmes, is a valuable and realistic complement which remained somewhat under-exposed in the Basic Principles and Guidelines on the Right to a Remedy and Reparation. In two other aspects the Impunity Principles differ from, albeit do not contradict, the Basic Principles and Guidelines. They are not limited to "gross violations" ('any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries –' (principle 31)) and, as noted above, guarantees of non-recurrence of violations (principles 35–38) are not listed as a form of reparation but as a connected and separate category.

5 *Forms of Reparation in a Concluding Perspective*

Already in the early version of the Basic Principles and Guidelines proposed by the Special Rapporteur of the Sub-Commission, the following forms of reparation were identified and spelled out: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[42] It should be recalled that they were formulated with the (then draft) Articles on State Responsibility of the

42 Final Report of the Special Rapporteur, (b 2), UN Doc. E/CN.4/Sub.2/1993/8, para. 137.

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International Law Commission in mind, subject to the difference, however, that the ILC Articles list the obligation of cessation and non-repetition under "general principles" and forms of reparation under "reparation for injury".[43] In the process of the further elaboration and adoption of the Basic Principles and Guidelines the various forms of reparation were retained and refined and they now appear in section IX of the document (Reparation for harm suffered). The Basic Principles and Guidelines underline that victims are entitled to adequate, effective and prompt reparation which should be proportional to the gravity of the violations and the harm suffered.

The various forms of reparation and their scope and content may be summarised as follows:

- *Restitution* refers to measures which 'restore the victim to the original situation before the gross violations of international human rights law and serious violations of international humanitarian law occurred' (Basic Principles and Guidelines, article 19). Examples of restitution include: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property.
- *Compensation* 'should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case' (Basic Principles and Guidelines, article 20). The damage giving rise to compensation may result from physical or mental harm; lost opportunities, including employment, education and social benefits; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
- *Rehabilitation* includes medical and psychological care, as well as legal and social services (Basic Principles and Guidelines, article 21).
- *Satisfaction* includes a broad range of measures, from those aiming at cessation of violations to truth seeking, the search for the disappeared, the recovery and the reburial of remains, public apologies, judicial and administrative sanctions, commemoration, human rights training (Basic Principles and Guidelines, article 22).
- *Guarantees of non-repetition* comprise broad structural measures of a policy nature such as institutional reforms aiming at civilian control over military and security forces, strengthening judicial independence, the protection of human rights defenders, the promotion of human rights standards in public

43 See General Assembly resolution 56/83, Annex, Responsibility of States for internationally wrongful acts, articles 28–39.

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service, law enforcement, the media, industry, and psychological and social services (Basic Principles and Guidelines, article 23).

Some concluding observations are called for in affording various forms of reparation. *First*, these forms and modalities are not mutually exclusive. In certain instances and with respect to certain individual victims or groups of victims more than one form of reparation may commend themselves in order to render justice. The Basic Principles and Guidelines are designed with a fair degree of flexibility in this regard. *Second*, while the legal and judicial approach to reparation characterises the Basic Principles and Guidelines, in reality non-judicial schemes and programmes offering redress and reparation do also contribute to reparative justice for the benefit of large numbers of victims. Such schemes and programmes should operate in coordination with other justice measures.[44] Both the judicial and the non-judicial approach should interrelate and interact in a complementary fashion. *Third*, though perceptions, notions and forms of reparation are mostly discussed and understood in monetary terms, the importance of non-monetary and symbolic forms of reparation, with the aim to render satisfaction to victims, must not be neglected. *Fourth*, in situations of gross violations of human rights law and serious violations of international humanitarian law, the numbers of victimised women, children and men tend to reach appalling proportions. For this reason, reparative policies are very complex in terms of demarcation of beneficiaries and entitlements to and modalities of reparation. Nevertheless, also in these circumstances and in order to meet the requirements of justice, policies and programmes of reparation must aim to be complete and inclusive in affording material and moral benefits to all who have suffered abuses.

44 See in particular Pablo de Greiff, 'Reparations Efforts in International Perspective: What Compensation Contributes to the Achievement of Imperfect Justice,' in Charles Villa-Vicencio and Erik Doxtader (eds), *Repairing the Irreparable: Reparations and Reconstruction in South Africa* (Cape Town, 2004).

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