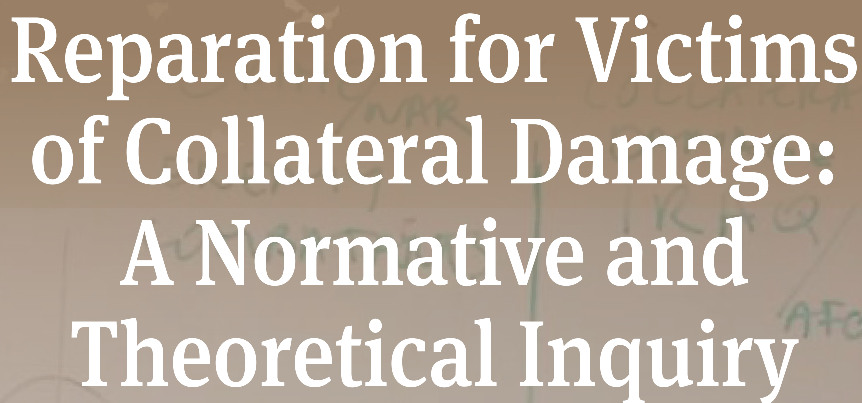

Reparation for Victims of Collateral Damage: A Normative and Theoretical Inquiry

Alphonse Muleefu

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Reparation for Victims of Collateral Damage: A Normative and Theoretical Inquiry

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ter verkrijging van de graad van doctor aan Tilburg University op gezag van de rector magnificus, prof.dr. Ph. Eijlander, in het openbaar te verdedigen ten overstaan van een door het college voor promoties aangewezen commissie in de aula van de Universiteit op

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Alphonse Muleefu

geboren op 6 juni 1979 te Rakai, Uganda.

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Dedication

In memory of my mother, Daphrose Mukamusoni, and my sister Agnes Gahongayire,
I dedicate this book. I wish you had lived longer enough to see me graduate.
May your souls rest in peace.

This book is also dedicated to all victims of war.

Preface

In 2004, I conducted a research work at the International Criminal Tribunal for Rwanda (ICTR) that had a tremendous impact on me and shaped my dedication to furthering the rights and status of victims in society. The research was focused on the prosecutor's discretion powers and the absence of *citation directe*, a criminal process that grants victims a direct access to the means of justice. After conducting that research, I became very critical of the fact that the ICTR Statute grants the prosecutor very extensive discretion which, if abused, leaves no clear avenue for victims to appeal or challenge his or her decision to drop the case. I could not understand why the International Community that adopted the 1985 UN Declaration on Basic Principles of Justice for victims of Crime and Abuse of Power could not include a single right for victims in the Tribunal's statute. Since that experience, I started promoting victims' rights in Rwanda through research, trainings and conferences/seminars. It was through those activities that I came into contact with the International Victimology Institute Tilburg (INTERVICT) in the 2009 Conference on Victimological Approaches of International Crimes focusing on Africa, an event I consider the beginning of my PhD journey.

It is with that same passionate support for victims' rights and a critical reading of international law that I came up with the title of this book; 'Reparation for Victims of Collateral Damage: a Normative and Theoretical inquiry'. Collateral damage, a concept that is often used to describe incidental and accidental damages of war does not exist as a legal term in laws of war. Reisman calls it 'a *terminus technicus,* a technical term', and argues that one of the functions of such terms 'is to present their referent so clinically and so emotionlessly that it facilitates dispassionate analysis.' (….) But in reality, 'it [collateral damage] means killing and injuring noncombatant men, women and children and destroying their property.'[1] The biggest challenge throughout this research was to ensure that activism does not undermine academic neutrality, and that could not have been achieved without a team of great supervisors. I therefore thank sincerely Prof. Rianne Letschert, Prof. Randall Lesaffer and Dr. Felix Ndahinda for their constructive criticisms and guidance. Rianne, I thank you so much for believing that I could do a PhD even before I thought about it. Since the beginning of my stay in Tilburg University (February 2010), I have been thinking about how to best express my gratitude to you, even now, I am still unable to find appropriate words that can describe how valuable you and your family have been to me. To Randall, thank you so very much for supporting my application, and your

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[1] W. Michael Reisman, 'Compensating Collateral Damage in Elective International Conflict' (2013) 8:1 *Intercultural Human Rights Review*, 9.

expertise greatly improved my understanding of the evolution of laws of war. To Felix, I am so grateful for all the candid discussions we had that sometimes went beyond the subject of this book, I cannot thank you enough without mentioning Uwera Belle, you both acted like another family to me. I am unreservedly thankful for all committee members, Prof. Liesbeth Zegveld, Prof. Tom Ryus and Prof. Koen de Feyter, I significantly benefited from your comments.

This book benefited from different people, experts and non-experts. I am indebted to Joseph Akwenyu, my former internship colleague at the International Criminal Court (ICC), for introducing me to different members of the Ugandan civil society's victims' rights working group especially those working in the North. Several meetings I had with them and their beneficiaries (war victims) helped me to understand most of the nuances of the Lord's Resistance Army (LRA)'s war and victimization. Special thanks go to Sarah Holewinski, former Executive Director at Center for Civilians in Conflict for inviting me in Istanbul –Turkey to attend a gathering on victims' assistance and amends. This meeting (in Istanbul) gave me an opportunity to interact with practitioners from Libya, Afghanistan and Pakistan, and two great scholars in the field, Prof. W. Michael Reisman and Prof. Liesbeth Zegveld. My sincere gratitude goes to Bas Boele and Ancora Dupain, Judges of the High Court (The Hague), Karin Deudekom, Rianne Jacobs and Anastasia van Strien of the Ministry of Justice and Security and Michiel Tjepkema of Leiden University, for introducing me to the Dutch process for compensation of Government lawful damages. Many thanks go to Alice Bosma, a research master and victimology student who volunteered to translate some relevant judgments from Dutch to English. I am indebted to Emeritus Prof. Hans van Houtte, former President of the Eritrea-Ethiopia Claims Commission (EECC), for explaining to me the mandate and working of the Commission. Thank you so much Nico Jansen, for checking my English spelling and grammar, and Hedwig Suurmeijer, for translating the English Summery to Dutch. Special thanks go to Annemarie Middelburg for reading through the concluding chapter. Your suggestions helped me to improve it, and not forgetting the good times I shared with Erik Walschots and you. My special appreciation goes to Prof. Antony Pemberton, for his valuable comments on different categories of war victims and their possible perceptions.

I thank Tilburg Law School for giving me the opportunity to conduct this study and INTERVICT for hosting me. Without their funding, this book would have remained a mere dream. I would like to thank the entire management team of INTERVICT and staff, my colleagues, for their convivial and supportive working spirit. I thank in particular Prof. Marc Groenhuijsen, Director of INTERVICT, for his inclusive leadership style that made me feel part of the Institution. I deeply acknowledge the assistance provided by the staff of INTERVICT secretariat and Tilburg University Library front desk, nothing would have been possible without your unwavering support. I am thankful to the Netherlands School of Human Rights Research and Tilburg Graduate Law School for organizing inspiring seminars and research talks.

Several people helped me settle in the Netherlands and Tilburg in particular. Dr. Anne-Marie de Brouwer, thank you so much for picking me at the train station on my first day in Tilburg and for introducing me to members of your family and foundation (MUKOMEZE). Your efforts made me feel at home. Father Sjaak de Boer, Pastor of the International English Speaking Roman Catholic Church of Our Saviour in The Hague, has been a good friend and strong connection in the Netherlands since 2006; I sincerely thank you for introducing me to many people. Anneke Overbosch, thank you so much for assisting me in furnishing the apartment and the very early morning drive to Antwerp for the awkward connection to Schiphol. I also thank you for introducing me to your family. In the same way, I thank Jean de Dieu Ngirinshuti and his family, your presence in Tilburg and friendship was an irreplaceable gift to me. Special thanks go to my Paranymphs, Mark Bosmans, also my officemate, and Eefje De Volder, for their assistance. Mark, I thank you so much for being such a wonderful officemate, I truly enjoyed our many exchanges both academic and non-academic and your thoughtful views. Eefje, I am grateful for your friendship and for benefiting from your amazing organizational skills, especially in reminding me many administrative and logistical things.

I wonder whether I would have completed this research without a social life. I am grateful for all my friends and colleagues, I will avoid mentioning names for the fear of missing some, but each is truly thanked for joining me in so many social events that were a good escape from the daily routine of PhD research. I thank the staff of the Rwandan Embassy in The Hague and Rwandan Diaspora for organizing different events that kept me connected to my home country. I am equally thankful for the support of my good friends back in Rwanda, the phone calls, emails, chat messages, and visits whenever I came for my often short holidays strengthened our friendship and kept me close to them while I was far away.

I am grateful for the fact that conducting this research never affected my interest in transitional justice education. Since 2009, I have been co-developing a course that helps different participants (scholars, students and practitioners) learn different initiatives that have been adopted in the post-genocide Rwanda. This initiative became successful because of the great support from co-organizers, Dr. Roelof Haveman and Dr. Usta Kaitesi. I sincerely thank them for their endless contribution to this endeavour and I am thankful of the exciting participants, which gave me a forum of diverse people to share my research findings.

I wouldn't have completed this book without the support of my family. Special thanks go to my relatives, brothers, sisters, cousins, aunts, uncles, in-laws, nieces and nephews, for their encouragements and advice. My sincere gratitude goes to a man that represents everything valuable in me, my father, John Baptist Bushishi. He is the foundation on which all the things I get in life are based. I look up to his caring and loving character. Thank you so much, 'Taata'.

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List of Abbreviations

ACLU	American Civil Liberties Union
AMIS	African Union Mission in Sudan
ANC	African National Congress
AYINET	African Youth Initiative
BCC	British Claims Commission
CERP	Commander's Emergency Response Program
COOPI	Cooperazione Internationale
CIVIC	Campaign for Innocent Victims in Conflict
CRPC	Commission for Real Property Claims of Displaced Persons and Refugees
DoD	Department of Defence
EEBC	Eritrea-Ethiopia Boundary Commission
EECC	Eritrea-Ethiopia Claims Commission
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EPLF	Eritrean People's Liberation Front
FCA	Foreign Claims Act
FCC	Foreign Claims Commission
FOIA	Freedom of Information Act
FTCA	Federal Tort Claims Act
GALA	General Administrative Law Act
HPCC	Housing and Property Claims Commission
IAC	International Armed Conflict
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IED	Improvised Explosive Device
IDPs	Internally Displaced Persons
ILA	International Law Association
ILC	International Law Commission
LRA	Lord's Resistance Army
MCA	Military Claims Act
NATO	North Atlantic Treaty Organization
NECPA	North East Chili Producers Association
NIAC	Non-International Armed Conflict
NRA	National Resistance Army

NRM	National Resistance Movement
OTP	Office of the Prosecutor
OPCD	Office of Public Counsel for Defence
OPCV	Office of Public Counsel for Victims
PCA	Personnel Claims Act
POW	Prisoners of War
PVA	Public Vessels Act
SAA	Suits in Admiralty Act
SGBV	Sexual and Gender Based Violence
SOFA	Status of Forces Agreements
TFV	Trust Fund for Victims
TPLF	Tigrayan People's Liberation Front
TRC	Truth and Reconciliation Commission
UAE	United Arab Emirates
UN	United Nations
UNCC	United Nations Compensation Commission
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSCSL	United Nations Special Court for Sierra Leone
UPDF	Uganda People's Defence Forces
US	United States of America

Chapter 1: General Introduction

1.1 The Contextual Background and Problem Statement

An Iraqi man is walking along, holding something similar to an Improvised Explosive Device (IED), in an area that is known for roadside bombs. Worried US soldiers fire multiple rounds, killing the man. When the soldiers reach the scene, no IED or other weapons are found. In another location a civilian van is approaching a US patrol convoy. A soldier through an interpreter shouts 'Stop' but the driver pays no attention to the warning and the soldiers on the roadblock open fire, killing the driver and five other passengers. When the vehicle is searched, no contraband or weapons are found. In a separate incident, US soldiers open fire on a family approaching their convoy, injuring three and killing a bystander. In Kabul, a riot broke out against US soldiers for causing an accident that destroyed civilian properties. In response, soldiers fire into the crowd injuring and killing some of the rioters and bystanders.[1] In Kosovo, North Atlantic Treaty Organization (NATO) soldiers mistakenly drop bombs on a refugee convoy, killing and injuring civilians; mostly children, women and elderly.[2] During intense fighting in Darfur, a Sudanese military helicopter drops a bomb on a rebel's car destroying it and causing the death of two children in the vicinity.[3]

These are just some cases of war damage, of the destruction of lives and property of different individuals and families. While we often see such incidents on our television screens, many others are never reported on. These kinds of wartime incidents fall into two categories: either they are lawful under international law or they are not. The problem, however, is that these two kinds of damages often

---

1 These are some of the many individual and family stories that are found in the documents received from the US Department of the Army in response to American Civil Liberties Union (ACLU) Freedom of Information Act Request, https://www.aclu.org/sites/default/files/webroot/natsec/foia/log.html, accessed on 5 November 2013.

2 International Criminal Tribunal for the former Yugoslavia (ICTY), 'Final Report to the Prosec tor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia' http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf §§ 48, 90 & 91, accessed on 2 May 2014 (hereafter ICTY Final Report); Noam Neuman, 'Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality', in M. N. Schmitt and L. Arimatsu (eds.), *Yearbook of International Humanitarian Law* (Vol. 7, T. M. C. Asser Instituut, 2004) 79, 94.

3 ICC Pre-Trial Chamber I, 'Situation in Darfur, Sudan, in the case of the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al-Bashir"): Decision on 8 Applications for Victims' Participation in the Proceedings' [Nº.:ICC-02/05-01/09 of 9 July 2010] §§ 9-10.

happen in the same conflict which makes it difficult to distinguish them. The fact that a certain military is committing widespread violations of the laws of war does not necessarily mean that it will not cause lawful damages as well, just as a highly disciplined and trained military will not totally prevent some of its (rogue) soldiers from committing some unlawful acts. If this presumption – that within a same war there is often a mixture of lawful damages with unlawful ones – is true, it should also be correct to assume that making a distinction between victims of such kind of categories will be difficult or at least controversial.

The underlying rationale for conducting this study is based on the fact that the existing laws of war do not provide for reparation to all victims who got harmed during war. They exclude victims of collateral damage, i.e. damages caused by acts which are considered lawful under the laws of war. The laws of war prohibit intentional targeting of non-combatants and any other attack that can cause excessive damage in relation to the expected military objective to be achieved. The basic guiding humanitarian rule of war – the principle of distinction – demands combatants 'to ensure respect for and protection of the civilian population and civilian objects, (…) to distinguish between the civilian population and combatants and between civilian objects and military objectives (…) and to accordingly direct their attacks against military objectives.'[4] Under the laws of war, collateral damage is accepted when it results from proportionate attacks and accidents or unintended actions, such as those due to inaccurate military intelligence or a mechanical failure of the weapon. In either of those circumstances, individuals not involved in the fighting can be killed, injured, or their properties can be destroyed without making such incidents unlawful under international law.[5] According to Article 3 of the 1907 Hague Convention related to Laws and Customs of War on Land and Article 91 of the Additional Protocol 1 to the Geneva Conventions (hereafter Additional Protocol 1), victims of violations of laws of war are entitled to reparation. The fact that reparation is formulated as a secondary right, a right that is triggered by the violation of another right or legal prohibition, has made it difficult to legally justify reparation for victims of collateral damage (lawful damages).[6] The existing laws

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4 Article 48 of the Additional Protocol I of the Geneva Conventions.

5 Kenneth Watkin, 'Assessing Proportionality: Moral Complexity and Legal Rules' in A. McDonald, and T. McCormack (eds.), *Yearbook of International Humanitarian Law* (Vol.8, T. M. C. Asser Instituut, 2005) 3, 8-9; A. Cohen, 'Proportionality in the Modern Law of War: An Unenforceable Norm, or the Answer to Dilemma?' (Perspectives Paper No. 20 2006) http://www.biu.ac.il/SOC/besa/perspectives20.pdf accessed on 13 November 2011, 2.

6 Heidy Rombouts, Pietro Sardaro, and Stef Vendeginste, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights', in K. De Feyter. and others (eds.) *Out of the Ashes Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 345, 352; Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (2003) 85 *International Review of the Red Cross* 851; Yael Ronen, 'Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict' (2008) 42 *Vanderbilt Journal of Transitional Law* 189; F.V. Garcia-

of war are not explicit on how to repair the collateral damage. The development of the laws of war was more inspired by the desire to minimize the damage in relation to the anticipated military goal, realising that it would be impossible to completely prevent the killing of innocent non-combatants or destruction of their properties.

This study is based on the premise that international law (at least in theory) provides for (a) sanctions and (b) the obligation to repair damages, on states or individuals that violate the laws of war, while those who cause lawful damages of war are neither condemned nor expected to repair the harm. Hence, the research question of this study is formulated as follows: why are the laws of war silent about repairing the harm suffered by victims of collateral damage? The focus is on: (a) understanding the reasoning behind providing reparations to victims of violations of laws of war while excluding those of collateral damage, and (b) finding out whether there are grounds (moral or legal) on which reparation to victims of collateral damage could be (un)justifiable.

1.2 Key Concepts

It is important to clarify key concepts that are central to this study such as reparations, war and victims of collateral damage. The purpose of this section is to provide a contextual explanation of the most important terms that are crucial to the understanding of the subject, as opposed to providing mere definitions.
To begin with, *reparation(s)* is a concept familiar to most lawyers and scholars but its meaning and composition is not the same in different instruments and writings. In different regional and international legal instruments, the term reparations is interchangeably used with other words such as compensation, amends, remedies, redress, restitution, satisfaction and restoration. Article 8 of the Universal Declaration of Human Rights provides for 'a right to "an effective remedy" to everyone whose fundamental rights are violated'. The American Convention on Human Rights provides for 'compensation' to the victim of miscarriage of justice (Article 10) and stipulates that a person whose rights have been violated 'be remedied' and given 'fair compensation' (Article 63). It also refers to 'compensatory damages' in its Article 68(2). The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that 'the victim of an act of torture "obtains redress" and has an enforceable right to fair and adequate compensation' (Article 14). The International Covenant on Civil and Political Rights provides for an 'effective remedy' to a person whose rights have been violated (Article 2), and 'compensation' for a person who has been unlawfully arrested or detained (Article 9(5)). The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides for 'an effective remedy' for individuals whose rights and freedoms

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Amador, L. B. Sohn and R. R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Oceana publications, Inc., 1974) 21ff.

are violated (Article 13), 'an enforceable right to compensation' to a victim of unlawful arrest and detention (Article 3(5) and Article 3(5) of Protocol 7 of the same convention provides for 'compensation to wrongful convictions.' Article 3 of the 1907 Hague Convention (IV) on Regulations concerning the Laws and Customs of War on Land, and Article 91 of the Additional Protocol 1 to the Geneva Conventions refers to an obligation of the party to pay 'compensation' where the case demands so. The Draft Principles on the Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities provides for 'adequate compensation' (Principle 4).

Another challenge is related to different meanings given to the same terms when used in different instruments. Whereas, for instance, the Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereafter the Draft Articles) considers the cessation and non-repetition of the wrongful conduct (Article 30) as separate from the obligation to make 'full reparation for material or moral damage' (Article 31), the 2005 UN 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 (hereafter the Basic Principles and Guidelines) includes restitution, compensation, rehabilitation, satisfaction (including cessation of the violation) and guarantees of non-repetition as forms of reparation. The 1971 Convention on International Liability for Damage Caused by Space Objects provides that the launching State shall be liable to pay compensation for the damage (Article II) and that the compensation shall be determined according to international law, and principles of justice and equity, 'in order to provide such reparation (…)' (Article XII), hence treating compensation as a form of reparation. The Statute of the International Criminal Court equally treats restitution, compensation and rehabilitation as forms of reparations (Article 75 (1)). According to Article 41 of ECHR, the European Court of Human Rights can order for 'a just satisfaction' in case the High Contracting Party provides for 'partial reparation.' Referring to reparations as synonymous to (or as a form of) satisfaction is somehow different from the Basic Principles and Guidelines which refers to satisfaction as a separate form of reparations. The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that victims should have access to justice and fair treatment (including prompt redress), restitution, compensation, and assistance without making any indication that these are forms of reparation or not.

De Greiff finds that reparations are defined in two distinct contexts. The first context is the wide definition that is used under international law (judicial), where reparations refer to 'all those measures that may be employed to redress the various types of harms that victims may have suffered as a consequence of certain crimes (...) such as restitution, compensation, rehabilitation and satisfaction.' In the second context, he defends a narrow definition that makes reference to those programmes that attempt to provide direct benefits to the victims. In the latter sense, he notes that, 'reparations' exclude programmes such as 'truth-telling,

criminal justice and institutional reforms'.[7] Evans notes that even if reparations are often misunderstood to mean monetary compensation, the current meaning of the concept has evolved to include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. She also stresses that the word 'remedy' is related to a much broader concept than reparations because in addition to the components of reparations it includes access to justice – which is often equated to criminal prosecution or access to human rights procedures – and that redress is often used as synonymous to remedy even if it (redress) sometimes refers to the action.[8] Daly and Proietti-Scifoni demonstrate how reparation, restoration and making amends are differently and interchangeably used in both domestic and international law.[9] They argue that '[t]oday, in international law, reparation is the overarching concept, with restorative justice and restoration as secondary. In domestic criminal justice, restorative justice is the overarching concept, with reparation or restoration as secondary terms.'[10]

For May, 'if the loss is the possession of a thing, then the loss is understood to trigger restitution. (…) If the loss is that one retains the thing but it has now been damaged, then this is understood to trigger reparations. [And] if such a *status quo ante* cannot be achieved, then additional compensation is due (…).'[11] In both situations, reparations or restitution are about achieving restorative justice, 'to restore something is to return it to a previous state (…) before it was damaged or lost'.[12] May's definition of reparations is very narrow and somehow contrary to those given above or that of the handbook on *Reconciliation after Violent Conflict* which finds the term 'reparation' as the most comprehensive notion, including concepts such as restitution, compensation, rehabilitation, satisfaction, redress and 'covering a wide range of measures that are taken to redress past wrongs which may or may not qualify as human rights violations and/or as criminal offences.'[13]

The Basic Principles and Guidelines, the most recent instrument to specifically focus on reparation, states that reparation can be in the form of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Restitution refers to measures that are aimed at restoring the victim to his or her previous position before the cause of harm. Compensation is the form of reparation that focuses on the 'economically assessable damages such as physical or mental harm, lost opportunities, material damages and loss of

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7 Pablo De Greiff, *The Handbook of Reparations* (Oxford University Press, 2006) 452-453.

8 C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press, 2012) 13.

9 Kathleen Daly and Gitana Proietti-Scifoni, 'Reparation and Restoration' in M. Tonry (ed.), *The Oxford Handbook of Crime and Criminal Justice* (Oxford University Press, 2011) 207, 207-253.

10 Ibid, 213.

11 L. May, *After War Ends: A Philosophical Perspective* (Cambridge University Press, 2012) 185.

12 Ibid, 183-184.

13 S. Vandeginste, *Reconciliation After Violent Conflict: A Handbook* (International Institute for Democracy and Electoral Assistance, 2003) 145.

earnings, moral damages, costs of experts/legal assistance, costs of medicine and medical, psychological and social services.' Rehabilitation is about provision of services such as medical, psychological, legal or social services. Satisfaction includes measures of cessation of harm, truth finding, apology, sanctions and commemoration. Reparation of guarantees of non-repetition includes adopting reform and preventive measures to ensure that the harm does not happen again.[14]

It is fair to conclude that the existing different uses of the term reparations do not solve the problem of defining the concept, and for that matter, the meaning of reparations used here should be seen as relevant to the context and purpose of this study, which will (inescapably) add to the existing confusion. For the purpose of this study, reparations shall refer to all those measures that are aimed at removing or (at least) reducing the consequences of harm. In other words, reparations should attempt to take back the victim to his or her situation before the harm, and where it is not possible, measures directly benefiting the victim, aimed at adequately dealing with the consequences of harm. The measures referred to include restitution, compensation, satisfaction, rehabilitation, and any other measure that might directly impact on the victim's situation in as far as resolving the consequences of harm is concerned. The meaning of reparations here does not include punitive measures (such as criminal prosecutions, institutional reforms, and guarantees of non-repetition) or any other measure that is aimed at condemning the conduct. The exclusion of such measures seeks to accommodate the fact that collateral damages of war are lawful. It would be irrelevant to promise guarantees of non-repetition for an unavoidable incident or condemn it once it has happened.

War: According to the *Stanford Encyclopedia of Philosophy*, 'war is understood as an *actual, intentional, and widespread* armed conflict between political communities.'[15] This definition includes inter-state wars, civil/internal wars (wars between rival communities, or a rival community and the state), and wars between a political 'pressure' group and a (foreign) state (irregular or internationalized armed conflicts), and excludes fighting between individuals and rival gangs whose fighting is not politically motivated.[16] Though there are some overlaps, war is regulated into three major bodies of law: *jus ad bellum* concerns reasons for going to war, *jus in bello* (laws of war) deals with the fighting and *jus post bellum* regulates the aftermath of war. This study is cutting through all these bodies of law by focusing on how to address lawful damages of war.

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[14] 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 (A/Res/60/147 of 16 December 2005), ix(18)-(23).

[15] Brian Orend, 'War' in Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* (Fall 2008 Edition) http://plato.stanford.edu/archives/fall2008/entries/war/, accessed on 19 November 2013.

[16] Ibid; see also (Unknown Author, 'The Nature of War and Armed Conflict' (AP 3000 1.1.1, The Nature of Conflict) http://www.raf.mod.uk/rafcms/mediafiles/374B4B80_1143_EC82_2E66FC5A92A09A90.pdf, accessed on 19 November 2013.

The existing laws of war – including international humanitarian law – apply differently depending on whether a war is an international armed conflict (IAC), or a non-international armed conflict (NIAC). According to the 2008 Opinion Paper of the International Committee of Red Cross (ICRC), it is stated that (1) an IAC occurs 'whenever there is resort to armed force between two or more States' and (2) a NIAC is to be defined as 'protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State.'[17] The same ICRC opinion paper clarifies that whether a conflict is an IAC does not depend on the reasons, the intensity (destruction) or duration of hostilities; it simply depends on the fact that one or more states decide to use armed forces against another, and it does not matter either whether the attacked state responded or not. However, in order for a NIAC to be distinguished from 'other internal forms of violence such as internal disturbances and tensions, riots or acts of banditry', the confrontation should (a) at least reach a certain minimum level of intensity, and (b) the non-state actor involved must be an organised group with a structure and command capable of sustaining hostilities.[18] The laws of war concerning the protection of non-combatants, in particular civilians and their properties, apply discriminately to IACs and NIACs, but most scholars have argued that such a distinction has become unsustainable.[19] For the purpose of this study, the term 'war' is used within the meaning of an armed conflict (international or non-international), as long as specific laws of war – 'rules governing the actual conduct of armed conflict'[20] – especially those concerning the protection of non-combatants and their properties and more specifically the principles of distinction and proportionality are applicable.

Victims of collateral damage: The fact that one of the essential characteristics of wars is the use of violence in pursuit of their objectives makes wars destructive by their very nature. Wars cause damages either through direct violence or due to the general disruption of economic and social infrastructures. The quest for reparations to victims of collateral damage concerns victims of *direct violence*. A victim of direct violence can be a direct victim (having suffered harm directly) or an indirect victim (based on the relationship with the direct victim e.g. a

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[17] Opinion Paper: How is the Term "Armed Conflict" Defined in International Humanitarian Law? (International Committee of Redress Cross, March 2008) 5 http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf, accessed on 20 November 2013.

[18] Ibid.

[19] The relevance or irrelevance of such distinction (different treatment of non-combatants depending on the nature of an armed conflict) see also J. G. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85:850 *International Review of the Red Cross* 313, 313-314.

[20] A. Roberts and R. Guelff, (eds.), *Documents on the Laws of War* (2nd edn., Oxford University Press, 1989) 2.

child can be a victim where a parent is a direct victim). Victims might suffer individually or collectively,[21] but the harm suffered must be personal.[22] Thus, reference to victims of direct violence excludes victims who suffer from lack of food, exhaustion, diseases, bad conditions (hygiene) in refugee camps or any other consequence attributable to war in a general sense rather than to a specific act of violence. In other words, collateral damage refers to victims of direct violence resulting from an attack that is proportionate to the military objective (incidental) as well as damages resulting from errors or unintended actions (accidental). The reason for the exclusion of general consequences of war is that it is hard to attribute responsibility to a specific group of fighters, and where such a connection is possible, consequences affect entire populations including victims of direct violence. Thus, in case of general consequences of war, measures that benefit entire populations such as general rehabilitation and reconstruction projects as opposed to specific harm tailored reparations appear more appropriate.

One would want to know the relevance of focusing on victims of collateral damage when there are other international lawful conducts of states that cause harm to innocent people. This is an interesting question considering the fact that it is a common practice for states either through the UN Security Council or regional groupings to adopt measures such as economic sanctions that hurt innocent citizens of other states. It is true that (apart from maybe targeted sanctions) economic sanctions largely affect ordinary innocent people, who have little or nothing to do with national policies, leaving those responsible (political elites) in some cases more adamant. If we take the example of economic sanctions that were imposed on Iraq immediately after its invasion and occupation of Kuwait in the beginning of 1990s, the most affected people were ordinary citizens; many deaths and sufferings because of lack of basic supplies.[23] In that respect, economic sanctions are comparable to collateral damages of war because in both situations it is the innocent individuals who suffer the most. However, unlike war situations where some victims are entitled to reparations (victims of violations) at the

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[21] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (A/RES/40/34 of 29 November 1985), A(I); see also Rule 85 of the ICC Rules of Procedure and Evidence ((ICC-ASP/1/3 and Corr.1).

[22] 'Personal harm' see ICC Appeal's Chamber, 'The Situation of the Democratic Republic of Congo, *Prosecutor V. Thomas Lubanga Dyilo*, on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008' [nº.:ICC-01/04-01/06-1432 11-07-2008] §§ 29-39.

[23] United Nations Economic and Social Council, Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights (SUBCOM), 'The adverse consequences of economic sanctions on the enjoyment of human rights' (Working paper prepared by Mr. Marc Bossuyt) adopted in the 52nd session, 21 June 2000 (E/CN.4/Sub.2/2000/33), §§59-73; Dursun Peksen, 'Better or Worse? The Effect of Economic Sanctions on Human Rights' (2009) 46:59 *Journal of Peace Research,* 59-77; Joy Gordon, 'Economic sanctions and global governance: the case of Iraq' (2009) 10:4 *Global Crime*, 356-367.

exclusion of others (those of collateral damage) there is no right to reparation for all victims of economic sanctions. Therefore, the normative discrimination found in laws of war does not exist in economic sanctions and the present research investigates justifications for such discrimination.

1.3 Methodology and Structure

This study is mainly a product of desktop research methodology combining both descriptive and analytical approaches. Through a thorough examination of relevant international norms about laws of war and reparation, available doctrine and the practice of some institutions, this study explores what arguments exist for or against providing reparation to victims of collateral damages of war. The main sources of information are legal instruments (binding and non-binding), jurisprudence, and literature including Non-governmental organization (NGO) and government reports, as well as other primary and secondary sources on reparation and the laws of war. In some instances, the study benefits from exchanges with different experts on reparation and the laws of war. Between July and August 2012, I conducted a study visit in Northern Uganda to learn about the consequences of war and the meaning of reparations by observing and listening to victims and their service providers. The use of informal consultations with experts and practitioners combining it with a field visit to Northern Uganda significantly contributed to the understanding of current theories on laws of war and reparations and broadened the scope for critical analysis.

From a theoretical and normative perspective, the study explores a possible disjuncture between the existing laws of war and established theories of reparative justice. The purpose was to discursively examine grounds on which victims of collateral damage can or cannot claim reparation. In addition to analytical arguments, different practical examples of reparations were used for purposes of illustration. It is assumed that understanding the practical aspects of reparations contributes to the understanding of some theoretical explanations on the needs of victims and the impact of (not) providing reparations. As Neff notes, '[t]hose who believe that ideas or doctrines have no impact on 'real life' are mistaken. (…) But they are also mistaken [those] who suppose that ideas or doctrines have a life entirely of their own (…).'[24] Throughout the study, the most important arguments for or against reparation for victims of collateral damage are analysed on their merits, taking the imperatives of justice, equity and societal harmony into consideration. Combining these theoretical perspectives with some practical experiences results in an evaluative framework providing grounds for (against) reparation to victims of collateral damage.

The book is divided into seven chapters. This first chapter gives a contextual background, statement of a problem, research question and research methodology

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[24] S. C. Neff, *War and the Law of Nations: A General History* (Cambridge University Press, 2005) 2.

and defines some key concepts that are crucial to the understanding of the subject. Chapter 2 focuses on the laws of war (*jus in bello*). It starts with a brief historical development of laws of war before focusing on how the notion of collateral damage is construed in both IACs and NIACs. Chapter 3 covers the development of war-related reparations and delves into current legal underpinnings before turning to some mass claims processes such as the United Nations Compensation Commission (UNCC), the Eritrea-Ethiopia Claims Commission (EECC) and the work of Truth and Reconciliation Commissions (TRCs). The selection of mass claims commissions was based on the fact that it was established after 1977, the adoption of Additional Protocol 1, an instrument that clearly codified principles of distinction and proportionality, to deal with a war (like) situation. Chapter 5 discusses assistance activities of the International Criminal Court's Trust Fund for Victims (TFVs), taking Northern Uganda as a case study. Chapter 6 focuses on the United States compensation mechanisms for war damages such as the Foreign Claim Act (FCA), Condolences Fees and Solatia Payments together with the amends campaign, a civil society initiative that is aimed at convincing fighting parties to provide reparations to all victims of war. In all these cases, much attention is paid to understanding how victims of collateral damage are either included or excluded from reparations and on which basis. Chapter 6 extends the discussion outside the confines of the laws of war and war related reparations. An attempt is made to analyse arguments for or against a right to reparation for victims of collateral damages on the basis of analogies with other fields of (international) law. It gives a brief discussion of some tort-law theoretical perspectives relevant to reparations such as economic analysis, distributive and corrective justice. It explores the role of human rights law, international strict liability of states, and administrative law in compensating lawful police damages following the case of The Netherlands. Chapter 7 is the concluding chapter. It is a recap of the major points made in the preceding chapters, explains the need for reparation to victims of collateral damage, establishes a foundation on which victims of collateral damage can claim reparation and responds to possible objections to the idea of providing reparation to victims of collateral damage. In other words, Chapter 7 is both a reflection of previous chapters but also a response to the question whether victims of collateral damage ought to be given reparations, and if so, offers a basis on how it should be pursued.

Chapter 2: The Laws of War

2.1 A Brief Background

Human attempts at organizing and regulating the conduct of wars and the protection of non-combatants predates the era of codification of the laws of war by far. It is true that the desire to protect individuals not involved in the fighting is found in all major religions and traditions.[25] However, the roots of modern laws of war were developed mainly in the Western tradition.[26] The development of the laws of war can be traced back to Antiquity as well as to the attempts by the Roman Catholic Church during the Middle Ages to bestow protection and immunity upon certain categories of persons, regarded as innocent (clergymen, elderly people, women and children).[27] During the late 17th and 18th centuries, the professionalization of warfare led to the emergence of a more general distinction between combatants and civilians.[28] The ever increasing destructive

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[25] E. G. Bello, *African Customary Humanitarian Law* (Oyez, 1980); M. Khadhuri, *War and Peace in the Law of Islam* (John Hopkins Press, 1955); C. Phillipson, *The International Law and Customs of Ancient Greece and Rome* (vol. 1, Macmillan, 1911); M. Keen, *The Laws of War in the Late Middle Ages* (Rutledge and Paul Kegan, 1965); E. T. Olawala, *The Nature of African Customary Law* (Manchester University Press, 1965); G. Best, *War and Law since 1945* (Clarendon, 1994) 14-28; Hugo Slim, 'Why Protect Civilians? Innocence, Immunity and Enmity in War', (2003) 79:3 *International Affairs* 481, 493-494; P. Ramsey, *The Just War, Force and Political Responsibility* (Rowman & Littlefield, 1983) 19-41; David W. Lovell, 'Protecting Civilians During Violent Conflict: An Issue in Context' in D. W. Lovell and I. Primoratz, *Protecting Civilians During Violent Conflict: Theoretical and Practical Issues for the 21st Century* (Ashgate Publishing limited 2012) 1, 6.

[26] R. Lesaffer, *European Legal History, A Cultural and Political Perspective* (Cambridge University Press, 2009) 17-18; Benjamin Valentino, Paul Huth, and Sarah Croco, 'Covenants Without the Sword, International Law and the Protection of Civilians in Times of War' (2006) 58:3 *World Politics* 339, 341; K. A. Raaflaub, *War and Peace in the Ancient World* (1st edn., Blackwell, 2006); Helen Durham, 'International Humanitarian Law and the Gods of War: The Story of Athena versus Ares' (2007) 8 *Melbourne Journal of International Law* 247, 254; H. C. Hoover and H. Gibson, *The Problems of Lasting Peace* (Doubleday Doran & Company inc., 1942).

[27] Slim, *Killing Civilians, Method, Madness and Morality in War*, 13; S.V.Viswanatha, *International Law in Ancient India* (Longmans Green, 1925) 125-126; A. Perreau-Saussine, and J. B. Murphy, *The Nature of Customary Law: Legal, historical and philosophical perspectives* (Cambridge University Press, 2007); Neuman, 'Applying the Rule of Proportionality', 83.

[28] Randall. Lesaffer, 'Siege Warfare in the Early Modern Age: A study on the customary laws of war' in A. Perreau-Saussine and J. B. Murphy, (eds.), *The Nature of Customary Law: Legal, historical and philosophical perspectives* (Cambridge University Press 2007) 176, 183; Randall Lesaffer, 'From War as Sanction to the Sanctioning of War' in M. Weller and A. Solomou, eds., *Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2014).

power of weaponry, particularly over the last century, made war into a real threat to our (human) existence.[29]

While Traditional Western laws of war mostly aimed at regulating the behaviour of armed forces against each other, covering issues such as the treatment of prisoners of war (POW) and the limitation or prohibition of the use of certain weaponry were largely codified in the Hague Conventions of 1899 and 1907,[30] the four Geneva Conventions of 1949 and their Additional Protocols focused on protection of non-combatants.[31] Nonetheless, wars have continued to cause havoc, belligerents through their lawyers and diplomats have justified their use of force as well as their ways of fighting using the same laws of war and non-combatants (civilians in particular) continue to suffer.[32] This reality could lead to a cynical conclusion that international legal instruments are useless, but it can also be said that the existence of these instruments is important because they at least provide a benchmark on which discussions can be based

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[29] S. Bidwell and D. Graham, *Fire-Power: British Army Weapons and Theories of War 1904-1945* (George Allen & Unwin, 1982); C Jorgensen and others, eds., *Fighting Techniques of the Early Modern World AD 1500 to AD 1763* (The History Press, 2005); Susan R. Grayzel, '"The Souls of Soldiers": Civilians under Fire in First World War France' (2006) 78:3 *The Journal of Modern History* 588; Y. Van Dongen, *The Protection of Civilian Populations in Time of Armed Conflicts* (University of Michigan Press, 1991) 42-58; Best, *War and Law since 1945*, 47-59 & 115-123; Heinz M. Hanke, 'The 1923 Hague Rules of Air Warfare — A Contribution to the Development of International Law Protecting Civilians from Air Attack' (1993) 33 *International Review of the Red Cross* 12; Richard H. Wyman, 'The First Rules of Air Warfare' [1984] *Air University Review*.

[30] Paul Cornish, 'Oxford Companion to Military History: Geneva and Hague Conventions' (Oxford University Press/Encyclopedia article: 1. ed); Francois Bugnion, 'Droit de Genève et droit de La Haye' (2001) 83:844 *Revue Internationale de la Croix-Rouge* 901.

[31] Judith Gardam, 'Proportionality as a Restraint on the Use of Force', (1999) 20, *Australian Year Book of International Law* 161, 164ff; J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press, 2004) 14-15; Mary E. O'Connell, 'Preserving the Peace: The Continuing Ban on War Between States', (2008) 38:1 *California Western International Law Journal* 41 (Notre Dame Legal Studies Paper No. 08-23).

[32] RS Documentation Center for War Crimes Research, 'Children – Victims of War and Peace: Reports of Participants from *Republika Srpska* at an International Conference Sarajevo' (Banja Luka 2001), http://www.rs-icty.org/PUBLIKACIJE/children-wictims_of_war.pdf accessed on 14 November 2011, 1; Grayzel, '"The Souls of Soldiers": Civilians under Fire in First World War France', 588-622; Judith Licgtenberg, 'War, Innocence, and the Doctrine of Double Effect', (1994) 74 *Philosophical Studies* 347; Thomas Nagel, 'War and Massacre' (1972) 1:2 *Philosophy and Public Affairs* 123; Patricia Hynes, 'On the Battlefield of Women's Bodies : An Overview of the Harm of War to Women' (2004) 27 *Women's Studies International Forum* 431; S. R. Hartigan, *The Forgotten Victim: A History of Civilian* (Precedent Publishing Inc, 1982) 15-22 & 55-64; Slim, *Killing Civilians, Method, Madness and Morality in War*, 24; Rianne Letschert and Theo Van Boven, 'Providing Reparation in Situations of Mass Victimization: Key Challenges Involved' in R. Letschert and other (eds.) *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) 153; D. Rothbart and K. V. Korostelina, *Why They Die: Civilian Devastation in Violent Conflict* (The University of Michigan Press 2011).

– either in public opinion forums or through courts of law – to determine the legitimacy of what happens in wars. In fact, given the reality of war in general and due to different political interests that were present during the negotiations of the Geneva laws, it is too much to expect that we could have obtained more restrictive laws of war than what is provided for in the Geneva Conventions.[33] Just as Shue and Wippman argued,

> [i]f (laws of war) prohibited everything necessary to the effective conduct of warfare, it would simply be ignored and would quickly fall into disuse. On another hand, if it allowed whatever most contributes to victory, it would be pointless and would add nothing to good strategy.[34]

Therefore, a flexible agreement balancing both military necessity with civilian immunity had to be reached and the outcome of it was to accept that under certain circumstances – to achieve military objectives – killing civilians and destruction of their properties is unavoidable as incidental or accidental damages: this is often referred to as 'collateral damage'. A term Slim finds 'unfortunate and de-humanizing to describe victims of killings.'[35]

The laws of war oblige those in combat to apply two principles: (1) the principle of 'distinction' which requires parties in the conflict to always distinguish civilians and civilian objects from military objectives and to always direct their attacks to military objectives[36] and (2) the principle of 'proportionality' which prohibits military actions that might cause damage that is (clearly) excessive in

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[33] Aldrich, one of the US Delegates in the negotiations to the adoption of the 1977 Geneva Conventions Additional Protocol 1, responded to criticisms in the following words;
'The United States Delegation, of which I was a Chairman, was not naïve. We approached the 1974-77 Geneva Conference more as a hazard than an opportunity. Although there were a number of possible new provisions we wanted to see included in the law, particularly in light of our recent experience in Vietnam, we were never prepared to pay for them by accepting a host of "bad" provisions that might appeal to other countries. We were also quite skeptical of the possibility of obtaining sound results out of a large conference of more than 100 nations, particularly since most shared few of our interests….'
George H. Aldrich, 'Commentary: Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol 1', (1986) 26:3 *Virginia Journal of International Law* 693, 695.

[34] Henry Shue and David Wippman, 'Limiting Attacks on Dual-Use Facilities Performing Indispensible Civilian Functions', (2002) 35:559 *Cornell International Law Journal*, 559; See also K. Dijkhoff, *War, Law, and Technology* (Wolf Legal Publishers 2010) 36; Schott T. Paul, 'The Duty to Make Amends to Victims of Armed Conflict' (2013) 22:1 *Tulane Journal of International & Comparative Law* 87, 95.

[35] Slim, *Killing Civilians: Method, Madness and Morality in War*, 169.

[36] Joseph Holland, 'Military Objective and Collateral Damage: Their Relationship and Dynamics' in *Yearbook of International Humanitarian Law* (Vol.7, T. M. C. Asser Instituut 2004) 35, 39.

relation to the military advantage expected to be achieved.[37] Commentators on the laws of war disagree on many issues, but unanimously agree that the killing of innocent civilians and destruction of their properties is inevitable in time of war.[38] Walzer remarks that 'whether it is a war of aggression, or a war of self-defence, whether it is fought to conquer another people or to rescue them from conquest, whether its purpose is to defend an empire or stop a massacre, children die in all these wars.'[39]

The dilemma caused by the need to balance the protection of non-combatants and achieve military objectives remains a controversial topic in the interpretation and implementation of laws of war. It is not an overstatement to say that challenges of interpretation and application exist in all wars without exception. The claim that armies of democratic states are more likely to avoid collateral damage than non-democratic states is questionable.[40] Some studies have even claimed that in fact armies of democratic countries are more likely to cause collateral damages because of a strong demand at home to avoid risking their soldiers in combat.[41] The purpose here is neither to show which states do respect laws of war better than others nor to criticize circumstances under which laws of war permit collateral damage. This remark is intended to show the real ugliness of war, the acceptance that certain damages of war are unavoidable due

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[37] Watkin, 'Assessing Proportionality: Moral Complexities and Legal Rules', 8-9; see also Cohen, 'Proportionality in the Modern Law of War: An Unenforceable Norm, or the Answer to Dilemma?', 2.

[38] Holland, 'Military Objective and Collateral Damage: Their Relationship and Dynamics', 50; see also Kenneth Watkin, 'Assessing Proportionality: Moral Complexities and Legal Rules', 4-5; Adam Roberts, 'Lives and Statistics: Are 90% of War Victims Civilians?' (2010) 52:3 *Survival* 115.

[39] Micheal Walzer, 'Responsibility and Proportionality in State and Non-State War' [2009] *Parameters* 40 (Remarks delivered on 5th February 2009 at the US Army War College), 41 http://www.carlisle.army.mil/usawc/parameters/articles/09spring/walzer.pdf accessed on 13 November 2011.

[40] Benjamin Valentino, Paul Huth and Dylan Balch-Lindsay, '"Draining the Sea": Mass Killing and Guerrilla Warfare' (2004) 58:2 *International Organization* 375; Dan Reiter and Curtis Meek, 'Determinants of Military Strategy, 1903-1994: A Quantitative Empirical Test' (1999) 43:2 *International Studies Quarterly* 363; Rudolph J. Rummel, 'Libertarianism and International Violence' (1983) 27:1 *Journal of Conflict Resolution* 27; Denis Halliday, 'Responsibility to Protect – Why Not?' (2009) 53 *Development Dialogue*: *Responses to Mass Violence – Mediation, protection, and prosecution* 83.

[41] S J Rockel and R Halpern (eds), *Inventing Collateral Damage: Civilian Causalities, War, and Empire* (Between the Lines 2009); Michael W. Reisman, 'Compensating Collateral Damage in Elective International Conflict' (2014) 8:1 *Intercultural Human Rights Law Review*, 11; Paul Robinson, '"Ready to Kill But Not To Die": NATO Strategy in Kosovo' (1999) 54:4 *International Journal* 671; Alexander B. Downes, 'Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War' (2006) 30:4 *International Security* 152; Eyal Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians' (2006) 39:2 *Israel Law Review* 81, 95; Dijkhoff, *War, Law, and Technology,* 233-234.

to the supremacy of military objectives over civilian immunity.[42]

Two reasons can be given to explain why total immunity of non-combatants is unattainable.[43] Firstly, it is claimed that it is not always easy to distinguish between combatants and non-combatants. Disagreements exist on what really constitutes a military objective and whether the role civilians play in the sustainment of wars is genuinely insignificant to protect them from enemy military attacks.[44] Secondly, laws of war acknowledge that during an armed conflict unintentional errors and 'proportional' intentional damage can happen without making such incidents of war a violation of law.[45] The difference between the two kinds of collateral damage is elaborated further in the next section. The reality of war does not allow total avoidance of civilian casualties. The argument is that however strongly one would desire to avoid harming non-combatants, errors of judgment and accidents do happen in real life. Therefore it is not expected that an armed conflict will end without causing an unintended damage. In a situation of a war it is more likely that errors, accidents, or unintended actions resulting into death or injury of non-combatants and/or destruction of their properties will occur.[46]

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[42] Thomas Hurka, 'Proportionality in the Morality of War' (2005) 33:1 *Philosophy & Public Affairs* 34, 36; Van Dongen, *The Protection of Civilian Populations in time of Armed Conflicts*, 53.

[43] Details on laws of war and the challenges of civilian protection see: Avril McDonald 'The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the increased Participation of civilians in Hostilities' (background working paper for a presentation by the Author at the University of Teheran in April 2004) http://www.asser.nl/Default.aspx?site_id=9&level1=13337&level2=13379 accessed on March 12, 2012; see also G D Solis, *The Law of Armed Conflict: International humanitarian Law in war* (Cambridge University Press 2010); M Byers, *War Law: Understanding International Law and Armed Conflict* (Grove Press, 2005); Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd ed. Cambridge University press, 2010); Michael N Smith, 'War, Technology, and International Humanitarian Law' [2005], Occasional paper series Harvard University Program on Humanitarian Policy and Conflict Resolution; P J Griffiths, *Agent Orange: Collateral Damage in Vietnam* (Alpen Editions 2004).

[44] Aaron Xavier Fellmeth, 'Questioning Civilian Immunity' (2007) 43:453 *Texas International Law Journal*; M J Sandel, *Justice, What's the Right Thing to Do?* (Farrar, Straus and Giroux 2009) 24-27; K Nabulsi, *Traditions of War, Occupation, Resistance, and the Law* (Oxford University Press 1999) 77; Best, *War and Law since 1945*, 275; Valentino, Huth, and Croco, 'Covenants Without the Sword, International Law and the Protection of Civilians in Times of War' 339; Licgtenberg, 'War, Innocence, and the Doctrine of Double Effect', 347-348; Slim, 'Why Protect Civilians? Innocence, Immunity and Enmity in War', 481; Slim, *Killing Civilians: Method, Madness and Morality in War,* 121-179.

[45] For further details on the development of the principle of collateral damage read also S Conway-Lanz, *Collateral damage: Americans, Non-Combatant Impunity and Atrocity after World War II* (Routledge Taylor & Francis Group 2006); Slim, *Killing Civilians: Method, Madness and Morality in War,* 121-179.

[46] Article 57(2)(b) Additional Protocol 1: "an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation

Besides mere accidents, combatants may also cause intentional damage as a result of a conscious decision to target military objectives while it is clear to them that innocent non-combatants or their properties in the vicinity of military targets will be harmed as long as the damage is not (clearly) excessive. Based on these reasons, the choice made in laws of war to prohibit intentional targeting of non-military objectives and any other damage that might be considered excessive in relation to military advantage and not to prohibit all wrongs that occur during an armed conflict was a pragmatic decision.[47]

In order to better understand how collateral damage is construed under the laws of war, the following section examines those provisions that tolerate harming innocents in the process of achieving military goals as a result of accidents or through the principle of proportionality. It aims to understand how the laws of war envisaged the coexistence of the two seemingly contradictory principles – civilian immunity and the military necessity. In other words, it is an attempt to clarify different circumstances under which collateral damage is allowed within the general protective framework of non-combatants. The laws of war governing IACs developed separately from those concerning NIACs and this distinction has had an impact on the interpretation of the treatment and protection of civilians, non-combatants.[48] In the following sub-sections an analysis is made to clarify the notion of collateral damage in both types of wars.

2.2 Victims of Collateral Damage under International Armed Conflicts

2.2.1 Collateral Damage resulting from Application of the Proportionality Principle

The issue of proportionate damage resulting from wars between states is regulated by both the Geneva Conventions and the Rome Statute of the International Criminal Court (ICC). In principle, the laws of war oblige parties to the conflict to avoid directing attacks to non-military persons and objects – persons not taking part in the conflict and their properties[49] and those no longer taking part in the conflict (*hors de combat*) –[50] except when their harming is unavoidable and

to the concrete and direct military advantage anticipated." See also R Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2007) 224. This kind of victimization should not be confused with victimization resulting from recklessness that is supposed to be avoided by taking precautionary measures (Articles 57 and 58 Geneva Conventions, Additional Protocol 1).

[47] William J Fenrick, 'The Law Applicable to Targeting and Proportionality after Operation Allied Force: a View from the Outside' in *Yearbook of International Humanitarian Law* (Vol.3, T. M. C. Asser Instituut 2000) 53, 57.

[48] D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn., Oxford University Press, 2008) 79.

[49] Part V, Additional Protocol 1.

[50] Article 41 (1 &2) Additional Protocol 1 provides that:
'A person who is recognized or who, in the circumstances, should be recognized to be *hors*

not manifestly excessive compared to the expected military objective.

To understand the moderation of wars requires understanding the conceptual relationship that exists between the proportionality principle and the principle of distinction.[51] While the principle of distinction requires belligerents to direct their attacks to only military objectives, the principle of proportionality is an exception to that basic rule. The principle of proportionality is a reflection of the reality that even if the overall mission should be to direct attacks against military objectives, collateral damage is unavoidable.[52] The underlying basic rule of distinction provided in Article 48 of the Additional Protocol 1 states that '[i]n order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.'[53] Article 52(2) of Additional Protocol 1 defines Military Objectives as 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'

The principle of proportionality is derived from Articles 51(5)(b) and 57(2)(a)(iii) of Additional Protocol 1 which prohibits an attack which may cause excessive 'incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, (…) in relation to the concrete and direct military advantage (…).' Article 8(2) (b) (iv) of the Rome Statute criminalizes the act of '[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects (…) which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.'[54] It implies that both the laws of war and international criminal law permit those in combat to launch an attack when it is expected that the damage to be caused to non-combatants will not be excessive.[55]

de combat shall not be made the object of attack. […] A person is hors de combat if: (a) He is in the power of an adverse Party; (b) He clearly expresses an intention to surrender; or (c) He has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself; provided that in any of these cases he abstains from any hostile act and does not attempt to escape.'

See also Article 8(2) of the Rome Statute criminalizing grave breaches of the Geneva Conventions of 12 August 1949 which include wilful attacks directed to persons and properties protected under the Geneva Conventions.

51 Watkin, 'Assessing Proportionality: Moral Complexities and Legal Rules', 8-9.

52 R Cryer and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2007) 243, 249 & 251; see also Ronen, 'Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict', 181ff.

53 Cryer and others, Ibid, 247.

54 The Rome Statute of the International Criminal Court (A/CONF.183/9 of 17 July 1998) as amended up-to-date.

55 Watkin, 'Assessing Proportionality: Moral Complexities and Legal Rules', 9; see also K.

In other terms, the proportionality principle allows violating civilian immunity for the purposes of military necessity. In such circumstances the expected victims may include those civilians working or residing in the vicinity of the military objective or working within the military objective and/or individuals who are just visiting or bypassing at the time of the attack together with civilian objects near the military objective.[56] However, it is prohibited to deliberately target civilians and non-military objectives for purposes of terror.[57] The intentional (incidental) damage can be called collateral victimization when there is a strong indication that the military commander of the attacking force had enough information about the extent of damage to be caused to non-combatants and/or their properties in pursuit of the obvious military advantage to be gained.[58] Knowledge of the attacking party is the most important element to be considered here, as it defines the mindset of the attacking party in weighing the military advantage to be achieved and the damage to be caused. The commander must have sufficient information about the expected incidental damage to be caused and the anticipated military achievement before he or she decides to launch an attack. This process of weighing is what is called the application of the principle of proportionality.[59]

2.2.2 Collateral Damage resulting from Accidents or Unintentional Conduct

The above section (2.2.1) addressed collateral damage resulting from intentional harm caused through application of the principle of proportionality (incidental damage). This section discusses collateral damage resulting from errors or unintended/unintentional attack(s) on non-combatants and/or their properties (accidental damage). It is important to keep in mind that criminal law requires the prosecution to prove the criminal intention of the perpetrator.[60] In wars it is possible that accidents, mistakes or errors of judgment causing the death or injury of non-combatants and or destruction of their properties can happen outside the intention and beyond the attacker's total control.[61] Accidental

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Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (International Committee of the Red Cross, 2003) 161-176.

[56] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict,* 119.

[57] Article 51(2) of Additional Protocol 1 and Article 8(2)(b)(i), (ii), and (v) of the Rome Statute.

[58] Valentino, Huth, and Croco, 'Covenants Without the Sword, International Law and the Protection of Civilians in Times of War', 343-345.

[59] Waldemar A Solf, 'Protection of Civilians Against the effects of hostilities under customary International Law and Under Protocol 1' (1986) 1 *American University International Law Review* 117, 128.

[60] See Mohamed Elewa Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19:3-4 *Criminal Law Forum* 473.

[61] Cryer and others, *An Introduction to International Criminal Law and Procedure,* 224; see also Walzer, 'Responsibility and Proportionality in State and Non-State War', 41.

damage can happen in two circumstances: (A) as a result of pure accidents due to mechanical failures of military weapons which might hit a wrong target, or due to (B) human errors, where the attacker can be mistaken on the target. Human errors or mistakes are possible in two situations: (i) when the attacking force confuses a civilian object with a military one, such as mistakenly targeting civilian trucks for military vehicles. (ii) When the attacker is mistaken on the damage that is expected to be caused. It is expected that the attacking party will refrain from more attacks when information is available that the damage is expected to be excessive or that the target is not a military objective. However, accidental damage is different from reckless damage. Combatants are supposed to take precautionary measures to avoid reckless damages.[62] Unforeseen damages are inferred to in Article 57(2) (b) of Additional Protocol I which states that;

> [A]n attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

This provision implies that a war crime will be committed only if the commander continued the attack after realising that his objective was not military or that his attack would cause excessive damage. Therefore, victims of the initial misguided attack(s) are considered victims of collateral damage. To clarify with an example briefly mentioned in the general introduction: on 14 June 1999, NATO forces mistakenly dropped several bombs on a refugee convoy on the Djakovica-Prizren road killing about 75 and injuring about 100 Albanian civilians, mainly children, women and elderly. The International Criminal Tribunal for the former Yugoslavia-Office of the Prosecutor (ICTY-OTP) Committee established to review the NATO bombings recommended that the OTP should not carry out investigations into this incident. It was in the committee's opinion that civilians were not deliberately targeted and that the aircrew ceased to attack when they became aware of the fact that they were civilians. The committee continued to argue that it was probable that the aircrew flying hundreds of miles an hour above 15.000 feet to avoid being attacked limited their capacity to distinguish between a civilian convoy and a military convoy. Nonetheless, it concluded that even if the lower altitude would have benefited the aircrew,[63] the incident does not display a degree of recklessness in failing to adopt precautionary measures that would reach the level of placing a criminal charge over the perpetrator(s).[64] Walzer, who argues for the decrease of civilian casualties by increasing the risk of

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[62] Articles 57 and 58 of Additional Protocol I.

[63] Neuman, 'Applying the Rule of Proportionality', 94.

[64] ICTY Final Report paras 63-70.

combatants, notes that, 'we are bound to do what we can to reduce those risks, even if this involves risks to our own soldiers. If we are bombing military targets in a just war, and there are civilians living near these targets, we have to adjust our bombing policy – by flying at lower altitudes [...],'[65] – a suggestion Benvenisti partially rejects when he concludes that, '*in general* there is no requirement to risk combatants to reduce the risk to enemy civilians, but some of the specific rules entail the assumption of such risk.'[66]

The apparent challenge to civilian protection against accidental attacks is to some extent attributable to the nature of modern warfare. Warfare has changed from the traditional direct military confrontation within confined spaces to more distant and highly concealed combat. Wars are increasingly fought between unequal forces in terms of weaponry and discipline, and depending on context, all sides can be blamed for their displayed risk aversion that results into collateral damage.[67] It is also true that the advancement of military technology has increased the protection of soldiers in combat[68] and chances of finding and killing targeted enemies, but such a reduction in military deaths does not correspond with the reduction in the number of civilians killed or injured and/or the destruction of their properties.[69]

2.3 Victims of Collateral Damage under Non-International Armed Conflicts (NIACs)

2.3.1 Lack of Distinction and Proportionality Principles for NIACs

Interpreting the scope of civilian protection in NIACs requires extreme caution.

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[65] Michael Walzer, 'The Triumph of Just War Theory (and the Dangers of Success)' (2002) 69:4 *Social Research* 925, 937.

[66] Eyal Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians', 108; See also Kennedy, *Law of War*, 36.

[67] Dijkhoff, *War, Law, and Technology*, 14-15; Slim, *Killing Civilians: Method, Madness and Morality in War*, 156-161.

[68] Slim, ibid, 53.

[69] Ibid, 169; Dijkhoff, *War, Law, and Technology*, 229-238; Richard Murphy, 'Responses to the Ten Questions' (2011) 37:5 *William Mitchell Law Review* 5064; Ryan J. Vogel, 'Drone Warfare and the Law of Armed Conflict' (2011) 39:1 *Denver Journal of International Law and Policy* 101, 102; Michael N. Schmitt, 'Precision Attack and International Humanitarian Law' (2005) 87:859 *International Review of Red Cross* 445; David Whetham, 'Remote Killing and Drive-By Wars' in D.W. Lovell and I. Primoratz (eds.) *Protecting Civilians during Violent Conflict: Theoretical and Practical Issues for the 21st Century*, 199-214; Michael W. Lewis, 'Drones and the Boundaries of the Battlefield' (2012) 47:*2 Texas International Law Journal* 293. For a slight contrast read Robert P. Barnidge, Jr. 'A Qualified Defense of American Drone Attacks in Northwest Pakistan under International Humanitarian Law' (2012) 30 *Boston University International Law Journal* 409, 419-422; Susan Breau and Marie Aronsson, 'Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict' (2012) 35:2 *Suffolk Transnational Law Review* 255.

It is unclear on which grounds collateral damage might be justifiable because principles of proportionality and distinction are derived from rules regulating IACs and there is no equivalent provision for NIACs. Common Article 3 of the Geneva Conventions and the Additional Protocol relating to the Protection of Victims of NIAC (hereafter Additional Protocol 2) are vague on the treatment of non-combatants. There is no clear provision to address the manner in which the military commander shall humanely fight and win the war.

Common Article 3 provides for non-combatants to be treated 'humanely' and lists a number of violations that are strictly prohibited. Additional Protocol 2 that supplements Common Article 3 provides that non-combatants should enjoy 'general protection' without extending the protection provided in Additional Protocol 1 to NIACs. A similar omission is also found in the Rome Statute where it is clearly indicated that the war crime of causing disproportionate damage applies to wars or conflicts *between* states.[70] The ICC Elements of Crimes dealing with an attack that causes excessive damage to non-combatants clearly excludes internal armed conflicts. For the perpetrator to be held responsible, the elements of the crime prescribe that the conduct in which the attack occurred must have been within a context of an international armed conflict.[71]

Additional Protocol 2, Article 13(1) provides that '[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations'. This provision, which comes to supplement Common Article 3, fails to give clear limitations by not defining the term 'general protection'. If Additional Protocol 2 is carefully read together with the wording of Common Article 3, one could conclude that either civilians are untouchable, which would be unrealistic to suggest in a context of war, or that civilian protection is subject to the discretion of fighting parties which is contrary to the main objective of laws of war, namely to reduce the suffering caused by war for those who are not taking part in the fighting, be it internal or international.[72]

Common Article 3 strongly prohibits all acts of violence against non-combatants using words such as 'at any time and in any place whatsoever'. Such a wording gives an impression that military attacks are prohibited at any time they are expected to harm non-combatants, even if there is a high military

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[70] Cryer and others, *An Introduction to International Criminal Law and Procedure*, 249; Heike Spieker, 'The International Criminal Court and Non-International Armed Conflicts' (2000) 13:2 *Leiden Journal of International Law* 395.

[71] Article 8 (2) (b) (iv) of the ICC Statute (War crime of excessive incidental death, injury, or damage), ICC Elements of Crimes, As reproduced from the *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002* (United Nations publication, Sales No. E.03.V.2 and corrigendum), and amended by the 2010 Review Conference *of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010* (International Criminal Court publication, RC/11), 19 http://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf, accessed 7 September 2011.

[72] Cryer and others, *An Introduction to International Criminal Law and Procedure*, 222.

necessity or advantage. Even though Common Article 3 starts by demanding parties to be bound by the article at the minimum, it does not explain what the 'minimum application' entails, contributing even more to its vagueness. It is not clear whether it is prohibited to harm non-combatants in all circumstances or whether there is a certain standard to be respected. The Rome Statute in Articles 8(2)(c) and (d) that criminalize violations of Common Article 3 and 8(2)(e)(i)-(ii) that prohibit intentional attacks against civilians are also silent on the issue of excessive damage in internal armed conflicts.

2.3.2 Extension of Distinction and Proportionality Principles in NIACs

The absence of clear regulations on the protection of non-combatants in NIAC calls for an exploration into the applicability of the principles of proportionality and distinction. It is crucial to briefly examine why the laws of war provide a different protection to civilians when it was already clear during the negotiations of the two Additional Protocols that civilians in NIACs deserved similar treatment to civilians in IACs?[73] According to some historical explanations, it was believed that NIACs (rebellions, strife or insurrections) were purely internal matters regulated by 'national criminal law',[74] due to their small magnitude and the nature of the violence involved, which could be contained within a given territory of a concerned state without international intervention.[75] The treatment of civilians in NIACs was supposed to be a domestic affair concerning the relationship between a given state and its subjects (citizens). Thus, other states were not supposed to intervene since it would compromise state sovereignty.[76] Additionally, states opposed the application of inter-state laws of war into NIACs because of the need to protect the monopoly of state security institutions in keeping domestic law and order through the use of force against rebellious groups. States did not want to give similar rights to rebels as those accorded to state armies.[77] The laws of war and international law in general aimed at regulating relations between different states and not to address how individuals interacted with their states.

It is interesting also to question the intentions of influential states that were involved in the drafting of the two Additional Protocols for ignoring civilian

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[73] It is noted that delegates from several countries during the negotiations suggested the adoption of similar rules for the protection of civilians regardless of whether it is an international or non-international armed conflict. See for further details H S Levie, (ed.) *The Law of Non-International Armed Conflicts, Protocol II to the 1949 Geneva Conventions* (Martinus Nijhoff Publishers, 1987) 449-470.

[74] *ICTY Prosecutor v. Dusko Tadic* 1 (ICTY-94-1). App. Ch.'s Decision on Defence Interlocutory Appeal on Jurisdiction, 2 October 1995, § 96.

[75] L Moir, *The Law of Internal Armed Conflict* (Cambridge University press 2002) 3-4.

[76] Cryer and others, *An Introduction to International Criminal Law and Procedure*, 229-230.

[77] Fleck (ed.), *The Handbook of International Humanitarian Law*, 612-613.

protection in NIAC.[78] The period leading to the adoption of the two Additional Protocols followed the Nuremberg Trials and the Tokyo War Crimes Tribunal (1945-1946) and the adoption of the Universal Declaration of Human Rights (1948),[79] both seminal episodes, clearly demonstrating that targeting civilians is deplorable. At the same time, colonial powers were still using violent means to suppress civilian populations demanding independence in the 1960s whereby none of those responsible were ever prosecuted.[80] This precedent has made some scholars conclude that principles regulating warfare developed in the West disregarded not only NIACs but also other 'conflicts between the so-called civilized world and the "uncivilized", the colonizers and the colonized, or conflicts involving white nations or people on one side and black, brown, or red peoples on the other.'[81]

The argument that a NIAC is a domestic matter is losing ground because of the nature of recent wars, many of which spread over the borders.[82] There is a growing momentum among scholars to argue for the extension of the international protection of civilians in NIACs,[83] a position also held by the

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[78] Drafting of the two Additional Protocols started in 1960s; see Sylvie S. Junod, 'Additional Protocol II: History and Scope' (1983) 33:29 *American University Law Review* 29, 31–33.

[79] Slim, *Killing Civilians: Method, Madness and Morality in War*, 19.

[80] Rama Mani 'Reparation as a Component of Transitional Justice: Pursuing 'Reparative Justice' in the Aftermath of violent Conflict' in K De Feyter and others (eds.) *Out of the Ashes Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005) 53.

[81] Stephen J Rockel, 'Collateral Damage: A Comparative History' in S J Rockel and R Halpern (eds), *Inventing Collateral Damage: Civilian Casaulities, War, and Empire* (Between the Lines 2009) 1, 17 on footnote 60 citing page 20 of G Best, *Humanity in Warfare* (Wiederfeld and Nicholson 1980) and A Dworkin, 'The Laws of War in the Age of Asymmetric Conflict' in Kassimeris (ed.), *The Barbarization of Warfare* (New York University Press 2006, 222-24).

[82] Taking the examples of the 1990 to 1994 war and 1994 genocide that took place in Rwanda and its subsequent impact on the Great Lakes Region, particularly on the Democratic Republic of Congo (DRC); the Kosovo conflict; the endless armed conflict and lawlessness in Somalia and its impact to its neighboring Kenya and Ethiopia; the case of the Northern Uganda's Lord Resistance Armey (LRA) and its impact on Sudan, DRC and the Central Africa Republic, the Conflict in South Sudan and its impact on Uganda, Kenya and Ethiopia; the 2010 post-election dispute of Ivory Coast and the influx of refugees to Liberia and Ghana; the case of Darfur and its proximity to Chad, the Nepalese conflict (1996 -2006), the Sri Lankan conflict against the Tamil Tigers and the Libyan conflict and its impact on the proliferation of some weapons into the hands of militant groups in the Sahara or the impact of uprisings/revolutions in Arab countries in particular Syria and its impact on its neighboring countries with the involvement of external players as well, are indications that NIACs are not so much internal anymore.

[83] Moir, *The Law of Internal Armed Conflict*, 1-21; ; Cryer and others, *An Introduction to International Criminal Law and Procedure*, 224-225 & 230; Holland, 'Military Objective and Collateral Damage: Their Relationship and Dynamics', 51-52; J M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law*, Volume I. (Rules) (International Committee of Red Cross, 2009) 3-78.

ICTY Appeal's Chamber's decision (*Prosecutor v. Tadic*).[84] NIACs can result into refugee influx and/or movements of people affecting neighbouring countries. In other words, what was entirely a domestic issue is not in real sense an internal affair because of the negative impact it can have on other states. In the same vein, it is hard to know when a conflict is internal or not, due to the fact that some NIACs might involve other state(s) in proxy war supporting internal belligerents. The increase in human sufferings and economic damages resulting from the most recent NIACs has fostered the desire to require from parties involved in combat to respect principles of distinction and proportionality in order to minimize civilian casualties.[85] It would be in the interest of non-combatants (civilians) if the laws of war concerning the protection of civilians were similarly applicable irrespective of whether an armed conflict has an international or non-international character. In the *Tadic* case, it was acknowledged that due to the development of human rights law, the 'state-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well.'[86] This has contributed to a suggestion that rules governing IACs should also shift towards NIACs to allow possible similar protection to all those individuals who are not involved in wars. Non-combatants are non-combatants irrespective of whether the war is international or non-international. The fact that serious violations of human rights can significantly contribute to inter-state and regional conflicts which threaten international peace and security, state sovereignty should not be used to undermine the protection of civilians.[87]

In spite of obvious differences in provisions, it can be argued that the link that exists between the first and second Additional Protocols and the four Geneva Conventions is a reflection that these instruments complement each other. Article 1 of Additional Protocol 2 states that it supplements Common Article 3 and applies to situations that are not provided for in Article 1 of Additional Protocol 1. It can therefore be argued that since Additional Protocol 2 comes in to cover the gap left out by Additional Protocol 1 and Common Article 3, it cannot provide for less protection than what is already provided for in Additional Protocol 1 when actually the whole logic of developing the laws of war was about reducing the suffering caused by wars.

In addition, the connection can be established between Article 1(2) of

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[84] *ICTY Prosecutor v. Dusko Tadic* 1 (ICTY-94-1). App. Ch.'s Decision on Defence Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 97.

[85] D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 605.

[86] *Prosecutor v. Tadic,* § 97; see also M.A Baderin and M. Ssenyonjo (eds.) *International Human Rights Law: Six Decades after the UNDHR and Beyond* (Ashgate Publishing Limited 2010) 548.

[87] C Tomuschat, *Human Rights between Idealism and Realism* (2nd ed. Oxford University, Press 2008) 154; see also the United Nations Security Council Resolution 794 of 3 December 1992 concerning Somalia (S/RES/794(1992).

Additional Protocol 1 and the Preamble of Additional Protocol 2 where both recognize that 'in cases not covered (…), the human person remains under the protection of the principles of humanity and the dictates of the public conscience'. The two protocols recognized the importance of the Martens clause (though modified) of The Hague Conventions of the 1899 and 1907 which implied that existing laws and customs of war would remain in force for those issues not covered in the conventions.[88] There is a continued disagreement on the meaning of the clause in present International Humanitarian Law. On the one hand, this clause is seen as a mere diplomatic statement that has nothing to do with the interpretation and application of laws of war, while on the other hand it is viewed as a codification of customs, public consciousness or opinion and principles of humanity.[89] The answer probably lies in the middle. As much as this statement cannot stand as a source of a positive obligation on its own, it is also too simplistic to assume that public opinion and principles of humanity have nothing to do with how we interpret the laws of war. The commentary on Additional Protocol 1 gives two reasons as to why the Martens clause was affirmed in 1977;

> First, despite the considerable increase in the number of subjects covered by the law of armed conflicts, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment; thus the Martens clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted. Secondly, it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned regardless of subsequent developments of types of situation or technology.[90]

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[88] The Original Martens clause in the preamble of the 1899 the Hague Convention (II) with Respect to the Laws and Customs of War on Land, states that; 'Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.' This was subsequently modified in the preamble of the 1907 Hague Convention VI, respecting the Laws and Customs of War on Land, and all the articles of denunciations of the Four Geneva Conventions, article 1, of the Additional Protocol I, and finally the preamble of Additional Protocol II.

[89] Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11:1 *European Journal of International Law* 187; Emily Crawford, 'The Modern Relevance of the Martens Clause' (2007) 6 ISIL *Yearbook of International Humanitarian and Refugee Law* 1, Sydney Law School Research Paper No. 11/27; Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94:1 *The American Journal of International Law* 78; Dijkhoff, *War, Law, and Technology*, 76-82.

[90] International Committee of the Red Cross, Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, (article 1, Para 3.) http://www.

The commentary concludes that 'the Martens clause, which itself applies independently of participation in the treaties containing it, states that the principles of international law apply in all armed conflicts, whether or not a particular case is provided for by treaty law, and whether or not the relevant treaty law binds as such the Parties to the conflict.'[91] It is persuasive to argue that the present principles of humanity and dictates of public conscience indicate that wars should be reasonably fought within humane consideration. To achieve a humane balance between protecting non-combatants and winning the war requires adopting measures based on proportionality principles. All these reasons mentioned above were given in the ICTY Appeals Chamber's decision in the case *Prosecutor v. Tadic* which concluded that due to increased internal armed conflicts with much cruelty, large scale destruction and the universality of human rights values, 'since the 1930s, (...) the distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict.'[92]

The call to extend principles of distinction and proportionality is aimed at advancing the view that excessive damage should be avoided irrespective of whether it is an international or non-international armed conflict. A similar suggestion was already made in 1758, with Vattel noting that;

> [I]t is perfectly clear that the established laws of war, those principles of humanity, forbearance, truthfulness, and honor, (…), be observed on both sides in a civil war. The same reasons which make those laws of obligation between State and State render them equally necessary, and even more so, in the unfortunate event when two determined parties struggle for the possession of their common fatherland.[93]

2.4 Challenges of Determining Collateral Damage

Even if the principles of proportionality and distinction were to be unanimously accepted as part of customary international law – thus making them applicable in all wars – that alone would not resolve all the challenges. These principles do not provide total protection: civilians still remain vulnerable to incidental and accidental damage. The prohibition of 'clearly' excessive damage leaves non-combatants, victims of war in the lurch in different ways. It is hard to assess

icrc.org/ihl.nsf/COM/470-750004?OpenDocument, accessed on 9 November 2011.

[91] Ibid

[92] *Prosecutor v. Tadic,* § 97.

[93] E. de Vattel, *The Law of Nations or the Principles of Natural Law: Applied to the Conduct and to the Affairs of Nations and of Sovereigns* 1758 (C G Fenwick trans. Slatkine Reprints – Henry Dunant Institute 1983) 338; E de Vattel, *the Law of Nations or Principles of the Law of Nature applied to Conduct and Affairs of Nations and Sovereigns* by J. Charity (New Edition), Book III: Of War, § 294 http://www.constitution.org/vattel/vattel_03.htm, accessed on 23 February 2012; Fleck (ed.), *The Handbook of International Humanitarian Law*, 615.

what constitutes 'excessive' and whether or not the rule of proportionality has been applied correctly. The subjectivity involved leaves several uncertainties in determining whether the harm caused resulted from a war crime or whether it was collateral damage.[94] By consequence, it is often hard to assess whether damage caused to civilians is 'collateral' and thus licit, or excessive, and thus illicit. Additionally, even if we were to tighten the rules of fighting, mechanical faults of weapons, errors in military technology and human fallibilities will continue to cause civilian casualties. Total protection of civilians is only possible if we could achieve a completely peaceful world, as it was recognised by the ICRC that it is 'only peace that could guarantee effective protection for the civilian population (…) because the principle of proportionality contains a subjective element that is liable for abuse.'[95]

The weighing of the damages of a military operation in relation to its achievements is a very complicated task for those in combat and those who are intending to evaluate whether the principle of proportionality was respected.[96] Holland argues that weighing the damage caused against anticipated military gains requires a subjective examination of the intention of the attacking commander using unrelated values: 'the civilian losses and their properties on the one side and the military advantage on the other'.[97] Some critics have wondered whether measuring the evilness and goodness of war is morally right, whether the principle of proportionality is clear and if it can be explicable through arithmetical figures.[98] For instance, it is unclear whether there are fixed quantitative yardsticks for measuring the proportionality of a military attack?[99] It is also unclear whether an evaluation should be based on each separate destruction caused by every military attack (military tactics) or if it is supposed to be weighed in totality of the whole warfare (military strategy),[100] or whether the whole total destruction

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[94] Watkin, 'Assessing Proportionality: Moral Complexities and Legal Rules', 5 & 31; Neuman, 'Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality', 90 – 93; Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians', 81ff.

[95] Levie, (ed.) *The Law of Non-International Armed Conflicts, Protocol II to the 1949 Geneva Conventions,* 451 (author's paraphrasing); see also Slim, *Killing Civilians, Method, Madness and Morality in War*, 21.

[96] Cohen, 'Proportionality in the Modern Law of War: An Unenforceable Norm, or the Answer to Dilemma?', 1; see also Oxford Institute for Ethics, Law and Armed Conflict, 'Workshop Report: Proportionality in War of 21 May 2009' http://www.elac.ox.ac.uk/downloads/ProportionalityinWarWorkshopReport.pdf accessed on 20 October 2010.

[97] Holland, 'Military Objective and Collateral Damage: Their Relationship and Dynamics', 46-47.

[98] Hurka, 'Proportionality in the Morality of War', 51-66; Hamutal Esther Shamash, 'How Much is Too Much? An Examination of the Principle of Jus in Bello Proportionality' (2006) 2 *Israel Defense Forces Law Review* 1.

[99] Watkin, 'Assessing Proportionality: Moral Complexities and Legal Rules', 49-51.

[100] Neuman, 'Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality', 99-100 & 109-111.

caused during that whole process of warfare should be measured in relation to the overall achievement of the military campaign?[101]Kennedy notes that 'even a leading humanitarian law expert will not tell you how many civilians should be killed for this or that. The possible answer you could get is 'you can't target civilians' – thereby refusing to engage in the pragmatic assessments.'[102] These are undoubtedly hard questions requiring answers beyond the scope of this study because the aim of this research is not to examine the necessity of increasing the threshold of civilian protection, but rather to find out whether victims of collateral damage should be granted reparation. Nonetheless, these unanswered questions indicate many unresolved issues surrounding the application and interpretation of the principle of proportionality.

Challenges of interpretation concerning the application of the proportionality principle also exist among responsible institutions.[103] The often cited example is the decision of the ICTY's Prosecutor in relation to the NATO bombings. In a period of about three months (24 March 1999 to 9 June 1999) NATO launched a military campaign against the army of the former Federal Republic of Yugoslavia. The conduct of NATO during this campaign was criticized for (allegedly) violating international humanitarian law and critics, including Amnesty International, demanded that military officers who were involved in the operation be investigated, indicted and possibly prosecuted for their alleged responsibility.[104] Despite NATO's acknowledgement that some errors of judgment were made while carrying out military raids,[105] the ICTY Committee that was established to review the NATO bombing concluded that 'most applications of the principle of proportionality are not quite so clear cut' and after finding out that, 'either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate

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[101] Cryer and others, *An Introduction to International Criminal Law and Procedure,* 251.

[102] Kennedy, *Law of War*, 147.

[103] ICTY Final Report paras 48, 90 & 91; See also Luis Moreno-Ocampo, The ICC Chief Prosecutor, 'OTP Letter in response to communications received about Iraq' (the ICC, The Hague, 9 February 2006) http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf accessed on 17 November 2011; Susana Sacouto & Katherine Cleary, 'The Gravity Threshold of the International Criminal Court' (2007) 23:5 *American University International Law Review* 807.

[104] ICTY Final Report Paras 1-9; Erlanger Steven, 'Rights Group Says NATO Bombing in Yugoslavia Violated Law' *New York Times*, (June 08, 2000) http://www.nytimes.com/2000/06/08/world/rights-group-says-nato-bombing-in-yugoslavia-violated-law.html accessed on 06 September 2011; Amnesty International, 'Federal Republic of Yugoslavia (FRY) /NATO: "Collateral damage" or unlawful killings? Violations of the Laws of War by NATO during Operation Allied Force' http://www.amnesty.org/en/library/info/EUR70/018/2000 accessed on 06 September 2011.

[105] Carolin Wuerzner, 'Mission Impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals' (2008) 90:872 *International Review of Red Cross* 907, 907.

charges against high or lower level accused for particularly heinous offences,' the Committee recommended that 'no investigation be commenced by the Office of the Prosecutor (OTP) in relation to the NATO bombing campaign or incidents that occurred during the campaign.'[106] Although the report on the NATO bombing has been criticized for leaving many issues unanswered,[107] its overall conclusion is instructive on the reality of war as far as the protection of non-combatants is concerned.

Furthermore, international law seems to prescribe different standards of proportionality. While Article 51(5)(b) of the Additional Protocol 1 obliges parties to avoid attacks *expected* to cause excessive damage, Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court prohibits 'an attack launched in the "*knowledge*" of the attacking force that it would cause incidental damage that is "*clearly*" excessive in relation to the "*concrete* and *direct overall*" military advantage anticipated.' The ICC's adoption of 'knowledge' instead of 'expected' can be attributed to the United States' influence in contribution to the drafting of the elements of crimes. The US delegation emphasised that:

> [t]he knowledge element is key to the "excessive damage" or "proportionality" analysis for this offence. Since the evaluation is necessarily subjective, the proportionality knowledge threshold must be high and analysis must be based on the perspective of the accused in planning and conducting the attack, based on what was known at the time of the attack, and with appropriate consideration of the exigent circumstances.[108]

Even if it is specified in the ICC Elements of Crimes that this should not mean that belligerents are allowed to violate the laws of war, the application of the word 'knowledge' instead of 'expected' and the fact that the damage is not only required to be excessive but 'clearly' excessive leads to the suggestion that the Rome Statute applies different criteria to what was provided for in Additional Protocol 1 when it comes to assessing whether proportionality precautions were violated.[109]

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[106] ICTY Final Report paras 48, 90 & 91; Hamutal Esther Shamash, 'How Much is Too Much? An Examination of the Principle of Jus in Bello Proportionality'.

[107] Read for example Michael Bothe, 'The Protection of Civilian Population and NATO Bombing on Yugoslavia: Comments on the Report to the Prosecutor of the ICTY' (2001) 12:.3 *European Journal of International Law* 531; Fenrick, 'The Law Applicable to Targeting and Proportionality after Operation Allied Force: a View from the Outside', 54-55.

[108] Proposal submitted by the United States of America, 'Draft Elements of Crimes, Addendum' to the Preparatory Commission for the International Criminal Court, 4th February 1999, PCNICC/1999IDP .4/Add.2, 10.

[109] Articles 51(5)(b), and 57(2)(a)(iii) Additional Protocol 1, Article 8(2)(b)(iv) Rome Statute, see also Holland 'Military Objective and Collateral Damage: Their Relationship and Dynamics', 49-50.

Although it can be said that the difference between 'expectation' and 'having knowledge' is insignificant, given the fact that in every situation the prosecutor has to clearly prove that the perpetrator intentionally violated the laws of war,[110] differences in terms of evidence still seem to exist. To show that someone had knowledge of something seems to demand the prosecutor to prove with certitude that the perpetrator knew the exact outcome that the attack was to cause (clear) excessive damage (subjective evidence). Whereas it can be said that expectation is about proving the probability based on the circumstance existing at the time of the attack to indicate that the commander should have expected to cause (clearly) excessive damage (objective evidence). Therefore, Additional Protocol 1 requires commanders to make more efforts in gathering intelligence to 'a reasonable person' threshold before launching an attack to avoid excessive damage. Moreover, the fact that the Rome Statute introduces a new element of 'clear' excessiveness can also be considered as another way of providing a much wider discretion to military commanders.[111]

It is unclear whether following the above analysis, one can unequivocally conclude that the threshold used by the Rome Statute 'regresses' the protection of non-combatants because being asked not to cause excessive damage is obviously different from being asked to avoid causing damage that is clearly excessive. There is an undeniable link between war crimes found in the Rome Statute and the Additional Protocol 1,[112] but what is not clear under international law is how domestic courts will deal with conflicting rules that might arise out of these two bodies of law. For instance, to ensure the effective application of the ICC's principle of complementarity, governments are called upon to implement the Rome Statute while most of these states are also parties to the Additional Protocol 1. It is therefore interesting to see which interpretation will stand in case of conflict. Undoubtedly, any attempt to resolve a conflict related to the choice of law requires leaning towards traditional principles which explain the relationship of different laws, treaties and statutes, applicable in both international and national law (*lex specialis derogat legi generali* and *lex posterior derogat priori*). Whereas the Rome Statute is specific in international criminal law matters, Additional Protocol 1 is specific in situations of armed conflict. To argue that the most recent law, the Rome Statute, overrides the Additional Protocol I would be in violation of good faith because there is no evidence to indicate that the intention of the drafters of the Rome Statute was to reduce the existing protection of non-combatants.[113] It suffices to note that in case of doubt, in

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[110] Cryer and others, *An Introduction to International Criminal Law and Procedure*, 252; Badar, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective'.

[111] Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 120; Watkin, 'Assessing Proportionality: Moral Complexities and Legal Rules', 8.

[112] The Rome Statute in its Article 8 (war crimes) criminalizes a number of violations of International Humanitarian Law.

[113] For , 341-342 on 22 Mays ict resoleconciliation unlawful conduct more discursive views

criminal matters, law is interpreted in favour of the accused person.

The distinction between incidental and intentional killing of civilians during wars also remains controversial on moral grounds. Some scholars have argued that in fact tactical bombing (a tactical bomber targets a military objective knowing for sure that civilians and civilian objects in the vicinity will be damaged) is similar to terror bombing (a terror bomber targets civilian population to lower the morale of the enemy forces). The underlying argument is that there is no difference between the two types of bombings and if there is any, it is subjective to the attacker's intention and such intention has nothing to do with the actual harm caused to the victims.[114] The fact that damage caused by a tactical bomber is incidental whereas that of a terror bomber is an objective in itself makes little change on the ground. Bennett raises a moral rhetoric that 'if a tactical bomber who targets a military objective knowing for sure that civilians in vicinity will be killed is not killing them directly, which other way that kills directly than dropping bombs on them?'[115] Rockel argues that in fact collateral damage is a result of 'killing [non-combatants] accidently on purpose'.[116] Similarly, Cocking who sees collateral damage as a story of parents who sexually abused their 8 years old son under the justification of providing sexual education to him, argues that causing unintended but foreseen consequences is to indirectly intend those consequences and notes that 'what a person intends, of course, is not simply up to them. They might, for example, be lying or deluded about their intentions.'[117] But, in a more pragmatic approach, Walzer notes that the principle of proportionality on which collateral damage is based puts 'the interest of individuals and mankind at a lesser value than the victory that is being sought.'[118] Nathanson, before concluding that 'almost absolute is not good enough', in his argument for the total protection of civilians, reemphasizes Walzer's argument that "proportionality leaves too much room for judgment and interpretation, and its use is bound to be skewed under conditions of fear and uncertainty."[119] However, since wars can hardly exist without causing collateral damage, knowing the intention of the attacker (a

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see M. Newton and L. May, *Proportionality in International Law* (Oxford University Press 2014) 85-153.

[114] M Walzer, *Just and Unjust Wars, A moral Argument with Historical Illustrations*, (revised ed. Basic Books 2006) 153-155; J Bennett, *The Act Itself* (Clarendon Press 1995) 203-208; Joseph M Boyle Jr., 'Towards Understanding the Principle of Double Effect' (1980) 90:4 *Ethics* 527.

[115] J Bennett, Ibid, 203-204 (paraphrased).

[116] Rockel and Halpern (eds), *Inventing Collateral Damage: Civilian Causalities, War, and Empire*, 4.

[117] Dean Cocking, 'Collateral Damage: Intending Evil and Doing Evil' in D.W. Lovell and I. Primoratz (eds.) *Protecting Civilians during Violent Conflict: Theoretical and Practical Issues for the 21st Century*, 53ff (paraphrased).

[118] Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 129.

[119] Stephen Nathanson, 'Are Attacks on Civilians Always Wrong?' in Lovell and Primoratz (eds.) *Protecting Civilians during Violent Conflict: Theoretical and Practical Issues for the 21st Century*, 30&35.

military commander) is not entirely useless. As Hills notes:

> It is bad to treat killing as if it were valuable for its own sake and worth pursuing for its own sake. It is worse for you to adopt the indirect terror plan rather than either of the strategic plans, even if you would kill the same number of people and cause the same amount of suffering in either case.[120]

Additionally, the process of weighing the principle of proportionality is also complicated by the fact that it is difficult to establish the real intentions and motives of those who caused the damage during war. The Rome Statute requires investigators and/or prosecutors of war criminals to place themselves in the context of a war. There is no doubt that for one to achieve a fair balance between the protection of civilians and achieving military objective he or she should be positioned in the situation of combatants, but the major concern here is that, despite the good intentions of that strategy, it is unlikely that a war situation can be mentally recreated. Normally, attempts to investigate (though not always) often happen some years after these alleged violations were committed, and even if investigations were to be conducted immediately after the attack, many issues remain mysterious. The story about Afghan goatherds as described by Sandel can help us to understand a lot of uncertainties that happen in war that we cannot easily contemplate:

> In June 2005, a team of four US Special force in Afghanistan was sent on a secret mission near the Pakistan border. Shortly after taking their positions, two Afghan farmers with their goats arrived together with a boy of about 14. On the one hand, the goatherds appeared to be unarmed civilians. On the other hand, letting them go would run the risk that they would inform the Taliban of the presence of the US soldiers. As the four soldiers contemplated their options, they realized that they didn't have any rope, so tying up the Afghans to allow time to find a new hideout was not feasible. The only choice was to kill them or let them go free. They decided to let them go, about an hour after they released them, they were attacked by Taliban fighters who killed three of the four soldiers on the mission and shot a US helicopter that sought to rescue them killing all sixteen soldiers onboard.[121]

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[120] Alison Hills, 'Defending Double Effect' (2003) 116:2 *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 133, 148; Against the idea that all wars should be prohibited see for example C. Mckeogh, *Innocent Civilians: The Morality of Killing in War* (Palgrave Macmillan, 2002) 103ff.

[121] Sandel, *Justice, What's the Right Thing to Do?*, 24-25, (A deducted version of the account as cited from Luttrell M, with P Robinson, *Lone Survivor: The Eyewitness Account of Operation Redwing and the Lost Heroes of SEAL Team 10* (Brown and Company 2007).

Sandel argues that since we now know the whole story, it is easy to (perhaps) suggest that killing these goatherds would have been a right thing to do, maybe because these were not civilians *per se* and it would have saved the mission including 19 lives of American soldiers and the loss of their helicopter.[122] Indeed, arithmetically, killing three civilians might not be (clearly) excessive in relation to the military objective that was expected to be achieved out of that operation. But let us assume for a moment that we do not know the ending of this story and that the US soldiers decided to kill the goatherds, who were clearly unarmed civilians, doing civilian activities; how many investigators, prosecutors, or judges would have been convinced that killing these Afghan farmers was a military objective or collateral damage? We should also be reminded that in situations of doubt about whether someone is a civilian or not, that person should be considered a civilian.[123] Even if we were to assume that these three Afghan farmers were (illegal) combatants, the US soldiers would not be expected to kill them because the laws of war oblige combatants to treat POW humanely and not to kill captured combatants (including illegal combatants).[124] As it was noted in an ICTY judgment, there are no sustainable arguments to exclude some persons from protection (*ICTY Prosecutor v. Delalic et al*). If persons are not protected by the Third Geneva Convention relative to the Treatment of Prisoners of War, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War should be applicable.[125] The mere fact that US soldiers had to first deliberate on whether these Afghan civilians were to be killed or not is an indication that there is a serious disagreement on the treatment of non-combatants and sometimes killing them is just one of the options. It is quite significant and interesting to learn that Marcus Luttrell, the only survivor of the mission, revealed that the reason he voted for the release of the Afghan farmers, a vote he still regrets, was based on the dictates of his Christian soul, not on the laws of war.[126] This is an indication of how difficult it is to understand the intentions and motives of combatants during the fighting. Clausewitz notes that:

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[122] Sandel, *Justice, What's the Right Thing to Do?*, 26.

[123] Article 50(1), Additional Protocol I states that, '…In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.'

[124] Fourth Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949; Common Article 3 of the Four Geneva Conventions read it together with the whole Geneva Conventions of 12 August 1949, Convention (III) relative to the Treatment of Prisoners of War, and article 45 of the Additional Protocol I; see also Fleck (ed.), *The Handbook of International Humanitarian Law*, 82.

[125] *Prosecutor v. Zejnil Delalić et al.* ("*Čelebići*"), Case No. IT-96-21-T, Trial Judgement, 16 November 1998, paras 236-277 (This citation was first seen on Wikipedia about the term unlawful combatants http://en.wikipedia.org/wiki/Unlawful_combatant accessed on 13 September 2011).

[126] Sandel, *Justice, What's the Right Thing to Do?*, 25.

> (…) war is such a dangerous business that mistakes which come from kindness are the very worst. (…) It would be futile – even wrong – to try and shut one's eyes to what war really is from sheer distress at its brutality. (…) To introduce the principle of moderation into the theory of war itself would lead to logical absurdity.[127]

This is not a proposal to abandon the principle of proportionality or the laws of war altogether; it is an explanation of the fact that it is not easy to know real reasons behind the destruction that happen in wars.[128] For instance, it is not possible to know for sure whether civilians are intentionally killed due to lack of means to halt a possible revelation of certain information to the enemy soldiers, or whether it is a result of hatred or whether it is genuine unavoidable collateral (incidental) damage. Nathanson notes that, 'our feelings about these things also depend on who the victims and perpetrators are. We have less sympathy for some victims than for others as well as varying positive and negative attitudes towards perpetrators.'[129] There is no doubt that the 'knowledge' of the attacker is necessary – as far as establishing the criminal intention is concerned – but what is questionable is whether the intention of the injurer should have anything to do with the determination of the factual existence of the harm caused to the injured and potential obligations to repair.

2.5 Concluding Remarks

The current protection of non-combatants, in particular innocent civilians, from violence of wars is derived from the Geneva Conventions and its two Additional Protocols which provide that civilians and civilian objects are not supposed to be targeted during the fighting. This protection is supposed – at least expected – to be applied by all sides in all wars whether international (inter-state) or non-international (civil war) and the violation of the laws of war by one party to the war do not obliterate the obligation of the other. However, the same laws of war acknowledge the fact that total protection of civilians is impossible. Civilians can be killed, injured or their properties destroyed as a result of lawful incidents – collateral damage – either as accidents and/or due to incidental damage that is not (clearly) excessive in relation to the expected military gains.

This chapter has demonstrated that it is the intention of the attacker and not

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127 C Von Clausewitz, *On War* (M Howard and P Paret eds. and Trans Princeton University Press 1976) 75-76.

128 C Fried, *Right and Wrong* (Harvard University Press, 1978) 23, 30-53; see also J R Searle, *Intentionality: an Essay in the Philosophy of Mind* (Cambridge University Press, 1983).

129 Nathanson, 'Are Attacks on Civilians Always Wrong?', 18; subjectivity on victimization in wars see also Alphonse Muleefu, 'Beyond the Single Story: Rwanda's Support to the March 23 Movement (M23)' (2013) 5:1 *Amsterdam Law Forum* 106, 109; Maja Zehfuss, 'Killing Civilians: Thinking the Practice of War' (2012) 14 *The British Journal of Politics and International Relations* 423-440.

the seriousness of harm that matters for an incident to be either a war crime or collateral damage. This is the main reason why collateral damage remains a controversial topic susceptible to subjective interpretations by both theorists and practitioners of the laws of war. The fog of war, lack of independent information from battlefields and the subjectivity in interpretation of the principle of proportionality have all contributed to the continued disagreements about whether the damages of war resulted from mere accidental and/or incidental military conducts, or whether it was due to unlawful conduct. Despite the existence of disagreements, scholars and commentators on the laws of war unanimously agree that collateral damage is inevitable.

The next issue to explore therefore is how to repair the harm caused to victims of collateral damage given the fact that recent developments in international (criminal) law are increasingly and (to a certain extent) exclusively in favour of the individual right to reparation for victims of war crimes.

Chapter 3: War Reparations: The Case of Mass Claims and Truth Commissions

3.1 Historical Antecedents of War Reparations

The development of reparation for war damages can be traced back through the history of peace treaties. The just war theory, which took its classical form during the Late Middle Ages, most famously through the writings of Saint Thomas Aquinas (c. 1225-1274), implied a discriminatory concept of war: war could not be just on both sides. This meant that only the just side had a right under the *jus ad bellum* to wage war. As a logical consequence, both the *jus in bello* (laws applicable during war) and the *jus post bellum* (the laws about ending war) had to be applied discriminatingly. Whereas the just side enjoyed the benefits and protection of the laws of war (*jus in bello*), the unjust did not. The just side was thus entitled to plunder and ask for restitution and compensation for all the damages suffered during the war and costs made as a result of the war, while the unjust side was liable for all wartime actions. The logical consequence of a just war ought to be that at the time of peace making the just side would be determined – the guilt for the war was attributed to one side and justice about the object of contention would be rendered – whilst the just side would receive compensation for all its costs and losses.[130]

While the just war theory had never been a very practical concept, over the Early Modern Age (15th-18th centuries) it got even more on a collision course with reality. The ideal of justice inherent to the discriminatory character of the just war clashed with the reality of the emerging sovereign states. Within the European society of equal and sovereign states, it was impossible for states to render or accept any judgment on the justice of a war. The absence of any arbitral organ above states to decide on their disputes left states with one option,

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[130] On details about the history of war reparations see; P. D'Argent, *Les réparations de guerre en droit international public: la responsabilité internationale des États à l'épreuve de la guerre* (Emile Bruylant 2002); Randall Lesaffer, 'The Classical Law of Nations (15th to 18th Centuries)' in A. Orakhelashvili, ed., *Research Handbook on the Theory and History of International Law (Research Handbooks in International Law Series)* (Edward Elgar, 2011) 408; Randall Lesaffer, 'Peace Treaties from Lodi to Westphalia' in R Lessaffer, (ed.), *Peace Treaties and International Law in European History, From the Late Middle Ages to World War One* (Cambridge University Press, 2004) 9; Randall Lesaffer, 'A Schoolmaster abolishing Homework?:Vattel on Peacemaking and Peace Treaties in V Chetail and P Haggenmacher (eds.), *Vattel's International Law in a XXIst Century Perspective = Le droit international de Vattel vu du XXIe siècle* (Martinus Nijhoff Publishers 2011), 353; H. van Houtte, B. Delmartino and I. Yi, *Post-War Restoration of Property Rights under International Law* (Vol.1, Cambridge University Press, 2008).

barring total victory, that of reaching an agreement through concessions and compromises in peace treaties. Within the context of peace treaties, the concept of just war had to yield to the concept of legal war. Whereas for a war to be just, one had to have a just cause – which basically came down to the claim that one reacted to a prior, ongoing or threatening injury committed by the enemy – for a legal war, only formal conditions applied: a belligerent had to be sovereign and the war had to be formally declared. All European peace treaties from the 15th to the early 20th century signed between sovereign powers abstained from rendering any judgment on the justice of war and were built on the silent acceptance that both sides had held a right to wage the war, in the sense of a legal war. By consequence, both sides enjoyed the protection of the laws of war and could thus not be held liable for their actions under the laws of war.[131] But peace treaties went even further. Until the end of the 18th century, almost all peace treaties held a clause of 'amnesty', expressly excluding any kind of legal or other action to achieve redress – including for trespasses against the laws of war. The amnesty clauses favoured the preservation of the future peace over the rectification of the wrongs of the past. Peace treaties were compromises between parties and an amnesty clause meant that all related past injustices were forgotten as if nothing ever happened. It is as if the introduction of sovereignty that saw states exempted from reparation for the violation of *jus ad bellum* acted as an excuse to even forego reparation concerning trespasses against *jus in bello*, which is less logical because *jus in bello* concerns the conduct of war, not the reasons for going to war.

Until the 20th century, it was commonly accepted in doctrine that an amnesty clause was tacitly implied in all peace treaties extending to state–to–state reparation but that it could be lifted by an express and one–sided clause on indemnification.[132] From 1815 (the post–Napoleon era), peace treaties often

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[131] Details see Randall Lesaffer, 'Alberico Gentili's *ius post bellum* and Early Modern Peace Treaties' in B. Kingsbury and B. Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford University Press, 2010) 221-226.

[132] Read Neff, *War and the Law of Nations*; Lesaffer, Ibid, 221-226; United Nations 'Reports of International Arbitral Awards, Mixed Claims Commission United States-Venezuela 17 February 1903' (2006) IX, 113-318 http://untreaty.un.org/cod/riaa/cases/vol_IX/113-318.pdf, accessed on 18 November 2011; United Nations, Reports of International Arbitral Awards, Execution of German – Portuguese Arbitral Award of June 30th 1930 (Germany – Portugal), 16 February 1933, (2006) III, 1371-1386 http://untreaty.un.org/cod/riaa/cases/vol_III/1371-1386.pdf, accessed on 18 November 2011; United Nations, Reports of International Arbitral Awards, Samoan Claims (Germany, Great Britain, United States), 14 October 1902, (2006) IX, 23-27 http://untreaty.un.org/cod/riaa/cases/vol_IX/23-27.pdf, accessed on 18 November 2011; Lesaffer, 'Peace Treaties from Lodi to Westphalia', 9ff; Lesaffer, 'A Schoolmaster abolishing Homework? :Vattel on Peacemaking and Peace Treaties', 353ff; Heinhard Steigner, 'Peace Treaties from Paris to Versailles' in R Lessaffer (ed.), *Peace Treaties and International Law in European History, From the Late Middle Ages to World War One* (Cambridge University Press, 2004) 59ff; Randall Lesaffer and Erik-Jan Broers, 'Private Property in the Dutch – Spanish Peace Treaty of Münster (30

included clauses of state-to-state war indemnification imposed by the victor upon the defeated power. The most famous examples are the Paris Peace Treaty of 1815, which imposed on France what is believed to be the highest amount of compensation to have ever been fully paid ahead of time[133] and the Frankfurt Peace Treaty of 1871, signed at the end of the Franco-Prussian war. Peace treaty based reparations sometimes included repairing the injustices from before the war, damages caused during the war and the cost of war. The imposition of compensation by victor(s) upon the vanquished was based on victory, not on the justice of war which ignored the fact that weaker states too could have just reasons to go to war thus making it unfair because 'victory is ordinarily on the side of strength and skills rather than on that of justice'.[134] Peace treaties with state-to-state reparations clauses continued to be adopted, generally excluding compensation of damages caused to civilians. Where such damages were sought, it was through the state on behalf of its citizens.

The Treaty of Versailles adopted after the First World War reintroduced the concept of discriminatory peace. Even though the Germans were persuaded by Wilson's Fourteen Points to lay down their arms, during the negotiations at Versailles, European members of the allied powers, instead of agreeing to the US President's lenient proposal, opted for retribution.[135] Articles 227 to 230 of the Versailles Peace Treaty of 1919 declared German officials criminally responsible for violating the laws and customs of war against the nationals of Allied and Associated Powers. Article 227 in particular provided for the prosecution of the Germany Emperor 'for a supreme offence against international morality and the sanctity of treaties' (for violating the 1839 London Treaty on Belgium's sovereignty and neutrality). Bassiouni notes that 'Article 227, which addressed the criminal responsibility of the Kaiser for waging a war of aggression, as it would now be called, did not exist at the time in international criminal law.'[136] However, the individual criminal prosecution of German officials was never fully implemented; the Germany Emperor who had sought asylum in The Netherlands was never extradited to any of the Allied Powers and the new

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January 1648)' [2007] Tilburg University Legal Studies Working Paper, 1-6, http://ssrn.com/abstract=1002389, accessed on 17 November 2011.

[133] Eugene N. White, 'Making the French pay: The costs and consequences of the Napoleonic reparations' (2001) 5 *European Review of Economic History* 337; van Houtte, Delmartino and Yi, *Post-War Restoration of Property Rights under International Law*, 11 & 14-16.

[134] Vattel, *The Law of Nations or the Principles of Natural Law : Applied to the Conduct and to the Affairs of Nations and of Sovereigns* 1758, xxi.

[135] United States Holocaust Museum, 'Treaty of Versailles, 1919: Impact of the World War I' (last updated January 6, 2011) http://www.ushmm.org/wlc/en/article.php?ModuleId=10005425 accessed on March 12, 2012.

[136] M. Cherif Bassiouni, 'World War I: "The War to end all Wars" and the Birth of a Handicapped International Criminal Justice System' (2002) 30 *Denver Journal of International Law and Policy* 244; see also Jesse S. Reeves, 'The Neutralization of Belgium and the Doctrine of Kriegsraison' (1915) 13 *Michigan Law Review* 179, 181-183; van Houtte, Delmartino and Yi, *Post-War Restoration of Property Rights under International Law*, 15.

German authorities prosecuted a very limited number of military officials who at the end of all trials were either acquitted or given lenient sentences.[137] The retributive nature of the Versailles Treaty was enforced through the infamous 'guilt clause' (Article 231) that was formulated based on the French and British proposal, which declared Germany responsible for all damages resulting from the war caused to civilian populations, corporations and governments of all the Allied Powers.[138] The significance of the guilt clause remains controversial. It is not clear whether it was an attribution of guilt for all that happened in war or a mere acknowledgment that it was the German's declaration of war on Russia and France, and its occupation of Belgium that magnified a boiling situation.[139] In either meaning, the guilt clause remains the harshest stipulation of the Versailles treaty. It was, after being threatened twice with the renewed use of force, that Germany succumbed to the demands of the Allied Powers accepting her full responsibility including the obligation to compensate all damages. Bassiouni holds that during the time of the Versailles Treaty, compensation for war damages was already acceptable under international law but he questions 'whether it included, under circumstances, such punitive damages.' He argues that 'there was no principle in international law that satisfied the goals of the allies.'[140] In addition, the allied powers created an unfair precedent by failing to compensate victims who might have suffered from their military conduct such as victims of 'hunger blockades' which, as Bassiouni notes, was clearly a violation of the *jus in bello* applicable during that period. What is more interesting is that the US, which never ratified the Versailles Treaty,[141] still benefited from all the rights and advantages provided therein except 'claims for pensions, allowances to prisoners of war, or separation allowances, which she chose to denounce through the exchange of notes between the German Chancellor and the American Ambassador at Berlin.'[142] The creation of the United States – Germany Mixed

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[137] Bassiouni, 'World War I: "The War to end all Wars" and the Birth of a Handicapped International Criminal Justice System', 256ff; see also Reeves, 'The Neutralization of Belgium and the Doctrine of Kriegsraison', 181-183.

[138] Bassiouni, Ibid, 275; Edwin M. Borchard, 'Opinions of the Mixed Claims Commission, United States and Germany (Part II)' (1926) 20:1 *The American Journal of International Law* 69; Richard M. Buxbaum, 'A Legal History of International Reparations' (2005) 23:2 *Berkeley Journal of International Law* 320.

[139] Ernest Minor Patterson, 'Effect of Economic Policies of Post War Period' (1940) 20:272 *International Conciliation* 272, 278-279; Clarence A. Berdahl, 'Myths about the Peace Treaties of 1919-1920' (1942) 21:411 *International Conciliation* 411, 417; Richard von Kuhlmann, 'Germany and France: The problem of Reconciliation' (1932) 11:137 *Foreign Affair* 137, 142ff.

[140] Bassiouni, 'World War I: "The War to end all Wars" and the Birth of a Handicapped International Criminal Justice System', 256.

[141] Berdahl, 'Myths about the Peace Treaties of 1919 – 1920'; see also article 1 of the Treaty of Peace between the United States and Germany signed at Berlin, August 25, 1921.

[142] Hessel E. Yntema, 'The Treaties with Germany and Compensation for War Damage' (1923) 23:6 *Columbia Law Review*, 511ff.

Claims Commission saw US citizens file individual complaints against Germany for the loss, damage, or injury directly or indirectly caused to persons or their properties.[143] However, such practices of individual victim-based reparation remained exceptional. The well-established practice was that individuals fall under diplomatic protection; the damage done to individuals was regarded as harm against their state and it was the state that had a right to claim reparation.[144]

In spite of the enormous destruction caused to civilians during the Second World War, allied forces favoured state-to-state reparation over individual victim-based reparation and in some circumstances states decided to waive reparation altogether for the benefit of peace and economic cooperation.[145] The Potsdam Agreement of 1945, the Paris Peace Treaties of 1947, the Treaty of Peace with Japan of 1951 and The Austrian State Treaty of 1955[146] concentrated on territorial issues such as territories under occupation, borders, colonial territories, independence and sovereignty rather than on the needs of individual victims. Following what is seen as the role of the Versailles Treaty in the rise of the National Socialist Party in Germany (Nazism), Allied Powers after the Second World War chose to pursue reparations with caution.[147] In some situations, monetary compensation was replaced with reparation in kind such as forced labour of Germans, loss of territories, appropriation of industries and intellectual properties.[148] After the Second World War, victorious states wanted to achieve political and diplomatic

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[143] International Law Association, Toronto Conference (2006), Compensation to Victims of War ('Compensation for Victims of War, Substantive Issues, Do Victims of Armed Conflicts Have an Individual Right to Reparation?'), Professor Rainer Hofmann, 8. See also United Nations, 'Reports of International Arbitral Awards, Mixed Claims Commission (United States and Germany) (1 November 1923 – 30 October 1939)' (2006) VII 1-391, 10 http://untreaty.un.org/cod/riaa/cases/vol_VII/1-391.pdf accessed on 18 November 2011, also see its Appendices in Vol. VIII, 469-511) http://untreaty.un.org/cod/riaa/cases/vol_VIII/469-511.pdf accessed on 18 November 2011; Bellais Renaud and Coulomb Fanny, 'The Fight of a 'Citizen Economist' for Peace and Prosperity: Keynes and the Issues of International Security' (2008) 19:5 *Defence and Peace Economics* 361.

[144] Van Houtte, Delmartino and Yi, *Post-War Restoration of Property Rights under International Law*, 17 (reintroduced in 1922).

[145] Text as Issued by Department of State, 'United States, France, United Kingdom, Netherlands, Belgium, Yugoslavia, Luxemburg, Final Act and Annex of the Paris Conference on Reparations' (1946) 40:4 *The American Journal of International Law Supplement: Official Documents* 117; Jacob Viner, 'German Reparations Once More' (1943) 21:4 *Foreign Affairs* 659; see also the International Law Association, 'The Hague Conference 2010' Commentary by Hofmann on Article 6 (Right to reparations) http://www.ila-hq.org/download.cfm/docid/4E702C99-897E-46A9-AA505E7FF291AFB7 accessed on 17 November 2011; van Houtte, Delmartino and Yi, *Post-War Restoration of Property Rights under International Law*, 23-29.

[146] Robert L. Ferring, 'The Austrian State Treaty of 1955 and the Cold War' (1968) 21:4 *The Western Political Quarterly* 651.

[147] Bassiouni, 'World War I: "The War to end all Wars" and the Birth of a Handicapped International Criminal Justice System'.

[148] Buxbaum, 'A Legal History of International Reparations', 322.

alliances over imposing crippling indemnities on the vanquished which in some instances sacrificed the needs of individual victims to receive reparation.[149]

After the Second World War, each country dealt with the needs of victims differently. First, due to various challenges that victims of war faced, different countries in Europe used domestic pension programmes and social security schemes which had developed since the end of the First World War to channel welfare assistance to war victims of physical and psychological injuries.[150] Second, due to the skilful advocacy and restless diplomatic negotiations of Jewish communities supported by the US government, countries in Europe adopted either administrative or (semi)-judicial mechanisms to restore property rights to persecuted victims or their heirs.[151] The decision to restore property rights of the persecuted communities was not a result of immediate peace treaty negotiations; in some instances, it took more than 50 years to obtain some form of comprehensive reparations for victims of various Nazi crimes.[152] Such a

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149 Article 14 (a) of the Treaty of Peace with Japan states that '[i]t is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient (…)' see also Steven C. Clemons, ' Recovering Japan's Wartime Past – and Ours' (New York Times, 4 September 2001) http://www.nytimes.com/2001/09/04/opinion/recovering-japan-s-wartime-past-and-ours.html?pagewanted=all accessed on 5 March 2012; the Join Communiqué between Japan and China where it is stated in paragraph 5 that 'The Government of the People's Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan' (Joint Communique of the Government of Japan and the Government of the People's Republic of China, September 29, 1972) http://www.global-alliance.net/SFPT/SinoJapanJointCommunique29Sept1972.htm accessed on March 5, 2012, first seen at the Global Alliance for Preserving the History of WWII in Asia, 'San Francisco Peace Treaty: Has Justice Been Served and Peace Secured?' http://www.global-alliance.net/SFPT/SFPTSanFranciscoPeaceTreatyIntroduction.htm accessed on 5 March 2012.

150 Leonard Dudley and Ulrich Witt, 'Arms and the Man: World War I and the Rise of the Welfare State' (2004) 57:4 *Kyklos* 475; Buxbaum, 'A Legal History of International Reparations', 314ff; Ministry of Health, Welfare and Sport, The Netherlands, Department of Victims and Remembrance WWII (ed.) 'World War II and its Aftermath in The Netherlands' [June 2009] 6-11 http://www.christies.com/pdf/services/2011/ministry-of-health-welfare-and-sport-netherlands.pdf accessed on 10 April 2014.

151 W. Veraart and L. Winkel (eds.), *The Post-war Restitution of Property Rights in Europe: Comparative Perspectives* (Kloof Booksellers, 2011).

152 On 2 August 2000, the Foundation "Remembrance, Responsibility and Future" was created by the Germany Government to 'make financial compensation available through partner organizations to former forced laborers and to those affected by other injustices from the National Socialist period.' Section 2(1) of the Law creating the Foundation adopted as of 2 August 2000, which entered into force on 12 August 2000 (Federal Law Gazette I 1263), last amended by the Law of 1 September 2008, which came into force on 9 September 2008 (Federal Law Gazette I 1797), the foundation closed all its compensation programmes in 2007 and is now solely orientated to its second statutory mandate, which is the support of international projects, http://www.stiftung-evz.de/

long process of negotiations and advocacy caused some compensation claims to remain unsolved.[153]

Progress in the development of individual victim-based reparation came after the end of the Cold War. The UNCC, created on 3rd April 1991 to process compensations claims resulting from Iraq's 1990 to 1991 invasion and occupation of Kuwait,[154] showed a more progressive approach towards the realization of reparation to individual victims of armed conflict. The UNCC prioritised individual civilian reparations over state or corporation claims and never attempted to discriminate victims based on lawfulness or unlawfulness of attacks.[155]

3.2 Legal Underpinnings for Reparation to Victims of War

Recent developments with regard to the enforcement of international humanitarian law have focused more on the prosecution of perpetrators through international and internationalised tribunals and courts than on providing reparations to victims.[156] The general legal basis for the reparation of war damages under laws of war are Article 3 of The Hague Convention related to Laws and Customs of War on Land (Hague IV) of 18 October 1907 which stipulates that, '[a] belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation (...)' and

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eng/about-us/ accessed 5 March 2012, see details about other reparation programmes at the Claims Conference website http://www.claimscon.org accessed on 5 March 2012. See also Gideon Taylor, Greg Schneider and Saul Kagan, 'The Claims Conference and the Historic Efforts for Holocaust – Related Compensation and Restitution' and Judah Gribetz and Shari C. Reig, 'The Swiss Banks Holocaust Settlement' both 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 Making* (Martinus Nuhoff Publishers, 2009) 115-142; more about restitution of property rights after the second world war see Veraart & Winkel (eds.), *The Post-War Restitution of Property Rights in Europe: Comparative Perspectives*.

[153] ICJ Judgment of 3 February 2012, 'Jurisdictional Immunities of the state (Germany v. Italy Greece intervening) http://www.icj-cij.org/docket/files/143/16883.pdf accessed on 1 May 2012.

[154] UN Security Council Resolution, (S/RES/687 (1991) of 8 April 1991, 2981st meeting, 3 April 1991.

[155] Elke Schwager, 'The Right to Compensation for Victims of an Armed Conflict,' (2005) 4:2 *Chinese Journal of International Law* 417, 426-427.

[156] The creation of war crimes tribunals in particular the Nuremberg and Tokyo Tribunals after the Second World War, the creation of the two UN *ad hoc* Tribunals for Rwanda and former Yugoslavia, the UN Special Court for Sierra Leone and Cambodia and the International Criminal Court have focused more and more on individual criminal responsibility as opposed to state responsibility to provide reparation to victims. See M. S. Groenhuijsen and A. Pemberton, 'Genocide, Crimes Against Humanity and War Crimes: A Victimological Perspective on International Criminal Justice' in R. Letschert and other (eds.) *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) 25ff.

Article 91 of the Additional Protocol 1 which states that, '[a] Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation'. On 16 December 2005, the General Assembly of the United Nations after recalling these two articles among others, adopted the Basic Principles and Guidelines.[157] It is important to note that the Basic Principles and Guidelines do not create new legal obligations under the laws of war. They simply 'identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations.'[158] The legal basis for reparation under the laws of war remains the two provisions already mentioned (Article 3 of The Hague Convention and Article 91 of the Additional Protocol 1). However, it is still unclear whether these two articles provide a direct right to victims of war to claim reparation under international law in their own capacity without depending on the diplomatic protection of their states.[159] The International Law Association (ILA), which undertook the initiative to adopt a Declaration of International Law Principles on Reparation for Victims of Armed Conflict, concludes that the right to reparation belongs to individuals 'even in instances where claims of individuals are submitted by their states'.[160] Still, collateral damage is left out of consideration particularly because reparation is formulated as a 'secondary right'; a right which can be invoked based on the violation of another 'primary right'.[161] Normally, reparation is imputable to injurer states as a consequence of their unlawful conduct such as the failure to respect or protect another right. It is therefore difficult to attribute responsibility in case of collateral damage which is a lawful incident.[162] As Boxill remarks, 'when someone has done his duty nothing can be even demanded of him. (...) if, in my estimation, I have acted dutifully even when someone is injured as a

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157 United Nations General Assembly Resolution 60/147 of 16 December 2005 (A/Res/60/147).

158 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) 76:1 *Revue internationale de droit penal*,77.

159 Dinah Shelton, 'The United Nations Principles and Guidelines on Reparations : Context and Contents' in De Feyter and others, 18; Rombouts, Sardaro and Vandeginste, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights', in Feyter and others, 364-368; Luke T Lee, 'The Right of Victims of War to Compensation', in R. St. J Macdonald, (ed.), *Essays in Honour of Wang Tieya* (Kluwer Academic Publishers 1994) 489-496.

160 ILA, Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive issues), Article 6 (right to reparation), commentary 2, (Conference Report, The Hague 2010), 14.

161 Rombouts, Sardaro, and Vandeginste, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights', in De Feyter and others, 352; Zegveld, 'Remedies for victims'; Ronen, 'Avoid or Compensate?', 189.

162 Garcia-Amador, Sohn and Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens*, 21ff.

result, then I must feel that nothing can be demanded of me and that any repairs I may make are gratuitous.'[163] Similarly, Lloyd-Bostock notes that '[t]he law takes the position that losses arising from accidents rest where they fall – that is, on the victim – unless there are good grounds for shifting them, and fault is regarded as providing such grounds.'[164] To use Gardner's words, 'the reasons why one must pay for the losses that one occasions are the very same reasons why one must not occasion those losses in the first place.'[165] Therefore demanding someone to provide reparation for damage is another way of saying to that person that you are not allowed to cause that harm.

The commissioner of the Mixed Claims Commission between the United States and Venezuela of 1903 in the *Volkmar case*, concerning properties accidentally destroyed in the course of war, ruled that even if the evidence was enough to prove that properties were destroyed and that the loss was suffered, that did not prove any liability on the side of the government. The reason was that international law does not provide redress for damages resulting from military operations that happen in time of war. In reaching that conclusion, a reference was made to Vattel's view that 'no action lies against the State for misfortunes of this nature, for losses which she has occasioned, not willfully, but through necessity and by mere accident in the exertion of her rights.'[166] According to the commentary prepared by Hofmann on the 2010 ILA Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflicts, 'it is as yet unclear whether a right to reparation is triggered in such a situation [collateral damage].'[167]

The contemporary literature on the laws of war too does not offer more explanation for exclusion of victims of collateral damage beyond the traditional reasoning of the law. Most of the just war theorists who can be credited for their contribution in the development of this literature have focused more on the *jus ad bellum* (justice of going to war) and *jus in bello* (justice in war) and ignored the *jus post bellum* (justice after war). Those who have attempted to address the *jus post bellum* have not paid much attention to reparation for individual victims of war.[168] The compensation often referred to while discussing the *jus post bellum*

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[163] Bernard R. Boxill, 'The Morality of Reparation' in Tommy Lee Lott & John P. Pittman (eds.), *A Companion to African-American Philosophy* (Blackwell Pub., 2003) 58.

[164] Sally M. Lloyd-Bostock, 'Common Sense Morality and Accident Compensation' (1980) 1980:6 *Insurance Law Journal* 331, 331-332.

[165] John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' [2010] No. 1/2010 University of Oxford Legal Research Paper Series, 40.

[166] United Nations, 'Reports of International Arbitral Awards: Mixed Claims Commission United States-Venezuela of 17 February 1903' [2006] Vol. IX, 317-318.

[167] ILA, International Committee on Reparation for Victims of Armed Conflict, 'The Hague Conference 2010: Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)' Commentary on Article 4, 9.

[168] Michael Walzer, *Just and Unjust Wars: A moral argument with historical illustrations* (Basic Books, 1977); Brian Orend, *Michael Walzer on War and Justice* (University of Wales Press,

are the costs of war – war indemnities – owed to the aggressed victor by the vanquished aggressor, and reparation to individual victims of war has often been secondary or ramped-up together with state reparations. Where reparation awards to individuals have been considered, it has been through the tireless work of civil society, in particular victims' associations.[169] The disagreement among scholars is also on whether the unjust side can fight justly.[170] This disagreement cause challenges when it comes to knowing who is responsible for what. In contrast to Walzer's view that an unjust side can fight justly,[171] Orend, a strong supporter of the *jus post bellum* convention, argues that once a belligerent unjustly enters a war and thus becomes the aggressor, everything else he does is unjust.[172]

3.3 Mass Claims Reparations

In the examination of grounds for reparation to victims of collateral damage, it is important to focus on both theory and practice (judicial as well as non-judicial). The analysis in this section concerns some selected examples of post-war mass reparation programmes in relation to the current doctrine on reparation and the laws of war. This is to recognize that both reality and theory can provide lessons to improve future practice. However, it is important to set some caveats; (a) the selected reparation programmes are those that were implemented after the adoption of the two Additional Protocols (1977); this is a reflection of the fact that contemporary understanding of collateral damage became clearer thanks to the adoption of those two additional protocols protecting civilians. This is not

2000); Carsten Stahn and Jan K. Kleffner (eds.) *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (T.M.C. Asser Press, 2008); Josef L. Kunz, '*Bellum Justum* and *Bellum Legale*' (1951) 45:3 *The American Journal of International Law*, 528-534; Carsten Stahn "Jus Ad Bellum', 'Jus in Bello' . . . 'Jus Post Bellum'? - Rethinking the Conception of the Law of Armed Force' (2006) 17:5 *European Journal of International Law*, 921-943; Gary J. Bass, 'Jus Post Bellum' (2004) 32:4 *Philosophy & Public Affairs*, 384–412; Nigel D. White and Christian Henderson, *Research Handbook on International Conflict and Security Law: Jus Ad Bellum, Jus in Bello and Jus Post Bellum* (Edward Elgar Publishing, 2013).

[169] The case in mind is the Jewish reparation movements in particular the Conference on Jewish Material Claims Against Germany (http://www.claimscon.org/), the reparation to the Japanese-American (WWII victims of internment, see the US Civil Liberties Act of 1988), and the Japan's WWII Comfort Women.

[170] Michael Walzer, 'Coda: Can the Good Guys Win?' (2013) 24:1 *The European Journal of International Law* 433.

[171] Michael Walzer, *Just and Unjust Wars: A moral Argument with Historical Illustrations* (1977) 21ff; see also Hurka, 'Proportionality in the Morality of War', 35ff; Jasmine Moussa, 'Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law' (2008)90:872 *International Review of Red Cross*, 963-990.

[172] Brain Orend, '*Jus Post Bellum*: A Just War Theory Perspective' in Carsten Stahn and Jan K. Kleffner (eds.) *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (T.M.C. Asser Press, 2008) 34, 38; Jeff McMahan, 'The Ethics of Killing in War' [2004] 114 *Ethics* 693–733.

to ignore the significant contribution of reparations regimes before that period. When necessary, historical examples are given. (b) The selected programmes are also limited to situations of war where the issue of collateral damage can arise, thus excluding reparations targeting certain categories of victims such as victims of genocides, torture, forced labour, internment, sexual violence and rape and any other crime that is committed against non- combatants when they are under the custody of the perpetrator.

Claims commissions adopted after 1977 include among others; the UNCC established by the UN Security Council Resolution 687 (1991) to deal with claims related to the 1990-1991 Iraq-Kuwait conflict, the Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) created pursuant to Article XI of Annex 7 of the Dayton Peace Agreement to deal with claims related to the 1992-1995 war in Bosnia and Herzegovina, the Housing and Property Claims Commission (HPCC) created by Regulation 1999/23 of the United Nations Interim Administration Mission in Kosovo (UNMIK) to deal with claims related to the 1999 Kosovo conflict and the EECC created by the Algiers Agreement to decide on claims of damages related to the Ethiopia-Eritrea border conflict.[173] The above set criterion excludes HPCC and CRPC from our discussion because of their specific nature. HPCC was created to resolve disputes in Kosovo concerning residential property rights such as real property, residential ownership or possession revoked by the discriminatory law of 23 March 1989, issues of involuntary property transactions and complaints of individuals whose rights of ownership, possession or occupancy that were deprived prior to 24 March 1999. CRPC was created to re-establish the pre-war property rights in Bosnia and Herzegovina. Both mechanisms excluded claims related to war damages (bombing).[174] Given the understanding of the laws of war, it is assumed that in the context of the above described reparation processes (HPCC and CRPC), it is less likely that issues of collateral victimization can arise. Therefore, the focus will be on the UNCC and the Ethiopia Eritrea Claims Commission (EECC). In addition to studying the contribution of the UNCC and EECC, it is also important to draw lessons from the contribution of Truth and Reconciliation Commissions (TRCs) in developing the notion of reparation.

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[173] For details about different mass claims see H. Holtzmann and E. Kristjansdottir (ed.), *International Mass Claims Process: Legal and Practical Perspectives* (Oxford University Press, 2007).

[174] Ibid, 23-76. See also Carla Ferstman and Sheri P. Rosenberg, 'Reparation 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 Making* (Martinus Nuhoff Publishers, 2009) 483-513. HPCC, Final Report of the Housing and Property Claims Commission (Pristina, 2007) http://www.pca-cpa.org/upload/files/HPCCFinalReport.pdf, accessed on 13 March 2012.

3.3.1 United Nations Compensation Commission (UNCC)

3.3.1.1 Iraq-Kuwait Conflict in a Nutshell

Between 2 August 1990 and 28 February 1991, the world witnessed the invasion and occupation of Kuwait by Iraq.[175] There are three reasons explaining Iraq's invasion of Kuwait. Firstly, in the period leading to 1990, the Iraqi government was struggling to overcome financial difficulties resulting from debts accrued during the Iraq-Iran war of the 1980s. The war which lasted for about eight years forced Iraq to borrow sums of money mainly from Saudi Arabia, Kuwait and the United Arab Emirates (UAE). After the war, Iraq asked for the exoneration of its debts as a token of appreciation for its checking the Iranian threat towards Arab countries; a request that was denied. Secondly, but also linked to the first reason, was the alleged over-drilling of Kuwait's oil. In an attempt to service its debts and generate more revenue, the Iraqi administration wanted to increase oil prices through low oil production, a plan that was thwarted by Kuwait's discovery of new oil reserves and its expansion of oil production, thus causing a decrease in oil prices. Thirdly, despite the fact that Iraq had recognized the independence of Kuwait in 1963, it always maintained that Kuwait belonged to pre-colonial Iraq. In advancing this historical claim, Iraq argued that Kuwait was a creation of the British colonial administration.[176] In brief, the major cause of the 1990-1991 Iraq-Kuwait war was a serious financial frustration that was expressed in the context of the unresolved historical border dispute; a nationalistic excuse for Saddam Hussein to justify the invasion.

Within a period of less than a week (from 2 August 1990 to 7 August 1990), Kuwait was annexed by Iraq as its 19th province. The Iraqi invasion and annexation of Kuwait was quickly condemned by the international community, in particular the United Nations and the League of Arab States. The role of the US in forming a coalition against Iraq is well documented. Even if the US government had to some extent supported Iraq against Iran, it was outraged by Iraq's occupation of Kuwait for mainly two reasons. Firstly, Iraq's occupation of Kuwait was a threat to the US ally, Saudi Arabia. Secondly, the US feared that Iraq's expansionist agenda would result in a single powerful Middle-Eastern

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[175] James P. Terry, 'Gulf War Syndrome: Addressing Undiagnosed Illnesses from the First War with Iraq' [2009] 1 *Veterans Law Review 167,* 169ff.

[176] H. Rahman, *The Making of the Gulf War: Origins of Kuwait's Long-Standing Dispute with Iraq* (Garnet Publishing Limited 1997); The Sykes-Picot Agreement was signed between the French and British governments in 1916; available at the website of the Jewish Virtual Library ttp://www.jewishvirtuallibrary.org/jsource/History/sykes_pico.html accessed on 3 January 2012; R Atkinson, *Crusade: The Untold Story of the Persian Gulf War* (Houghton Mifflin company, 1993); P M Taylor, *War and the Media: propaganda and persuasion in the Gulf War* (2nd edn., Manchester University Press, 1998); J Baudrillard, *The Gulf War Did Not Take Place* (Indiana University Press, 1995); H. Rahman, *The Making of the Gulf War: Origins of Kuwait's Long-Standing Territorial Dispute with Iraq* (Ithaca Press 1997).

country capable of threatening its political and economic interests in the volatile main oil source region, since Iraq now also controlled the Kuwait oil reserves.[177]

On the very day of the attack (2 August 1990), the UN Security Council under Chapter VII, Articles 39 and 40 of the UN Charter issued Resolution 660 (1990) condemning the invasion, demanding an immediate and unconditional withdrawal of Iraqi forces and calling upon the two countries to reach a negotiated solution to their differences. Iraq ignored the UN resolution and on 6 August 1990 the Security Council adopted Resolution 661 (1990) imposing economic sanctions. On 9 August 1990, two days after Iraq's declaration of annexation of Kuwait, the UN Security Council adopted Resolution 662 (1990) expressing its disapproval, called upon all states to consider the annexation illegal, null and void, and reiterated the demand for an immediate withdrawal of all its forces and expressed the Council's determination to restore the sovereignty, independence and integrity of Kuwait. The Security Council intensified its pressure by adopting many more resolutions,[178] but Iraq remained defiant and unmoved. On 29 October 1990, the Security Council repeated its previous demands and reminded Iraq of its liability under international law for any 'loss, damage or injury arising in regard to Kuwait and third States, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait (…) [and] invited States to collect relevant information (…) for restitution or financial compensation.' In Resolution 677 (1990) of 28 November 1990, the Security Council repeated its concern over the human suffering caused, and condemned Iraq's attempt to alter the demographic composition of Kuwait. Regrettably, despite all the UN Security Council's calls to end the occupation of Kuwait, Iraq remained defiant.

On 29 November 1990, the Security Council adopted Resolution 678 (1990) authorizing member states cooperating with Kuwait 'to use all necessary means to uphold and implement Resolution 660 (1990) and all subsequent relevant resolutions', (…) 'unless Iraq withdrew its forces on or before 15 January 1991'. On 17 January 1991, just two days after the 15 January deadline, the US led a coalition of 34 states in a military campaign to force Iraq out of Kuwait. The Iraqi army was unable to match the coalition's military capabilities and within a period of less than two months Kuwait was liberated. On 28 February 1991, a day after Iraq's declaration of its withdrawal from Kuwait, the US President announced the total liberation of Kuwait.[179] At that time, it is believed that the

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177 Ibid; Mannaraswamighala S Rajan, 'The UN Security Council and the Iraq – Kuwait Conflict (1990): an Exercise in Hypocrisy by Member Nations' (1997) 37:4 *Indian Journal of International Law* 595.

178 Resolution 665 (1990) of 25 August, 666 (1990) of 13 September, 667 (1990) of 16 September, 668 (1990) of 29 November, 669 (1990) of 25 September, 670 (1990) of 25 September, 1990).

179 Seymour Hersh, 'Annals of War, Overwhelming Force: What happened in the final days of the Gulf War?' *The New Yorker*, 22 May 2000 http://cryptome.org/mccaffrey-sh.htm accessed on 3 January 2012.

Iraqi soldiers had either been forced to retreat back to Iraq, or a number of them had been killed or surrendered to the coalition forces or simply escaped into the civilian population.[180] The war ended leaving behind a lot of damages caused by both sides.[181]

3.3.1.2 The Creation of the UNCC: Context, Structure and Mandate

While Kuwaitis breathed a sigh of relief because the seven months occupation had come to an end, for Iraqis it was the beginning of a painful process of more than a decade of paying for the consequences of war. After Iraq's promise to comply with all resolutions of the UN Security Council,[182] the Security Council adopted Resolution 686 (1991) which formalized the ceasefire and upheld that all 12 Iraq-Kuwait conflict related resolutions shall 'continue to have full force and effect' on Iraq. In addition, Resolution 686 asked Iraq to; (a) 'Rescind immediately its actions purporting to annex Kuwait', (b) accept its liability for any loss, damage or injury resulting from its invasion of Kuwait, (c) release all POW and civilians detained in Iraq and return remains of bodies of those deceased (Kuwaiti and third-state nationals), (d) return all Kuwaiti property seized by Iraq, (e) end provocative military actions, and (f) assist in the demining of explosives in Kuwait. In case Iraq refused to comply with these conditions, the coalition forces were still authorized under chapter VII of the UN Charter to use all necessary measures including military action to force compliance.

Additional conditions were imposed on 3 April 1991 by Resolution 687 (1991). Even if it was recognized that there was indeed a need to demarcate the border between Iraq and Kuwait, it was noted that Iraq was to respect the 1963 Agreement while waiting for the Secretary General of the United Nations to assist in the demarcation. Resolution 687 maintained the economic sanction imposed under Resolution 661 against Iraq for as long as it had not fully complied with the conditions set out in Resolution 687. In the end, they would last until May 2003.[183] Resolution 687 created a demilitarized zone of 10 kilometres in

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[180] For further details about the Iraq-Kuwait war, see Atkinson, *Crusade: The Untold Story of the Persian Gulf War*; Taylor, *War and the Media: propaganda and persuasion in the Gulf War*; Baudrillard, *The Gulf War Did Not Take Place*.

[181] Middle East Watch, *Needless deaths in the Gulf War: civilian casualties during the air campaign and violations of the laws of war* (Human Rights Watch (Organization) Series 1991); Beth Osborne Daponte, 'Wartime Estimates of Iraqi Civilian Causalities' (2007) 89:868 *International Review of Red Cross* 943.

[182] Ramanand Mundkur, Michael J. Mucchetti and D. Craig Christensen, 'The Intersection of International Accounting Practices and International Law: The Review of Kuwaiti Corporate Claims at the United Nations Compensation Commission' (2001) 16:5 *The American University International Law Review* 1195, 1196.

[183] The economic sanctions imposed on Iraq in response to its invasion and occupation of Kuwait were lifted a decade later by the UN Security Council Resolution 1483 (2003) adopted at the Security Council 4761st meeting, on 22 May 2003 (S/Res/1483 (2003)).

Iraq and 5 kilometres in Kuwait and approved a deployment of a UN observer unit. Iraq was asked to accept the destruction of all its chemical and biological weapons and all related materials and all its ballistic missiles of a range wider than 150 kilometres under international supervision and to desist from any action of terrorism. The Security Council showed concern for 'reports in hands of member states that Iraq has attempted to acquire materials for a nuclear-weapons programme contrary to its obligations under the Treaty on the Non-Proliferation of the Nuclear Weapons of 1 July 1968.' Given the fact that Iraq had been militarily defeated, it was left with one option; agreeing to every proposal by the Security Council. It accepted all measures, sanctions and conditions adopted before, during and after the coalition's campaign to liberate Kuwait. Iraq was also reminded that it was still obliged under international law to honour its debts owed to other states and to compensate all damages caused due to its invasion and occupation of Kuwait.[184]

In Paragraph 19 of Resolution 687, the Security Council recalled Iraq's liability under international law and tasked the Secretary General to propose within thirty days recommendations for the structure and functioning of the compensation mechanism. On 2 May 1991, in his report (S/22559) to the Security Council, the Secretary General made several proposals which were subsequently adopted by the Security Council resolution 692 (1991) of 20 May 1991. A Compensation Fund was to be created by the Secretary General as a special account of the United Nations. After considering humanitarian needs and Iraq's sources of revenue, on 30 May 1991 (note: S/22661), the Secretary General determined that the compensation to be allocated to the Fund should not exceed 30 per cent of Iraq's annual value of the exports of petroleum and petroleum products. About the Commission, the Secretary General emphasised the need 'to distinguish between questions of policy making and the functional aspects of the Commission.' The Commission became a subsidiary organ of the Security Council whose structure reflected the two distinctive roles; the Governing Council, composed of 15 members representatives of the members of the Security Council, with a mandate of dealing with all issues of policy making and a group of commissioners whose number and responsibilities were to be determined by the Governing Council depending on the need of work to be done.

The Secretary General cautioned that the work of the UNCC should not be considered as that of a court or an arbitral tribunal before which parties appear. He emphasized that 'it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, as-

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[184] David D. Caron and Brain Morris, 'The UN Compensation Commission: Practical Justice, not Retribution' (2002) 13:1 *European Journal of International Law* 183, 193-194; Holtzmann and Kristjansdottir (eds.), *International Mass Claims Process: Legal and Practical Perspectives*, 21; for further details see M. Weller, *Iraq and Kuwait: The Hostilities and Their Aftermath* (Cambridge University Press, 1993); R.B. Lillich (ed.) The United Nations Compensation Commission [Thirteenth Sokol Colloquium] (Transnational Publishers, Inc 1995)

sessing payments and resolving claims.' The decision of the commission cannot be appealed, the work of commissioners was done on behalf of the Governing Council and where necessary it was the Council which could ask commissioners to review their decisions. The quasi-judicial role could only arise when a claimant alleged that the commissioners made some error(s), and then a board of commissioners would settle that dispute and a final decision would be taken by the Governing Council. Despite the fact that (almost) everything the Commission was doing concerned Iraq, Iraq was left with a negligible right of simply commenting on claims and reports without an opportunity to appeal where it would feel unfairly treated.[185]

3.3.1.3 UNCC Claims and Claims Procedure

According to Article 1(12-13) of the Provisional Rules for Claims Procedure (hereafter the rules)[186] and Paragraph 16 of the Security Council Resolution 687, a claimant before the UNCC can be any individual, government, corporation or other private legal entity, public sector entity or international organization that suffered any direct loss, damage or injury including environmental damage and the depletion of natural resources resulting from Iraq's invasion and occupation of Kuwait. Paragraph 18(a) of the Criteria for Expedited Processing of Urgent Claims (hereafter criteria) clarified that the compensatory loss might have resulted from the military operations or threat of military action caused by either side of parties in the conflict during the period of 2 August 1990 to 2 March 1991 (S/AC.26/1991 of 2 August 1991).

As a matter of principle, only governments were allowed to submit claims on behalf of their nationals and corporations. Exceptionally, for those individuals without a government to submit their claims, the Secretary General nominated international organisations (UN agencies in particular) to do it on their behalf. Where claimants had two nationalities or belonged to a former federal state, concerned governments could agree on which government to submit the claim to avoid duplication.[187] Whereas it is clear that corporations or any other legal entity could submit their claim(s) directly to the Commission with reasons explaining why the government refused to submit the claim on their behalf, it is not clear what an individual victim could do in case his or her government refused to submit the claim. The fact that individuals could not directly claim reparation was not connected to the traditional practice under international law where states and not individual victims are entitled to claim reparation. It was a pragmatic choice based on the expectation that the Commission was going to

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[185] Hans Wassgren, 'The UN Compensation Commission: Lessons of Legitimacy, State Responsibility, and War Reparations' (1998) 11:3 *Leiden Journal of International Law* 473, 479-484.

[186] United Nations Compensation Commission Governing Council, 'Provisional Rules for Claims Procedure' (S/AC.26/1992/10 of 26 June 1992).

[187] Article 5 of the Rules.

receive a number of claims which would have made it very difficult for them to process if each claim was to be submitted separately by individuals. The Secretary General of the United Nations in his report of 2 May 1991 warned that 'the filing of individual claims would entail tens of thousands of claims to be processed by the commission, a task which could take a decade or more and could lead to inequalities in the filing of claims disadvantaging small claimants'.[188] The choice of states over individual submission of claims should therefore be seen as a mere pragmatic approach aimed at facilitating the work of the Commission. Unlike the traditional state's right to reparation under the international law of diplomatic protection which allowed states to discretionarily decide on how to distribute reparation received on behalf of its citizens, the UNCC established a reporting procedure and a fixed period of time in which a government should have distributed reparation to its respective individual beneficiaries and in case of failure to do so, states were obligated to return undistributed reparation awards back to the Commission.[189]

The Governing Council classified claims into six categories ('A' to 'F'). Category 'A' related to individuals who departed from Kuwait or Iraq in the period of conflict (2 August 1990-2 March 1991). A lump sum for individual claimants was set at US$2,500 to US$4,000 while families could be awarded US$5,000 to US$8,000. Category 'B' is for individuals who suffered bodily injuries and or loss of their close relatives (spouse, child or parents). An individual claim was set at US$2,500 while successful families were entitled to a maximum of US$10,000. Category 'C' was for individuals claiming damages of either of the two categories (bodily injuries; physical and mental or any other loss related to departure) that is up to US$100,000. Category 'D' is also for individual claims similar to category 'C' with the only difference being in the amount claimed (exceeding US$100,000). Category 'E' is for corporations and legal entities (private and public sector enterprises) while Category 'F' is for governments and international organizations claiming damages related to evacuation of refugees, environmental damages and damage caused to foreign governments' properties.[190] The priority in claim processing was given to the first three categories. Requirements

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[188] Report of the Secretary – General Pursuant to Paragraph 19 of Security Council Resolution 687 of 2 May 1991 (S/22559), 7.

[189] The United Nations Security Council, Decision Concerning the Return of Undistributed Funds taken by the Governing Council of the United Nations Compensation at its 75th meeting, held on 2 February 1998 at Geneva (S/AC.26/Dec.48 (1998)).

[190] Further details about the claims and claims procedure see United Nations Compensation Commission information http://www.uncc.ch/theclaims.htm accessed on 13 December 2011; see also Marco Frigessi di Rattalma and Tullio Treves (ed.) *The United Nations Compensation Commission: a handbook* (Kluwer Law International, 1999); Mundkur, Mucchetti and Christensen, 'The Intersection of International Accounting Practices and International Law' 1195-1239; Gregory Townsend, 'The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & (and) US Remedies' (1995) 17:973 *Loyola of Los Angeles International and Comparative Law Review* 973, 976-980.

and means of proof for categories 'A', 'B' and 'C' were made less rigorous compared to category 'D' and other categories.[191]

According to the rules and criteria, to achieve consistency and uniformity in filing, governments or organizations submitted claims in standard application forms adopted by the Commission. The verification or control of the authenticity of claims was conducted at three levels; (a) pre-filing verification; before filing a claim, a government had to verify and ascertain that the claim and information in all supporting documents provided is correct to the best of its knowledge, (b) administrative control; in the process of entering the claim into the computer database, the Registrar Office at the UNCC headquarters in Geneva was tasked to verify every claim according to the requirements stipulated in the criteria and the rules established to govern the Commission, (c) substantive verification; the panel of three commissioners was assigned category(ies) of claims to evaluate and recommend to the Governing Council the amount to be awarded to each successful claimant in a specified period of time (according to Article 37(b) of the rules; within the span of 120 days). According to Article 40 of the rules, the decision of the Governing Council was final; it could not be 'appealed or reviewed on procedural, substantive or other grounds.' The UNCC dealt with over 2.6 million claims filled by nearly one hundred governments (on behalf of their nationals, corporations and on their own behalf) and thirteen UN offices on behalf of individuals whose claims could not be submitted by states. By the end of 2007, the Commission had completed (all) payments related to individual claimants.[192]

3.3.1.4 The UNCC's Contribution to the Development of Reparation

Despite the UNCC's recommendable achievements in demonstrating the possibility of processing mass claims in a short period of time, its work has earned both strong admirers[193] and critics. Critics argue that Resolution 687 which created the Commission is an instrument of 'victor's justice', with articles 'far more laconic than the voluminous provisions of the Versailles Treaty and its related annexes' [which made a] 'summary judgment holding Iraq responsible for a series of breaches of international law.'[194] Even if the Security Council never

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[191] For details about the claims processing before the UNCC see Francis E. McGovern, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14:171 *Harvard Negotiation Law Review*.

[192] di Rattalma and Treves (ed.) *The United Nations Compensation Commission: a handbook*.

[193] Lillich (ed.), *The United Nations Compensation Commission: Thirteenth* ; Andrea Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations' (2002) 13:1 *European Journal of International Law* 161; Caron and Morris, 'The UN Compensation Commission: Practical Justice, not Retribution', 183-199.

[194] David J. Bederman, 'The U.N. Compensation Commission and the Tradition of International Claims Settlement' (1994) 27:1 *New York University Journal of International Law and Politics* 1, 6&18ff.

accused Iraq of the crime of aggression for invading Kuwait,[195] when one reads Resolution 660(1990) together with subsequent resolutions, it is clear that the UNSC saw the invasion as an act of aggression and thus triggered the liability for full compensation. The whole Iraq invasion of Kuwait was considered illegal and therefore all actions arising out of it were considered as unlawful, thus liable for compensation. Iraq not only violated Article 2(4) of the UN Charter by resorting to the use of force but also refused to respect the United Nations Security Council's calls for a peaceful solution. The burden imposed on Iraqis carried a retributive message to the government that the international community deplored its actions of having started an aggressive war.[196] The question is whether it was indeed right for the UNSC to impose punitive economic sanctions,[197] in addition to reparations seem to have gone far beyond mere reparation for war damages 'strictly' caused by Iraq.[198]

The UNSC's decision to hold Iraq responsible for all damages resulting from 'the invasion and occupation of Kuwait' instead of focusing on the harm directly caused by Iraq avoided the need to establish the actual causal connection between the damage suffered and the direct author. It was unnecessary to prove that the harm was a result of a particular Iraqi action or omission. The causal link was tied to the period in which the alleged harm occurred and not to the author of the harm. As a result, any damage caused by either party in the conflict was eligible for compensation by Iraq so long as it happened within the context and time span of the Iraq-Kuwait conflict. The critique on the UNCC is that it ignored providing reparation to Iraqi nationals who might have suffered harm as a result of violations of *jus in bello* at the hands of Allied forces. Even if the Iraq Government was responsible for waging an aggressive war it does not make it responsible for the violations of *Jus in Bello* by the Allied forces. A party to the conflict that violates *Jus Ad Bellum* is liable for all its violations of *Jus in Bello* and other damages resulting from lawful incidents of both parties but it cannot be held responsible for the other party's violation of *Jus in Bello*. Foreseeability entails the view that the aggressor should have expected that the aggressed will proportionately respond to the aggression and possibly cause lawful damages

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195 The UNSC resolutions avoided the phrase 'aggressive war' in the description of Iraq's invasion of Kuwait. Resolution 660(1990) was based on article 39 of the UN Charter and determined that there was a breach of international peace without mentioning 'aggression' and demanded both parties (Iraq and Kuwait) to reach a negotiated solution to their differences. Not all wars that breach international peace are necessarily aggressive. See Michael Walzer, 'The Crime of Aggressive War' (2007) 6:635 *Washington University Global Studies Law Review* 635.

196 Merritt B. Fox, 'Imposing Liability for losses from Aggressive War: An Economic Analysis of UN Compensation Commission' (2002) 13:1 *European Journal of International Law* 201.

197 Rajan, 'The UN Security Council and the Iraq – Kuwait Conflict (1990): an Exercise in Hypocrisy by Member Nations', 624.

198 Compensating individuals for simply departing from either Kuwait or Iraq during the time of war seems to have gone beyond the usual war reparations.

acceptable under international law.[199] Otherwise, if the aggressor is liable for all violations including the other party's violation of *Jus in Bello*, it would mean that the aggressed in war is permitted to murder, rape and destroy properties aimlessly. As Blank states, '[t]he claim that a just cause erases any wrongs committed in war is an old story, just like the opposite claim that an unjust cause renders all acts unlawful.'[200] Today international law is clear that '[a] breach of the *Jus ad Bellum* by a state does not create liability for all that comes after.'[201] Murphy and others note that 'when a state unlawfully uses force against another state, that other state nevertheless is obligated to follow the laws of war.'[202] It is therefore unclear on which basis Paragraph 17 of the UNCC criteria specified that a claimant cannot be an Iraqi national unless such an individual has a bona fide nationality of another state. It is unclear whether Iraqis were considered as victims of collateral damage or whether it was simply a political choice based on the ground that it would not have made much sense since it was the Iraq government who was held responsible for the payment of reparation. Probably, the answer lies in the EECC statement that '[the UNCC] Governing Council [was] a political organ that operated in an unusual political and factual setting. It [never followed] judicial processes or necessarily [applied] international law in its decisions.'[203] The decision to provide reparation to all victims who suffered all sorts of damages except Iraqi nationals contradicts the *Jus in Bello* logic that 'to kill in battle in support of an aggressive war is not a crime, [whereas] to murder in a lawful war is.'[204] Without considering the death of hundreds of thousands of Iraqis due to economic sanctions and the destruction of basic facilities necessary for civilian survival,[205] it is estimated that about 3,500 Iraq civilians were killed from direct violence of war. A number of Iraq soldiers were intentionally killed

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[199] EECC, 'Final Award: Ethiopia's Damages Claims between The Federal Democratic Republic of Ethiopia and The State of Eritrea' paragraphs 276 – 479 http://www.pca-cpa.org/upload/files/ET%20Final%20Damages%20Award%20complete.pdf accessed on 28 February 2012; see also EECC's 'Decision Number 7: Guidance Regarding Jus ad Bellum Liability' http://www.pca-cpa.org/upload/files/EECC_Decision_No_7.pdf accessed on 28 February 2012.

[200] Laurie R. Blank, 'A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities' (2011) 43:3 *Case Western Reserve Journal of International Law* (Emory Public Law Research Paper No. 11-149), 1.

[201] EECC, 'Final Award: Ethiopia's Damages Claims between The Federal Democratic Republic of Ethiopia and The State of Eritrea' §. 289.

[202] Sean D. Murphy, Won Kidane, and Thomas R. Snider, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (Oxford University Press, 2013) 129.

[203] EECC, 'Decision Number 7: Guidance Regarding *Jus ad Bellum* Liability', §.11

[204] Gerry Simpson, ''Stop calling it aggression': War Crime' (2008) 61(1): 191-228 *Current Legal Problems* 191, 195.

[205] Eric Hoskins, 'The Humanitarian Impact of Economic Sanctions and War in Iraq' in T G Weiss and others, *Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions* (Rowman & Littlefield Publishers, inc. 1997).

while retreating back to Iraq on the infamous 'Highway of Death'.[206] It is still controversial to argue that killing 'retreating soldiers' is wrong[207] but since there were no independent investigations carried out to dispel rumours, it is not easy to totally dismiss the view that some of the killings of Iraq civilians and destruction of their properties resulted from violating the laws of war.

Two observations should be made: on one side the UNCC was a significant improvement for compensating all damages to all victims of war (except Iraqi nationals) including departure costs.[208] On the other side, the UNCC can be seen as a collective punishment to Iraqi nationals by excluding them from any form of reparation. In other words, one can state that the balance sheet of the UNCC as it concerns the promotion of victims' right to reparation is a glass half full or half empty depending on one's standpoint.

3.3.2 Eritrea – Ethiopia Claims Commission

3.3.2.1 A Historical Synopsis of the Eritrea - Ethiopia Border Conflict

The Eritrea-Ethiopia (May 1998 to June 2000) border conflict was a result of historical antecedents. Whereas Ethiopia resisted the waves of the European scramble for Africa during the Age of New Imperialism (1870-1920), Eritrea became an Italian colony in 1890.[209] The failure to colonise Ethiopia was a result

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[206] Middle East Watch, *Needless Deaths in the Gulf War*; Carl Conetta, 'The Wages of War: Iraqi Combatant and Noncombatant Fatalities in the 2003 Conflict; Appendix 2: Iraqi Combatant and Noncombatant Fatalities in the 1991 Gulf War' [2003] Research Monograph 8 Project on Defense Alternatives; Beth Osborne Daponte, 'Wartime estimates of Iraqi civilian casualties', 947; James Bovard, 'Iraqi Sanctions and American Intentions: Blameless Carnage? Part 2' [2004] The Future of Freedom Foundation http://www.fff.org/freedom/fd0402c.asp accessed on 3 January 2012; Richard Garfield, 'Morbidity and Mortality Among Iraqi Children from 1990 Through 1998: Assessing the Impact of the Gulf War and Economic Sanctions' [1999] CASI Internet version http://www.casi.org.uk/info/garfield/dr-garfield.html accessed on 3 January 2012; Beth Osborne Daponte, A Case Study in Estimating Causalities from War and Its Aftermath: the 1991 Persian Gulf War' (1993) 3:2 *Physicians for Social Responsibility Quarterly* 57; Mary E. O'Connell, 'Debating the Law of Sanctions' (2002) 13:1 *European Journal of International Law* 63, 69.

[207] Larry May, 'Killing Naked Soldiers: Distinguishing between Combatants and Noncombatants' (2005)19:3 *Ethics and International Affairs* 39.

[208] Individual victims of other nationalities (except Iraq) were allowed to claim reparation damages including claiming for the costs of departure when it is in fact a good precaution measure during armed conflicts to encourage non combatants to flee a conflict area to avoid excessive incidental harm. See for details about compensation for departure, The United Nations Security Council Compensation Commission, 'Report and Recommendations made by the Panel of Commissioners Concerning, the First Installment of Claims for Departure from Iraq or Kuwait (Category "A" Claims)' (S/AC.26/1994/2) of 21 October 1994.

[209] Natalie Klein, 'State Responsibility for International Humanitarian Law Violations and the Work of the Eritrea Ethiopia Claims Commission So Far'(2004) 47 *German Yearbook of International Law* 214, 216; Jean-Louis Péninou, 'The Ethiopian – Eritrean

of a military defeat of the Italians in the famous Battle of Adwa of 1896 which earned the Ethiopians respect among Western nations.[210] The Ethiopians' decisive military triumph over the Italians ended with the signing of the October 1896 Addis Ababa Peace Treaty which was later followed by three other treaties (in 1900, 1902 and 1908) to delineate the border between Ethiopia and Eritrea.[211] Nevertheless, the Italians never really abandoned their ambitions of conquering Ethiopia. In 1935, Italy invaded and occupied Ethiopia until 1941 when it was liberated by the British army in the wider context of the Second World War.[212]

After the defeat of the Italians, the British temporarily ruled Eritrea from Sudan, a British protectorate, and from Ethiopia.[213] The situation of Eritrea was later clarified by the decision of the United Nations General Assembly which federated it with Ethiopia.[214] In taking the decision to federate Eritrea with Ethiopia, the UN believed in the importance of considering '[t]he wishes and welfare of the inhabitants of Eritrea and their capacity for self-governance, the interests of security and peace together with Ethiopia's claims over Eritrea based on geographical, historical, ethnic or economic reasons including in particular Ethiopia's legitimate need for adequate access to the sea.' The United Nations General Assembly Resolution 390(V) recommended that Eritrea would constitute 'an autonomous unit federated with Ethiopia.'[215] As Selassie notes, the federal structure created by Resolution 390(V) was a union of unequals:[216] Eritrea possessed 'legislative, executive and judicial powers in the field of its domestic

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Border Conflict' [1998] IBRU Boundary and Security Bulletin https://www.dur.ac.uk/resources/ibru/publications/full/bsb6-2_peninou.pdf accessed on 10 February 2012; Bereket Habte Selassie, 'Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience' (1997) 29:91 *Columbian Human Rights Law Review* 91; Siphamandla Zondi and Emmanuel Réjouis, 'The Ethiopia-Eritrea Border Conflict and the Role of the International Community'(2006) 6:2 *African Centre for the Constructive Resolution of Disputes/African Journal on Conflict Resolution* 69, 70-73.

210 Eritrea-Ethiopia Boundary Commission decision regarding delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia http://www.pca-cpa.org/showpage.asp?pag_id=1150 accessed on 08 February 2012, 11.

211 Abebe T. Kahsay, 'Ethiopia's Sovereign Right of Access to the Sea under International Law' (*LLM Theses and Essays*, 2007 Paper 81) http://digitalcommons.law.uga.edu/stu_llm/81/ accessed on 07 February 2012, 20-24; Klein, 'State Responsibility for International Humanitarian Law Violations and the Work of the Eritrea Ethiopia Claims Commission So Far', 216.

212 Klein, Ibid.

213 Won Kidane, 'Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea – Ethiopia Claims Commission in The Hague' (2008) 25:1 *Wisconsin International Law Journal* 23, 27.

214 Klein, 'State Responsibility for International Humanitarian Law Violations and the Work of the Eritrea Ethiopia Claims Commission So Far', 216.

215 UN General Assembly Res.390(v), of 2 December 1950 adopted in the 316th plenary meeting.

216 Selassie, 'Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience', 115.

affairs' while the Federal Government dealt with matters of 'defence, foreign affairs, currency and finance, foreign and interstate commerce and external and interstate communications, including ports' within the whole federation.[217] In 1961, Emperor Haile Selassie made matters worse by denouncing the federation and declaring Eritrea one of the provinces of Ethiopia.[218]

The marginalisation of Eritreans resulted into the formation of the Eritrean People's Liberation Front (EPLF) to fight for their rights in a war that lasted for about 30 years. The EPLF allied with the Ethiopian Tigrayan People's Liberation Front (TPLF), to form a strong force that came to overthrow the Amharic leadership in 1991.[219] In 1993, Eritreans overwhelmingly voted for their independence – with more than 99 % voting in favour – in a UN supervised free and fair referendum.[220] Even though the colonial treaties signed between Ethiopia and Italy had delimited the border between Ethiopia and Eritrea, the common border had never been demarcated which resulted in consistent border disputes. It was an incident at Badme, one of the contested areas that sparked the May 1998-June 2000 war.[221] The war, which came to an end with the signing of the 18 June 2000 Algiers ceasefire agreement,[222] left behind a dire economic situation and thousands of human deaths and injuries.[223]

In search of a lasting solution, the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (hereafter the parties) signed an agreement on 12 December 2000 in Algiers. In the Algiers Agreement, parties agreed to permanently cease military hostilities, refrain from the threat or use of force against each other and recommended the creation of three neutral bodies to resolve their differences. Article 3 provided for the creation of an independent and impartial investigation body to determine the origin of the conflict. This body, however, has not been created so far. In Article 4 parties agreed to create a Boundary Commission (the Eritrea-Ethiopia Boundary Commission (EEBC)) to delimit and demarcate their common border – following the colonial treaties of 1900, 1902 and 1908 and other relevant international law – without powers to make decisions *ex aequo et bono*. On 13 April 2002,

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[217] UN General Assembly Res.390(v), of 2 December 1950 adopted in the 316th plenary meeting.

[218] Selassie, 'Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience', 116.

[219] Zondi and Réjouis, 'The Ethiopia-Eritrea Border Conflict and the Role of the International Community', 70-73.

[220] Klein, 'State Responsibility for International Humanitarian Law Violations and the Work of the Eritrea Ethiopia Claims Commission So Far', 216-217;

[221] Ibid, 217; Abede Zegeye and Melakou Tegegn, 'The Post-war Border Dispute between Ethiopia: On the Brink of Another War' (2008) 24:2 *Journal of Developing Societies* 245, 259-262; Péninou, 'The Ethiopian – Eritrean Border Conflict'.

[222] Klein, Ibid, 214-215;

[223] H M Holtzmann and E Kristjánsdóttir, (ed) *International Mass Claims Processes; Legal and Practical Perspectives* (Oxford University Press 2007) 33.

the EEBC issued its decision regarding the delimitation of the border between the State of Eritrea and the Federal Democratic Republic of Ethiopia awarding different contested territories to Eritrea, including Badme.[224] Eritrea welcomed the decision but Ethiopia rejected it.[225] Since the adoption of this decision, the EEBC has not been allowed to proceed with the demarcation[226] and most of the contested areas are still under Ethiopian occupation.[227] A third body was created by Article 5 of the Algiers Agreement to address the negative socio-economic impact of the conflict on the civilian population. Parties committed themselves to establishing the EECC, a neutral claims commission to deal with claims related to violations of international law during the conflict.

3.3.2.2 The Mandate and Functioning of the EECC

According to Article 5(1) of the Algiers Agreement, parties (Eritrea and Ethiopia) agreed that

> the Commission shall decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict (…), and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.

The decisions of the Commission, which consisted of 5 arbitrators,[228] were binding and not subject to any possible right of appeal. Parties had a right to request for the interpretation of an award, correction of computation and clerical errors or other errors of similar nature or make a request for an additional award to claims already presented in the proceedings but omitted from the award.[229]

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224 Eritrea-Ethiopia Boundary Commission decision regarding delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia; Terrence Lyons, 'The Ethiopia – Eritrea Conflict and the Search for Peace in the Horn of Africa' (2009) 36:120 *Review of African Political Economy* 167.

225 Zegeye and Tegegn, 'The Post-War Border Dispute between Ethiopia and Eritrea: On the Brink of Another War?', 265.

226 The Eritrea-Ethiopia Boundary Commission, Press Release of 12 September 2007, http://www.pca-cpa.org/showpage.asp?pag_id=1150 accessed on 13 February 2012.

227 Zegeye and Tegegn, 'The Post-War Border Dispute between Ethiopia and Eritrea: On the Brink of Another War?'; Lyons, 'The Ethiopia – Eritrea Conflict and the Search for Peace in the Horn of Africa', 167-169.

228 Article 5 (2)&(3) of the Algiers Agreement provided that each party shall nominate two arbitrators who are not nationals neither permanent residents of the nominating state who (the four nominated arbitrators) also shall nominate their president, to make 5 arbitrators/commissioners.

229 Article 21(1), Eritrea-Ethiopia Claims Commission, 'Rules of Procedure'.

In carrying out their duties, arbitrators were not allowed to make decisions *ex aequo et bono* and were expected to endeavour to reach their decisions by unanimity or majority. If there was no majority or if it was authorized by the Commission, the president would make a decision subject to revision.[230] In trying to understand the mandate entrusted to the EECC, the Commission members made an interpretative decision in which it noted that; (a) Article 5(1) does not confer to the Commission a right over claims regarding the interpretation or implementation of the Algiers Agreement, (b) the conflict between parties referred to in Article 5(1) subject to the jurisdiction of the Commission began in May 1998 and ended in December 2000, (c) filing claims for incidents that occurred after December 2000 is only possible if the claimant can demonstrate that such claims arose as a result of the said conflict, (d) it is logically impossible for incidents that took place before May 1998 to be related to the conflict because the conflict in question had not been started (retrospectively, it avoided questions related to the causes of the conflict).

The EECC faced a number of challenges but most of them were partly related to financial constraints. The budget necessary for the functioning of the Commission including logistical costs such as renting rooms necessary for conducting proceedings and other activities at the seat of the Commission in The Hague's Peace Palace, paying fees for the commissioners, remuneration for supporting contract staff either from outside as 'experts' or as administrative assistants provided by the Permanent Court of Arbitration was a heavy burden to two weak economies emerging from a devastating conflict. For such reasons, both parties and the Commission worked under a tight framework to minimize the financial burden. According to Article 5(8) & (9) of the Algiers Agreement, each party was supposed to submit claims on 'its own behalf or on behalf of its nationals, both natural and juridical persons' and in appropriate circumstances on behalf of individuals of origin from either party who are not nationals of the filing state. Parties were supposed to complete the filing of the claims in a period not later than one year after the effective date of the Algiers Agreement and any claim filled after that period was to be rejected. Under Article 5(10) of the Algiers Agreement, the Commission adopted a mass claims process which grouped individual claims into 5 categories: the unlawful expulsion, displacement, treatment of prisoners of war, detention and related injuries, and any other injury or loss to persons.[231] In an effort to ease the time constraints, the Commission also prioritized communication by emails and faxes. Since the mandate of the EECC was 'to determine all claims for loss, damage or injury caused by either state against the other state or persons (natural or juridical) of the other (…)' in accordance with international law, the Commission agreed to

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[230] Article 18(2)&(3), Eritrea-Ethiopia Claims Commission, 'Rules of Procedure'.

[231] Eritrea – Ethiopia Claims Commission, 'Decision Number 2: Claims Categories, Forms and Procedures'

follow Article 38(1) of the Statute of the International Court of Justice (ICJ).[232] However, the war had left behind between 70,000[233] and 200,000[234] persons killed, thousands of persons with emotional and physical injuries, over a million people displaced and severe social and economic disruption, with each country holding more than a thousand prisoners of war.[235] This meant that, meeting a certain (acceptable) standard of evidence establishing every alleged violation of international law on an individual basis was not feasible in a period of one year. Consequently, parties decided to file state-to-state claims.[236]

The parties submitted claims against each other requesting billions of US dollars in compensation for alleged violations of international law. The Commission carried out its activities in two phases. First, it established liability, and second, it awarded damages relating to each violation. Each state was found liable on different levels of responsibility for multiple violations of international humanitarian law including permitting or failing to prevent unlawful treatment of prisoners of war, looting and unlawful destruction of properties belonging to both civilians and government, failure to prevent rape, failure to take precautionary measures to prevent death and injuries to civilians, unlawful expulsion or forcible displacement of civilians, tax discrimination, loss of business and real estate of each other's civilians plus physical and emotional injuries caused to both civilians and military detainees. Even if the EECC had considered in principle monetary compensation to be the appropriate remedy,[237] in some instances the mere determination of the violation was seen as enough in itself to be an appropriate form of satisfaction.[238] In addition to the award of satisfaction, Ethiopia was

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232 Read Article 19 of the Eritrea – Ethiopia Claims Commission: Rules of Procedure together with Article 38(1) of the United Nations, Statute of the International Court of Justice, 18 April 1946, http://www.refworld.org/docid/3deb4b9c0.html accessed 6 May 2014).

233 Susan Notar, 'Introductory note to Eritrea-Ethiopia Claims Commission, Decision 7 Regarding Jus Ad Bellum Liability' (2007) 46:1119 *International Legal Materials*, 1119.

234 Zegeye and Tegegn, 'The Post-War Border Dispute between Ethiopia and Eritrea : On the Brink of Another War?', 245.

235 Klein, 'State Responsibility for International Humanitarian Law Violations and the Work of the Eritrea Ethiopia Claims Commission So Far', 249; Christine Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?' (2006) 17:4 *The European Journal of International Law* 699, 703; Lyons, 'The Ethiopia-Eritrea Conflict and the Search for Peace in the Horn of Africa', 168.

236 Kidane, 'Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea – Ethiopia Claims Commission in The Hague', 34-35

237 The Eritrea-Ethiopia Claims Commission, 'Decision Number 3: Remedies'.

238 The Commission considered having 'found Eritrea liable for violation of the Vienna Convention on Diplomatic Relations by arresting and detaining the Ethiopian Chargé d'Affaires and by violating official Ethiopian diplomatic correspondence and interfering with the functioning of the Ethiopian diplomatic mission to be appropriate reparation.' Final Award – Ethiopia's Damages Claim, XII part C, as reached on 17 August 2009. It (EECC) also concluded that 'Ethiopia unlawfully deprived dual Eritrean-Ethiopian nationals of their Ethiopian nationality and that Ethiopian unlawfully interfered with the

awarded a total of US$ 174,036,520 in monetary compensation[239] and Eritrea was awarded a total of US$ 163,520,865.[240]

3.3.2.3 Reflections on the Decisions of the EECC

The Commission encountered several difficulties. The choice of parties to pursue state-to-state reparation instead of individual victims' reparation made the work of the Commission less relevant to individual victims who wanted to receive reparation. Even if the damages awarded 'to the two countries were primarily for harms suffered by individuals, (…) these amounts were not awarded to the individuals themselves.'[241] This does not, however, mean that the failure to provide reparations to individual victims renders the whole work of the Commission pointless.[242] There are some lessons that can be learnt from the challenges and achievements of the Commission in relation to the advancement of the interpretation and application of laws of war in relation to reparation.

One of the important determinations of the EECC is a decision that found Eritrea liable for the violation of the *jus ad bellum* by resorting to the use of force on 2 May 1998 when it attacked and occupied the town of Badme.[243] Article 2(4) of the United Nations Charter prohibits all states 'from the threat or use of force against the territorial integrity or political independence of any state, in their international relations in any manner that is inconsistent with the Charter.'[244] This decision is obviously controversial given the fact that it was taken after the boundary Commission had already issued its demarcation decision concluding that Badme town is in fact Eritrean territory.[245] Ethiopia argued that Eritrea is liable for starting an aggressive war and it should be held responsible for all damages caused by both parties during the fighting. Eritrea

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Eritrea's departing diplomats to be appropriate reparation for such violations. Final Award – Eritrea's Damages Claim, XI Paragraphs 17 and 18, as done on 17 August 2009.

[239] Final Award – Ethiopia's Damages Claim, done on 17 August 2009.

[240] Final Award – Eritrea's Damages Claim, done on 17 August 2009; Michael J. Matheson, 'Introductory Note to Eritrea's and Ethiopia's Damage Claims' (2009) 49:101 *International Legal Materials* 101, 102; Ari Dybnis, 'Was the Eritrea-Ethiopia Claims Commission Merely a Zero-Sum Game?: Exposing the Limits of Arbitration in Resolving Violent Transitional Conflict' (2011) 33:255 *Loyola of Los Angeles International and Comparative Law Review* 255, 255-256.

[241] Dybnis, Ibid, 266.

[242] Ibid, 284-285 also cited Kidane, 'Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea – Ethiopia Claims Commission in The Hague', 86.

[243] Eritrea Ethiopia Claims Commission, Partial Award - *Jus ad bellum* - Ethiopia's Claim 1-8.

[244] Paraphrase of article 2(4) of the United Nations Charter.

[245] Eritrea-Ethiopia Boundary Commission decision regarding delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia; see also Lyons, 'The Ethiopia – Eritrea Conflict and the Search for Peace in the Horn of Africa', 167. See also George H. Aldrich, 'The Work of the Eritrea-Ethiopia Claims Commission' in *Yearbook of International Humanitarian Law* (T.M.C Asser Instituut, 2006) 440.

responded that Badme and other Eritrean territories were under Ethiopia's illegal occupation. Eritrea asked the Commission to reject the claim on grounds of lack of jurisdiction because Article 3 of the Algiers Agreement had provided for the creation of a neutral investigative body that was going to establish the origins of the conflict. Eritrea maintained that if the Commission decided to proceed with the examination of the Badme incident, it should also be able to investigate other incidents that happened before May 2, 1998 because it claimed that reasons for the outbreak of the conflict resulted from incidents that had happened as early as 1997.[246] The decision on violation of *jus ad bellum* raised a question of whether the issue of 'use of force' was within the EECC jurisdiction and, if so, whether Article 2(4) of the UN Charter applies in a situation where a state was trying to reclaim its territory under illegal occupation?[247] In response to the argument of lack of jurisdiction, the Commission concluded that the investigative body provided in Article 3 of the Algiers Agreement had never been established and that, even if it was operational, its role is of fact finding, not of making legal determinations. It emphasized that it is only the EECC that has a mandate of making legal determination on issues that follow within a period of the conflict which excludes incidents that happened before 2 May, 1998.[248] The determination of the Commission was that Eritrea is liable for the violation of *jus ad bellum* because it attacked Badme when it was under peaceful control of Ethiopia.[249]

During the damage phase, parties expressed strong disagreements about the reparation to be awarded for Eritrea's violation of *jus ad bellum*. Eritrea argued that the decision determining its alleged violation of international law in itself should be enough remedy to serve as a satisfaction for the harm suffered whereas Ethiopia claimed that Eritrea should pay for all damages caused by either party for the entire two years period of the armed conflict.[250] The Commission concluded that it 'did not find that Eritrea bore sole legal responsibility for all that happened throughout the two years of conflict'. (…) it argued that '[a] breach of the *Jus ad bellum* by a state does not create liability for all that comes after. Instead,

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246 Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?', 701.

247 Klein, 'State Responsibility for International Humanitarian Law Violations and the Work of the Eritrea Ethiopia Claims Commission So Far', 224; Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?', 699.

248 Eritrea Ethiopia Claims Commission, Partial Award - *Jus ad bellum* - Ethiopia's Claim 1-8 (Chapter II: Jurisdiction, §. 4)

249 Eritrea Ethiopia Claims Commission, Partial Award - *Jus ad bellum* - Ethiopia's Claim 1-8(Chapter III: Merits, paras 15&16); see also Zondi and Réjouis, 'The Ethiopia-Eritrea Border Conflict and the Role of the International Community', 73. The authors explain how Badme population before the war fully participated in socio-economic and political life of Ethiopia and not Eritrea.

250 Eritrea Ethiopia Claims Commission, Decision Number 7: Guidance Regarding Jus ad Bellum Liability, §. 15.

there should be a sufficient causal connection.' Without taking either party's line of argument, the Commission chose to restrict *jus ad bellum* damages to foreseeable consequences resulting from the attack of 2 May 1998 at Badme and its neighbouring West Front areas dismissing all other Ethiopia's claims for lack of proof. To avoid double compensation, the Commission decided to award compensation to those incidents that were not compensable under the Eritrea's violation of *jus in bello,*[251] in other words, collateral damages.

The disruption of the economic situation and displacement of people are some of the realities of armed conflicts that negatively affect civilian populations. Apart from incidents that were found to be causally connected to Eritrea's violation of *jus ad bellum*, the Commission concluded that there is no general protection for adverse economic consequences of war or the mere displacement of civilians. The Commission concluded that unless the displacement was unlawful or forcible, a state cannot be held liable under international law for voluntary displacement of civilians fleeing to avoid the danger of conflict or due to the population's perceived fear of the approaching enemy combatants. In fact, the Commission further clarified that in addition to proving that the displacement was forcible, the claimant has to prove that the respondent state unlawfully displaced civilians without any military necessity or security justifications. It is also relevant to note that, apart from grave violations such as rape, for the respondent state to be held liable for a certain violation the claimant had to provide enough evidence substantiating that such a conduct was not an isolated incident but rather 'a pattern of systematic, frequent or pervasive' nature.[252]

The EECC gave a mixed conclusion about the protection of dual purpose objects (objects that serve both military and civilian purposes). The Commission found Ethiopia liable for bombing a water reservoir and in another incident found it lawful to bomb an uncompleted electricity station. In the months of February 1999 and June 2000, Ethiopian troops dropped bombs on the Haisile Water Reservoir situated in the desert area 17 kilometres from Assab port.[253] Ethiopia argued that it saw the water reservoir as a military objective because of the purpose it served to the Eritrea army. The intention, as explained in the

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[251] Eritrea Ethiopia Claims Commission, Partial Award - *Jus ad bellum* - Ethiopia's Claim 1-8 (Chapter IV: Award, § B (1) Findings on Liability for Violation of International Law.

[252] Eritrea Ethiopia's Claims Commission, Eritrea's and Ethiopia's Claims, Final Awards: Ethiopia's Damages, (2010) 49:101 International Legal Materials, 222ff (Chapter XI. Ethiopia's Claims for Compensation for Eritrea's Violation of the *Jus ad Bellum*, paragraphs 271 – 479.) See also Allehone Mulugeta Abebe, 'Displacement of Civilians during Armed Conflict in the Light of the Case Law of the Eritrea-Ethiopia Claims Commission' [2009] 22 *Leiden Journal of International Law* 823.

[253] Eritrea Ethiopia Claims Commission, 'Partial Award: Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26 between The State of Eritrea and The Federal Democratic Republic of Ethiopia' Chapter V. Unlawful Aerial Bombardment (Eritrea's Claim 26) §98 http://www.pca-cpa.org/upload/files/FINAL%20ER%20FRONT%20CLAIMS.pdf accessed 22 February 2012.

testimony of one Air Force commander, was to deprive the Eritrean army of drinking water, a necessity in the desert climate which would have reduced their capacity of fighting at the Eastern Front.[254] Eritrea argued that the reservoir was the sole source of water serving only civilians living in the city of Assab because the Eritrean army had their own wells and underground storage tanks at the front. In conclusion, Eritrea claimed that the Commission should find Ethiopia liable for violating Article 54 of the Additional Protocol 1 which prohibits targeting objects indispensable for civilian survival.[255] Without denying the Ethiopian argument that the destruction of the water reservoir might have provided a military advantage, given the importance of water in a desert area, the Commission still found Ethiopia liable for having targeted such an important civilian object. The Commission stated that it was convinced that

> the Government of Ethiopia knew that the reservoir was a vital source of water for the city of Assab. Thus, it seems clear that Ethiopia's purpose in targeting the reservoir was to deprive Eritrea of the sustenance value of its water and that Ethiopia did not do so on erroneous assumption that the reservoir provided water only to the Eritrean armed forces.[256]

Given the significance of the reservoir to humanitarian conditions of civilians, even if the reservoir was fortunately not damaged or slightly damaged and quickly repaired, Ethiopia is liable under Article 54 of the Additional Protocol 1.[257] It is plausible to state that given the precious value of water for civilians' survival in a desert area, the Commission's decision showed how humanitarian grounds can outweigh the military advantage.

The Commission's majority decision that found Ethiopia not liable for the Aerial bombardment of Hirgigo Power Station drastically reversed the protection of dual purpose objects that was reached in the Haisile Water reservoir claim. On 28 May 2000, the Ethiopian Air Force bombed and significantly damaged Hirgigo Power Station, which by the time of attack was complete but not yet operational. Eritrea asked the Commission to find Ethiopia liable for violating article 52(2) of the Additional Protocol 1. Ethiopia responded that even if the station in itself qualified as a military objective, the attack that damaged it on that day resulted from a target that was aimed at destroying an anti air-craft launcher that was suspected to be located next to the station, thus arguing that it was a lawful incidental/collateral damage. Eritrea successfully rejected this justification to the satisfaction of the Commission. However, the Commission concurred with Ethiopia that electricity power stations are legitimate military objectives for their vital roles in sustaining conflicts through communication, transport and

[254] Ibid.
[255] Ibid, C: Merits §99.
[256] Ibid, para.100.
[257] Ibid, D: Award, §2.

industry which makes them legitimate targets during war except those separable stations that serve only humanitarian purposes. In its reasoning, the Commission stated that military advantage should be evaluated in the context of the conflict as a whole and agreed with the interpretation of the British Defence Ministry's Manual of the Law of Armed Conflict which interprets the term 'purpose' mentioned in article 52(2) of the Additional Protocol 1 to include intended future use of an object. In its majority decision, the Commission concluded that the station was going to have a significant role in generating electricity when put in full use which would have made a great military contribution to the country at war. Additionally, the Commission noted that it is lawful to inflict economic damage to the adversary so that pressure is increased that can eventually achieve a political goal of ending the conflict. For those reasons, the Commission found the attack at the station lawful.[258] This reasoning is controversial mainly for what can be seen as subjecting protected civilian objects to military attacks and for adding more uncertainty in determining what really makes a military objective. In his separate opinion, Hans van Houtte, the president of the Commission, rightly stated that:

> [T]he objective's contribution to the military action must be "effective" in the actual situation, not *in abstracto*. Otherwise, every object potentially of use to enemy troops could become a military objective. (…) The infliction of economic loss or the undermining of morale through the destruction of a civilian object, or the possibility that the destruction may bring the decision-makers to the negotiating table, do not make that object a military objective.[259]

Hans van Houtte further opined that attacking the station was unlawful because of its failure to respect the principle of proportionality. He explained that given Ethiopia's response that the damage was incidental resulting from a target aimed at an anti aircraft launcher means 'that [it] did not investigate beforehand whether the concrete and direct military advantage of this bombing outweighed the damage (…). International law does not permit bombing first and justification later.'[260] He concluded that Ethiopia is liable for violating both Articles 52(2)&(3), and 57 of the Additional Protocol 1 and in his view should pay damages for the destruction of an electricity station that was of a great

[258] Eritrea Ethiopia Claims Commission, 'Partial Award: Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9-13, 14, 21, 25 & 26 between The State of Eritrea and The Federal Democratic Republic of Ethiopia' Chapter VI. Aerial Bombardment of Hirgigo Power Station (Eritrea's Claim 25) §§106-121 http://www.pca-cpa.org/upload/files/FINAL%20ER%20FRONT%20CLAIMS.pdf accessed on 22 February, 2012.

[259] Ibid, (Eritrea's Claim 25) Separate Opinion, §3.

[260] Ibid, para.10.

significance to civilian use.[261]

Despite the importance of the Commission's work in interpreting relevant laws of war, it did not make any direct meaningful impact to the lives of individual victims directly affected by the Eritrea-Ethiopia border conflict.[262]Although one could argue that the relevance of the Commission to individual victims got lost in the fact that the outcome of its work was 'a zero-sum game', where almost each country owes the other a relatively comparable total amount of compensation,[263] it is also unlikely that parties are willing to enforce these award decisions. Furthermore, if Eritrea is going to pay the balance as it has promised,[264] something it is allowed not to respect under international law as a reciprocal response to Ethiopia's refusal to respect the decision of the boundary commission, there is no indication that either party is willing to provide relief directly to the affected victims.[265] The individual victims' hope to receive reparation disappeared when parties chose state-to-state reparation without an enforcing mechanism to distribute awards. As Dybnis notes '[i]n reality Eritrea and Ethiopia will merely exchange checks for identical sums of money. Essentially, the result will be the same regardless of whether the Commission awards ten times the amount of money, or awards no money at all.' He, however, further notes that awarding such amounts of money to victims of rape or their support organizations would still have made some difference in the lives of the poor individuals in Eritrea and Ethiopia.[266]

Even if the EECC awarded compensations to the violations of *jus ad bellum* and *jus in bello*, the whole idea of parties being committed to addressing the needs of victims from both sides was in itself an unrealistic promise. The actual output of the Commission fails to meet victims' expectations because all decisions taken regarding reparation have not been enforced. It was equally idealistic for the Commission to expect that both states were to 'ensure that the compensation awarded was to be paid promptly, and that funds received in respect of their claims be used to provide relief to their respective civilian populations injured in the war'[267] without an enforcement mechanism in place.

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[261] Ibid.

[262] Dybnis, 'Was the Eritrea-Ethiopia Claims Commission Merely a Zero-Sum Game?: Exposing the Limits of Arbitration in Resolving Violent Transitional Conflict'.

[263] Ibid, 273-2274.

[264] Amnesty International, 'Eritrea – Amnesty International Report 2010' http://www.amnesty.org/en/region/eritrea/report-2010 accessed on 23 February 2012.

[265] Holtzmann and Kristjánsdóttir (eds.) *International Mass Claims Processes: Legal and Practical Perspectives*, 139.

[266] Dybnis, 'Was the Eritrea-Ethiopia Claims Commission Merely a Zero-Sum Game?: Exposing the Limits of Arbitration in Resolving Violent Transitional Conflict', 273-374.

[267] Paraphrased - Eritrea – Ethiopia Commission's Final Award – Eritrea's Damages Claim, Chapter IX. Award, paragraph 21 and Final Award – Ethiopia's Damages Claim, Chapter XII. Award, Paragraph 17, (2010) 49:101 International Legal Materials, 173 and 253.

3.4 Collateral Damage under Truth and Reconciliation Commissions (TRCs)

The creation of Argentina's National Commission on the Disappeared Persons (*Comisión Nacional sobre la Desaparición de Personas*, CONADEP) in 1983, was followed by an increase in the creation of different forms of similar *ad hoc* commissions to investigate past/historical abuses in several countries.[268] The mandate of most TRCs has been (mainly) that of establishing historical and contextual truth about violations that occurred during an armed conflict or a repressive system of governance, aiming at justice and reconciliation.[269] The emphasis of TRCs is not on the punishment of offenders, but on unravelling the narrative of the violations committed, simultaneously offering victims an opportunity to voice their experiences and receive acknowledgement of the wrongs committed against them.[270] Some TRCs have made provisions for monetary and symbolic reparations, educational and health service programmes, memorials and commemorations, the reestablishment of land and property rights and projects that strengthen democratic institutions.[271] Apart from the Timor-Leste Commission for Reception, Truth and Reconciliation (*Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste*, CAVR), which investigated human rights abuses committed in East-Timor from 1974 to 1999, including violations of the Indonesian occupying forces,[272] most of the commissions have

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[268] The United States Institute of Peace's Truth Commissions Digital Collection has listed about 40 truth commissions and bodies of inquiry worldwide, for 'background information on the composition of each body, links to the official legislative texts establishing such commissions, and each commission's final reports and findings.' see http://www.usip.org/publications/truth-commission-digital-collection accessed on 14 August 2012; see also P. B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2011) 10; N. J. Kritz, (ed.), *Transitional Justice : How Emerging Democracies Reckon with Former Regimes II* (United States Institute of Peace Press, 1995) 328.

[269] Hayner, Ibid, 20; for general information about truth commissions see also Frank Haldemann, 'Drawing the Line : Amnesty, Truth Commissions and Collective Denial', in R. Letschert and other (eds.) *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) 265; Stephan Parmentier and Pietro Sullo, 'Voices from the Field : Empirical Data on Reconciliation in Post War Bosnia and Their Relevance for Africa' in R. Letschert and other (eds.) *Victimological Approaches to International Crimes: Africa* (Intersentia 2011) 335 – 339.

[270] Priscilla B. Hayner, 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study' (1994) 16 :4 *Human Rights Quarterly* 597, 604-605.

[271] William A. Schabas, 'Reparation practices in Sierra Leone and The Truth and Reconciliation Commission' in K De Feyter. and others (eds.) *Out of the Ashes Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia, 2005) 289; Margaret (Peggy) Maisel, 'Have Truth and Reconciliation Commissions Helped Remediate Human Rights Violations Against Women? A Feminist Analysis of the Past and Formula for the Future' (2011) 20:143 *Cardozo Journal of International and Comparative Law* 143.

[272] For further details about the CAVR and its reports see http://www.cavr-timorleste.org/ accessed on 14 August 2012; see also Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 39-42.

been dealing with internal violations where the need to reconcile perpetrators and victims is more pressing than in a post- inter-state conflict.

TRCs have at times investigated abuses of repressive regimes and armed conflicts with some degree of victims' participation.[273] However, TRCs have generally avoided making distinctions between victims of war crimes from victims of collateral damage. Arguably, it is due to the fact that most of TRCs did not deal with abuses under the laws of war, but with abuses of repressive regimes such as forced disappearances, torture, illegal detention, rape and sexual violence and other forms of ill-treatment which can only be committed when a victim is under the physical detention of the perpetrator. Under such violations, the accused person cannot use the defense of collateral damage. However, even in situations where TRCs have been dealing with an armed conflict such as Sierra Leone or warlike situations such as South Africa, victims of collateral damage were never separated from other victims. There is little information (if any) available in their reports focusing on victims of collateral damage as a category. This section does not contain a study of TRCs – there are already numerous and extensive studies on either truth commissions in general or specific TRCs.[274] The focus here is on the process of truth seeking and reconciliation as some of the reasons that have contributed to TRCs' approaches on collateral damage .

3.4.1 The Process of Truth Finding

The process of reaching the truth and the kind of truth sought through TRCs is that of fact finding bodies as opposed to judicial processes. The process of collecting and assessing information used by TRCs does not go into details of establishing the intention of individual perpetrators behind every incident that caused damage in an armed conflict. The methodological approach and standard of proof used is mainly aimed at creating a general contextual story of

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[273] Maisel, 'Have Truth and Reconciliation Commissions Helped Remediate Human Rights Violations Against Women? A Feminist Analysis of the Past and Formula for the Future', 166-170.

[274] Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*; N. J. Kritz, (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (United States Institute of Peace Press, 1995) Volumes I-III; David Dyzenhaus, 'Survey Article : Justifying the Truth and Reconciliation Commission' (2000) 8 :4 *The Journal of Political Philosophy* 470; Amnesty International, 'Broken Promises : The Equity and Reconciliation Commission and its Follow-up' (Amnesty International 2008, Index :MDE 29/001/2010); R. Letschert and other (eds.) *Victimological Approaches to International Crimes: Africa*, 265-352; Muhamad Suma and Chrisian Correa, 'Report and Proposals for the Implementation of reparations in Sierra Leone' [2009] International Center for Transitional Justice; Lisa J. Laplante & Kimberly Theidon, 'Truth with Consequences : Justice and Reparations in Post-Truth Commission Peru' (2007) 29 *Human Rights Quarterly* 228; Julian Simcock, 'Unfinished Business: Reconciling the Apartheid Reparation Litigation with South Africa's Truth and Reconciliation Commission' (2011) 41:1 *Stanford Journal of International Law* 239.

what happened in the conflict rather than establishing whether an incident was collateral (incidental) damage or not. To understand the basis of this claim, we have to go back to the definition and controversies surrounding the meaning of collateral damage. Collateral damage results from lawful incidents of war such as proportionate attacks and unintentional attacks or accidents that can happen during an armed attack. Assessing the intention of the perpetrator is inherently part of understanding the proportionality principle which is also part of understanding collateral damage. The ICC's Elements of Crimes clearly sets out that for an attack to be a crime of excessive incidental death, injury or damage, it would be of such an extent that is clearly excessive in relation to concrete and direct overall military advantage foreseeable by the suspected perpetrator at the relevant time.[275] In order to ascertain whether victimization resulted from collateral damage or not, it is therefore necessary to establish what the perpetrator (attacker) knew before she or he launched the attack. Being required to establish the 'knowledge' of the perpetrator is to some extent similar to being asked to prove something 'beyond reasonable doubt', a formula which is normally used in criminal trials. On the contrary, as Hayner notes, '[t]ruth commissions generally do not seek to meet that high level of proof.' She argues that '[w]hile there is no uniform practice, the emerging standard for truth commissions is to rely on a "balance of probabilities" standard (…) which means that there is more evidence to show something to be true than to not be true.'[276] It is true that 'the standard of "a balance of probabilities" is sufficient and proportionate to establish the facts that are relevant to an order of reparations (...)'[277] but it does not eliminate all other possible alternative theories – it simply means that one alternative is more probable than the other possibilities.[278]

The balance of probabilities is a good standard of proof when its purpose is to recommend for the investigation and possible prosecution of certain individuals suspected of having committed crimes but it cannot reach the threshold of convicting the perpetrator.[279] For example, where TRCs have attempted to take decisions that affect specific individuals, such as the Liberia's TRC which

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[275] A paraphrase of elements n°1 – 3 of the ICC Elements of Crimes on Article 8 (2) (b) (iv) of the Rome Statute (the war crime of excessive incidental death, injury, or damage), as published by the International Criminal Court, (2011 version, ICC-PIDS-LT-03-002/11_Eng), 19.

[276] Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 142.

[277] ICC Trial Chamber I, 'Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo: Decision establishing the principles and procedures to be applied to reparations' [n°.: ICC-01/04-01/06 of 7 August 2012] §§251-254.

[278] Mark Klamberg, 'Fact Finding in International Criminal Procedure: How Collection of Evidence may Contribute to Testing of Alternative Hypotheses' (Paper to be Presented during lecture at the Amsterdam Center for International Law (ACIL), 30 May 2011 http://ssrn.com/abstract=1847710 accessed on 18 December, 2012; William Benjamin Hale, *Handbook on the Law of Torts* (West publishing co., 1896) Chapter V. Remedies for Torts – Damages.

[279] Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 91-94.

recommended for the suspension of some individuals from holding positions of public office including President Ellen Johnson Sirleaf, such decisions were criticized for overstepping the mandate of truth commissions and for their lack of due process.[280] Similarly, Douglass W. Cassel, Jr. has argued that the El Salvador Truth Commission lacked minimum requirements of fairness. He remarks that; '[it] made no pretense of affording all the usual elements of due process of law.'[281] Whereas he acknowledges that the truth commission was not a court and never made legal determinations or imposed sentences, naming those it found responsible had a significant impact on them, because in his view '[it] imposed moral punishment and public condemnation.'[282] Even if international criminal tribunals are criticized for overreliance on eyewitnesses,[283] it is argued here that a process similar to a criminal trial is much more suitable for determining whether damage resulted from a collateral incident or not because of the importance of wanting to establish the knowledge and motives of the suspected attacker. A requirement much similar to proving *mens rea* is crucial for determining collateral damage, a basic requirement of criminal law which is not necessarily important with the story telling process of information gathering used by truth commissions. The fact that the truth telling process used by TRCs does not reach the threshold required to determine whether an incident was collateral damage or not leaves therefore a possibility to claim that victims of such incidents equally benefit from reparation programmes. This conclusion should be cautiously stated because it is based on the assumption that those designing TRCs understand that making distinctions between victims of war based on the (un)lawfulness of the conduct that caused harm may run contrary to the furtherance of their reconciliation mandate.

3.4.2 Reparation: Contributing to Reconciliation

Understandably, some TRCs and victims claim that obtaining reparation is one stepping stone towards achieving reconciliation. It does not sound peculiar to

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[280] Paul James-Allen, Aaron Weah, and Lizzie Goodfriend, 'Beyond the Truth and Reconciliation Commission : Transitional Justice Options in Liberia' [May 2010] International Center Transitional Justice 9-12 & 21-22 http://www.ictj.org/sites/default/files/ICTJ-Liberia-Beyond-TRC-2010-English.pdf accessed on 16 August 2012; Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 138; Hayner, 'Fifteen Truth Commissions – 1974 to 1994 : A Comparative Study', 647-650; Julian Simcock, 'Unfinished Busness: Reconciling the Apartheid Reparation Litigation and Reconciliation Commission', 240-242.

[281] Douglass W. Cassel, Jr. 'International Truth Commissions and Justice', in N. J. Kritz, (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes I* (United States Institute of Peace Press, 1995) 329-330.

[282] Ibid, 330.

[283] N.A. Combs, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press, 2010).

suggest that before you talk about reconciliation to a victim, you should first think of how to address the harm suffered. However, it is not clear how addressing these sufferings contributes to reconciliation because reconciliation like other terms such as 'justice' or 'truth' – is often used without much consideration to its detailed meaning. We do not know exactly when reconciliation is achieved – is it for example when perpetrators and victims are peacefully living together or is it when a victim receives compensation? Can we categorically say that Hutu and Tutsi of Rwanda or Blacks and Whites of South Africa are reconciled because of the prevailing peaceful coexistence or that the Jews and Germans have reconciled because Germany paid reparations? While truth is certainly a very important element in the process of reconciliation,[284] there is currently not sufficient scientific evidence to conclusively identify which elements – security, economic development, prosecution, amnesty/impunity or reparations – contribute most to reconciliation.[285] The claim is that providing reparation to victims is a form of restoring their dignity and a direct recognition of the harm suffered.[286] It is also echoed in what a Chilean victim said to Hayner; '"[e]very time she receives a check, it's a recognition of the crime," (…) after so many years of denial, month by month, it's a recognition that we were right."'[287] On contrary, Verdeja argues that 'clearly to expect reconciliation and justice to emerge from reparations program is to overburden it normatively.'[288] We know from empirical studies that reparations can be regarded as a form of delivering a message of recognition or acknowledgment directly to the victim.[289] What is not known is the extent to which this form of recognition contributes to reconciliation.

The TRCs' desire to contribute to reconciliation through reparations has resulted in some commissions recommending that reparations be implemented in a manner that does not discriminate victims or communities. For instance, the Sierra Leone's Truth and Reconciliation Commission acknowledged that 'without adequate reparation and rehabilitation measures, there can be no healing or reconciliation'[290] and recommended that reparation should not be used to discriminate victims of war based on whether they testified before the commission or not. It noted that it would '(…) arbitrarily preclude a large proportion of victims from being recognized, (…) making such a distinction is not

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[284] James L. Gibson, 'The Contribution of Truth to Reconciliation' (2006) 50:3 *Journal of Conflict Resolution* 409.

[285] Elin Skaar, 'Reconciliation in a Transitional Justice Perspective' (2012) 1:1 *Transitional Justice Review* 54, 54-57.

[286] Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 174.

[287] Hayner, Ibid, 167 (emphasis added).

[288] Ernesto Verdeja, 'A Normative Theory of Reparations in Transitional Democracies' (2006) 37:3-4 *Metaphilosophy* 449, 461ff.

[289] Pham PN and others, *When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda* (Human Rights Center, University of California, Berkeley; 2007) 34-38.

[290] Report of the Sierra Leone's Truth and Reconciliation Commission (2004) 237.

likely to contribute to reconciliation, which is one of the goals of the reparations programme.'[291] The Chilean Commission on Truth and Reconciliation noted that; '[m]easures of reparation must aim to bring society together and move toward creating conditions for true reconciliation; they should never cause division.'[292] The Liberian Truth and Reconciliation Commission recommended that 'the Government of Liberia assumes its full responsibility under international law (…) to provide reparations for all those individuals and communities victimized by the years of instability and war.'[293] The South African Truth and Reconciliation Commission went even further to acknowledge that 'human rights violations affect many more people than simply their direct victims.' That '(…) many victims who approached the Commission were simply going about their daily business when they were caught in the crossfire.'[294] In fact, during some hearings, victims of collateral damage received apologies from members of the African National Congress (ANC). 'Mr Mohammed Shaik, (…) stated that *'[w]here there were civilian casualties these were never at any stage intended to be targets, but were rather caught in the crossfire. To the extent that there were civilian casualties, I express my deep regret to those who experienced pain and suffering.'*[295]

Evidently, to achieve the 'completeness' of reparations programmes, it is important that every reparations programme tries to reach all victims. However, this is not always possible, in addition to structural difficulties to address the needs of a huge number of victims, most post-conflict societies suffer from limited resources.[296] TRC's recommendation for reparations is very different from the actual implementation, in fact, as Verdeja notes, 'most of [reparation] programmes have not been carried out'.[297] Even if reconciliation is at the heart of a TRC, it is often impossible that every victim will directly benefit from reparations; some form of prioritization will always need to be made.[298] In situations where TRCs have prioritized some victims, the exclusion was not made on the basis of collateral damage. It was based on the nature of harm, the vulnerability of

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291 Ibid, 242.

292 N. J. Kritz, (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Volume III Laws, Rulings and Reports* (United States Institute of Peace Press 1995) 156.

293 Republic of Liberia, Truth and Reconciliation Commission Volume II : Consolidated Final Report (June 30, 2009) 378 http://trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf accessed on 22 August 2012.

294 Truth and Reconciliation Commission of South Africa, (1998) 'Report' (Vol. 5, Chapter 4: Consequences of Gross Violations of Human Rights §4) 125.

295 Ibid, Chapter 7 Causes, Motives and Perspectives of Perpetrators, §12) 262.

296 The Office of the United Nations High Commissioner for Human Rights, 'Rule of Law Tools for Post-Conflict Societies: Reparations programmes (HR/PUB/08/1)' (Geneva, 2008) 15ff. http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf accessed on 22 August 2012.

297 Ernesto Verdeja, 'A Normative Theory of Reparations in Transitional Democracies', 458.

298 The Office of the United Nations High Commissioner for Human Rights, 'Rule of Law Tools for Post-Conflict Societies: Reparations programmes (HR/PUB/08/1)' (Geneva, 2008) 15ff.

victims or political reasons. For example, Argentina first provided reparations to victims of forced disappearance at the exclusion of victims of torture, those who were killed and their bodies found, children born while their mothers were in detention and minors who were in detention together with their parents or in military camps because their parents had either been killed or disappeared. All the victims previously excluded had to wait for about 10 years to receive reparations.[299] In Peru, the Government excluded victims believed to have been associates of illegal armed groups.[300] South Africa and Chile commissions prioritized victims whose names appeared in the commission's report as a form of evidence to claim reparations.[301] The Sierra Leone Commission focused mainly on certain vulnerable categories of victims such as victims of sexual violence and rape, amputees, crippled and bullet wounded victims, war widows and wives of male amputees, elderly and orphaned children, abductees and forcefully conscripted children, at the exclusion of war widowers and husbands of female amputees.[302] To explain this exclusion, the commission argued that 'it is generally accepted that husbands and widowers are often the bread-winners of their family and are therefore economically independent.'[303] Briefly, TRCs look at war damages indiscriminately whether it is collateral or not, hence recommending for reparation indiscriminately.

3.5 A Concluding Perspective

War related reparations through mass claims and TRCs do not provide adequate answers to the question of whether victims of collateral damage should (not) receive reparation. Other than the TRCs that are essentially disinterested in making the distinction for societal benefits such as reconciliation, the work of the two mass claims commissions (EECC and UNCC) do not explain why victims of crimes are entitled to reparation at the exclusion of victims of collateral damage beyond the prevailing legal reasoning. The main reason is that these institutions were created to operate in the existing legal and political order. It would be too much to expect them going beyond the prevailing legal reasoning, that it is the violation of a legal obligation which entails the duty to repair. Therefore, the responsibility is on researchers to theorise on these issues and inform (international) law making bodies about the existing gaps.[304]

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[299] Ibid, 27; N. J. Kritz, (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes: Volume III Laws, Rulings and Reports* (United States Institute of Peace Press, 1995) 44-46; Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 171.

[300] Hayner, ibid, 174.

[301] Ibid, 167&176.

[302] Report of the Sierra Leone's Truth and Reconciliation Commission (2004), Vol. Two, Chapter Four (Reparations) §§ 53 – 65.

[303] Ibid, § 66.

[304] Albin Eser, 'The Importance of Comparative Legal Research for the Development of

The perspective of the traditional laws of war and of international criminal law to consider reparation as a secondary right dependent on the commission of a violation of the laws of war is understandable. There are some historic reasons for it. The logic of the traditional laws of war as well as International Humanitarian Law is to regulate and influence the behaviour of troops (against other troops or civilians) and not reparation.[305] *Jus post bellum* is treated as the logical outcome of *jus in bello* and not as a self-standing concern. International Criminal Law of course focuses on criminal accountability. This leaves victims of collateral damage in the cold for which there are no convincing reasons except for the logical consistency of the law as a system. It is true that '[i]f the existence of a proposed norm is unclear it should be assumed that a norm has not been created.'[306] However, that 'norm free area'[307] should be open to discussion. The mere fact that the existing laws of war are not explicit on how to redress the harm caused to victims of collateral damage, whose killing, injury (physical and or mental) and the confiscation or damaging of whose properties was licit under the laws of war alone cannot be the justification to conclude that such a category of victims should not be entitled to reparation. There is a need to have some other justifications beyond this legal reasoning. Of course this is not to reject the existing legal order, but, following Sandoz's view:

> Any examination of international humanitarian law must be carried out in a very open-minded manner – one that rules out nothing, not even the possibility of scraping the law entirely and constructing a new edifice on different foundations, if one were convinced that it was not possible to incorporate the changes needed into the law as it stands.[308]

It is imperative for investigators/prosecutors to know the circumstances under which the damage was caused during a war, to establish the individual criminal responsibility of perpetrator(s), but it is less convincing to assume that there is a difference in the harm suffered or needs of victims – both categories of victims are likely to suffer similar consequences irrespective of the fact that collateral

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Criminal Sciences' in Roger Blancpain (Hrsg.), *Law in Motion: Recent Developments in Civil Procedure, Constitutional, Contract, Criminal, Environmental, Family & Succession, Intellectual Property, Labour, Medical, Social Security, Transport law* (Kluwer Law International, 1997) 492, 506-510; Douglas W. Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31:2 *Journal of Law and Society* 163, 178.

[305] See also Scott T. Paul, 'The Duty to make Amends to Victims of Armed Conflict', 100.

[306] Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15:3 *European Journal of International Law* 523, 551.

[307] Ibid, 547.

[308] Yves Sandoz, 'International Humanitarian Law in the Twenty-First Century' in T. McCormack and A. McDonald (eds.), *Yearbook of International Humanitarian Law* (Vol.6, T.M.C. Asser Press 2003) 4.

damage is not prohibited by law. If the answer to Gandhi's question, 'what difference does it make to the dead, the orphans and the homeless, whether the mad destruction is wrought under the name of totalitarianism or the holy name of liberty or democracy?'[309] is that 'there is no actual difference in the harm suffered by both categories of victims', why then should reparation, of which its main purpose is to wipe out the consequences of the harm, ignore victims of collateral damage?[310] As Reisman notes, 'there is certainly nothing remarkable in the notion that the consequences of an illegal action should be repaired (…). But it does not follow, as a necessary corollary, that compensation should not be owed' for lawful damages.[311] Therefore, it should be reasonable to suggest that knowing whether an injurious incident was a result of a violation of the laws of war should be limited to determining criminal prosecution and not reparation to victims. However, this suggestion alone cannot be enough justification to dismiss an existing legal order.

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309 Mahatma Gandhi, Indian Political and Spiritual Activist (1869-1948), *Non-violence in Peace and War* (Vol 1, Ch 142) seen in Chris Lucas, 'What difference does it make' [2006] http://www.calresco.org/wp/differ.htm accessed on 22 September 2011; See also M Walzer, *Just and Unjust Wars* (revised ed.), 153-155; Walzer wonders whether the difference matters for the victims.

310 T A Cavanaugh*, Double – Effect Reasoning, Doing Good and Avoiding Evil* (Clarendon Press 2006) 165-166; Ronen, 'Avoid or Compensate?', Fernando Val – Garijo, 'Reparations for Victims as a Key Element of Transnational Justice in the Middle East Occupied Territories' (2010) 6:4 *International Studies Journal* 39.

311 Michael W. Reisman, 'Compensating Collateral Damage in Elective International Conflict' (2014) 8:1 *Intercultural Human Rights Law Review* 1*, 3.*

Chapter 4: The International Criminal Court's Trust Fund for Victims

Generally, reparation focusing on individual victims is still a developing concept under international law. The war reparations which emerged from peace treaties have been a preserve of states to the exclusion of individual victims. Post-war arbitration or claim commissions and truth commissions remain scarce. The adoption of the 1998 Rome Statute which entered into force on July 1, 2002 was the beginning of a paradigm shift for victims of international crimes, including war crimes. [312] International military tribunals such as the Nuremberg and Tokyo, *ad hoc* tribunals such as International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) or the UN Special Court for Sierra Leone (UNSCSL) had either ignored the role of victims or considered them as mere witnesses. Article 75(2)&(3) of the Rome Statute provides that the Court can 'make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. (…) or order that the award for reparations be made through the Trust Fund (…).' According to the nature of reparations under Article 75, it is very difficult to include victims of collateral damage under this provision because it is largely construed in the classical sense, as a secondary right (in this case based on the commission of an international crime and dependant on the judicial outcome, after the conviction of the suspected offender). This excludes all victims of lawful incidents of war (collateral damage) from the Court.

However, in addition to the creation of 'offender – victim' reparation (Article 75),[313] the Rome Statute established the Trust Fund for Victims (TFV). Article 79(1) provides for the creation of the Trust Fund 'for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.'[314] From 2008 until January 2014, the TFV has implemented several projects out

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312 The Rome Statute of the International Criminal Court (A/CONF.183/9 of 17 July 1998) as amended up to date.

313 It is fair to note (without undermining the theoretical significance of Article 75) that the recent Lubanga decision shows how it is still difficult for individuals to obtain direct reparations. The Court has clearly favoured a collective approach over individual reparations. ICC Trial Chamber I, 'Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo: Decision establishing the principles and procedures to be applied to reparations' [nº.:ICC-01/04-01/06 of 7 August 2012] §§217-221.

314 Whereas Article 79(1) provides reparation specifically to victims of crimes, in practice, as it shall be indicated, the TFV is using a different definition of victims of crimes from that applied in proceedings before the Court.

of the funds collected through voluntary contributions by providing 'material support, psychological and physical rehabilitation' reaching about '42,300, direct beneficiaries and an additional 182,000 of their family members' in both Northern Uganda and DR Congo.[315]

4.1 The Structure and Mandate of the Trust Fund for Victims

The TFV came into being on 9 September 2002 with the adoption of Resolution ICC-ASP/1/Res.6 which also created its Board of Directors. The TFV is a semi-independent organ of the Court managed according to the Regulations of the Trust Fund for Victims. The Board of Directors is composed of five members of different nationalities, 'with high moral character, impartiality and integrity' elected by the Assembly of States considering gender balance and equitable geographical representation.[316] Their first tasks included establishing management regulations,[317] fundraising and recruiting personnel for the Secretariat.[318] The Regulations of the TFV were adopted on 3 December 2005.[319] The Board of Directors meet once each year and members serve 'in an individual capacity on a pro bono basis.' In carrying out their duties they are expected to take their decisions by consensus and where it is not possible a majority vote is required.[320] It is the Secretariat that deals with the daily management of the activities of TFV under the guidance of the Board of Directors.[321] The Secretariat is comprised of staff members working at the seat of the Court in The Hague and field staff. The number of staff can be increased by the Registrar depending on the available workload.[322] In carrying out its mandate, the TFV collaborates with both local and international partners and or victims themselves to implement projects and

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[315] ICC – The Trust Fund for Victims, 'Projects' http://www.trustfundforvictims.org/projects, accessed on 17 January 2014.

[316] Paragraphs 2-3 of the Annex to the resolution of the Assembly of State Parties Resolution Establishing the fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims (ICC-ASP/1/Res.6) adopted at the 3rd plenary meeting, on 9 September 2002.

[317] Assembly of State Parties Resolution ICC-ASP/1/Res.6, §3.

[318] ICC Assembly of State Parties, 'Report to the Assembly of State Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the period 16 July 2004 to 15 August 2005' [ICC-ASP/4/12 of 29 September 2005]; ICC Assembly of State Parties, 'Report to the Assembly of State Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims 2003-2004' [ICC-ASP/3/14 of 29 July 2004].

[319] ICC's Assembly of State Parties, 'Regulations of the Trust Fund for Victims' [Resolution ICC-ASP/4/Res.3 adopted December 3, 2005].

[320] Regulation 13 of the Regulations of the Trust Fund for Victims.

[321] The Assembly of State Parties resolution ICC-ASP/3/Res.7 of September 10, 2004.

[322] Assembly of State Parties, Resolution ICC-ASP/3/Res.7, 'Establishment of the Secretariat of the Trust Fund for Victims', Adopted at the 6th plenary meeting, on 10 September 2004, by consensus.

activities aimed for the rehabilitation of victims.[323]

In addition to receiving and managing all resources collected either through fines or forfeiture and voluntary contributions, the TFV has a twofold mandate.[324] The first mandate is related to the case(s) before the Court. Under this mandate: (A) the Chamber can decide that the reparations award offered to victims be made by the TFV in case the convicted person is unable to pay reparations. This also includes projects/activities which can be triggered by the Court order. (B) 'The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim.' (C) 'The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.'[325] In addition, if the Board of Directors finds it necessary that it can supplement the award deposited with additional funding from voluntary contributions.[326] Reparation that can be provided for under this first mandate may take different forms including restitution, compensation and rehabilitation.[327]

The second mandate of the TFV relates to providing general assistance to victims as provided for in Rule 98(5) that 'other resources of the Trust Fund may be used for the benefits of victims (…)'[328]. 'Other resources' refers to voluntary contributions and not resources collected through reparation awards imposed on convicted persons, fines or forfeiture.[329] Under this second mandate the TFV is more independent than in the first mandate. The relationship between the TFV and the Court is that the Board of Directors is supposed to notify the Court of their decision to implement certain projects or activities for the benefit of victims as provided for in Regulation 50(a). The choice of focusing on the TFV's second mandate (broader general assistance activities/projects) is to study how victims of crimes under the jurisdiction of the Court are assisted in practice, and whether victims of collateral damage are (not) included among the beneficiaries of assistance projects.

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[323] The ICC Trust Fund for Victims, 'Recognizing Victims & Building Capacity in Transitional Societies', Spring 2010 Programme Progress report, 8.

[324] Heidy Rombouts and Stephan Parmentier, 'The International Criminal Court and its Trust Fund are Coming of Age: Towards a Process Approach for the Reparation of Victims' (2009) 16:149 *International Review of Victimology* 149, 150.

[325] Article 75(2), Rome Statute and Rule 98(2&3) Rules of Procedure and Evidence.

[326] Regulation 56 of the Regulations of the TFV.

[327] Article 75(1), see also The ICC Trust Fund for Victims, 'Recognizing Victims & Building Capacity in Transitional Societies', Spring 2010 Programme Progress report, 3.

[328] Article 79(1), Rome Statute of the International Criminal Court.

[329] Rule 98(5) of the ICC Rules of Procedure and Evidence.

4.2 The Selection Process and Approval of the TFV's Assistance Projects

Before discussing the implementation process of the TFV assistance projects we should first understand who the potential beneficiaries are. According to Regulation 42 of the Regulations of the TFV, '[t]he resources of the Trust Fund shall be for the benefit of victims of crimes within the jurisdiction of the Court, as defined in Rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families.' Regulation 48 further elaborates that the '[o]ther resources of the Trust Fund shall be used to benefit victims of crimes as defined in Rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, who have suffered physical, psychological and/or material harm as a result of these crimes.' The term 'victims' according to Rule 85 sub-rule (a)&(b) means natural and legal persons who suffered harm as a result of the commission of any crime within the jurisdiction of the Court'. For natural persons, the harm suffered can be direct or indirect, individual or collective, or both but such a harm (injury, hurt, loss or damage) must be personal.[330] For legal persons (organizations or institutions), the harm sustained must be direct.[331] Despite that clear-cut legal meaning of the term 'victims' – beneficiaries – the practice of the TFV shows that it has adopted a broader interpretation that goes beyond the strict meaning of 'victim' as defined in Rule 85.[332] The TFV notes that the advantage of working outside the 'narrowly-defined legal principles and decision-making' avoids discriminating victims of a similar situation.[333] The TFV states that 'transitional justice projects that fail to adequately embrace all those touched by war can actually exacerbate tensions and renew conflict.'[334] The TFV wants to ensure that reparations and assistance benefit as many victims as possible.[335] However, it does not explain what is meant by a broader meaning of the term victims, neither does it show how beneficiaries of its assistance activities are determined beyond the temporal jurisdiction. The TFV is also silent on whether its projects are limited to assisting victims of unlawful incidents of war (war crimes) at the exclusion of lawful incidents of war (victims of collateral damage) or not.

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330 The Situation of the Democratic Republic of Congo, *Prosecutor V. Thomas Lubanga Dyilo*, on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (ICC-01/04-01/06-1432 11-07-2008), §§ 29-39.

331 Rule 85(b); Ibid, §§ 30.

332 The ICC Trust Fund for Victims, 'Recognizing Victims & Building Capacity in Transitional Societies', Spring 2010 Programme Progress report, 4.

333 ICC-TFV, 'Programme Progress Report November 2009' http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20November%202009.pdf accessed on 24 October 2012, 7.

334 The ICC Trust Fund for Victims, 'Recognizing Victims & Building Capacity in Transitional Societies', Spring 2010 Programme Progress report, 17.

335 Ibid, 4.

According to Regulation 50(a)(i), 'the Trust Fund [is] considered seized when the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families.' To carry out this mandate of assisting victims, a strategic approach was adopted to classify victims into two categories: '(1) assistance to victims of specific crimes, including sexual violence and conscription of child soldiers; and (2) assistance to communities victimized by pillage, massacre, and or displacement.'[336] According to Regulation 50(a)(ii), the Board of Directors is required to inform the Court of their decision to implement a certain project in writing. The TFV can only proceed with its plan if the Court does not respond within 45 days. Meaning that the decision of Board of Directors to implement a certain project is not automatic because it has to fulfil certain requirements and judges can refuse to implement them if the following requirements are not satisfied.

The first requirement concerns fair trial and due process. The Court must be satisfied that the project to be implemented will not '…pre-determine any issue to be determined by the Court, including the determination of jurisdiction (…), admissibility (…), or violate the presumption of innocence, (…) be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.'[337] Before a project is approved, the prosecution and the defence, in case of a concerned accused, and/or the Office of Public Counsel for Defence (OPCD) and the Office of Public Counsel for Victims (OPCV) respond to the submission of the Board of Directors about whether there is not any issue that might be pre-determined by the proposed project.[338] The evidentiary standard of proof used in determining whether a project will not pre-determine any issue is lower than the reasonable doubt standard. The Chamber informs the Board of Directors that the projects 'do not appear *per se* to pre-determine any issue to be determined by the Court, […], and do not appear to be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.[339] The application of the term 'to appear *per se*' is an indication of the minimum evidentiary standard used in the selection of projects or in determining victims eligible for assistance of the TFV.

The second requirement is about the availability of sufficient resources (liquidity requirement). In addition to showing that the proposed project to be implemented shall be funded by other resources (voluntary contributions),[340] the TFV must furnish information to the satisfaction of the Court that there are

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[336] Ibid, 5.

[337] Regulation 50(a)(ii) of the Regulations of TFVs.

[338] Pre-Trial Chamber I, Situation Democratic Republic of Congo, 'Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund', (ICC-01/04-492 11-04-2008).

[339] Pre-Trial Chamber I, Situation Democratic Republic of Congo, 'Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund', (ICC-01/04-492 11-04-2008).

[340] Rule 98(5) of the ICC Rules of Procedure and Evidence.

enough funds that can be used in case of possible court order/award offering reparation to victims linked to case(s) before the Court.[341] This was not provided for in the beginning; the Pre-Trial Chamber I noted that it was important for the TFV to be mindful of possible reparation awards in case of convictions where there are no resources collected from fines or forfeitures.[342] However, the Chamber never provided an estimation of the amount required for the eventual court reparation awards. This omission can be attributed to the fact that even the Court itself is not capable of determining the exact number of victims to benefit from conviction related reparation orders and neither can it determine the amount that shall be awarded for each individual victim or group of victims depending on whether the Court decides to offer individual or collective awards or both. This second requirement indicates that the assistance to victims under Article 79 of the Rome Statute is secondary to the mandate of reparation awards under Article 75. It means that the Court can actually stop the Board of Directors from implementing assistance activities on grounds that sufficient funds to meet eventual court-case reparation awards are lacking. Dannenbaum concludes that the liquidity requirement undermines the independence of the Board of Directors as far as the management of voluntary contributions is concerned and that it is in contradiction with the original intention of the provisions regulating the Trust Fund,[343] in particular Regulation 56 which provides that '[t]he Board of Directors shall determine whether to complement the resources collected through awards for reparations with "other resources of the Trust Fund" and shall advise the Court accordingly (...).'[344]

One of the greatest innovations of the TFV is that victims-beneficiaries of assistance projects are not necessarily expected to be linked to the case before the Court. The assistance can be implemented even before the beginning of the trial of the suspected perpetrator(s).[345] It is in this vein that the TFV has been able to implement assistance projects in Northern Uganda and DR Congo.[346] Projects

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341 Pre-Trial Chamber I, Situation Democratic Republic of Congo, 'Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund', (ICC-01/04-492 11-04-2008), 7 (it was considered that 'the responsibility of the Trust Fund is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparation (…)'.

342 Tom Dannenbaum, 'The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims' (2011) 28:2 *International Law Journal* 234.

343 Ibid.

344 For criticisms about the Pre-Trial Chamber 1's Decision read Tom Dannenbaum, 'The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims'.

345 The ICC Trust Fund for Victims, 'Recognizing Victims & Building Capacity in Transitional Societies', Spring 2010 Programme Progress report, 4.

346 ICC – The Trust Fund for Victims, 'Empowering Victims and Communities towards Social Change: Programme Progress Report Summer 2012' http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20PPR%20Summer%202012%20ENG%20Final_.pdf accessed on October 24, 2012, 4.

undertaken are focusing on three main kinds of rehabilitation programmes: (1) physical rehabilitation, which includes activities of treatment like victims surgery, bullet and bomb fragment removal, prosthetic and orthopaedic devices, referrals to services like fistula repair and HIV and/or AIDS screening, treatment, care and support; (2) psychological rehabilitation that focuses on individual and group trauma counselling; and (3) material support which is providing housing/shelter, vocational training, small income generating schemes and literacy/education grants.[347] The beneficiaries of the Trust Fund are mainly 'widows and widowers whose partners were killed, former child soldiers and abducted youth, vulnerable children or orphans, victims of physical injuries or those suffering from trauma because of violence and their family members.'[348]

To reach the beneficiaries, the TFV uses its field staff to identify partners from both local and international organizations working with victims.[349] However, a clear basis or protocol on how field staff of the TFV decides with which organizations to partner or which projects to implement and on which basis victims are selected, is lacking. The TFV is not mandated to determine whether the harm resulted from a war crime or a lawful incident, and even if it was one of the requirements, it would have been technically difficult to achieve through the limited evidence used for the implementation of assistance projects.[350] Despite the TFV's efforts in training its partners on identifying victims,[351] it would still be difficult for them to perform such a complex task – a task that requires rigorous examination of the laws of war.

The TFV's attempt to introduce transparency and equal opportunity to all interested organizations to apply for the assistance was hampered by the decision of the Pre-Trial Chamber II concerning the situation of the Central African Republic. The Board of Directors wanted to open up a tender to attract competitive applications from various organizations, but this approach was rejected on the ground that it did not provide enough information to the Court to examine whether activities and projects would not pre-determine any issue to be determined by the Court or would affect the rights of the accused.[352] The Court ruled that the Board of Directors should formally notify the Court with all the

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[347] The ICC Trust Fund for Victims, 'Recognizing Victims & Building Capacity in Transitional Societies', Spring 2010 Programme Progress report, 5-6.

[348] ICC – The Trust Fund for Victims, 'Empowering Victims and Communities towards Social Change: Programme Progress Report Summer 2012', 4-5.

[349] The ICC Trust Fund for Victims, 'Recognizing Victims & Building Capacity in Transitional Societies', Spring 2010 Programme Progress report, 8.

[350] For difficulties involved in determining whether an incident was collateral damage or not, see chapter two of this book.

[351] The ICC Trust Fund for Victims, 'Recognizing Victims & Building Capacity in Transitional Societies', Spring 2010 Programme Progress report, 4-5

[352] ICC Pre-Trial Chamber II, Situation in the Central African Republic, 'Decision on the Submission of the Trust Fund for Victims dated 30 October 2009', no. ICC-01/05 of 16 November 2009.

necessary information relating to the projects or activities to be implemented.[353] The TFV has since managed to creatively go around this constraint by launching a call for 'Expression of Interest' from different organizations interested in the rehabilitation of victims of rape and sexual violence in the Central African Republic and out of 19 applicants, 9 organizations were selected for training on the basic requirements needed to meet the standards of the TFV's mandate.[354]

4.3 The Trust Fund for Victims in the Situation of Northern Uganda

The TFV is a growing institution still facing some practical challenges. Its success will depend on how it responsibly approaches every conflict with a flexible strategy that addresses challenges that were unforeseeable during the adoption of the regulations. With that in mind, it would be unfair to pass a critical judgment on its performance at this stage. The following analysis therefore is limited to its activities in the situation of Northern Uganda. The choice of Northern Uganda is because of two connected reasons:

(a) Activities of the TFV in Northern Uganda were implemented in a situation where none of the ICC suspects had been arrested despite the fact that it was the first situation to reach the Court. This illustrates how the work of the TFV is independent from the Court's judicial process and outcome.
(b) The TFV is almost winding up all its activities in Northern Uganda. It means that we can use the case of Northern Uganda to sketch a picture of its limitations and achievements.

In addition to the knowledge gained while on a study trip to Uganda (in Entebbe,[355] Kampala,[356] Gulu[357] and Lira[358]) from 21 July 2012 to 1 August 2012, the

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[353] ICC Pre-Trial Chamber II, Situation in the Central African Republic, 'Decision on the Submission of the Trust Fund for Victims dated 30 October 2009', No. ICC-01/05 of 16 November 2009.

[354] ICC – The Trust Fund for Victims, 'Empowering Victims and Communities towards Social Change: Programme Progress Report Summer 2012', 7-8.

[355] In Entebbe, the researcher had a meeting with different individuals (victims and victims' rights groups) including Victor Ochen, the Executive Director of African Youth Initiative (AYINET), Uganda Chapter, Acham Hellen Ketty Elungat, the Chairperson of the Northern Uganda Transitional Justice Working Group and Executive Director North East Chili Producers Association (NECPA), Okello Daniel, Program Coordinator of Lira NGO Forum.

[356] In Kampala, the researcher had a meeting with some of the ICC field office staff.

[357] In Gulu, the researcher had a meeting with Pamela Lukwiya, Okwey Project Officer of the Anglican Diocese of Northern Uganda, Wokorach Wilfred Mogi, the Sexual, and Gender Based Violence (SGBV) Researcher at the Refugee Law Project – Gulu, and Moses Odokonyero, a Journalist and Media Consultant, focusing on citizens media outreach for justice and peace in Northern Uganda.

[358] In Lira, the researcher interacted with the field staff of NECPA and their beneficiaries.

following analysis is based on different non-governmental organization (NGO) reports, the TFV's reports and arrest warrants issued against the leadership of the Lord's Resistance Army (LRA). In Entebbe, I attended a workshop discussing reparation issues in Uganda, which provided an opportunity to interact with different stakeholders working directly with victims in Northern Uganda. A visit to Gulu and Lira, one of the LRA war affected areas, provided some useful insights into the kind of projects that were implemented, in particular counselling (healing of memory seminars), teaching conflict affected communities on saving schemes and providing scholarships. The combination of reports and academic literature together with information from exchanges with people either affected or working with affected communities provided an in-depth perspective on the consequences of war and assistance activities in Northern Uganda.

4.3.1 Victimization in Northern Uganda

Uganda had experienced numerous forms of violence before the end of the British Protectorate Administration, but waves of conflicts intensified immediately after it gained independence in 1962.[359] Military dictatorship, civil wars and *coup d'états* caused a number of deaths and injuries, forced disappearances, illegal detentions, torture and destruction of civilian properties.[360] The relative peace known in most parts of Uganda started in 1986 after the 5 years 'Bush War' that brought Yoweri Kaguta Museveni to power. However, 1986 marks also the beginning of a more than two decade brutal conflict in the Northern parts of Uganda. Conflicts in Northern Uganda are on the one hand a result of British rule and on the other hand due to the mistrust between the people of the North and Museveni's leadership. During the British rule, southerners dominated positions of leadership whereas northerners served as soldiers, thus causing an imbalanced development and struggles for power dominance.[361] When Museveni came to power, the people from the greater northern part of Uganda who had continued to dominate the army during the post-independence successive regimes (Apolo Milton Obote from Lango, Idi Amin Dada from West Nile Region, and Tito Okello Lutwa from Acholi) opposed his new government whose army's leadership was predominantly from the Western, Southern and main Central parts of Uganda and also accused him of breaking the 1985 Nairobi Agreement

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[359] Rita M. Byrnes (2d ed.), 1 Uganda: A Country Study (Federal Research Division, 1992) 195-206 (Chapter 5: National Security); John L. Bonee III, 'Caesar Augustus and the Flight of the Asians - The International Legal Implications of the Asian Expulsion from Uganda during 1972' (1974) 8:1 *International Lawyer* 136ff; Pablo Castillo Diaz, 'ICC in Northern Uganda: Peace First, Justice Later' (2005) 2:1 *Eyes on the ICC* 17, 18-19.

[360] The Republic of Uganda – The Justice Law and Order Sector, 'Final Study Report on Traditional Justice and Truth Telling and National Reconciliation' [July 2012].

[361] Manisuli Ssenyonjo, 'Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court' (2005) 10:405 *The Journal of Conflict & Security Law* 405, 409.

that was supposed to make peace between National Resistance Movement/ Army (NRM/A) and Okello's government.[362]

When Museveni's NRA soldiers captured power in Kampala, the defeated soldiers retreated to their home areas and formed different resistance groups. However, members of these different groups which had been formed to resist the new government did not last for too long; around 1987 most of them had either been amnestied and integrated into the National Resistance Army (NRA) or defeated and fled to neighbouring countries. It was out of the remnants of those different militia groups in particular members of the Holy Spirit Movement (1986-1987) of Alice Auma Lakwena, that Joseph Kony formed the LRA.[363] The war continued until 2006 when the LRA was forced out of Uganda to South Sudan and later to the jungles of the Democratic Republic of Congo and Central Africa Republic, where it sporadically continues to cause mayhem to civilian populations.[364]

The war between the NRA (which later became the Uganda People's Defence Forces (UPDF)) and LRA resulted in numerous forms of victimization of civilians in the whole of the Greater Northern Uganda, in particular the Acholi, Lango, Teso and West Nile communities.[365] The LRA committed systematic and widespread violations of human rights and international humanitarian law, including abduction and forced recruitment of thousands of civilians (mainly using children as sex slaves, porters and fighters), numerous

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[362] For further details about conflicts in Uganda see the Refugee Law Project briefing notes at http://www.beyondjuba.org/NRTJA/index.php# accessed on 1 November 2012; The Report of the Uganda Constitutional Commission. Analysis and Recommendations [Republic of Uganda 1993] 711 -714; Rita M. Byrnes (2d ed), *Uganda: A Country Study* (Federal Research Division, 1992) 195-214; Hema Chatlani, 'Uganda: A Nation in Crisis' (2007) 37:277 *California Western International Law Journal* 277, 279.

[363] For further details see the Refugee Law Project, 'Behind the Violence: Causes, Consequences and Search for solutions to the War in Northern Uganda' [Refugee Law Project Working Paper Nº.11 2004] http://www.refugeelawproject.org/working_papers/RLP.WP11.pdf accessed on 5 December 2012.

[364] Cecily Rose, 'Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations' [2008] *28*:345 *Boston College Third World Law Journal* 345, 348; Chatlani, 'Uganda: A Nation in Crisis', 279-281; Rita M. Byrnes (ed.). *Uganda: A Country Study*. 2d ed. (Library of Congress 1992) 195-214; Human Rights Watch, 'International Justice: Unfinished Business, Closing Gaps in the Selection of ICC Cases' (New York 2011) 29; Human Rights Watch, 'No End to LRA Killings and Abductions' [23 May 2011] http://www.hrw.org/sites/default/files/related_material/LRA_NoEnd_May2011%20EN.pdf accessed on 22 November 2012; Alex de Waal, Jens Meierhenrich, and Conley-Zilkic, 'Bridget How Mass Atrocities End: An Evidence-Based Counter-Narrative', (2012) 36:1 *Fletcher Forum of World Affairs* 1, 22-23.

[365] UN Office of the High Commissioner for Human Rights, 'Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda', August 2007 http://www.unhcr.org/refworld/docid/46cc4a690.html accessed on 22 November 2012, 4.

murders, torture, burning of civilians and their houses, pillage and destruction of civilian properties, amputation, cutting of nose, lips, ears and castration of men, rape and other forms of inhumane treatment of civilians.[366] The targeting of civilians significantly increased after the Government of Uganda launched the '2002 Operation Iron Fist' which left their (LRA) bases in the Southern Sudan dismantled. The weakened remnants of LRA retaliated with ferocity targeting refugee camps, where more than 80% of the Acholiland population (around 1.8 million) were confined as Internally Displaced Persons (IDPs).[367] Although on a small scale, UPDF too is allegedly responsible for different forms of violations such as rapes, murder of abducted LRA soldiers and suspected civilian collaborators, torture and indiscriminate bombing of villages.[368] To examine whether victims of collateral damage are (not) beneficiaries of the TFV's assistance activities, victims and or survivors of LRA's war are put into the following four categories.

The first category of victims concerns those under the jurisdiction of the ICC (those connected to cases before the Court). Following the letter of the Government of Uganda (GoU) of 16 December 2003 referring the situation of Northern Uganda to the ICC, on 6 May 2004, the Office of Prosecutor (OTP) applied for arrest warrants of five top leaders of the LRA, which the Pre-Trial Chamber II granted on 8 July 2005.[369] Joseph Kony, the overall commander of LRA (still at large), is accused of 33 counts of sexual enslavement, rape, attacks against civilian population, enlisting of children, pillage, murder, cruel treatment and inhumane acts against civilians as either war crimes or crimes against humanity.[370] The other accomplices include Vincent Otti (presumed dead) who out of 33 counts is allegedly responsible for 32, Raska Lukwiya (killed on 12 August 2006) was accused of 6 counts, Okot Odhiambo (still at large) 9 counts

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[366] Chatlani, 'Uganda: A Nation in Crisis'; Kennedy Amone-P'Olak, 'Coping with Life in Rebel Captivity and the Challenge of Reintegrating Formerly Abducted Boys in Northern Uganda' (2007) 20:4 *Journal of Refugee Studies* 641; Abigail Leibig, 'Girl Child Soldiers in Northern Uganda: Do Current Legal Frameworks Offer Sufficient Protection' (2005) 3:1 *Northwestern University Journal of International Human Rights* 1ff.

[367] Chatlani, Ibid, 279-288; United Nations' Peace Building and Recovery Assistance Programme For Northern Uganda 2009-2011 (UNPRAP) 7-8 http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/CA4908551F8D0E8EC12575F9003B76EE/$file/UNPRAP+FINAL+NARRATIVE.DOC accessed on 22 November 2012; Human Rights Watch, 'The Christmas Massacres: LRA attacks on Civilians in Northern Congo' [New York, 2009] 12; Boniface Ojok and others, 'Killing Every Living Thing: Barlonyo Massacre in Uganda' [Justice and Reconciliation Gulu District NGO Forum, Field Note IX February 2009].

[368] Human Rights Watch, 'International Justice: Unfinished Business', 23-27; Phuong Pham and others, 'When the War Ends: A Population-Based Survey on Attitudes About Peace, Justice and Social Reconstruction in Northern Uganda', 37.

[369] ICC, *the Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*' [ICC Uganda: ICC-02/04-01/05] read Arrest warrants for further details.

[370] ICC Pre-Trial Chamber II, 'Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005' [ICC-02/04-01/05] Public redacted version.

and Dominic Ongwen (still at large), himself a former child soldier allegedly abducted in 1980s at the age of 10, is accused of 6 counts.[371] The redacted versions of arrest warrants provide insufficient information about the kind of crimes committed between 2003 and 2004. They do not include details about months or dates of attacks or specific areas of attack, or victims of committed crimes. Based on such limited information, the TFV, which is supposed to assist victims of crimes under the jurisdiction of the Court, cannot distinguish incidents or victims that are potential beneficiaries of reparations under Article 75 (those eligible for reparations related to cases before the Court) from victims of the war in general. It means that the TFV is implementing projects for the benefit of victims irrespective of whether the harm they suffered resulted from crimes linked to suspected individuals or not. The possible enforceable requirement is to ensure that at least beneficiaries of the TFV are victims who suffered harm after July 2002.[372]

The second category of victims concerns those who suffered harm resulting from crimes committed during the same period and within the same geographical area under the ICC jurisdiction but which do not form part of the accusations brought before the Court. It is not clear whether the TFV is limited to victims linked to only those incidents attributable to Kony's LRA or if victims of incidents attributable to UPDF soldiers are also eligible. It is possible that the TFV considers victims of both parties because the OTP has maintained that all crimes committed by both parties are under the jurisdiction of the Court and that the only reason there are no charges brought against any of the UPDF soldiers is because of the less severity. The prosecution has maintained that the alleged crimes committed by UPDF soldiers are of minimal seriousness compared to those of the LRA.[373] It is therefore plausible to argue that victims of possible UPDF incidents fall in the same category as victims of other LRA incidents that are not covered by the charges brought against those five indicted individuals. Since '[t]he Court is powerless to order reparations from anyone other than the individual violator'[374] and for only those crimes

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[371] Read ICC Pre-Trial Chamber II, Arrest warrants for Vicent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen all issued on 8 July 2005 [ICC-02/04] Public redacted versions; see also Enough, 'Wanted by the ICC: The LRA's leaders: Who they are and what they've done' http://www.enoughproject.org/files/pdf/lra_leaders.pdf accessed on 7 November 2012.

[372] ICC – The Trust Fund for Victims, 'Empowering Victims and Communities towards Social Change: Programme Progress Report Summer 2012', 4.

[373] Human Rights Watch, 'International Justice: Unfinished Business', 27; Luis Moreno-Ocampo, 'Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives' (2006) 21:4 *American International Law Review* 501; for different perspectives read also Sarah M. H Nouwen and Wouter G. Werner, 'Doing Justice to the Political: the International Criminal Court in Uganda and Sudan' (2010) 21:4 the *European Journal of International Law* 950-954.

[374] M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Martinus Nijhoff 2005, Vol I.) 177.

he or she was found guilty of, the TFV's assistance activities and projects may serve as an alternative to fill the gap that would otherwise have been left out because of the prosecutor's discretionary powers in deciding who to charge and what kind of charges to bring. However, since the work of the TFV does not include attributing criminal responsibilities, the claim made here should remain speculative and limited. In other words, it is not justifiable to draw a conclusion about who might have caused the harm or the (un)lawfulness of it, based on the mere fact that the alleged victims benefited or not from the projects of the TFV.

The third category includes victims of crimes and incidents which might have happened before the entry into force of ICC's Rome Statute (1 July 2002) and victims in neighbouring countries.[375] This reality invokes questions of fairness; why is a victim who suffered harm on 30 June 2002 not eligible for either ICC reparations or assistance of the TFV when a person victimized after 2 July 2002 is? Or why is a victim from Northern Uganda eligible for reparations and assistance at the exclusion of a victim of most recent crimes of LRA committed in DR Congo, Central Africa Republic or South Sudan? To refuse reparations or assistance to victims of a related conflict based on the mere difference in dates of harm or territorial jurisdiction when the perpetrator and other circumstances are the same is hard to explain beyond the legal provision. The real impact of such a distinction on victims is beyond the scope of this research. It has been alleged that since the issuance of arrest warrants, the LRA has killed more than 2,400 and abducted more than 3,400 civilians outside the territory of Uganda.[376] At the moment, the ICC prosecution is limited to LRA crimes that were committed in Northern Uganda and there is no indication that victims from neighbouring countries will benefit from either ICC reparations or the assistance of the TFV or whether ICC prosecution will at some point be extended to include neighbouring countries, as recommended by Human Rights Watch.[377]

The fourth category of victims concerns those who suffered harm from incidents that are not crimes or are remotely connected to the crimes of the five suspected persons. As previously noted, during war both parties in the conflict can cause damages that are either unlawful or lawful. The Government of Uganda forced or asked residents of the conflict areas to go into internal refugee camps to isolate the LRA which caused poor living conditions, insecurity, and loss of properties (houses and crops mainly destroyed because of a lack of

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[375] UN Office of the High Commissioner for Human Rights, 'Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda', 8; Chatlani, 'Uganda: A Nation in Crisis'.

[376] Human Rights Watch, 'International Justice: Unfinished Business,' 29; Human Rights Watch, 'No End to LRA Killings and Abductions', 1; Human Rights Watch, 'The Christmas Massacres: LRA attacks on Civilians in Northern Congo' [New York, 2009].

[377] Human Rights Watch, 'International Justice: Unfinished Business,' 30 (Human Rights Watch argues for the expansion of the OTP's investigations to include these new crimes).

maintenance).[378] Some refugee camps were built on private properties which also caused damages to land owners due to the overexploitation. According to some studies conducted by the Refugee Law Project (RLP) of Makerere University, most of the victims find both parties (UPDF/The Government of Uganda and LRA leadership) responsible for the victimization.[379] In addition to incidents that were allegedly committed by the UPDF soldiers or their collaborators, some victims blame the Government of Uganda for its failure to address Kony's demands through peaceful means and for not protecting them from Kony's attacks. Kony obviously takes the greatest blame for intentionally inflicting different forms of violence to civilians.[380] On the research visit to Northern Uganda, I was told that one of the owners of the pieces of land on which a refugee camp was built wanted compensation for his land; he claims that his land became barren because of overutilization. The people of Northern Uganda were also victimized by the Karamojong people, cattle rustlers, who took advantage of lawlessness in Northern Uganda and raided cattle of the conflict affected communities.[381] Therefore, some victims blame the Karamojong community for raiding their cattle and some find regional and international actors responsible for their failure to stop the violence.[382] Since most of the LRA leaders are from the Acholi people, some other groups of victims blame the Acholi people for their victimization despite the fact that Acholiland suffered the most compared to other areas. In addition to cross-fire damages and other similar incidents which might have caused damages to civilians, it is understandable for individuals affected under all those circumstances of war to feel entitled to some kind of reparations – for instance compensation – for the harm or losses suffered.[383] However, some war damages are difficult to attribute to a certain party, and where it is possible, such

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[378] UN Office of the High Commissioner for Human Rights, 'Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda', 4-8.

[379] RLP: Beyond Juba, 'Briefing notes 1-6' http://www.beyondjuba.org/NRTJA/index.php accessed on 23 May 2013; see also Phuong Pham and others, 'When the War Ends: A Population-Based Survey on Attitudes About Peace, Justice and Social Reconstruction in Northern Uganda', 1.

[380] Pham and others, 'When the War Ends: A Population-Based Survey on Attitudes About Peace, Justice and Social Reconstruction in Northern Uganda', 1.

[381] UN Office of the High Commissioner for Human Rights, 'Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda', 8.

[382] RLP: Beyond Juba, 'Briefing notes 1-6'.

[383] In the population-based survey conducted in Northern Uganda by the Human Rights Center at University of California at Berkeley, respondents 'defined "victims" in broad terms, including the Acholi people (59%), all people of northern Uganda (35%), children (23%), women (20%), and everyone (20%).' Phoung Pham and Patrick Vinck, 'Transitioning to Peace: A population-Based Survey on Attitudes about Social Reconstruction and Justice in Northern Uganda' (Human Rights Center University of California Berkeley, December 2010) 44.

attribution might not conform to an unlawful responsibility.

The reason for making this distinction is to make it clear that the presumption should not be that wherever the ICC has jurisdiction that every incident that caused harm was necessarily a result of a war crime. For example; the Single Judge refused to grant participation to a victim in the case of prosecutor against President Omar Hassan Ahmad Al Bashir of Sudan because the incident that caused harm was considered incidental. The victim had claimed that in the process of liberating their village, which was under the control of rebels, the aeroplane of the Government of Sudan dropped a bomb on the rebel's car causing the death of his two children who were nearby. Even if the victim provided enough information to the satisfaction of the judge proving that he had suffered harm, the Single Judge denied him to participate because it was obvious that the government forces had not targeted those children.[384] In another case (Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus), about eight applicants were denied the right to participate in the proceedings because their damage was found to be remote in relation to the crimes charged. Applicants indicated that when the rebels attacked soldiers of the African Union Mission in Sudan (AMIS) at Haskanita, it caused the African Mission to leave that area; they too had to leave Haskanita because of fear for their safety – losing their employment and properties – thus suffering both material and psychological harm. The Chamber concluded that even if it is established that such attack contributed to their alleged suffering, it 'would be too remote from the alleged crimes to meet the requirement of having occurred "as a result" of those crimes (…)' adding that 'harm suffered because of the displacement does not qualify as a harm resulting from the charges (…).'[385] Since participation is not a requirement for a victim to benefit from the ICC reparations or the TFV's assistance, separating victims of collateral damage from war crimes related victims without an alternative thorough process is difficult. If damages resulting from forced or voluntary displacement of civilians during war are not necessarily violations of laws of war unless it is proved that it was done without a military necessity,[386] it is likely that the TFV's projects benefiting victims of displacement, killings, and injuries include victims of collateral damage. In 'Untreated wounds', a 20-minutes documentary of the Refugee Law Project, 'Ojok' narrates how

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[384] ICC Pre-Trial Chamber I, ("Omar Al-Bashir"): Decision on 8 Applications for Victims' Participation in the Proceedings' [N°.:ICC-02/05-01/09 of 9 July 2010] §§ 9-10.

[385] ICC Pre-Trial Chamber I, 'Situation in Darfur, Sudan in the case of the Prosecutor v. Abdallah banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus: Decision on Victims' Participation at the Hearing on the Confirmation of the Charges' [N°.:ICC-02/05-03/09 of 29 October 2010] §§ 13-15 & 23-24.

[386] See also Eritrea Ethiopia's Claims Commission, Eritrea's and Ethiopia's Claims, Final Awards: Ethiopia's Damages, (2010) 49:101 International Legal Materials, 222ff (Chapter XI. Ethiopia's Claims for Compensation for Eritrea's Violation of the *Jus ad Bellum*, paragraphs 271 – 479.); Abebe, 'Displacement of Civilians during Armed Conflict in the Light of the Case Law of the Eritrea-Ethiopia Claims Commission', 823-851.

the UPDF soldiers shot him in pursuit of LRA which had abducted them and 'Ojwiya', who was also shot in similar circumstances, explains that he is not sure of the origin of the stray bullet that injured him.[387] Victims whose injuries or losses resulted from cross-fire bullets might be benefiting from the TFV's bullet removal and reconstruction surgery projects. Stressing this reality is not intended to criticize the work of the TFV because this practice is not very different from a situation where an army medic can help a farmer who got hurt by a stray bullet during the battle taking place on his or her fields, or the assistance from the ICRC or any other humanitarian agency attending to victims without considering who caused harm. The point here is to stress the importance (and apparent possibility) of flexibility in minimizing the discrimination of victims.

The victims' main interests include truth, compensation and assurance that they can start living a normal peaceful life.[388] According to the population-based survey conducted in northern Uganda by the Human Rights Center of the University of California, Berkeley, when asked about reparation, respondents favoured individual compensation 'including financial compensation (52%), food (9%), and livestock/cattle (8%). Equal numbers (7%) mentioned counselling and education for children.'[389] Respondents said that 'victims should receive reparations, (…) because they are believed to be poor and need it (49%), as a form of acknowledgement or recognition of their suffering (24%), and to help them forget (19%).'[390] Currently, there is relative peace in the Northern Uganda but to ensure that ultimate peace is achieved, victims still consider repatriation of LRA fighters (90% of LRA fighters are victims of abduction) a priority. As long as LRA is still active in the region, victims remain concerned that violence might return. Most of the victims are of the view that compensation should consider all the harm suffered with special attention to some specific vulnerable individuals. They (victims) agree that special attention should be given to victims of rape and sexual violence, amputees, burns, and other forms of physical deformations, children, women and elderly people.[391]

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[387] Refugee Law Project, 'Untreated Wounds: Communities deeply injured by the armed conflict' (RLP, 2012) http://www.refugeelawproject.org/video_advocacy.php?vidName=untreated_wounds accessed on 28 January 2013.

[388] People lost their properties through war crimes and crimes against humanity but also from the exchange of fire, properties were seized for military purposes and or for the use in IDPs Camps, all these properties are not yet compensated.

[389] Phuong Pham and others, 'When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda', 34 (footnote omitted).

[390] Phoung Pham and Patrick Vinck, 'Transitioning to Peace: A Population-Based Survey on Attitudes about Social Reconstruction and Justice in Northern Uganda' (Human Rights Center University of California Berkeley, December 2010) 44-45.

[391] For further details read related reports of beyond Juba Project, at http://www.beyondjuba.org/; see also Joseph Akwenyu and others, '"The dust has not yet settled". Victims' Views on the Right to Remedy and Reparation' [UN High Commissioner for Human Rights, Uganda Human Rights Commission, 2011]; The Republic of Uganda: The Justice Law and

4.3.2 Implementation of the TFV's Projects in Northern Uganda

In accordance with Regulation 50(a) of the Regulations of the Trust Fund, the Pre-Trial Chamber II approved 18 projects for Northern Uganda on 19 March 2008 for the benefit of victims of crimes under the jurisdiction of the Court and their families.[392] As of October 2012, out of 18 approved projects, the TFV decided to implement only 16 projects benefiting about 38,900 direct victims through psychological, physical and material support[393] and about 100,000 individuals through sensitization,[394] costing – in the same period – a total of 28,310 US$, 739,575€ and 6,952,407,747 UGX (Uganda Shillings).[395] Despite the absence of a clear written selection procedure in the identification of beneficiaries of the TFV,[396] the implementation process mainly focused on victims of rape and sexual violence, widows and widowers whose partners were killed during the conflict, former abducted youth or child soldiers, orphans and children vulnerable due to the conflict, victims who suffered physical or mental injuries and other family members of the victims including victims of displacement, as long as their harm occurred after 1 July 2002.[397] Projects implemented can be divided in four major categories; (a) the support for victims of Sexual and Gender Based Violence (SGBV); the TFV through its partners such as Cooperazione Internationale (COOPI) is providing medical and psychological care to women who were victims of gender and sexual related violence.[398] COOPI, operating in Oyam district, Lango Sub Region, provides protection, counselling and shelter for hundreds of victims of SGBV and girls at risk of sexual violence, ambulance services for emergency response, education, and conducts public awareness campaigns reaching out to about 100,000 individuals (mainly local and traditional

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Order Sector, 'Traditional Justice and Truth Telling and National Reconciliation' [Study Report: Final Draft July 2012] 80ff; UN Office of the High Commissioner for Human Rights, 'Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda'.

[392] TFV, 'Earmarked Support at the Trust Fund for Victims: Programme Progress Report' [winter 2011] 30 http://www.trustfundforvictims.org/sites/default/files/imce/TFV_Programme_Progress_Report_Winter_2011_USA_PRINTING.pdf accessed on 27 November 2012.

[393] TFV, 'Mobilizing Resources and Supporting the Most Vulnerable Victims through Earmarked Funding Programme Progress Report' [Winter 2012] 14 http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/TFV%20Programme%20Progress%20Report%20Winter%202012Finalcompressed.pdf accessed on 27 November 2012.

[394] Ibid, 10.

[395] Ibid, 14, read it together with TFV, 'Earmarked Support at the Trust Fund for Victims: Programme Progress Report/winter 2011' 36

[396] TFV, 'Programme Progress Report' [November, 2009] 9,

[397] TFV, 'Earmarked Support at the Trust Fund for Victims: Programme Progress Report' [winter 2011] 7.

[398] Ibid, 42.

leaders, women's grassroots organizations and other community groups) through community awareness activities on sexual violence and rape.[399] (b) The TFV has implemented five specific rehabilitation projects providing prosthetic limbs and reconstructive surgery among other things.[400] The African Youth Initiative (AYINET), Uganda Chapter is providing 'reconstructive or general surgery and psychosocial support' to amputees, victims of burns, bullets and bomb fragments wounds resulting from war, using some of the funding from the TFV.[401] (c) Skills and material support projects are providing trainings of trauma counsellors, vocational trainings for victims and scholarships. The Anglican Diocese of Northern Uganda is providing scholarships for about 100 students coming from victims' families and manages an income generating and saving schemes that support victims of torture. The North East Chili Producers Association (NECPA) is implementing an agro-financial scheme to communities of Lira and Teso.[402] It has about 2,700 victims receiving seeds, tools, animals and assistance in finding markets for their products. These initiatives assist victims and their communities to generate sustainable income. (d) Healing and reconciliation; in sessions of memory and healing, the Anglican Diocese of Northern Uganda brings together victims of torture and mutilation to share their experiences.[403]

Two important issues are worth noting. First, victims can benefit from more than one project; for example a victim of torture or mutilation can benefit from trauma counselling, at the same time benefit from a physical rehabilitation project where she or he can get a plastic surgery or a prosthetic limb and still benefit from financial support. Second, each local partner of the TFV selects its own beneficiaries; some of the partners have focused on one category of victims (victims of torture and mutilation, orphans and vulnerable children or former abductees) whereas others have adopted a combination of different approaches.

Even if the mandate of the TFV is to assist victims of international crimes under the jurisdiction of the Court, as already noted, the adoption of the broader meaning of the term 'victim', to cover as many victims as feasible, makes it difficult to know for sure whether the TFV is limited to victims of unlawful incidents of war. Both the reports and the Regulations of the TFV do not provide a clear separation between victims of war crimes and collateral damage.

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399 TFV, 'Programme Progress Report' [November, 2009] 35; TFV, 'Mobilizing Resources and Supporting the Most Vulnerable Victims through Earmarked Funding: Programme Progress Report/Winter 2012' 10.

400 TFV, 'Programme Progress Report' [Fall 2010] 20-21, http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Fall%202010.pdf accessed on 28 November 2012.

401 For details about the work of AYINET see at http://www.africanyouthinitiative.org/about-us/about-ayinet/ accessed on 31 October 2012.

402 For details about the work of NECPA see at http://necpaug.org/about-necpa.html accessed on 31 October 2012.

403 TFV's projects see reports (2009 to winter 2012) at http://www.trustfundforvictims.org/ accessed on 30 November 2012.

The broad meaning of victims ignores the fact that not every victim of war is a victim of an international crime. The TFV's 2010 spring report claims that the aim of assistance projects under Article 79 is 'to ensure that assistance is provided to those who were not able to participate in the judicial process directly',[404] but as it has been indicated, it is difficult to determine whether the assistance activities are limited to victims of crimes. The explanation for this reality may be twofold: First, logistically, the TFV can hardly make such a distinction requiring a meticulous examination of the laws of war, and doing so in fact would be in contradiction to the prohibition against making judiciable determinations. Second, the TFV considers discriminating victims of the same situation counter-productive to peace efforts. This desire to avoid discrimination is consistent with the perception of people in affected communities who consider victims in the broader meaning, irrespective of whether the harm was lawful or not.[405] Admittedly, this is an inference conclusion because the TFV reports do not mention anything about victims of collateral damage. Nonetheless, it is an indication of some practical challenges involved in making a distinction between victims of war.

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[404] TFV, 'Recognizing Victims & Building Capacity in Transitional Societies: Programme Progress Report' [Spring 2010] 3.

[405] See also Scott T. Paul, 'The Duty to make Amends to Victims of Armed Conflict', 89.

Chapter 5: The United States of America and Victims of War

There are a number of reasons that make focusing on the United States of America (US)'s military practice interesting for this study, but at least the following are the most compelling ones. The US Armed Forces is the most powerful in the World, in terms of budget allocation and advanced military equipment.[406] The US has the most far-reaching influence as a member of the NATO and as a party to several bilateral and multilateral military alliances. It is the only armed force capable of attaining superiority in any part of the globe. Since its creation, it has been involved in different military activities in Europe, Asia, the Americas, Africa and Oceania.

In spite of the fact that the US's role in the development of international law is undeniable,[407] its practice towards the victims' rights to reparation is interesting: on the one hand, based on the fact that it is a party to the 1907 Hague Convention (IV) relative to the laws and customs of war on land which in its Article 3 provides for possible compensation, it can be argued – as a matter of principle – that the US subscribes to the notion that victims of violations of laws of war deserve reparation. Contrariwise, the US is not a party to the Additional Protocol 1 to the Geneva Conventions of 1949 and the Rome Statute, which both provide for reparation to the victims of breaches of laws of war, or war crimes for the case of the Rome Statute. Additionally, in 2005, the US was among the 13 countries in the then United Nations Commission on Human Rights that abstained from voting for the resolution that adopted the Basic Principles and Guidelines.[408] On the other hand, (in practice) the US has several mechanisms in place that settle claims arising from or in connection with activities of its armed forces both at home and overseas.[409] Victims of incidents related to the activities of the

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[406] Anup Shah, 'World Military Spending' *Global Issues*, 06 May 2012 http://www.globalissues.org/article/75/world-military-spending accessed on 7 May 2013.

[407] John Fabian Witt, 'Form and substance in the Law of Counterinsurgency Damages' (2008) 41:1455 *Loyola of Los Angeles Law Review* 1455, 1457.

[408] 'The United States opposed the inclusion of the International Criminal Court' see footnote 249, Cherif M. Bassiouni, International Recognition of Victims' Rights (2006) 6:2 *Human Rights Law Review*, 250; see also Ellen Desmet, 'The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation: a landmark or window-dressing? An analysis with special attention to the situation of indigenous peoples' (2008) 24:71 *South Africa Journal on Human Rights* 71, 80.

[409] Andrew Gillman and William Johnson (ed.), *Operational Law Handbook* (International and Operational Law Department, US Army, 2012) 287-300 – Chapter 18: Foreign and Deployment Claims http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf accessed on 4 April 2013 (hereafter Operational Law Handbook).

US military can claim compensation through one of the following mechanisms. The Federal Tort Claims Act (FTCA) allows a person harmed on US territory to file a claim for a remedy with a possibility of even suing the US government to federal court, in case the claimant is not satisfied. The Personnel Claims Act (PCA) allows US service personnel – military and civilian personnel of the Department of Defence (DoD) – to claim compensation for personal loss, damage or property destruction that occurs during the deployment regardless of where the incident happened. The Military Claims Act (MCA) covers family members of US military personnel accompanying the troops. The Public Vessels Act (PVA) and Suits in Admiralty Act (SAA) covers maritime related damages. The US is also a member to different international organizations such as NATO and party to different agreements – Status of Forces Agreements (SOFA) – through which war victims can be compensated. The Foreign Claims Act (FCA) and solatia (condolences) payments, which will be discussed further, are both used in addressing harm caused to foreign nationals who were victimized by US military involvement. This chapter shows that – based on all these mechanisms – the US is in one way or another acknowledging that war victims deserve compensation or assistance to repair the harm suffered.

5.1 The Foreign Claims Act (FCA)

The origin of the FCA is found in the US's response to the First World War accidents which were partly resulting from the use of military motor vehicles. Witt notes that '[s]oldiers were driving motorized vehicles on roads built for horse-drawn vehicles in towns accustomed to horse-drawn speeds. The carnage was so great that it even affected those who were sent to try to resolve it. He goes further to note that '[i]n the law of military claims, the automobile seems to have created the same kind of growth that the railroad and industrialization caused (…) [in the development of] the law of torts.'[410] Inspired by the British Claims Commission (BCC) combined with the desire to promote friendly relations with the civilian populations abroad – in particular the French – towards the US military, the US Congress adopted the Indemnity Act in April 1918.[411] It was through the Indemnity Act that the inhabitants of France or any other European country not an enemy or ally of any enemy could claim compensation for damages caused by the US military.[412] It is this same Act that was subsequently modified in 1943 to cover other territories during the Second World War and which later became the present day FCA.[413]

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410 Witt, 'Form and substance in the Law of Counterinsurgency Damages', 1460.

411 Sixty-Firth Congress., Sess. II., Chap. 57: An Act to give Indemnity for Damages caused by American Forces Abroad, Approved, April 18, 1918 [H.R. 9901. Public, no. 133].

412 Act of April 18, 1918: Indemnity Act, Sess. 2, ch. 57, 40 Stat. 532.

413 Witt, 'Form and substance in the Law of Counterinsurgency Damages', 1461; Jordan Walerstein, 'Coping with Combat Claims: An analysis of the Foreign Claims Act's Combat Exclusion' (2009)11:319 *Cardozo Journal of Conflict Resolution* 319, 325-331.

Since the end of the Second World War, the FCA has been modified several times to fit into the context of other conflicts in which the US army has been involved.[414] The major purpose of the FCA is to achieve friendship for the US military from civilian populations in countries where they have bases. It is implemented by military lawyers/Judge Advocates (JAs)[415] or designated agents under the administration of the US Military Foreign Claims Commission (FCC). To claim compensation under the FCA, the claimant (who is supposed to be an inhabitant of a foreign country) must prove that the damage resulted from 'either negligence or wrongful acts or omissions of US Military personnel, or due to noncombat activities of the US forces.' The 'inhabitants of [a foreign country] refers to (…) all non-US nationals (both nationals of the 'receiving state and other non-US nationals)'.[416] In order to award compensation, the JA is required to apply 'the law of the country in which the claim arose to determine both liability and damages. This includes the local law or custom pertaining to contributory or comparative negligence and joint tortfeasors.'[417] The claimant must have suffered damage or loss of property, injury or death resulting from the conduct attributable to the US Armed Forces or its personnel and such conduct must have occurred outside the United States. The FCA does not include combat related activities or damages resulting from the enemy's conduct. In other words, the claimant must prove three important elements: (a) that the harm suffered resulted from negligence, accident, or wrongful conduct; (b) that the incident is attributable to the US army or personnel, and (c) that it was not related to the combat activities.[418] However, in addition to excluding US nationals, compensation can be denied when it is found not to be in the interest of the US, and FCA excludes individuals considered 'unfriendly' to the US and third parties such as insurers or subrogates.[419] Witt also notes that the FCA does not award punitive compensation and that it excludes legal costs associated with a claim.[420] Evans notes that the FCA provides for 'meritorious' and not 'charity money'. He further remarks that '[t]he injury or damage need not be the result of negligence or willful misconduct. It can be mere oversight or mistake of judgment. But a line of causation must be established.'[421] In case the claimant is

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414 Witt, 'Form and substance in the Law of Counterinsurgency Damages', 1461.

415 Judge Advocate officers are normally individuals with legal training and practical experience in issues of both civil and criminal cases responsible for the administration of military justice under the US Army Judge Advocate General's Corps. See further details at https://www.jagcnet.army.mil/.

416 Operational Law Handbook, 289.

417 Operational Law Handbook 290.

418 Operational Law Handbook 289.

419 Operational Law Handbook 289; US DEP'T OF ARMY, Armey Regulation. 27-20, Legal Services: CLAIMS: (10-9); Witt, 'Form and substance in the Law of Counterinsurgency Damages', 1465.

420 Witt, Ibid, 1465.

421 Vernon L. Evans, 'The Foreign Claims Act – Interpretive and Procedural Guidelines'

unsatisfied with the decision taken, he or she can furnish additional information to the FCC for reconsideration, or appeal to the Judge Advocate General. And, if there are reasons to believe that there were mistakes of law or facts, that decision can be corrected accordingly.[422] However, given the fact that the FCA establishes an administrative mechanism – not a judicial process – it is not possible for an unsatisfied claimant to sue the US government in a court of law (contrary to the FTCA).[423]

The connection between the FCA and victims of collateral damage is that the former compensates victims of war accidents who fall within the latter category. Collateral damage includes both victims harmed as a result of accidents, and those harmed through the application of the principle of proportionality (the harm/damage/loss that is not excessive in relation to the military gain). It is understood that – because of the combat exclusion principle – the FCA provides compensation for one category of victims of collateral damage – those of war accidents – at the exclusion of victims whose loss or harm is linked to the application of the proportionality principle. The main purpose of combat exclusion is to make sure that compensation is not awarded for the conduct that is deemed necessary to the military objective.[424]

However, those who have studied the 506 files released by the US government at the request of the American Civil Liberties Union (ACLU) under the Freedom of Information Act (FOIA) concerning the claims of Iraq and Afghanistan victims, [425] concluded that the 'combat exclusion' criteria have been interpreted in an inconsistent and sometimes arbitrary manner which has resulted in excluding a number of victims from benefiting compensation under the FCA.[426] Out of the 506 files, only 86 claimants received compensation

[1966] 21 *JAG Journals* 87.

422 Witt, 'Form and substance in the Law of Counterinsurgency Damages', 1462.

423 Ibid.

424 Department of the Army: Legal Services, Claims Procedures [Pamphlet 27–162, March 21, 2008] 29.

425 The American Civil Liberties Union (ACLU), 'Documents received from the Department of the Army in response to ACLU Freedom of Information Act Request' [Army 15-6 Documents, Released on October 31, 2007] http://www.aclu.org/natsec/foia/log.html accessed on 19 April 2013.

426 Jonathan Tracy, 'Compensating Civilian Casualties: "*I am Sorry for your Loss, and I wish you well in a Free Iraq*"' [2008] A Research Report Prepared for the Carr Center for Human Rights Policy and the Center for Civilians in Conflict, http://civiliansinconflict.org/uploads/files/publications/compensating-civilian-casualties_nov_2008.pdf accessed on 19 April 2013; Minako Ichikawa Smart, 'Compensation for Civilian Casualties in Armed Conflicts and Theory of Liability' in B. E. Goldsmith, J. Brauer (ed.) *Economics of War and Peace: Economic, Legal, and Political Perspectives* (Emerald Group Publishing Limited, 2010) 248-249; Christopher V. Daming, 'When in Rome: Analyzing the Local Law and Custom Provision of the Foreign Claims Act' (2012) 39:309 *Washington University Journal of Law & Policy* 309, 324-325; Jordan Walerstein, 'Coping with Combat Claims'; Witt, 'Form and substance in the Law of Counterinsurgency Damages', 1471ff.

under the FCA.[427] Tracy who has statistically analyzed the files finds that 'the "combat exclusion" of the Foreign Claims Act is applied broadly, arbitrary, and inappropriately. (…)'[428] and Witt notes that sometimes '[c]laims are denied for no reason at all'[429] and concludes that '[n]owhere are inconsistencies more readily apparent than in the interpretation of the combat exclusion.' He gives an example of where 'sometimes checkpoint shootings are treated as combat exclusion cases. At other times they are resolved on the merits as either negligent or not negligent shootings.'[430]

Smart puts combat exclusions into two categories; the first category includes individuals found in the vicinity of the US military targets 'such as being caught up in crossfire, being shot by a stray bullet or bombed while at home during a raid.' Such claims are denied based on the mere fact that the information found in the US military records indicates that there was fighting going on in that area. The second category which is probably more controversial – because it does not require the existence of fighting – includes civilians mistakenly attacked as enemy combatants. This category includes victims who were 'shot after failing to stop at a checkpoint, or driving too close to the military vehicle and a pedestrian whose bag was mistaken for a bomb.'[431] According to the Judges of the US Court of Appeal:

> The combatant activities exception applies whether US military forces hit a prescribed or an unintended target, whether those selecting the target act wisely or foolishly, whether the missiles we employ turn out to be 'smart' or dumb, whether the target we choose performs the function we believe it does or whether our choice of an object for destruction is a result of error or miscalculation (…) [the difference is of no significance] so long as the person giving the order or firing the weapon does so for the purpose of furthering our military objectives or of defending lives, property, or other interests.[432]

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427 Witt, Ibid, 1471-1472; The American Civil Liberties Union (ACLU), 'Documents received from the Department of the Army in response to ACLU Freedom of Information Act Request'; Jonathan Tracy, 'Compensating Civilian Casualties:', 15.

428 Jonathan Tracy, 'Compensating Civilian Casualties:', 5.

429 John Fabian Witt, 'Form and substance in the Law of Counterinsurgency Damages', 1472.

430 Ibid, 1473.

431 Minako Ichikawa Smart, 'Compensation for Civilian Casualties in Armed Conflicts and Theory of Liability', 249; see also The Center for Law and Military Operations, 'Legal Lessons Learned from Afghanistan and Iraq: Volume II: Full Spectrum Operations (2 May 2013 – 30 June 2004)' 193 http://www.fas.org/irp/doddir/army/clamo-v2.pdf accessed on 1 May 2013.

432 United States Court of Appeals, Ninth Circuit., 976 F.2d 1328 1994 A.M.C 1514, 61 USLW 2233, Mitra KOOHI; Iman Koohi, minor daughter; Kosar Koohi, minor daughter; Hassan Almassi; Iran Air Flight 655, Plaintiffs-Appellants, v. US of America; United States Department of Navy, Defendants-Appellees. Elizabeth H. BAILEY, as the personal representative, et al., Plaintiffs-Appellants, v. VARIAN ASSOCIATES, INC.;

In addition to claims being denied under the combat exclusion criteria, Tracy finds out that other claims were denied on the ground that the victim was either negligent, or that the incident resulted from the Afghan soldier, a military contractor, an ant Iraq fighter, or that the incident took place outside the Unit's operation, and in some other circumstances the claim was found to be fraudulent or that the victims were enemy fighters.[433] The unfairness also comes from the inconsistencies in the amount awarded to victims. Even if it is supposed to be clear that the amount payable under the FCA depends on the tort law of the host nation,[434] awards given to Iraq and Afghanistan victims have been very small and varied significantly. For instance, the average amount awarded for the death of a person is around $4,200[435] while the compensation given to victims of Sgt Robert Bales, who allegedly went from house to house on a killing spree in Kandahar, was rather high given the fact that each family received about $50, 000 for each person killed and 11,000 for the injured.[436] It suggests that the level of criminal responsibility might also play a role in determining the amount of compensation.

It is fair to note that combat exclusion has also been a challenge to pre-Iraq and Afghanistan conflicts. The US recognizes that if such a trend of combat exclusion is maintained, the aim of creating friendly relations for the US military operating in foreign territories cannot be achieved.[437] The desire to balance the strict interpretation of 'the combat exclusion' with achieving the military strategy of creating 'friendship' for the US military from affected populations, has resulted in the adoption of alternative mechanisms. Whereas the payment of compensation for combat related incidents of the Vietnam War (1961-1973) became a responsibility for the Vietnam government, during the 1983 invasion of Grenada, the US used its International Development Agency to settle combat related damages, and in the 1989 Panama invasion, the US funded the Panama government to compensate combat related damages.[438]

It was during the 1992 US intervention mission in Somalia that the US government first approved the payment of condolence fees to the victims of

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General Electric Co.; GE Aerospace; RCA Corp; Harnischfeger Industries; Syscon Corp.; Computer Sciences Corporation; John Connor, Defendants-Appellees. (Nos. 90-16107, 90-16159) decided Oct. 8, 1992 https://bulk.resource.org/courts.gov/c/F2/976/976.F2d.1328.90-16159.90-16107.html accessed on 24 May, 2013, §20.

433 Tracy, 'Compensating Civilian Casualties', 15.

434 Witt, 'Form and Substance in the Law of Counterinsurgency Damages', 1462.

435 Ibid, 1474.

436 Relatives of Afghan Shooting victims paid compensation (ABC Radio Australia, 26 March 2012) http://www.radioaustralia.net.au/pacific/2012-03-26/relatives-of-afghan-shooting-victims-paid-compensation/595260 accessed on 24 May 2013; Afghans: US paid $50,000 per shooting spree victim (Associated Press, 25 March 2012) http://usatoday30.usatoday.com/news/nation/story/2012-03-25/afghanistan-shooting-compensation/53765298/1 accessed on 24 May 24 2013.

437 Operational Law Handbook 296.

438 Witt, 'Form and Substance in the Law of Counterinsurgency Damages', 1469-1470.

the military related activities.[439] Condolence fees and solatia payments were subsequently approved to deal with combat related damages in Afghanistan and Iraq conflicts. There is no big difference between condolence fees which are an 'expression of sympathy' to the victim, and solatia payments which are a token or nominal payment that is given according to the custom of the area to express remorse or sympathy towards the victim. Both are the same; they are nominal and are acts of compassion, and both do not create 'an admission of legal liability or fault'.[440] As Tracy notes, the only 'difference between the two is that solatia payments are funded by the unit's Operation and Maintenance fund (O&M)[441] and condolence payments come from the Commander's Emergency Response Program (CERP).[442] In this book, the two concepts are used interchangeably in reference to the US practice of providing compensation to victims of collateral damage.

5.2 The Condolence Fees and Solatia Payments

The practice of solatia payments has been commonly associated with incidents of mistaken attacks resulting in deaths, injuries or destruction of properties – most prominently, involving the accidental shooting down of civilian aircrafts – where the attacker (state) has denied any legal responsibility but agreed to compensate victims on compassionate grounds.[443]

In March 2003, the US military started providing solatia payments to the Iraqi victims and a year later (March 2004), through the Commander's Emergency Response Program (CERP), the US started providing condolence payments.[444] In Afghanistan similar payments started in October 2005 for solatia payments

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439 Operational Law Handbook 296; Jordan Walerstein, 'Coping with Combat Claims', 332-335.

440 United States Government Accountability Office (GAO) Report to Congressional Requesters, 'Military Operations: The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan' [May 2007, GAO-07-699 Military Operations] 13.

441 Operational Law Handbook, 293.

442 Tracy, 'Compensating Civilian Casualties', 10.

443 Marian Nash Leich, 'Denial of Liability: Ex-Gratia Compensation on a Humanitarian Basis' (1989) 83: 2 *The American Journal of International Law* 319; Andreas F. Lowenfeld, 'Looking Back and Looking Ahead' (1989) 83: 2 *The American Journal of International Law* 336; Marian Nash Leich, 'Contemporary Practice of the United States Relating to International Law' (1989) 83:905 *The American Journal of International Law* 905, 912; Harold G. Maier, 'Ex Gratia Payments and the Iranian Airline Tragedy' (1989) 83:2 *The American Journal of International Law* 325.

444 Office of the Special Inspector General for Iraq Reconstruction, 'Commander's Emergency Response Program in Iraq Funds Many Large-Scale Projects' [SIGIR-08-006, January 25, 2008] i, http://www.sigir.mil/files/audits/08-006.pdf accessed on 1 May 2013; see also Michael W. Reisman, 'Compensating Collateral Damage in Elective International Conflict',16.

and condolence payments started in November 2005. The reasons given for the delayed commencement of condolence payments was that the US did not consider condolence payments to be a custom within these two countries. However, it is claimed that it was after the commencement of condolence/solatia payments that the trust from the affected communities towards the US military and its allied forces increased.[445] The CERP, whose funding in the beginning came from Iraq's oil money and seized assets,[446] was created 'to respond to urgent humanitarian relief, and reconstruction requirements within a commander's area of responsibility by executing programs that immediately assist indigenous populations and achieve "focused effects."'[447] CERP is at the discretionary use of military commanders to 'improve water and sanitation, electricity, food production, healthcare services, education, irrigation, economic and financial management, telecommunication, transportation, rule of law, civic and cultural buildings, employment of local nationals and payment to individuals released from prisons.'[448]

Condolence fees and solatia payments are mechanisms that provide compensation to victims who would otherwise not have been compensated under the FCA.[449] Condolence and solatia 'payments are not barred by the combat activities rule, and will commonly be based on injury or death resulting from combat activities.'[450] Condolence payments can also include '("martyr payments") to surviving spouses or kin of defense or police personnel killed as a result of US, coalition, or supporting military operations.'[451] Condolence and solatia payments are nominal assistance payments ranging from 500 to 2500 US dollars and in some other cases it can be a mere expression of sympathy in-kind – other than money – towards the victims.[452] In the determination of the amount to be paid for either condolence or solatia, even if commanders have broad discretionary powers in choosing whether to give it or not, or how much

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[445] Sarah Holewinski, 'Making Amends: A New Expectation for Civilian Losses in Armed Conflict' in Daniel Rothbart, Karina V. Korostelina and Mohammed D. Cherkaoui (ed.) *Civilians and Modern War: Armed Conflict and the Ideology of Violence (*Routledge, 2012) 317; Sarah Holewinski, 'Do Less Harm: Protecting and Compensating Civilians in War' (2013)19 *Foreign Affairs* 14, 16.

[446] Walerstein, 'Coping with Combat Claims', 340.

[447] Office of the Special Inspector General for Iraq Reconstruction, 'Commander's Emergency Response Program in Iraq Funds Many Large-Scale Projects'.

[448] Ibid, i&2.

[449] Jordan Walerstein, 'Coping with Combat Claims', 341; The Center for Law and Military Operations, 'Legal Lessons Learned from Afghanistan and Iraq: Volume II: Full Spectrum Operations (2 May 2013 – 30 June 2004)' 192.

[450] Operational Law Handbook, 226 &296.

[451] Operational Law Handbook, 226.

[452] Operational Law Handbook, 293; Witt, 'Form and substance in the Law of Counterinsurgency Damages', 1463; The Center for Law and Military Operations, 'Legal Lessons Learned from Afghanistan and Iraq: Volume II: Full Spectrum Operations (2 May 2013 – 30 June 2004)' 192.

to give, they are at least expected to consider 'the severity of the harm, the cost of living in the local community and any other cultural considerations.'[453]

Condolence and solatia payments serve two main mutually reinforcing reasons: (1) A military strategy: condolence payments are considered as a form of a 'soft weapon' or 'ammunition' that helps the military to win 'the hearts and minds' of local population – a strategy of injuring softly. Military officials believe that conducting a successful counterinsurgency depends on the trust of local communities – who would otherwise be allies to insurgents – in obtaining intelligence information, and in some cases creating resistance movements.[454] The military acknowledges that 'civilian casualties and damages to public or private property (collateral damage), no matter how they are caused undermine [their] support (…).'[455] (2) Condolence and solatia payments are also in some sense a moral 'obligation'. Assisting the needy victims out of kindness when there is no legal obligation to do so is the right thing to do. Through condolence or solatia payments, the injurer expresses the humane conduct of goodwill towards the victim ex-gratia.[456]

The Department of Defence believes that 'prompt payment of solatia ensures the goodwill of local national populations, thus allowing the US to maintain positive relations with the host nation.'[457] In brief, these payments help to achieve military strategic goals by enhancing a much more moral standing for the US military against its enemies. However, as Smart and Majima conclude – based on the fact that victims of the Libyan conflict were not compensated – the main reason US and NATO countries compensate victims of collateral damage is more of a strategic objective than a moral or humanitarian justification.[458]

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[453] United States Government Accountability Office (GAO) Report to Congressional Requesters, 'Military Operations: The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan' [May 2007, GAO-07-699 Military Operations] 31&35.

[454] Tracy, 'Compensating Civilian Casualties', 4-5; Witt, 'Form and substance in the Law of Counterinsurgency Damages', 1467; Jeremy Joseph, 'Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments' (2007) 23:3 *Negotiation Journal* 219, 222-225; Alice Gadler, 'Armed Forces as Carrying both the Stick and the Carrot? Humanitarian Aid in US Counterinsurgency Operations in Afghanistan and Iraq' (2011) 3:1 *Goettingen Journal of International Law* 217, 230-239.

[455] Commander, NATO ISAF, Afghanistan, US Forces, 'COMISAF's Initial Assessment', 30 August 2009 http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf accessed on 29 May 2013.

[456] Nesam McMillan, 'The Tactical Payment Scheme: Configurations of Life and Death in the Context of War' (2012) 23:3 *Current Issues in Criminal Justice* 316; Jeremy Joseph, 'Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments' (2007) 23:3 *Negotiation Journal*, 222.

[457] Operational Law Handbook, 293.

[458] Minako Ichikawa Smart, Shunzo Majima, 'The Moral Grounds for Reparation for Collateral Damage in Expeditionary Interventions: Beyond the Just War Tradition' (2012)26:1 *International Journal of Applied Philosophy* 183.

Another challenge is the manner in which payments are made. According to some individuals working in conflict areas, locals used to complain about the insensitivity of some US soldiers who would show up with bundles of money immediately after the attack wanting to pay for the damages when family members are still grieving for their killed relative(s).[459] As Walker explains, 'an apology that arrives too soon, one that precedes a full examination of the nature and magnitude of wrongdoing and appears to head off a full expression of the grief and anger of victims, becomes an insult.'[460] Currently, there is some improvement; efforts are being made to explain first before providing condolences.[461]

5.3 The Amends Campaign

In principle, the 'normal' procedure is that when a victim or a beneficiary complains to the US military, the Judge advocate (JA) or any other appointed officer looks into the evidence together with the claims card[462], verifies the location and circumstances to determine whether the claimant deserves compensation under the FCA or not.[463] If it is determined that the payment under the FCA is not possible because of the combat exclusion criteria, the JA or the responsible officer – the Project Purchasing Officer (PPO) – can move on to a much more flexible process of providing condolence or solatia payment to the claimant.[464] This seems like an easy and a straightforward process, but in reality it is not. For instance, out of the 233 claims that were denied under the FCA 'combat exclusion rule,' only 103 ended up receiving condolence payments.[465] Critics argue that the whole process is undermined by a lack of transparency and because of its flexible nature. Witt, who acknowledges the importance of

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459 See Joseph, 'Mediation in War', 219-248.

460 M. U. Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press, 2006), 203.

461 Scott T. Paul, 'The Duty to make Amends to Victims of Armed Conflict', 102; Robert Beljan, 'Afganistan: Lessons Learned from an ISAF Perspective' [2013] *Small Wars Journal*, 7.

462 Claims Cards are normally issued to victims immediately after the incident to facilitate a possible claim; they contain information about the date, time location and unit involved in the incident) Operational Law Handbook, 289 -290.

463 United States Government Accountability Office (GAO) Report to Congressional Requesters, 'Military Operations: The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan' [May 2007, GAO-07-699 Military Operations] 32.

464 United States Government Accountability Office (GAO) Report to Congressional Requesters, 'Military Operations: The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan' [May 2007, GAO-07-699 Military Operations] 32-33.

465 Jordan Walerstein, 'Coping with Combat Claims', 345; Tracy, 'Compensating Civilian Casualties', 14-16 .

flexibility in achieving strategic military objectives, warns that depending on '[p]ure local tactical discretion is a dangerous way to try to win the hearts and minds of civilians in war zones, especially if those civilians can see the inconsistencies that result.'[466] Some of the problems identified include 'non-uniform application of FCA standards, overreliance on the 'combat exclusion', low valuation of life in both FCA and condolence payouts, evidentiary problems and lack of referral to condolence payments for claims dismissed on combat exclusion criteria.[467] Whereas the FCA is criticized for being too strict, limitative and sometimes inconsistent in the exclusion or inclusion of some similar claims – due to the lack of a clear cut definition of the combat exclusion rule – condolence payments are criticized for being too flexible and broad, so easy to bend at the discretion of commanders whenever they find it fitting. Inconsistencies in Afghanistan do not result from US practice alone. Confusion and frustration also result from the fact that each ISAF (International Security Assistance Force - Afghanistan) participating state has its own procedure of paying for damages attributable to its military activities. Most of the differences relate to the period in which a victim can receive compensation, what kind of evidence is required (the standard of proof) and the amount which is payable.[468] In spite of the fact that ISAF has been streamlining its process of providing payments to victims of collateral damages in Afghanistan – through the adoption of non-binding standards[469] – there are still a number of issues that need to be improved not only to the benefit of the Afghanistan situation, but also to improve the treatment of victims of lawful incidents of war in other conflict areas.

NGOs working in conflict areas, spearheaded by the Center for Civilians in Conflict, formerly the CIVIC (Campaign for Innocent Victims in Conflict), are leading a campaign to improve the existing mechanisms and ensure that 'warring parties [should] recognize and help the civilians they harm during lawful combat operations.'[470] In their campaign to ensure that warring parties repair the harm caused to victims of lawful conducts, NGOs have adopted a much more generic term – amends – instead of 'reparations' which for so long has been associated with unlawful conducts. NGOs acknowledge that parties

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466 Witt, 'Form and substance in the Law of Counterinsurgency Damages', 1476.

467 Marla B. Keenan and Jonathan Tracy, 'US Military Claims System for Civilians' [2008] Center for Civilians in Conflict, http://civiliansinconflict.org/uploads/files/publications/2008_Civilian_Casualties_White_Paper.pdf accessed on May 2, 2013; see also; Tracy, 'Compensating Civilian Casualties'.

468 CIVIC, 'Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces' [2010] http://reliefweb.int/sites/reliefweb.int/files/resources/Addressing_civilian_harm_white_paper_2010.pdf accessed on 6 May 2013.

469 Afghanistan Annual Report 2011: Protection of Civilians in Armed Conflicts (United Nations Assistance Mission in Afghanistan and UN Office of High Commissioner for Human Rights, Kabul February 2012) 27-28.

470 Center for Civilians in Conflict, 'Work: Amends', http://civiliansinconflict.org/our-work accessed on 2 May 2013.

to the conflict are under no legal obligation to pay reparations to victims of collateral damage, but they (NGOs) argue that making amends is the only way parties can demonstrate compassion, dignity and respect to the people found in conflict areas.[471] As Holewinski notes, making amends 'is a logical extension of civilian protection (…) a moral imperative, (…) it reduces frustration of local population, (…) [and it] can be a peace-building measure – a pragmatic step to further healing, stability and reconciliation.'[472] According to the guiding principles for making amends '[t]he acceptance of amends does not disqualify victims from pursuing any applicable legal claims against a warring party for alleged violations of domestic or international law. Conversely, the provision of amends by a warring party is also not in itself evidence of legal liability for a violation.'[473]

NGOs have suggested that states harmonize their compensation schemes and where necessary create a common fund, adopt an outreach strategy raising awareness about the existence of payments and the procedure, and always include such standards into the military training materials. In addition, there are recommendations for the adoption of similar amends projects to the benefit of victims in other conflict areas and also to improve how victims in areas considered inaccessible (areas where drones and/or US Special Forces operate) can equally access condolence or solatia payments.[474]

It is true that current state 'policies are not similar enough to each other to suggest the emergence of a uniform rule' under customary international law, and it is also true that these condolence payments are called ex gratia[475], nonetheless, the practice demonstrates an increasing desire to repair collateral damages of war. The contribution of condolence payments remains significant to the development of a norm for reparation to victims of collateral damage even where the main reason for their implementation is to achieve military success, 'win hearts and minds' of the local population. It is because of the need to achieve military benefits that these practices have introduced a possibility for individual

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471 Nikolaus Grubeck, 'Civilian Harm in Somalia: Creating an Appropriate Response' [CIVIC, 2011] 41ff, http://civiliansinconflict.org/uploads/files/publications/Somalia_Civilian_Harm_2011.pdf accessed on 7 May 2013; Andrew Childers, 'Legal Foundations for "Making Amends" to Civilians Harmed by Armed Conflict' (International Human Rights Clinic, Harvard Law School, February 2012) <http://harvardhumanrights.files.wordpress.com/2012/02/making-amends-foundations-paper-feb-2012-final.pdf> accessed on May 7, 2013.

472 Holewinski, 'Making Amends: A New Expectation for Civilian Losses in Armed Conflict' [, 320-321;see also CIVIC, 'Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces' [2010].

473 Center for Civilians in Conflict, 'Guiding Principles for Making Amends' (principle 6) http://civiliansinconflict.org/uploads/files/publications/Making_Amends_Principles.pdf, accessed 16 October 2013.

474 More on amends campaign visit http://civiliansinconflict.org/our-work/amends/ accessed on 7 May 2013.

475 Paul, 'The Duty to make Amends to Victims of Armed Conflict', 105.

victims, not states, to obtain compensation even before the war ends.[476] The task to realise an international norm that will allow victims of collateral damage to receive reparation is currently undertaken by civil societies, in particular the Center for Civilians in Conflict.

[476] Joseph, 'Mediation in War', 223-224; Michael W. Reisman, 'Compensating Collateral Damage in Elective International Conflict', 17.

Chapter 6: The Concept of Reparation beyond the Laws of War

Focusing on laws of war and war related reparation mechanisms has shown that there is not a single consistent response towards reparation to victims of collateral damage. There is no legal obligation under international law, and current practices are inconsistent to suggest the existence of an emerging norm. The three chapters (3, 4, and 5) have demonstrated that there is no clear theoretical framework on the issue of reparation to victims of collateral damage. The UNCC provided reparation to all victims except Iraqi nationals without considering whether the cause of harm was lawful or unlawful. The EECC adopted a strict interpretation of laws of war and excluded victims of collateral damage on both sides. TRCs and ICC Trust Fund have adopted a cautious approach to achieve reconciliation. The US-NATO's condolences and ex-gratia payments have been arbitrary and contradictory in nature.

However, it is equally important to note that the above chapters on war related reparations (3, 4 and 5) have not produced convincing reasons (beyond strict interpretation of current laws) against reparation to victims of collateral damage which makes it desirable to have a look at other fields of law. This chapter is aimed at identifying arguments for or against a right to reparation for victims of collateral damage basing on analogies with other fields of law. It has four sections: Section 1 discusses some general theoretical perspectives about reparation focusing on tort law, Section 2 concerns human rights law, Section 3 is about international state (strict) liability and Section 4 studies the role of addressing lawful damages caused by the Dutch police. Given the fact that police are allowed to use force in the protection of others, understanding how damages resulting from their lawful activities is repaired can serve as an inspiration to reparation for victims of collateral damage. The Netherlands, the case study, is a pragmatic choice because it is the researcher's country of residence.

6.1 Theoretical Perspectives on Reparation from Tort Law

The field that comes to mind when one thinks of faultless damages in general is how private law deals with accidents that occur in our daily interpersonal interactions. Accidents as defined by Shavell are 'harmful outcomes that neither injurers nor victims wished to occur – although either might have affected the likelihood or severity of the outcomes.'[477] The law regulating accidents in as far as assigning liability is concerned is tort law.[478] Black's Law Dictionary defines a

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[477] S. Shavell, *Economic Analysis of Accident Law* (Harvard University Press, 1987) 1.

[478] Hans-Bernd Schaefer and Frank Mueller-Langer, 'Strict Liability versus Negligence in M.

tort as 'a civil wrong, other than breach of contract, for which remedy may be obtained.'[479] There are two kinds of tort law liability: (a) fault based liability and (b) strict based liability or faultless liability. Tort law theorists have developed different perspectives to explain the attribution of liability in case of accidents. The purpose of this section is to peruse some of those theoretical perspectives and see if they can offer (or not) some guidance on constructing a right to reparation for victims of collateral damage. The fact that tort law is part of private law – meaning that liability is related to what occurs between two private persons – its theoretical perspectives are limited when it comes to war situations.

6.1.1 Economic Analysis

Those who consider economic analysis to be the basis of tort law claim that the purpose of tort law is to promote economic efficiency.[480] The argument is that every decision we make has a price (the opportunity cost principle). Tort law is there to reduce the cost of accidents in an efficient manner – through a fair balance of the total cost of accidents with the total cost of avoiding them. If the cost of an accident is higher than the cost of avoiding it, a rational person will avoid it. If the cost of an accident is less than the cost of avoiding it, it is expected that a rational person will take the risk, and if an accident happens, then it will remain where it fell – on the victim – because that is what any other rational person acting with due care would do. It would be irrational to incur costs of avoiding an accident when doing so is costlier than the actual accident you intended to avoid.[481] In other words, as a rational person, you are not supposed to avoid taking a risk of doing something of which its benefits are higher than the cost of an accident that would happen along the way. 'Instead, you would pursue the course of conduct, secure the gain, absorb the loss.'[482] To clarify this argument, Coleman notes the following:

Faure (ed.), *Tort Law and Economics* (Vol.1 Encyclopedia of Law and Economics, 2nd edn., Edward Elgar Publishing limited 2009), 4.

479 *Black's Law Dictionary* (8th edn., 2004) 1526; see also Edward J. Kionka, *Torts in a Nutshell* (4th edn., Thomson/West, 2005) 1-6.; Kenneth W. Simons, 'The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives' (2008) 17 *Widener Law Journal* 719.

480 R. A. Posner, *The Economics of Justice* (Harvard University Press, 1981) 13-115; Satish K. Jain, 'Efficiency of liability rules: A reconsideration' (2006) 15:3 *The Journal of International Trade & Economic Development: An International and Comparative Review* 359.

481 G. L. Williams and B. A. Hepple, *Foundations of the Law of Tort* (2nd edn., Butterworths, 1984) 203-204; Jules Coleman, *Risks and Wrongs* (Oxford University Press, 2003) 234-239; Shavell, *Economic Analysis of Accident Law*, 2-5; Hans-Bernd Schaefer and Frank Mueller-Langer, 'Strict Liability versus Negligence', 4-6; Coleman, Jules and Mendlow, Gabriel, 'Theories of Tort Law', *The Stanford Encyclopaedia of Philosophy* (Fall 2010 Edition), Edward N. Zalta (ed.), http://plato.stanford.edu/archives/fall2010/entries/tort-theories/ accessed on 8 May 2014; Jules Coleman, *The Practice of Principle: In Defence of a Pragmatic Approach to Legal Theory* (Oxford University Press 2001) 13.

482 Coleman, *Risks and Wrongs*, 238.

> Suppose that you are both the injurer and the victim, so that whatever accidents we might imagine you causing someone else were ones you really caused yourself. Which of the accidents that you cause yourself would it be rational for you to prevent? [The answer is that …] you would prevent the greater injury at the lesser cost.[483]

He then notes that 'this is the economic strategy. Treat the injurer and victim as one person, then determine what investments in safety rationality requires.'[484] This analysis so far is applicable to situations where the occurrence of an accident and its prevention are solely dependent on the conduct of the injurer – in cases where there is nothing a victim can do to either avoid or reduce its happening – 'unilateral accidents'.[485] In cases where the reduction of risks is depending on the conduct of either party: the injurer or the victim, the party whose costs of avoiding an accident are least costly is the one expected to avoid its happening – 'the least cost-avoider'.[486] Even if the focus is on fault liability, Coleman argues that this does not mean that tort law is based on fault *per se,* '[t]o be at fault is not to act in a morally culpable way or to fall below a standard of care with which one is morally compelled to comply. To be at fault is to act inefficiently; no more, no less.'[487]

The other kind of liability under tort law is strict liability. Strict liability requires the injurer to repair the damage in all circumstances without a finding of fault.[488] The law imposes strict liability on activities that are dangerous by their very nature. The aim here is not to discourage those activities but rather to ensure that a rational decision is made before undertaking those activities, considering both their benefits and costs of possible accidents as a one thing. The potential injurer is supposed to internalize all costs of accidents, [489] weigh them against the profits, and then undertake those activities whose benefits are higher than the costs of accidents. In other words, undertake those activities which profits are capable of compensating victims once an accident occurs.[490] (Strict liability under international law is separately discussed below).

Economic analysis is seen as something that would reduce collateral damage. Ronen notes that: '[a]n obligation to compensate victims of incidental injury has the direct effect of shifting the cost of such injury from the victims to the

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483 Coleman, *Risks and Wrongs*, 237-238.

484 Ibid, 238.

485 Shavell, *Economic Analysis of Accident Law*, 6-7.

486 Ibid, 17.

487 Coleman, *Risks and Wrongs*, 239; on blame has nothing to do with the damage see also W. van Gerven, J.Lever and P. Larouche, *Tort Law* (Hart Publishing 2000) 19.

488 Hans-Bernd Schaefer and Frank Mueller-Langer, 'Strict Liability versus Negligence' 10; Williams and Hepple , *Foundations of the Law of Tort*, 128-132; E. J. Kionka, *Torts In a Nutshell* (4th edn., West Publishing Co. 2005) 39-55

489 Coleman, *Risks and Wrongs*, 241.

490 Coleman, *Risks and Wrongs*, 234, & 241-242; Shavell, *Economic Analysis of Accident Law*, 8.

injuring party. It may, therefore, also have an effect on the conduct of parties to armed conflict.'[491] The assumption is that those at war make some 'cost-benefit calculations', the moment reparation for victims of collateral damage is made an obligation, they will adopt measures to reduce reparation costs subsequently reducing collateral damage.[492] Warring parties may adopt precautionary measures including increasing the risk of their soldiers and/or 'developing of new weapons'.[493]

The economic analysis argument is criticized on lack of both moral grounds and empirical evidence to support it. Williams and Hepple argue that '[i]t seems absurd to say that a rational person places a money value on his life when he chooses a less safe means of transport' [… and] 'little evidence exists about the actual costs of accidents and the impact of liability rules on accident rates.'[494] The application of economic analysis to war situations seems problematic because it affects the core values on which collateral damage is accepted. Collateral damage is a result of balancing military necessity with humanitarian considerations. [495] It is certainly a valid point to argue that since the injurer could not pay for the damages that such damages were therefore excessive. However, as a matter of principle, reparation for war damages should not be used as an incentive to either increase or decrease the collateral damage. It would be outrageous if a military commander was to first check how much money he or she has before launching an attack. It can be argued that all the attacks that would otherwise have been aborted because of lack of money to compensate the victims were of less value compared to military advantage. Thus it would be outside the legitimate collateral damages of war. Article 57(3) of the Additional Protocol 1 provides that '[w]hen a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.' This provision implies that harming civilians is lawful in circumstances where the attack that caused damage was the only available alternative to reduce the number of casualties in relation to the military goal. Therefore, advancing the role of economic analysis in war situations should be done cautiously to avoid introducing money as another element in addition to the usual requirements of distinction and proportionality. As Goodin notes, '[i]t would (…) be wrong to presume that we as a society can do anything we like to people, just so long as we compensate them for their losses.'[496]

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[491] Ronen, 'Avoid or Compensate?', 195.

[492] Ibid, 196.

[493] Ibid, 197-202, &223ff.; see also Michael W. Reisman, 'The Lessons of Qana' (1997) 22 *Yale Journal of International Law* 381, 398.

[494] Williams and Hepple, *Foundations of the Law of Tort*, 205-206.

[495] Ronen, 'Avoid or Compensate?', 197.

[496] R. E. Goodin, *Utilitarianism as a Public Philosophy* (Cambridge University Press 1995), 160.

6.1.2 Distributive Justice

'"Distributive justice," also called "social justice" or "economic justice,"' [497] is concerned with the allocation of benefits and burdens within a society.[498] Aristotle who first coined the concept of distributive justice refers to it as a kind of justice 'which is manifested in distributions of (…) things that fall to be divided among those who have a share in the constitution.'[499] For distributive justice to take place, three important things are needed: (a) parties – participants in the distribution, (b) something to be shared or distributed – a burden or benefit – and (c) the criterion to be followed in distribution.[500] Bender argues that '[t]ort law should be wearing the long, flowing robes of Justice rather than the business suit it has paraded around' […, the kind of justice referred to is that justice that] 'redress dignitary injuries, promote social equality, and facilitate cooperation.'[501] For Cane 'tort liability is, from the defendant's perspective, a burden and from the claimant's perspective, a resource and benefit. When courts make rules about the circumstances in which tort liability to repair harm will arise (…), they contribute to the establishment of a pattern of distribution (…).'[502] Keren-Paz advocates for a tort law that is focused on equality, among other things, in distributing the burden of 'harm caused by involuntary interaction among people.'[503] The same is hesitantly echoed by Gardner who notes that if indeed law of torts 'has worse impacts on the less well-off, we ought to be striving to put that right, subject to the obvious imperative to make sure that we don't end up doing more harm than good in the attempt.'[504] One of the main reasons tort law should focus on contributing to social justice – equality in distribution of burdens – according to Bender is the interdependence of people. 'If we were all purely autonomous, independent beings, we would not create societies dependent upon human interactions and cooperation. (…), we need to be able to rely or depend upon one another's words and actions.'[505]

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497 S. Fleischacker, *A short History of Distributive Justice* (Harvard University Press 2004) 1.

498 J. Finnis, *Natural La wand Natural Rights* (Oxford University Press 1980) 165-177; Steven Walt, 'Eliminating Corrective Justice' (2006) 92:1311 *Virginia Law Review* 1311, 1311-1312.

499 Aristotle: Nichomachean Ethics (Book 5, Chapter 2).

500 E. J. Weinrib, *The Idea of Private Law* (Harvard University Press 1995) 62; Tsachi Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate, 2007) 8-20; Peter Cane, 'Distributive Justice and Tort Law' [2001] 4 *New Zealand Law Review* 401, 405-406; John G. Culhane, 'Tort, Compensation, and Two Kinds of Justice' (2003) 55:4 *Rutgers Law Review* 1027, 1064-1068.

501 Leslie Bender, 'Tort Law's Role as a Tool for Social Justice Struggle' (1998) 37 *Washburn Law Journal* 249, 255.

502 Cane, 'Distributive Justice and Tort Law', 204.

503 T. Keren-Paz, *Torts, Egalitarianism and Distributive Justice* (Ashgate 2007) 5.

504 John Gardner, 'What is Tort Law For? Part 2. The Place of Distributive Justice' [2013] Oxford Legal Studies Research Paper No. 62/2013, 2.

505 Leslie Bender, 'Tort Law's Role as a Tool for Social Justice Struggle', 254-256.

The available literature on distributive justice offers few insights to the quest for reparation to victims of collateral damage.[506] Kalmanovitz who has made a defense of reparation that focuses on achieving social justice in transitional societies is concerned with addressing the economic situation of the poor regardless of whether the poor is a victim or not. He claims that (a) wars normally cause widespread damages and in most post-conflict societies there are not enough resources to provide normative – right based – reparation. (b) In some cases conflicts are partly due to unequal distribution of resources, meaning that adopting a reparation approach returning people to their pre-war situation is illogical. (c) In most cases, he argues, transitional societies have undergone a series of conflicts which makes it difficult to decide how far reparation can go back.[507] For those reasons, based on Rawls' concept of primary social goods,[508] Kalmanovitz proposes that transitional societies need a reparation mechanism that focuses on giving all citizens access to the basic necessities – equal wealth and opportunities.[509]

6.1.3 Corrective Justice

Corrective justice is another form of justice Aristotle introduced in his Nicomachean Ethics. He refers to it as a justice that 'plays a rectifying part in transactions between man and man.' He notes that '(…) some transactions are voluntary (…) such as sale, purchase, loan for consumption (…), and others are involuntary - (…) such as theft (…) assault (…).'[510] Corrective justice theorists continue to disagree on (moral) grounds for providing reparation to some damages and others not.[511] Corrective justice considers tort law as a mechanism that regulates the interaction between two equal parties.[512] Weinrib argues that 'the equality

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506 Therefore, conducting an elaborate analysis of distributive justice goes beyond the scope of this study.

507 Pablo Kalmanovitz, 'Corrective Justice versus Social Justice in the Aftermath of War' in M. Bergsmo and others (eds.), *Distributive Justice in Transitions* (Torkel Opsahl Academic EPublisher 2010) 71, 72-74.

508 'Primary social goods (…) are things which it is supposed a rational man wants whatever else he wants. (…) to give them in broad categories, are rights and liberties, opportunities and powers, income and wealth.' John Rawls, *A Theory of Justice* (Oxford University Press, 1971) 90-95, 395-454.

509 Pablo Kalmanovitz, 'Corrective Justice versus Social Justice in the Aftermath of War', 76-92.

510 Aristotle: *Nichomachean Ethics* (Book 5, Chapter 2).

511 Curtis Bridgeman, 'Reconciling Strict Liability with Corrective Justice in Contract Law' (2007) 75:6 *Fordham Law Review* 3013, 3013-3017; Gardner, 'What is tort Law for? Part 1: The Place of Corrective Justice'; Ernest J. Weinrib 'Civil Recourse and Corrective Justice' (2012) 39:273 *Florida State University Law Review* 273; Coleman, *Risks and Wrongs*,361-406; E. J. Weinrib, *The Idea of Private Law*, 56-83; Jules Coleman and Arthur Ripstein, 'Mischief and Misfortune' (1995)41:1 *McGill Law Journal* 91.

512 E J. Weinrib, *The Idea of Private Law*, 105; Coleman, *Risks and Wrongs*, 314-316; Gardner, 'What is tort Law for? Part 1: The Place of Corrective Justice', 5.

of corrective justice is the abstract equality of free purposive beings under the Kantian concept of rights.'[513] Corrective justice is about what happens between two individuals, the injurer and the injured – 'bipolarity' –, the intrinsic unity between the defendant and plaintiff.[514] The victim has a right to claim reparation based on the inviolability of his autonomy and the injurer has a duty to repair the harm once he infringes on others' rights. 'Corrective justice involves one party's gain [actor] at the other's expense [victim]. [… Therefore, it] requires the actor to restore to the victim the amount representing the actor's self-enrichment at the victim's expense.'[515] Coleman argues that 'those who have the duty in corrective justice to make repair must in justice be made to do so. Any other scheme of liability is an offense to justice.'[516] It is because of the wrong and not the mere existence of a loss that corrective justice provides reparation to the victim.[517]

Admittedly, the brief description above does not cover all issues surrounding tort law as a theory of corrective justice.[518] Instead, I will focus on the question whether on the basis of the theory of corrective justice, victims of collateral damage could be included in the protection scheme based on either the principle of risk reciprocity or the concept of rectification of the wrong.

6.1.3.1 Reciprocity of Risk Imposition

The idea of risk reciprocity is that we are free to impose on others those same risks they impose on us.[519] In other words, we are expected to suffer harm, without reparation, if the harm is an outcome of those risks we 'impose reciprocally on each other.'[520] Curiously, one would want to know why we accept imposing risks on each other. The answer is found in balancing the freedom to achieve our desired ends and the need to protect the security of others. Keating argues that '[i]f we are not permitted to (…) endanger their security we cannot act and so cannot pursue our ends (…). Maximal security extinguishes liberty and maximal liberty devastates security. (…) Risk impositions thus pit the liberty of injurers against the security of victims.'[521] Thus, the purpose of tort law is to 'set terms

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513 Weinrib, *The Idea of Private Law* , 58.
514 Ibid, 63-68.
515 Ibid, 63.
516 Coleman, *Risks and Wrongs*, 311.
517 Ibid, 314.
518 For more different perspectives about tort law and corrective justice read; Ernest Weinrib 'The Special Morality of Tort Law' (1989) 34:3 *McGill Law Journal* 403; George P. Fletcher, 'Fairness and Utility in Tort Theory' (1972) 85:3 *Harvard Law Review* 537; Norman S. Wilson, 'Is Corrective Justice Subsidiary to Distributive Justice? Which Answer Better Captures the Meaning of Tort Law Practice? (2007) 10:44 *Trinity College Law Review*; Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, Inc., 1974) 54-87.
519 Gregory C. Keating, 'Tort, Rawlsian Fairness and Regime Choice in the Law of Accidents' (2004) 72:5 *Fordham Law Review*1857, 1890.
520 Fletcher, 'Fairness and Utility in Tort Theory', 543&549.
521 Gregory C. Keating, 'Tort, Rawlsian Fairness and Regime Choice in the Law of Accidents', 1863.

on which these competing freedoms are reconciled.'[522] The equilibrium is that if we impose risks on those who are not reciprocally imposing them on us, or if we impose much greater risks than those imposed on us, we should compensate victims once the harm is caused.[523] Keating continues to argue that 'risks are imposed by members of one community on members of another community when potential injurers and potential victims engage in distinct activities, which do not impose risks on one another.'[524] To explain how one community can cause non-reciprocal risks to another, Fletcher gives an example of where 'airplane owners and pilots are strictly liable for ground damage but not for mid-air collisions.'[525] He argues that, 'risk of ground damage is non-reciprocal; homeowners do not create risks to airplanes flying overhead. The risks of mid-air collisions, on the other hand, are generated reciprocally by all those who fly the air lanes.'[526]

Smart and Majima have applied the concept of non-reciprocal risks as a moral ground for reparation to victims of collateral damage.[527] The focus of their thesis is on what they call 'expeditionary interventions' or 'wars of choice' or 'elective wars' such as Iraq, Kosovo, or Libya as opposed to wars of survival. They argue that normally, in non-interventionist wars, each state party to the conflict has a reciprocal responsibility to repair lawful damages caused to its citizens and civilian properties but given the nature of expeditionary wars, such a kind of reciprocity is lacking. Therefore [they continue to argue that], powerful 'Western' states are morally liable for collateral damage because they choose to fight wars that are not geographically adjacent to their territories thus imposing risk on civilians of other states without putting theirs at the same risk. In some cases 'powerful states' do so when war was neither the last resort nor the proportionate response.[528] Reisman makes a different argument, claiming that since elective wars 'are not fought out of a perceived urgent defensive necessity', in order for participating democratic states to keep their citizens at least quiet, their military aircrafts will "fly higher" and selection of weapons will be always subject to reducing injuries to their soldiers and predictably causing collateral damage.[529] The moral ground for reparation under these circumstances is linked to the claim that an interventionist state cause non-reciprocal risks to civilians of another state.

This proposal appeals to pragmatism that is born out of frustration because

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[522] Ibid, 1863.

[523] Ibid, 1874; Fletcher, 'Fairness and Utility in Tort Theory', 542&548.

[524] Keating, 'Tort, Rawlsian Fairness and Regime Choice in the Law of Accidents', 1874.

[525] Ibid, 548.

[526] Fletcher, 'Fairness and Utility in Tort Theory', 548.

[527] Smart and Majima, 'The Moral Grounds for Reparation for Collateral Damage in Expeditionary Interventions', 192; see also Reisman, 'Compensating Collateral Damage in Elective International Conflict', 10-12.

[528] Smart and Majima, Ibid.

[529] Reisman, 'Compensating Collateral Damage in Elective International Conflict', 11 (paraphrased).

it is based on the acknowledgment that it is difficult 'to demand a powerful state that believes in their just cause to undertake additional obligations towards civilians on the basis of their *jus ad bellum* violation.'[530] First, it favours a moral norm over a legal norm. If the claim is that there was a violation – whether it is the breach of *jus ad bellum* or violation of precautionary measures – acknowledging the fact that powerful states would not accept responsibility is not a convincing reason to bend rules. The wrongfulness of a conduct does not depend on the consent of the wrongdoer. The wrong remains so irrespective of whether the actor accepts responsibility or not. Even if it is true that it can be difficult to compel a powerful state to provide reparation for victims of collateral damage on the basis of their violation of *jus ad bellum,* the same can be true in case it refuses to compensate victims of its violation of *jus in bello.* It should therefore be acknowledged that, in such circumstances, any other explanation used to persuade the injurer to provide reparation is pragmatic. Second, non-reciprocity argument does not address collateral damage resulting from the opposing party to the interventionist state. If, for instance, the United States and its 'Coalition of the Willing' had accepted to compensate all victims of collateral damage resulting from their conduct, who would have compensated for collateral damages resulting from the conduct of the opposing side – the Iraq Forces – and on which basis? Third, the non-reciprocity argument undermines the equality of civilians in war. The protection of civilians during war is based on military necessity, humanity and the shared innocence of non-combatants. It is perhaps true that certain attacks can be easily launched or stopped due to the identity of civilians found in the vicinity of the target,[531] but the ideal spirit of laws of war is to provide equal protection to all civilian populations.[532]

6.1.3.2 Rectification of the Wrong

May argues that the moment harm is caused, two separate legal consequences arise; (a) the duty on the perpetrator to compensate, and (b) the victim's right to be compensated.[533] Coleman notes that '[t]he principle of corrective justice requires the annulments of both wrongful gains and losses.'[534] The disagreement exists on whether the victim's right to reparation creates a duty that is supposed to be satisfied without (necessarily) involving the perpetrator. The source of tension according to May 'is between the principle that wrongdoers should not

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530 Smart and Majima, 'The Moral Grounds for Reparation for Collateral Damage in Expeditionary Interventions', 184.

531 On obligation of solidarity and membership, see Sandel, *Justice: What is the Right Thing To Do?* 234-236.

532 Article 15 of the Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949).

533 May, *After War Ends: A Philosophical Perspective* , 192.

534 Jules Coleman, 'Corrective Justice and Wrongful Gain' (1982) 11:2 *The Journal of Legal Studies* 421, 423.

be allowed to benefit from their wrongdoing and the principle that victims should be compensated.'[535] If a victim's right to reparation has a moral ground that is independent of the injurer, the duty to repair therefore extends to those unconnected to the wrong. In that vein, reparation for war damages becomes a responsibility shared by *all* states. May defends a proposal to establish 'a world-wide 'no-fault' insurance scheme' for war reparations, in which 'the question of fault (…) would not matter [,] whether a State is a victor or vanquished or merely a bystander' would contribute to this fund for the benefit of victims.[536] This responsibility is justified on the claim that (i) wrongdoers might not be in possession of the seized properties, (ii) wars cause massive destruction that (a) wrongdoer(s) cannot compensate, (iii) it is difficult to determine the real culprits of war, and (iv) reparation does not require the existence of a wrongful conduct (an injustice).[537] The idea that rectification of the wrong is an independent right can be an interesting solution to the quest for reparation to victims of collateral damage. However, it is criticised based on the claim that ordinarily, the responsibility to repair is founded on either having caused the damage or benefited from the risks.[538] As Keating notes, '[t]he fact that someone who has neither acted to impose a risk on others nor benefited from the imposition of that risk, might be the best party to disperse the costs of the harms arising out of that risk is a far more dubious and problematic basis for responsibility.'[539]

The idea of urging states to help others in distress is worth promoting and the international community is well-known for providing humanitarian assistance.[540] It is not unusual that states may adopt (collective) schemes to compensate certain categories of victims within their societies or of a certain tragedy. However, making it a mandatory obligation for *all* states[541] is particularly difficult because it ignores the fact that war is a manmade choice to pursue certain collective interests (imaginary or real). Even if collateral damage of war is lawful and sometimes unintended, imposing the responsibility to compensate victims on all states would be overreaching. Wars are fought in pursuit of interests that are never shared by all states, and which are sometimes incompatible with the

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535 May, *After War Ends: A Philosophical Perspective*, 186; see also Fletcher, 'Fairness and Utility in Tort Theory', 540; Keating, 'Tort, Rawlsian Fairness and Regime Choice in the Law of Accidents', 1879.

536 May, *After War Ends: A Philosophical Perspective*, 194.

537 Ibid, 192-211; see also Gabriella Blum and Natalie J. Lockwood, 'Earthquakes and Wars: The Logic of International Reparations' [June 30, 2012] Harvard Public Law Working Paper No. 12-30; Office of the United Nations High Commissioner for Human Rights, 'Rule-of-Law Tools for Post-Conflict States: Reparations Programmes [2008, HR/PUB/08/1], 39; Coleman, 'Corrective Justice and Wrongful Gain', 422-424.

538 Keating, 'Tort, Rawlsian Fairness and Regime Choice in the Law of Accidents', 1879; see also Williams and Hepple , *Foundations of the Law of Tort*, 90 & 207.

539 Keating, Ibid.

540 Gabriella Blum and Natalie J. Lockwood, 'Earthquakes and Wars: The Logic of International Reparations'; May, *After War Ends: A Philosophical Perspective*, 201-212.

541 May, Ibid, 194-198.

interests of others. It would be very difficult to convince a third party state – that was either opposed to the conflict or which influence was too remote – to provide reparation.[542] May is not ignorant of the fact that this proposal stretches 'justice considerations beyond recognition.' However, his response is that 'loss often occurs to innocent civilians who were not responsible or even liable for the aggressive war even though their government was indeed the aggressor (…), and hence the reparations paid to individuals are not necessarily benefiting the wrongdoer.'[543]

6.2 A Human Rights Perspective

> *All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*[544]

Those who suggest that reparation for victims of collateral damage can be justified through a human rights law perspective claim that 'making amends advances [the] commitment to defend the dignity of all victims of armed conflict.'[545] It is claimed that one's rights to life, and to enjoy his or her property do not stop existing because of a war. Milanovic asks: 'If human rights accrue to human beings solely by virtue of their humanity, why should these rights then evaporate merely because two states, or a state and a non-state actor, have engaged in an armed conflict?'[546] This suggestion is very innovative because a quick examination of the existing literature about the interaction between human rights law and laws of war indicates that the attention of commentators and scholars has not been so much about the issue of reparation to the victims of collateral damage. The first issue of interest has been about whether the two bodies of law compete, supplement or supplant each other during war, and how best to resolve possible competing or overlapping interests. In other words, which body of law takes precedence in case of conflict?[547] Those who oppose the application of human

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[542] It can be easily said that maybe a permanent member state of the UN Security Council is somehow responsible for war damages in South Sudan based on that special role in international community which can significantly impact on the course of events, but attributing liability of what is happening in the Syrian conflict to Botswana for instance is going too far.

[543] May, *After War Ends: A Philosophical Perspective*, 193-194.

[544] Article 1 of The Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948.

[545] International Human Rights Clinic, 'Legal Foundations for "Making Amends" to Civilians Harmed by Armed Conflict' [2012] Harvard Law School.

[546] Marko Milanovic, 'Norm Conflicts, International Humanitarian Law and Human Rights Law' in *Human Rights and International Humanitarian Law Collected Courses of the Academy of European Law*, Vol. XIX/1, Orna Ben-Naftali ed., (Oxford University Press, 2010), 8.

[547] Cordula Droege, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40:2 *Israel*

rights law into war situations argue that human rights law and laws of war are historically distinct and are meant to address two distinct situations.[548] Human rights law regulates the interaction between the un-equals (a state versus its citizens) in a period of peace while laws of war regulate equal parties (state versus states), or collectives in case of NIACs. Those in favour of the application of human rights law into the situation of war often cite the International Court of Justice (ICJ)'s *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* as their basis.[549] In this Advisory Opinion, the ICJ concludes that: 'some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.'[550]

The second issue of interest has been about whether the individual based

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Law Review 310; Cordula Droege, 'Elective affinities? Human Rights and Humanitarian Law'(2008) 90:871 *International Review of the Red Cross* 501; Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88:863 *International Review of the Red Cross* 491; Louise Doswald-Beck and Sylvain Vité 'International Humanitarian Law and Human Rights Law' [1993] 293 *International Review of the Red Cross* http://www.icrc.org/eng/resources/documents/misc/57jmrt.htm accessed on 22 May 2014.

548 Nancie Prud'homme, '*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40:2 *Israel Law Review* 355, 360.

549 Louise Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?' (2006) 88:864 *International Review of the Red Cross* 881, 892 (US and Israel reject the application of human rights law alongside international humanitarian law); see also Heike Krieger, 'A conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11:2 *Journal of Conflict & Security Law* 265; William A. Schabas, '*Lex Specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum' (2007) 40:2 *Israel Law Review* 592; Medard R Rwelamira, 'Human Rights and International Humanitarian Law: The Link or Common Ground Revisited' [1992] 3 *Stellenbosch Law Review* 329; Mustafa Mari, 'The ICJ's Advisory Opinion on the Legal Consequences of the Construction of Israel's construction of a separation barrier in the Occupied Palestinian Territory: a move in the right direction or an impediment to peace?' in the *Yearbook of International Humanitarian Law*, (Vol.7, T. M. C. Asser Instituut, 2004) 373ff; Djamchid Momtaz, 'Israel and the Fourth Geneva Convention: On the ICJ Advisory Opinion Concerning the Separation barrier' in *the Yearbook of International Humanitarian Law* (Vol.8, T. M. C. Asser Instituut, 2005) 344ff.

550 International Court of Justice, *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of July 9, 2004, §106, http://www.icj-cij.org/docket/files/131/1671.pdf accessed on 24 June 2013; Nancie Prud'homme, '*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?', 359ff; Marco Sasso'li and Laura M. Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts' (2008) 90:871 *International Review of the Red Cross* 599; see also César Sepulveda, 'Interrelationships in the Implementation and Enforcement of International Humanitarian Law and Human Rights Law (1984) 33:117 *The American University Law Review* 117.

right to reparation under human rights law can inspire a similar approach towards reparation to the victims of violations of laws of war, which is still, to a certain extent, a state to state arrangement.[551] Even if this debate is still ongoing[552], it is fairly reasonable to argue that the final purpose of reparation should be that of assisting individuals who directly suffered harm. However, the focus is still on victims of violations of laws of war and not so much on lawful incidents. Therefore, suggesting that human rights law can serve as a good basis for reparation to victims of collateral damage calls for a careful and critical examination.

Certainly, appealing to 'principles of dignity and humanity' is critically important to the quest for reparation to the victims of collateral damage and the idea that 'people should assist each other' is laudable.[553] However, using human rights law as a basis for reparation to victims of collateral damage appears to be problematic and inconsistent with the human rights legal framework. The basis for reparation in all human rights law instruments is a breach of a legal obligation that existed prior to the conduct that caused harm.[554] It means that reparation for victims of collateral damage under human rights law would require outlawing all lawful damages of war. It would mean that reparation for victims of collateral damage would be based on the violation of the (non-existing) human right to peace.[555] As Meron notes '[t]o genuinely humanize humanitarian law, it would be necessary to put an end to all kinds of armed conflict.'[556] In so doing any damage would become a violation thus attributable to the parties engaged in the

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[551] Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 2-4, 18-19, 31-32ff; Jean-Marie Henckaerts, 'Concurrent Application of International Humanitarian Law and Human Rights Law: A Victim Perspective' (237-267) and Cátia Lopes and Noëlle Quénivet, 'Individuals as Subjects of International Humanitarian Law and Human Rights Law' (199-235) both in Roberta Arnold and Noëlle Quénivet (ed.) *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff 2008).

[552] Markus Rau, 'State Liability for Violations of International Humanitarian Law – The Distomo Case before the German Federal Constitutional Court' (2005) 07:07 *German Law Journal* 701; Christian Tomuschat, 'Darfur – Compensation for the Victims' (2005) 3: 579-589 *Journal of International Criminal Justice* 579.

[553] International Human Rights Clinic, 'Legal Foundations for "Making Amends" to Civilians Harmed by Armed Conflict' [2012] Harvard Law School, 5.

[554] Article 8 of the 1948 Universal Declaration of Human Rights; Article 2(3) of the 1966 International Convention on Civil and Political Rights; Article 6, of the 1965 International Convention on the Elimination of all forms of Racial Discrimination; Article 14 of the 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Articles 13&41 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 6 of the 1981 African (Banjul) Charter on human and Peoples' Rights (it is on the right to property); Articles 10, 21 & 63 of the 1969 American Convention on Human Rights 'Pact of San Jose, Costa Rica'.

[555] Schabas, '*Lex Specialis*? Belt and Suspenders?', 606-608.

[556] Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 240.

fighting. Schabas acknowledges that, 'there is an anti-war or pacifist dimension to international human rights law that is largely absent – for understandable and logical reasons – from international humanitarian law.'[557] He further notes that 'because of this conceptual difference between international human rights law and international humanitarian law, it is impossible to entirely reconcile the two systems.'[558] Even if outlawing wars might seem to be a clear-cut response towards achieving a right to reparation for victims of collateral damage under human rights law, this suggestion is unrealistic. As Meron concedes, 'wars have been part of the human condition since the struggle between Cain and Abel, and regrettably they are likely to remain.'[559]

Another proposed way in which human rights law can be used to provide reparation to victims of collateral damage is through considering lawful incidents of war as excusable breaches. As Ronen puts it, 'the alleged breach would be of the right to life and bodily integrity' [and] '[t]he excuse presumably would be the existence of military necessity during an armed conflict.' She, however, dismisses this argument of '"breach and excuse" construction [as] inappropriate under the laws of armed conflict' because civilians' right to life is not guaranteed under humanitarian law.[560] Moreover, framing lawful incidents of war as breaches would to some extent affront the moral standing of military commanders because of its accusatory nature. It is premised on emphasizing the wrongfulness of the incident that caused harm such as the breach of one's right to life or physical integrity, which (impliedly) is another form of reproach. The objection to the excusable breaches proposal is that collateral damage is supposed to be seen as blameless.

The most (recent) evident connection for reparation under the two bodies of law is found in the Basic Principles and Guidelines.[561] This connection, however, does not provide even the slightest possible consideration for reparation to victims of collateral damage. On the contrary, it can be argued that by focusing on victims of "gross" and "serious" violations, the Basic Principles and Guidelines have raised the level of threshold on which reparation can be sought. Even if the Basic Principles and Guidelines do not give a definition of those terms,[562] it is reasonable to argue that proving the mere existence of a violation is not enough because on top of it, the violation has to be "gross" or "serious". Theo van Boven acknowledges 'that the word "gross" qualifies the term "violations" [which is] unduly restrictive since *all* violations of human rights entail the right to redress or reparation.' However, he goes ahead to explain that the focus on worst

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557 Schabas, '*Lex Specialis*? Belt and Suspenders?',607.

558 Ibid, 610.

559 Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 240.

560 Ronen, 'Avoid or Compensate?', 190.

561 Evans, *The Right to Reparation in International Law for Victims* of Armed Conflict, 5-7.

562 Marten Zwanenburg, 'Van Boven/Bassiouni Principles: An Appraisal' (2006)24:4 *Netherlands Quarterly of Human Rights* 641, 645.

violations prevailed in order to also cover the serious violations of international humanitarian law.[563]

It would be unfair to disregard the potential application of human rights law entirely without examining its position on reparation to the warlike situations. The following brief analysis looks into the current principles and exceptions of human rights protection. The International Covenant on Civil and Political Rights (ICCPR) and regional human rights instruments provide a number of rights to individuals on the basis of their inherent dignity as human beings. However, in case of emergency, these same instruments, in particular the ICCPR and the ECHR, allow states to take some necessary measures that may derogate on certain rights (Art.4 (2) ICCPR & Art.15 (2) ECHR). Not all rights can be suspended – the non-derogable rights are: the right to life (Art.6 ICCPR & Art.2 ECHR), the protection from torture, or cruel or inhuman or degrading treatment (Art.7 ICCPR & Art.3 ECHR), the right to be free from slavery and servitude (Art. 8(1)&(2) ICCPR & Art.4 ECHR), the right not to be imprisoned on failure to honour contractual obligations (Art.11 ICCPR), the right to non-retroactivity of penal law (Art.15 ICCPR & Art.7 ECHR), the right to be recognized as a person before the law (Art. 16 ICCPR), and the freedom of thought, conscience and religion (Art. 18 ICCPR).

If we examine the laws of war and the above list of non-derogable rights, two conclusions can be reached. First, apart from the right to life, the violation of other non-derogable rights cannot be easily justified under collateral damages of war. Second, the fact that the right to life is non-derogable gives the impression that 'human rights law protects physical integrity and human dignity in all circumstances,'[564] even in situations that threaten the life of a nation. However, this conclusion would be misleading because the right to life is formulated with an exception to it. According to Article 2 of the ECHR, the deprivation of one's life shall not be regarded as a violation 'when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.' Accordingly, Article 15(2) of the ECHR is even clearer, it provides that '[n]o derogation from Article 2 [the right to life], except in respect of deaths resulting from lawful acts of war (...).'[565] Even for those

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[563] Theo van Boven, 'Introductory Note: The United Nations 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' [2010] United Nations, http://untreaty.un.org/cod/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf accessed on 18 September 2013, 2.

[564] Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94:2 *The American Journal of International Law* 239, 240.

[565] See also Rachel Harvey and Emilia Mugnai, 'The 'Right To Life': Commentary on Article 2' [2002] http://www.childrenslegalcentre.com/userfiles/file/Right%20to%20life%20rich%20text%20format.pdf accessed on 26 June 2013.

human rights instruments that are not specific on deaths resulting from lawful incidents of war, it is the 'arbitrary deprivation' of one's life that is prohibited.[566] And, determining whether the death that happened during war constitutes an arbitrary deprivation of life requires going back to the laws of war (humanitarian law).[567] Therefore, the right to life is not completely non-derogable under human rights law. The conclusion that human rights law is stricter than laws of war[568] seems also less persuasive because it can be rhetorically argued that there is no situation that threatens the life of a nation that is absolutely necessary, to allow the deprivation of one's right to life, than being at war. The fact is that laws of war come in where human rights law is inapplicable. Tomuschat argues that '[s] ince international humanitarian law aims to maintain a modicum of civilization amid the worst of all cataclysms human communities can experience, namely war, it may be classified as one of the breaches of international human rights law.'[569]

It should furthermore be noted that not all situations where the right to life was found to have been violated under human rights law necessarily resulted into a reparation award. The case of *McCann v. UK* is illustrative here. Suspected terrorists (McCann, Farrel and Savage) were allegedly planning to detonate a bomb in Gibraltar. The team of the UK Special Forces who had been sent to stop them, shot and killed the suspects, but later it was found that at that moment they were not in possession of explosives.[570] The ECHR established that the shooting was legitimate because it was aimed at protecting other people from unlawful violence and that the use of force was not disproportionate because the soldiers honestly believed that it was necessary to shoot the suspects. However, it concluded that the right to life was violated in the process of planning and organizing of the operation because of (i) failure to stop the suspects from travelling to the target area and (ii) errors in the assessment of intelligence information. The Court nevertheless did not award compensation to the victims after determining that there was a violation of their right to life.[571] Of course it can be argued that it is less problematic not to award compensation to

566 Article 4 of the 1969 American Convention on Human Rights 'Pact of San Jose, Costa Rica'; Article 6 of the 1966 International Convention on Civil and Political Rights; Article 4 of African (Banjul) Charter on Human and Peoples' Rights (1986).

567 ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July 1996), §25; also cited in the ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004) §105; see also Theodor Meron, 'The Humanization of Humanitarian Law', 266ff.

568 Louise Doswald-Beck, 'The right to life in armed conflict: does international humanitarian law provide all the answers?', 891.

569 C. Tomuschat, *Human Rights: Between Idealism and Realism* (2nd edn., Oxford University Press 2008) 292.

570 Explosives were later found at one of their residence.

571 European Court of Human Rights (Grand Chamber), *Case of McCann and Others v. the United Kingdom*: *Application no. 18984/91*(Judgment, Strasbourg, 27 September 1995) §§38, 53, 148, 191, 213 and 200ff.

individuals who were allegedly planning to cause unlawful violence to innocent people. Still, for illustration purposes, in some cases where the right to life of an individual who was not a threat to others was violated, the ECHR often awarded compensation. For instance, in the case of *Güleç v. Turkey*, even if the Court acknowledged that the use of force was legitimate in dealing with riots, it concluded that in that circumstance, the force that was used was not absolutely necessary and the choice of weapons was criticized.[572] The same can be said for the case of *Isayeva, Yusupova, Bazayeva v. Russia*, where the Court concluded that even if it was a legitimate action to pursue a military objective, the planning lacked care for civilians.[573] Certainly, these examples can give an impression that human rights law applies a strict interpretation of the proportionality principle compared to laws of war but still such a conclusion does not provide an absolute protection of the right to life. In other words, there is still a certain margin in which someone could be killed without violating his or her right to life *per se* under human rights law and in such circumstance it is unlikely that that concerned victim(s) can receive compensation. Therefore, human rights law does not provide a solid basis for reparation to victims of collateral damage.

Furthermore, appealing to principles of 'dignity' and 'humanity' through human rights law is redundant because it does not introduce anything new to the current laws of war. There is no evidence to suggest that these principles are exclusive to human rights law because the laws of war also aim to protect 'dignity and humanity'.[574] The laws of war, in particular those regulating the fighting, are not called humanitarian for nothing because the protection referred to is for individuals.[575] The preliminary remarks of the ICRC compilation of the Geneva Conventions eloquently notes that: '[e]ach of these fundamental international agreements is inspired by respect for human personality and dignity; together, they establish the principle of disinterested aid to all victims of war without discrimination (…) but merely suffering and defenceless human beings.'[576] The preamble of The Hague Convention Regulating the Laws and Customs of War on Land (1899/1907) stresses 'the desire to serve, even in this extreme case,

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[572] The case concerned the killing of Ahmet Güleç, aged 15 by the security forces which fired at peaceful demonstrators. European Court of Human Rights, *Case of Güleç v. Turkey: [54/1997/838/1044]* Judgment, (Strasbourg, 27 July1998).

[573] The case concerns victims of aerial bombardment. *Isayeva v. Russia; Yusupova v. Russia; Bazayeva v. Russia*, 57947/00; 57948/00; 57949/00, Council of Europe: European Court of Human Rights, 24 February 2005 http://www.refworld.org/docid/422340c44.html [accessed 26 June 2013]

[574] Heike Krieger, 'A conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study', 275-276; Medard R Rwelamira, 'Human Rights and International Humanitarian Law: The Link or Common Ground Revisited', 338-339.

[575] Elke Schwager, 'The Right to Compensation for Victims of an Armed Conflict,' 419-420.

[576] International Committee of the Red Cross, *The Geneva Conventions of 12 August 1949* [Geneva, ICRC] http://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf accessed on 27 June 2013.

the interests of humanity (…)' and it introduces the famous Martens Clause calling for the guidance of 'the laws of humanity, and the dictates of the public conscience' in case of a legal vacuum.[577] A similar commitment is repeated in other instruments regulating war. The Common Article 3 to the four Geneva Conventions prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment'[578] and the Martens Clause is repeated in all the Geneva Conventions and in the two Additional Protocols.[579] Wordings of similar value such as 'humane treatment', 'penalties that conform to human dignity', 'treatment of persons under occupation with dignity' and 'recognition of the inherent dignity of all victims'[580] are used in various instruments regulating war. It is certainly justifiable to argue for reparation to victims of collateral damage by referring to the role played by those concepts ('dignity' and 'humanity') in the development of the laws of war. However, doing so through a human rights law lens given the current understanding of the laws of war would add controversy to the discussion.

6.3 International Strict Liability of States

Under international law, the responsibility of states is well developed under the Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereafter Draft Articles).[581] However, the duration of the process in which it took for the adoption of the Draft Articles demonstrates that issues of reparation are very difficult to agree on. It took the International Law Commission (ILC) more than four decades[582] to adopt the Draft Articles, a task that would have

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577 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

578 Article 3(1)(c); Common to the four Geneva Conventions. Acts against humanity dignity are equally prohibited in articles 75(2)(b) and 85(4)(c) of the Additional Protocol I, and article 4(2)(e) of the Additional Protocol II.

579 Article 63 of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Article 62 of the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Article 142 Convention (III) relative to the Treatment of Prisoners of War; article 158 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949); article 1(2) of the Additional Protocol I; preamble of the Additional protocol II.

580 See also the preamble of The Convention on Cluster Munitions of May 30, 2008.

581 United Nations General Assembly Resolution 56/83 (A/RES/56/83) of 12 December 2001 (Responsibility of States for internationally wrongful acts); see also Marco Sassòli, 'State responsibility for violations of international humanitarian law' (2002)84:846 *International Review of Red Cross* 401, 402

582 The United Nations General Assembly took a decision in December 1953 requesting the International Law Commission (ILC) 'to undertake the codification of the principles of international law governing state responsibility' (UN G.A. Res. 799(VIII) of 7 December 1953), a task that was concluded in 2001.

been less controversial given the fact that it concerned an obligation that was already established under international law.[583] Article 1 of the Draft Articles states that '[e]very internationally wrongful act of a State entails the international responsibility of that State' is similar to the conclusion of the Permanent Court of International Justice in the *Chorzow factory* case of 1928. Whereas state responsibility under the Draft Articles is based on the wrongfulness of the conduct, strict (absolute) liability that is commonly used in tort law refers to that responsibility that does not require proving the negligence or fault of the defendant.[584]

Obviously, very little is expected from the Draft Articles to inspire reparation to victims of collateral damage on the basis of the strict liability notion since the Draft Articles refer to *un*lawful conduct whereas collateral damage is lawful. However, what is interesting is the fact that in the beginning of the codification of the responsibility of states for international wrongful acts, the ILC was to a certain extent expected to combine it with the responsibility of states arising from activities not prohibited under international law.[585] However, the ILC decided to separate them;[586] the Special Rapporteur on state responsibility indicated that it was 'being understood that an internationally lawful act could also entail responsibility, but that it was preferable to study the consequences of the two kinds of act separately.'[587] The reason put forward was that 'to bear any injurious consequences of an activity which is itself lawful, and being obliged to face the consequences (not necessarily limited to compensation) of the breach of a legal obligation, are not comparable situations.'[588] In 2001 the ILC in addition to adopting the Draft Articles also adopted the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities (hereafter the Draft Articles on Prevention).[589] Being conscious of the fact 'that incidents involving hazardous

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[583] Friedrich Rosenfeld, 'Collective Reparation for Victims of Armed Conflict' (2010) 92:879 *International Review of the Red Cross* 731; Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96:4 *The American Journal of International Law* 833, 833-837.

[584] Williams and Hepple, *Foundations of the Law of Tort* ,92ff; Coleman, *Risks and wrongs*, 212-222 & 407-429; Guido Calabresi, and Jon T. Hirschoff, 'Toward a test for strict liability in torts' (1972) 81:6 *The Yale Law Journal* 1055; Richard A. Epstein, 'Toward a general theory of tort law: Strict liability in context' (2010) 3:1 *Journal of Tort Law* 1.

[585] Alan E. Boyle, 'State Responsibility and International Liability for Injurious Consequences of Acts not prohibited by International Law: A Necessary Distinction?' (1990) 39:1 *International and Comparative Law Quarterly* 1; Nathalie L.J.T. Horbach, *Liability versus Responsibility under International Law: Defending Strict State Responsibility for Transboundary Damage* (Rijksuniversiteit Leiden 1996) 9-19 & 415-419.

[586] Horbach, Ibid,14.

[587] Introduction by Special Rapporteur on State Responsibility, in the *Yearbook of the International Law Commission* of 1973, volume, 5.

[588] A/CN.4/SER.A/1980/Add.1 (Part 2), (*the Yearbook of the International Law Commission* 1980 Vol.II part 2 Chapter III: State Responsibility), 27.

[589] United Nations General Assembly (A/56/10): Prevention of Transboundary Harm from Hazardous Activities of 2001.

activities may occur despite compliance (…) with (…) obligations concerning *prevention* of transboundary harm from hazardous activities',[590] the ILC proceeded to adopt the Draft Principles on the Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities in 2006 (hereafter the Draft Principles on the Allocation of Loss).[591]

The adoption of the Draft Articles on Prevention was partly due to the recognition that compensation cannot fully restore the situation as it was before the harm. Thus, the need to emphasise that states should adopt preventive measures.[592] It was also acknowledged that however many preventive measures were implemented, still the damage can happen, and that in order to ensure that victims 'are not left to carry those losses' the Draft Principles on the Allocation of Loss could be used to obtain compensation.[593] Based on these principles, an analogous argument is made to support reparation for victims of collateral damage. Ronen likens the Draft Articles on Prevention with the precautionary measures that are required of the combatants under the Additional Protocol 1 and argues that reparation for victims of collateral damage would hence have a similar role as the Draft Principles on the Allocation of Loss.[594] She further remarks that 'since the activity in question is not prohibited per se, there is no obligation to cease it. Nor does failure to pay compensation render the activity illegal; it constitutes an independent breach of obligation.'[595] Horbach disagrees; her interpretation is that 'it is not reparation that is the key issue, but the damage.' Horbach argues that '[i]t is of course neither logical nor the intention that as long as the damage caused by such 'permitted' activities is compensated, a State would be entitled to continue to allow these activities knowing that they are likely to cause harm.'[596] The point here is not to settle this disagreement. What is important is to reflect on the fact that there are other circumstances in which states are required to compensate without rendering the conduct that caused harm unlawful. A point Ronen backs

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590 United Nations General Assembly (A/61/10): Draft principles on the allocation of loss in the case of Transboundary harm arising out of hazardous activities (preamble); see also Alexandre Kiss and Dinah Shelton, 'Strict Liability in International Environmental Law' in Tafsir Malick Ndiaye and Rudiger Wolfrum (eds.) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Menshah* (Koninklijke 2007) 1131.

591 United Nations General Assembly (A/61/10): Draft principles on the Allocation of Loss in the case of Transboundary Harm Arising out of Hazardous Activities.

592 United Nations, 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries 2001' http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf accessed on 18 September 2013 (commentaries).

593 United Nations, 'Draft Principles on the Allocation of Loss in the case of Transboundary Harm Arising out of Hazardous Activities, with commentaries 2006' http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_10_2006.pdf accessed on 18 September 2013 (commentaries).

594 Ronen, 'Avoid or Compensate?', 192-194.

595 Ibid, 193.

596 Horbach, *Liability versus Responsibility under International Law: Defending Strict State Responsibility for Transboundary Damage*, 422-423.

with some other examples of acts not prohibited but nonetheless entailing the obligation to pay compensation such as the compensation of properties taken for public interest – expropriation – and the compensation of properties and services taken from the inhabitants of occupied territories.[597]

Strict liability is based on the dangerous nature of the activity that once harm is caused the injured does not have to establish the fault of the injurer.[598] It sounds plausible to make an analogous argument that since war is an equally (or a more) dangerous undertaking that it should involve strict liability rules. However, given the difference – in nature and purpose – between economic activities and warfare, to compare collateral damage of war with harm resulting from activities referred to in the Draft Principles on the Allocation of Loss is slightly going too far. It was very clear from the beginning that even if some economic, industrial or scientific activities were necessary, to preserve the environment and protect human beings, states had to assume responsibility in case such activities caused harm to other states.[599] Mr. Alfred Ramangasoavina, a Malagasy member of the ILC agreed with Mr. Doudou Thiam, a Senegalese member that 'lawful acts of States even those conducted without the intention to harm or for humanitarian purposes might also cause harm requiring reparation'[600]

The strict liability rules can be inferred on the connection that already exists between the protection against damaging the environment and war. Article 35(3) of Additional Protocol 1 and Article 8(2)(b)(iv) of the Rome Statute both prohibit 'means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment that is clearly excessive in relation to the concrete and direct overall military advantage anticipated.'[601] Accordingly, principle 24 of the 1992 Rio Declaration on Environment and Development stipulates that '[w]arfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.'[602] It is fair to argue that the protection of

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597 Ronen, 'Avoid or Compensate?' 192; see also Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of the 1907 to Article 91 of Additional Protocol I of the 1977 and Beyond' (1991)40:827-858 *International and Comparative Law Quarterly* 827, 831.

598 Horbach, *Liability versus Responsibility under International Law: Defending Strict State Responsibility for Transboundary Damage*, 83.

599 Principle 2, Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, 2006.

600 *Yearbook of International Law Commission* [1973] Vol.1 Summary Records of the twenty-fifth session 7 May – 13 July 1973 (A/CN.4/SERA/1973), 8 (paraphrased).

601 Both Articles (of the Additional Protocol I and Rome Statute) joined.

602 Principle 24 of the Rio Declaration on Environment and Development as adopted in the United Nations Conference on Environment and Development, at Rio de Janeiro from 3 to 14 June 1992; see also Mansour Jabbari-Gharabagh, 'Type of State Responsibility for Environmental Matters in International Law' (1999)33:59 *Revue Juridique Themis* 59, 103ff.

the environment is (to a certain extent) about the fear that its destruction would cause loss of life and human suffering.[603] Therefore, the argument should follow that since states are willing to compensate war damage to the environment for its possible cause to human loss and suffering, for the same reasons, states should compensate collateral damages, something that brings about (directly) those same consequences.

6.4 Reparation for Lawful Damages Caused by Dutch Police

In the Kingdom of the Netherlands, just like in many other countries, the enforcement of the rule of law and maintenance of public order is in the hands of the police force. The police possess the monopoly of using force to protect people and their properties on behalf of the general public.[604] In case of public order and safety (general policing: prevention of crimes and disaster related activities), the police are under the local authority administration (the mayor of the municipality) and the Ministry of Interior and Kingdom Relations is the responsible ministry at the level of central government. In performing duties related to criminal justice administration such as investigation and/or arresting suspects, the police force is under the supervision of the Prosecution Office which is represented by the Ministry of Justice and Security.[605]

Police officers are under the obligation to diligently respect the rule of law and observe constitutional and human rights of all citizens. In other words, the police force is not above the law. The police are allowed to use force as a last resort in circumstances that are absolutely necessary and in a manner that is strictly proportionate to protect their own safety, defend 'any person from unlawful violence, effect a lawful arrest or prevent the escape of a person lawfully detained or quell a riot or an insurrection.'[606] The reason police officers are supposed to

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[603] Principles 2(a) and 3 of the Draft Principles on the Allocation of loss in the case of transboundary harm arising out of hazardous activities.

[604] 'Policing in The Netherlands' [Ministry of the Interior and Kingdom Relations, Police and Safety Regions Department, January 2009] 7; Matthew V. Hess, 'Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct' (1993) 149-203 *Utah Law Review* 149; 'Handbook on Police Accountability Oversight and Integrity [The United Nations Office on Drugs and Crime (UNODC), 2011], 5; The European Code of Police Ethics: Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum (Council of Europe, March 2002),16-17.

[605] 'Policing in The Netherlands' [January 2009], 11-33; see also 'Policing in The Netherlands'[Ministry of the Interior and Kingdom Relations, Police Department, September 2000] 11-23.

[606] Paraphrased Article 2 of the European Convention on Human Rights (ECHR); see also The European Code of Police Ethics: Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum (Council of Europe, March 2002) guideline 35-38; UN General Assembly Code of Conduct for Law Enforcement Officials (resolution 34/169 of 17 December

conduct their duties with such a care is that whenever someone is stopped on a street or arrested, it infringes on that person's freedom of movement, the use of force on someone affects that person's physical integrity or right to life and forced entry into someone's house might violate the owner's right to property and/or privacy. These are the kinds of individual rights the police force has to diligently balance with the general public's need to live in a secure environment, free of crime, misconduct and nuisance.[607]

In the process of arresting suspects or preventing the commission of a crime, the situation might require that the police resort to force including deadly force. The use of force can sometimes happen in moments of heightened tension, fear, and confusion, and in such circumstances, the police might cause damages either unlawfully (misconduct due to negligence, criminal or disproportional use of force) or lawful (as mere accidents or proportional use of force) to either the suspect or innocent bystander.[608] Ordinarily, in case a police officer acts unlawfully or carelessly, it is expected that in addition to holding responsible the involved individual officer, such as expulsion, suspension, demotion and or prosecution, if the conduct reaches the criminal level, the victim(s) of such a conduct can seek compensation.[609] In most cases, whenever damages are caused, the general

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1979); UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990).

[607] Melvin Reder, 'Citizen Rights and the Cost of Law Enforcement' (1974) 3:2 *The Journal of Legal Studies* 435; Peter Kruize and Dick J. Wijmer, 'The Use of Force in Daily Police Procedure in The Hague' (1991) 14:121 *Police Studies: International Review of Police Development* 121; Bruce C. McDonald, 'Use of Force by Police to Effect Lawful Arrest' (1966/67) 9:435 *Criminal Law Quarterly* 435.

[608] Marlen N. Dane, *Overheidsaansprakelijkheid voor schade bij legitiem strafvorderlijk handelen* (2009, Doctoral Thesis, Leiden University) 539; Sandra L. Resodihardjo, Carola J.A. van Eijk and Brendan J. Carroll, 'Mayor vs. Police Chief: The Hoek van Holland Riot' (2012) 20:4 *Journal of Contingencies and Crisis Management* 231; Pieter Kottman, 'Beach party ends in deadly shooting' August 24, 2009 http://vorige.nrc.nl/article2337485.ece accessed on 23 October 2013; 'Police bullet killed riot victim at dance party' 03 September 2009 http://vorige.nrc.nl/international/article2347997.ece/Police_bullet_killed_riot_victim_at_dance_party accessed on 23 October 2013; Kees Hudig, '(Analysis) Netherlands: Increased use of Firearms by Dutch police' (2012) 22:2/3 *Statewatch journal*; *Agent die Rishi doodschoot vrijgesproken van doodslag* 23 December 2013, http://www.nu.nl/algemeen/3661023/agent-rishi-doodschoot-vrijgesproken-van-doodslag.html accessed on 6 January 2014.

[609] For details about expectations for the accountability of police, see: 'The Handbook on Police Accountability, Oversight and Integrity' (The United Nations Office on Drugs and Crime (UNODC), Criminal Justice Series, 2011); Council of Europe, 'Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints against Police of 12 March 2009' (CommDH(2009)); Graham Smith, 'Every Complaint Matters: Human Rights Commissioner's Opinion Concerning Independent and Effective Determination of Complaints against the Police' (2010) 38: 2 *International Journal of Law, Crime and Justice* 59; Graham Smith, 'Actions for Damages against the Police

practice is that the police will preferably opt for an outside court settlement – administrative approach. In such a situation, compensation can be paid either through the prosecution, in case the damage was caused during prosecution related activities (during investigations or in the process of arresting a suspect), or the municipal government, in case the damage was related to maintenance of public safety and order. It is in case of failure to reach an amicable solution that the claimant might seek compensation through the court of law, based on the French principle of: '*l'égalité devant les charges publiques*' (hereafter the principle of *égalité*). The principle of *égalité* is about equality: the desire to ensure that all citizens contribute to the burdens of the state (costs of public interest).[610] Regarding the latter eventuality, it suffices to note here what Fairgrieve said about redressing grievances in England and France, '[i]f all the grievances that citizens have against the State were channeled through the courts, the present systems would be utterly swamped.'[611] This quote shows how non-judicial mechanisms play an important role.

As a reminder, the purpose of this section is to explore the meaning and application of the principle of *égalité*. The focus is on damages caused to third parties (not suspects) in the process of arresting suspected criminals or through the everyday policing activities. Lawful damages refer to loss or harm resulting from the conduct that is free of negligence or misconduct either as a result of pure accidents or through the use of force that is perfectly consistent with the law. The intention is to use this practice to analogously apply some grounds for reparation to victims of collateral damages of war. What makes this connection relevant is the supremacy of public interest over individual rights. Just as collateral damages of war are tolerated for purposes of achieving public interest (military objectives), equally so are the lawful police damages which are justified as a result of achieving public interest (public order and safety).

The principle of *égalité* is still an evolving concept in the Dutch legal framework. A national law legislating it was passed by the Parliament on 29 January 2013, but at the time of writing, it had not yet come into force. This is true despite the fact that the legal regime governing the Dutch Government liabilities as far as unlawful damages are concerned is well developed and almost unified in the General Administrative Law Act (GALA). Tjepkema notes that unlike the French, the Dutch lacked 'a strong voice' to articulate the need for reparation to lawful damages. He argues that 'the predominant opinion was that damages have to lie where they fall, *especially* when the government acts lawfully.'[612] The situation started changing in 1955 when it was recognized that

and the Attitudes of Claimants' (2003) 13:4 *Policing and Society: An International Journal of Research and Policy* 413.

[610] Donal Nolan, 'Suing the State: Governmental Liability in Comparative Perspective' (2004)67:5 *The Modern Law Review* 844, 849.

[611] D. Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford University Press 2003), 239.

[612] M.K.G. Tjepkema, *Nadeelcompensatie op basis van het égalitébeginsel : een onderzoek naar*

there is 'a right to compensation in case the individual has to carry a burden that he 'cannot reasonably be expected to carry."[613] Even if it was not clearly expressed, he submits that this was the beginning of numerous attempts to compensate lawful damages, which subsequently contributed to the application of the principle of *égalité*.[614]The highest administrative French court, the *Conseil d'Etat*, which developed the *égalité* principle at the start of the 20th century, understood that there is no contradiction between stating that: when a person causes damage while acting prudently, there is no good reason to shift that burden from where it fell, and saying that: the state should compensate victims of its lawful damages. The difference is that asking an individual to compensate for acts of bad luck, is to impoverish that person for something he or she did not bring about, while asking the state to compensate for its lawful damages is a question of sharing costs among all its citizens.[615] What would be unfair is to leave the burden of the entire society – the cost of the common good – on the shoulders of a few individuals. The purpose of the no-fault liability is to resolve that unfairness that would otherwise come as a result of making a few individuals shoulder the burdens of an entire society. As Reisman notes, 'without such burden-sharing, a hapless member of the community will suffer for the benefit of all others who will simply be free-riders.'[616] The role of the state is to ensure that those who suffer specific and abnormal damages because of public interest are compensated. The fact that the damage was caused while performing a function of general interest is not a reason to refuse compensating victims; general interest is instead the reason why the burden should be distributed among the entire society (all beneficiaries).[617]

The Dutch application of the principle of *égalité* and the no-fault state liability regime in general, is not exactly identical to the French approach. The French apply the *égalité* principle alongside the risk liability principle. The risk theory is based on the idea that certain activities impose greater risk on the society and if a state decides to engage in such activities, it should also be prepared to compensate victims when the damage materializes.[618] The risk liability is based

nationaal, Frans en Europees recht (2010, Doctoral thesis, Leiden University), 962.

613 Ibid, 963.

614 Ibid, 963-964; see also Marlen N. Dane, *Overheidsaansprakelijkheid voor schade bij legitiem strafvorderlijk handelen*, 544.

615 Bernard Schwartz, 'Public Tort Liability in France' (1954) 29:1432 *New York University Law Review* 1432, 1446-1448; Fairgrieve, *State Liability in Tort: A comparative Law Study*, 137-138.

616 Reisman, 'Compensating Collateral Damage in Elective International Conflict', 7.

617 Kathrin Maria Scherr, 'Public Liability for Administrative Acts under French Law' (2008) 14:2 *European Public Law* 213, 229-232; Bernard Schwartz, 'Public Tort Liability in France', 1446-1448; Tjepkema, *Nadeelcompensatie op basis van het égalitébeginsel : een onderzoek naar nationaal, Frans en Europees recht*, 963-964; see also Dane, *Overheidsaansprakelijkheid voor schade bij legitiem strafvorderlijk handelen*, 962.

618 Heinz R. Hink, 'Governmental Liability for Risk under French and Germany Law' (1965)19:3 *Rutgers Law Review* 472, 477-480; Fairgrieve, *State Liability in Tort: A comparative*

on the dangerous nature that is inherent to certain activities. Tjepkema gives an example of where 'the risks stemming from the use of firearms is recognized as a special risk, whereas the risk from working with tear gas or police *batons* is not.'[619] The Dutch Administrative courts have applied the principle of *égalité* in both situations. The same principle is also applicable in cases of public works and other government damages that are lawful. The delay in adopting a national law regulating the principle of *égalité* is suspected to come from some politicians who fear that creating a separate law compensating lawful damages might attract public attention leading to all sorts of claims against the government subsequently affecting state coffers.[620]

It is important to note that the principle of *égalité* does not recognize a right to reparation for lawful damages as such. As Bell notes, the principle of *égalité* 'is not really justified by a notion of liability, taking responsibility for one's actions and the harm they cause, but it is a matter of social solidarity – social burdens, however created, should not be unequally borne.'[621] The victim can claim reparation only when the damage fulfils the two underlying conditions of being both 'abnormal and special'. The abnormal condition refers to the magnitude or severity of the damage, the damage that goes 'beyond the inconveniences we experience in everyday life,' and the special condition refers to the number of people affected, the damage must have affected a specific category of people.[622] In case of a damage that is negligible or if it affected the entire collective (all members of the society), the government cannot provide reparation. It is when the damage is disproportionate and when it affected one or some individuals of the society that compensation under the principle of *égalité* is possible. It is equally important to indicate that a victim can also be refused compensation if the damage was a result of *force majeure* or if the victim contributed to its occurrence – contributory negligence.[623]

The application of the principle of *égalité* in the Dutch legal system is increasingly being clarified through the jurisprudence. In 2001, Mrs. Lavrijsen claimed compensation against the state for damages caused during a police search. The claimant (*Lavrijsen*) rented two pig houses on premises of someone suspected of being a drug dealer. Police officers while conducting a search on that location left some doors of the pig houses open affecting the ventilation system which caused some anomalies in the growth of pigs. Even if the search

Law Study, 144; Nolan, 'Suing the State: Governmental Liability in Comparative Perspective', 849.

[619] Tjepkema, *Nadeelcompensatie op basis van het égalitébeginsel : een onderzoek naar nationaal, Frans en Europees recht*, 968.

[620] See also ibid, 965.

[621] John Bell, 'Government Liability: Some Comparative Reflections' (Barcelona, 2006) http://www.indret.com/pdf/322_en.pdf accessed on 23 May 2014, 5

[622] Kathrin Maria Scherr, 'Public Liability for Administrative Acts under French Law', 229; Fairgrieve, *State Liability in Tort: A comparative Law Study*, 148.

[623] Scherr, ibid, 232; Hink, 'Governmental Liability for Risk under French and Germany, 474.

was legitimate and justified, the Court of Appeal found the state liable for causing disproportionate damage on an innocent person, who did not know the suspect's illegal activities. The court awarded Mrs. Lavrijsen full compensation, meaning that when one innocent person suffers damage in the pursuit of public interest, the damage is both disproportionate and specific.[624] In another case of forced entry (2004), the claimant (the owner of the house) was compensated 50% of the damages. In this case, two sisters (1&2) together with person (3) had a fight with person (4). Person (3) threatened person (4) with a gun. He (person 3) then handed the gun to sister (1) who took it inside the house where she lived with her aunt (the claimant). In relation to the fight, police came to search the house but there was no one at home. They broke the window to enter. However, no gun was found inside and nothing was taken out of the house connected to the crime. The Court of Appeal ruled that damages relating to other people than the owner of the house are normally not the responsibility of the innocent house owner, but this owner is partly responsible for damages because she is not a random third party, due to a family relationship. Therefore, she is partly responsible for the damages and the state is liable for the other 50%. The Supreme Court maintained this ruling on the ground that the state is only responsible for abnormal damages.[625] In this case it appears that the 50%-rule was never contested by the claimant, perhaps, the higher court (gerechtshof) could have awarded a full compensation. In the case Wherestad (2009), the claimant was awarded full compensation. Two houses of Woonstichting Wherestad, a social housing foundation, were being rented by two persons suspected of possessing illegal weapons. The police caused damages to the houses in the process of arresting these suspects. Wherestad was awarded full compensation because (a) the damage was large (disproportional), (b) it was the two tenants responsible for criminal activities, (c) Wherestad did not know of those activities and (d) it could not take measures to minimize the damages because it was never informed of that search and arrest.[626]

It appears fair to conclude that in general people who are unaware of criminal activities and are being confronted with lawfully imposed damages can claim 100% compensation. However, for someone sharing a house with the suspected person, it is much harder to prove that he or she was unaware of such activities. Nonetheless, the knowledge of another person's criminal activities cannot be presumed based on the mere fact of co-habitation or family relationship. In 2004, the police raided a house of a suspected terrorist in the presence of his pregnant wife and a minor son. The police seized propaganda recordings, identification documents different from his Dutch passport, guns, ammunitions and body armour. The police forcefully arrested the suspect and shortly after that search and arrest incident the pregnant wife had a miscarriage.

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[624] HR 30 March 2001, ECLI:NL:HR: 2001:ABO801.

[625] HR 17 September 2004, ECLI:NL:HR: 2004:AO7887.

[626] HR 2 October 2009, ECLI:NL:HR: 2009:BJ1708.

After being in custody for more than 3 months (July 30, – November 3, 2004) the suspect was acquitted of charges related to false identity documents and was never charged with terrorism. He was granted €14.400 as damages for being in custody. The wife and the son were seeking compensation including immaterial damages from the state for the distress caused during the search. Both the court of First Instance and Court of Appeal ruled against the claimants on grounds that the search was legitimate and damages were not disproportionate, and that they cannot be seen as random third parties – due to their relationship with the suspect. However, the Supreme Court disagreed; it concluded that family relationship is not enough ground to reject state liability, and referred the case to another Court of Appeal to determine whether the claimants were individually responsible. Even if this case is still pending (by the time of writing), it shows that based on the principle of *égalité*, a victim of a state lawful conduct can claim both material and immaterial (moral) damages.[627]

The principle of *égalité* considers reparation for lawful damages as part of the cost for the public good that was being pursued during the time of damage. To put it in the war perspective, reparation for lawful damages of war – collateral damages – would be part of the cost of war, in the same category as the costs of weapons and ammunitions. The cost of war falls under the responsibility of the government. It is not a responsibility of soldiers on battlefield who have to worry about the cost of military equipments and other payments. It is the duty of those individuals in decision making positions who have to find ways of funding the war. In the same line of thinking, providing reparation for lawful damages of war should not have much impact on laws of war – humanitarian law – it does not propose extra constraints towards combatants beyond what is provided for under the Geneva conventions. Compensating victims of collateral damage is to ask politicians (decision makers) to distribute public burdens (the cost of war) among the beneficiaries just as weapons and ammunitions are paid through public treasury. As Venezia notes, reparation is 'about the restoration of the victim to the situation of equality which he enjoyed before the special obligation was imposed on him.'[628] The unfairness does not lie in the damage that is lawful but in the refusal to compensate victims once the damage has been caused. Not providing reparation to victims of collateral damage is similar to imposing an obligation of buying weapons and ammunitions on a few individuals of the society for a war that is expected to protect all members. The purpose of reparation for collateral damages of war is to eliminate such an injustice through a system of taxation. This concept of shared responsibility makes sense in cases of domestic matters.[629]

However, for the principle of *égalité* to provide a justification for reparation

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627 HR 13 September 2013, ECLI:NL:HR:2013:BZ7396.

628 J.C Venezia, 'The Protection of Equality in French Public Law' in T. Koopmans (ed.), *Constitutional Protection of Equality* (Netherlands Association of Comparative Law/A.E. SIJTHOFF 1975) 137.

629 Ibid, 131; Léo Duguit, 'C–Administrative Law: Compensation for Losses of War' (1919) 13:3 *Law Review* 565.

to victims of collateral damage, three objections need to be overcome. First, the fact that the principle of *égalité* is applicable in domestic matters where individual victims share (on the basis of taxation and nationality) solidarity with other members of the society that are required to contribute to resolving state burdens, cannot easily be extended to cases of IACs, especially when victims of collateral damage are from an enemy state. Second, whereas there are several absolute strict liability regimes in different countries, the truth is that not all states embrace the French principle of *égalité*. It can be argued that proposing the extension of the principle of *égalité* into international law is stretching it beyond limits acceptable to those states. Third, as Duguit notes, '[i]t is impossible to take away entirely the considerable amount of *vis major* that is in all military operations in time of war. Besides, to tell the truth, the cause of the loss is the war, and not the functioning of a public duty.'[630]

Certainly these are strong objections, but the first two entail an implied acknowledgment that in case of NIACs the principle of *égalité* provides a good justification for providing reparation to victims of collateral damage. And, if this is true, then we would be providing a solution (theoretically) to many victims of current wars. The question of whether the principle of *égalité* should apply to IACs remains ideologically difficult to overcome. It would seem fair to assume that if the cost of military equipment is never contested, paying for collateral damages of war that are in the same category as those other costs of war should not cause problems as well. As Reisman argues, 'the foreign victim is doubly injured – by the act and by the absence of enjoyment of any indirect benefit from it as a member of the community on whose behalf the injurious act was done.'[631] The counter-argument would probably be that there is no alternative way to shift those other costs of war to the enemy state. Therefore, the purpose of the principle of *égalité* is to remain inspirational, to serve as an alternative way of looking at lawful damages of war, and not as a basis on its own for victims of collateral damage to claim reparation under international law.

The main objection that affects both IACs and NIACs is whether the *vis major* element of war should refuse reparation for victims of collateral damage. The Black's Law Dictionary defines *force majeure/vis major* as 'an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).'[632] An 'Act of God' is 'an overwhelming, unpreventable event caused exclusively by force of nature (…) all natural phenomena that are exceptional, inevitable, and irresistible, the effect of which could not be prevented or avoided by the exercise of due care or foresight.'[633] The defense of *force majeure* also referred to as the 'irresistible force defense' is based on the fact that the cause of damage was

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630 Duguit, 'C–Administrative Law: Compensation for Losses of War', 363.
631 Reisman, 'Compensating Collateral Damage in Elective International Conflict', 7.
632 *Black's Law Dictionary* (8th edn., Thomas West, 2014) 673-674.
633 Ibid, 37.

both unpredictable and unavoidable. It is the 'irresistible nature' of an event that gives an excuse to the concerned party.[634] The commentaries on Article 23 of the Draft Articles, which provides *force majeure* as one of the grounds that precludes the wrongfulness of an act of the state, explains that '[t]he adjective "irresistible" qualifying the word "force" emphasizes that there must be a constraint which the state was unable to avoid or oppose by its own means.'[635] In other words, to accept that *force majeure* is an excuse for parties to the conflict not to provide reparation to victims of collateral damage is to acknowledge that collateral damage is a result of an irresistible event (an event that is beyond the control of those parties). Even if it sounds consistent with the definition of collateral damages of war, war itself, the main cause of collateral damage, is not in the same category as 'Acts of God' (acts of nature). Collateral damage is instead a foreseeable phenomenon of war. The party claiming the defense of *force majeure* should not have contributed to the occurrence of that event. The commentaries on Article 23 of the Draft Articles refer to war as an exclusion of the wrongfulness of an act of a state in relation to the loss of the control over a territory due to an insurrection or due to the military activities of a third state.[636]

Let us agree, for the sake of argument, that war should be used as a *force majeure* defense even for parties to the conflict, it would still be fair to argue that that acknowledgment alone should not stop the debate about providing reparation to victims of collateral damages of war because the issue of wrongfulness is already out of question – laws of war make collateral damages of war lawful. Therefore, the discussion is not about the wrongfulness or not of the damaging incident but rather on which ground victims of lawful incidents of war could receive reparation. The analogy should be made in relation to the Draft Principles on the Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities. The fact that the draft principles do not preclude the responsibility of the injurious state (state of origin) on the basis of war – despite the fact that China had suggested for the exemption from prevention obligations 'in cases of *force majeure* such as natural disasters or armed conflicts'[637] – such a reasoning is equally useful in justifying reparation for victims of collateral damage under the principle of *égalité*.

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634 S.P. Singh, *Law of Tort: Including Compensation under the Consumer Protection Act* (5th edn., Universal Law Publishing co. 2010) 146; Matthew Parish, 'On Necessity' (2010)11:2 *The Journal of World Investment & Trade* 169, 170; Jay D. Kelley, 'So what's your excuse? An analysis of force majeure excuses' (2007) 2:1 *Texas Journal of Oil, Gas, and Energy Law* 91, 92.

635 Article 23, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, (Report of the International Law Commission on the work of its fifty-third session, 2001) 76.

636 Ibid.

637 Ma Xinmin, 'Statement on "Prevention of Transboundary Harm from Hazardous Activities and Allocation of Loss in the Case of Such Harm"' (2008)7:2 *Chinese Journal of International Law* 567, 568.

Chapter 7: Back to Basics: Humanitarianism and Reparation of Collateral Damage

The laws of war protect non-combatants against the effects of war. Belligerents are prohibited from attacking non-combatants or civilian properties directly and causing incidental damage that is excessive in relation to the military objective. In case of a violation, victims have a right to reparation. However, the laws of war do not provide total protection; non-combatants can be accidently or incidentally harmed or their properties destroyed without making that conduct unlawful (collateral damage).[638] The fact that the right to reparation is based on the breach of another (primary) right[639] tacitly excludes collateral damage from reparation.[640] There are historical reasons for this omission. The development of the current laws of war was too much oriented on preventing and punishing some behaviour and not so much based on the interests of the victim. They are crime - and not harm - oriented. That is because the idea of war crimes at the end of the 19th and beginnings of the 20th century became the very first inroad on the old paradigm of legal war, namely that states had a sovereign right to wage war (*jus ad bellum*) and had the right to commit their citizens (life and property) to the war. By consequence, all damages of the war were committed against states which often waived them (amnesty). The idea that there could be punishment and reparation for violations of the laws of war was a first inroad to that, and it was codified in The Hague Conventions (reparation) and in the Peace of Versailles and Nuremberg/Tokyo. Since then the *jus ad bellum* has radically changed and we do not accept any more that states, let alone non-state actors, can jeopardize the lives and property of non-combatants just like that.[641] The Geneva Conventions and Additional Protocols' focus on the protection of non-combatants is a demonstration of a shift towards acknowledging that individual rights ought to be respected during war, but the change has as yet not been fully consummated in the right to reparation. As Paul notes, 'protocol 1 reiterated The Hague compensation language verbatim in 1977, even when normative

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[638] Gabriel Sweney, 'Saving Lives: The Principle of Distinction and the Realities of Modern War' (2005) 39:3 *The International Lawyer* 733, 733-736; Alejandro Lorite Escorihuela, 'Humanitarian Law and Human Rights Law: The Politics of Distinction' (2011)19:2 *Michigan State Journal of International Law* 299, 323.

[639] Veronika Bilkova, 'Victims of War and Their Right to Reparation for Violations of International humanitarian law' (2007) 4:1 *Miskolc Journal of International Law* 1, 1.

[640] See also Rosenfeld, 'Collective Reparation for Victims of Armed Conflict', 731; J. Crawford, *State Responsibility: General Part* (Cambridge University Press 2013) 480.

[641] See also J. Pictet, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff Publishers, 1985), 40-58.

background and assumptions had radically changed.'[642] In other words, the old justification for limiting reparation to victims of war crimes has lost its historical-theoretical foundations.

Throughout the preceding chapter (in particular sections 6.2 to 6.4), some potential grounds justifying reparation for victims of collateral damage have been identified and discussed. Human dignity, a much more advanced concept in human rights law, which is also part of the laws of war, offers a human based justification. Providing reparation to victims of collateral damage advances the idea that 'all human beings have a right to live and to enjoy their property.'[643] Additionally, reparation for collateral damage is justifiable when wars are considered as dangerous activities, which they are. As a consequence, all damages caused during war (lawful and unlawful) would become compensable. The military necessity argument does not stand as a strong ground to refuse reparation for collateral damage in front of the principle of *égalité*. The principle of *égalité* considers the public interest –military necessity in this case – to be the reason why victims of lawful public damages should be compensated. Otherwise, not doing so makes some members of the society (victims) disproportionately shoulder the state burden. These are some of what Reisman calls deviations from established legal arrangements.[644] Human dignity, equality and strict liability are some of the principles that are given to justify reparation for victims of collateral damage.[645]

Preceding chapters have also shown that reparation to victims of collateral damage could have some societal benefits, such as contributing to reconciliation and social cohesion among the affected communities (section 3.4 & chapter 4) as well as promoting military-civilians 'friendly' cooperation (chapter 5). However, none of these grounds and benefits provides a coherent justification. By a coherent justification, I mean an explanation that fits into the current laws of war.[646] Reparation for collateral damage cannot be fully justified through human rights law for at least two reasons: (1) As Newton and May note, '[h]uman Rights are not absolute, but in human rights law the exceptions are few and largely restricted to cases of emergency.'[647] It is in that same vein that human

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[642] Paul, 'The Duty to Make Amends to Victims of Armed Conflicts', 99 (paraphrased).

[643] Reisman, 'Compensating Collateral Damage in Elective International Conflict', 9.

[644] Ibid, 9.

[645] Ibid*;* Paul, 'The Duty to Make Amends to Victims of Armed Conflict'; Ronen, 'Avoid or Compensate?'.

[646] For a discursive meaning of coherence see Paul Thagard and Karsten Verbeurgt, 'Coherence as Constraint Satisfaction' (1998) 22:1 *Cognitive Science* 1; Amalia Amaya, 'Legal Justification by Optimal Coherence' (2011) 24:3 *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law* 304; Robert Alexy and Aleksander Peczenik, 'The Concept of Coherence and Its Significance for Discursive Rationality' (1990) 3:1 *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law* 130.

[647] M. Newton and L. May, *Proportionality in International Law* (Oxford University Press, 2014) 131.

rights law does not prohibit incidental or accidental deaths that happen during war (collateral damage). (2) Reparation under human rights law is essentially a violation based right and calling collateral damage a violation would be rejected on moral grounds. (International) strict liability applicable in case of dangerous activities does not give a straightforward justification for reparation to collateral damages because reasons for going to war are slightly different from those of undertaking economic activities. Tort law too is inadequate because it was developed to regulate the conduct between private persons. The purpose of referring to the application of these norms (human rights/dignity, fairness, equality, strict liability and tort law) is to serve as an inspiration to introduce reparation for victims of collateral damage but doing so should be consistent with the laws of war. Justifying reparation for victims of collateral damage would become less strange if the laws of war fully integrated some ideas of strict liability, fairness, equality, human dignity as well as economic analysis and theories of corrective and distributive justice (section 6.1). As Englard argues, '[t]he search for a uniform, systematic liability principle will remain an unachievable end in legal theory. (…) the complex nature of human justice requires a pragmatic combination of the disparate, but essential, notions of individual responsibility, social solidarity and economic efficiency.'[648]

The crucial determination of this book so far is that discriminating victims of collateral damage is both unfair and indefensible. This claim will be further elaborated in Section 7.1, putting much emphasis on the similarity between victims of collateral damage and victims of violations of laws of war as a motivation to discourage discriminating the two categories. Section 7.2 is an attempt to provide a coherent justification for reparation to victims of collateral damage. It argues that reparation for victims of collateral damage should be justified on humanitarian reasons, a ground consistent with the legal framework protecting civilians during war.[649]

7.1 Fairness: Treat Like Victims Alike

Chapter 2 (in particular Section 2.4) has shown that there is, in reality, no clear-cut distinction between victims of collateral damage and victims of violations of the laws of war. The main hindrance is that making such a distinction appeals to subjective elements, understanding the intention of the attacker and also depends on how best you re-create – in mind – the situation of war.[650] A victim of a war

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[648] Izhak Englard, 'The Basis of Tort Liability: Moral Responsibility and Social Utility in Tort Law (1990) 10:89 *Tel Aviv University Studies in Law* 89, 98.

[649] Anthony E. Hartle, 'Humanitarianism and Laws of War' (1986) 61:235 *Philosophy* 109, 109; Michael Barnett, 'What Is the Future of Humanitarianism?' (2003) 9:3 *Global Governance* 401, 402; Didier Fassin, 'Humanitarianism as a Politics of Life' (2007) 19:3 *Public Culture* 499.

[650] See also Lester Nurick, 'Distinction between Combatant and Noncombatant in the Law of war' (1945) 39:4 *The American Journal of International Law* 680.

crime is not different from a victim of collateral damage because the required distinction is based on the conduct of the military commander and not of the victims. This section claims that, for purposes of fairness, since reparation is aimed at dealing with the consequences of harm which both categories of victims suffer, they should be treated alike. This argument is based on Hart's idea of 'treat like cases alike and unlike cases differently.'[651] To understand this claim requires understanding the use of the two concepts: fairness and likeness. The concept of fairness, which is often understood as a justification for individuals in a common venture to equally share the benefits and burdens of that cooperation,[652] is modified to fit the concept of equality of all victims resulting from having been subjected to similar consequences of war. The basis of this fairness claim is that collateral damages are losses that are imposed on innocent people in order to attain public interests such as peace or sovereignty. Therefore, the beneficiaries of that public good should equally share in the burden.

The unfairness claim is based on a belief that victims of collateral damage suffer similar consequences of war as victims of violations of laws of war, and since the latter is entitled to reparation at the exclusion of the former, it is unfair. 'Treat like cases alike', is often used to achieve uniformity, predictability and certainty of laws.[653] However, strict adherence to current laws of war is problematic because it is the main source of the unfairness. It is the existing laws of war that are causing victims of war being treated differently.[654]

To elaborate further on the unfairness of the current laws of war towards victims of collateral damage, four fictitious scenarios are used.[655] Let us assume that there is a war between belligerent A and B. On July 5, 2013, belligerent A gets some intelligence that on Saturday July 6, 2013, belligerent B will receive a truck full of heavy weaponry and ammunitions. While still working on some leads, additional information comes in swiftly that the truck is approaching a nearby primary school – the only remaining place outside a big city. The commander concludes that that is the remaining position where the attack on the truck might cause relatively few casualties to both civilians and to their soldiers.

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[651] H.L.A. Hart, *The Concept of Law* (Oxford University Press 1961) 153-163.

[652] Nozick, *Anarchy, State, and Utopia*, 90-101; Coleman and Ripstein, 'Mischief and Misfortune', 94-95; Elaine Hatfield, Michael Salmon, and Richard L. Rapson, 'Equity Theory and Social Justice' (2011) 8 *Journal of Management, Spirituality, and Religion* 101.

[653] Kenneth I. Winston, 'On Treating Like Cases Alike' (1974) 62:1 *California Law Review* 1, 16; see also David A Strauss, 'Must Like Cases Be Treated Alike?' [May 2002] University of Chicago, Public Law Research Paper No. 24 http://www.law.uchicago.edu/files/files/24.strauss.like-cases.pdf accessed on 5 August 2013; Andrei Marmor, 'Should Like Cases Be Treated Alike?' (2005) 11:01 *Legal Theory* 27.

[654] The reasoning inspired by combining what is in Kenneth I. Winston, 'On Treating Like Cases Alike', 18ff, and David A Strauss, 'Must Like Cases Be Treated Alike?', 9ff.

[655] Meaning all the information, figures and names, are made up.

Scenario one: At the primary school there are no pupils, except the Headmaster's family, (George and his wife Jane with their two children the 8-year-old daughter Josephine and the 10-year-old son, Joseph) who live two hundred meters away from the school. After weighing the military advantage and the consequences of it, the commander orders the attack. The aftermath is the destruction of the truck, but also the killing of George and his daughter Josephine who were both still having breakfast in the house. His son Joseph is injured from a fragment while playing outside. Jane had already left the house to her daily work in the market where she sells vegetables.

Scenario two: The commander is told that in addition to George's family there is a celebration going on at the primary school. It is an event that brings together teachers, pupils, and parents to celebrate the end of the academic year before the beginning of a summer holiday. The commander insists that the target is important and orders the attack anyhow. The aftermath is in addition to what happened to George's family in the first scenario, the killing of 40 other innocent civilians and injuring 100 more.

Scenario three: The commander got information before the truck reached the primary school, but in the process of targeting the truck, due to the technical malfunction of the weapon, a bomb drops on George's house causing exactly the same consequences to his family as in scenario one or as in scenario two.

Scenario four: The commander decides to target civilians to spread fear hoping that using that route will also be impossible. The shelling at the primary school causes the same consequences to George's family as in scenario one or as what happened in scenario two.

To demonstrate the likeness of victims of war, we take George's family as our focal point and assume that we know all facts. In scenario one, it can be argued that the killing of two civilians, George and his daughter Josephine, and injuring his son Joseph and destroying their family house is not (clearly) excessive in relation to the military advantage anticipated, the prevention of the delivery of weapons which would have contributed to the sustenance of the conflict and consequently resulted in the killing of many more people. Scenario two, even if what happened to George's family in scenario one remains the same, the killing of more other 40 and injuring of 100 innocent civilians, qualifies the attack as a massacre – thus, what happened to George's family in scenario one is collateral damage whereas it is a war crime in scenario two. In scenario three, the attack on George's family was an accident and therefore collateral damage, whereas in scenario four, since George's family was intentionally targeted when it is prohibited to target civilians, that conduct itself is a war crime irrespective of the number of casualties. In reality, there is no factual difference about what happened to George's family in these four scenarios, the only difference lies in the intention of the military commander and other surrounding circumstances.

The consequence of strict adherence to the rule that it is the unlawfulness of the conduct that matters means that Jane, George's widow, might receive reparations in scenarios two and four and not in scenarios one and three. Clearly, based on the likeness of what happened to George's family, treating her differently is both unfair and unjustifiable, at least from the victim's standpoint. It is reasonable to claim that Jane would expect similar treatment in all four scenarios because she will have the same needs – she will need shelter, she will be in grief for the loss of her husband and daughter, and she will have to face the challenges of taking care of her injured son and herself, irrespective of whether the harm resulted from an incident that is unlawful or not.

Certainly, war does not produce identical victims as it has been claimed in the above scenarios. Every incident produces different victims harmed in different ways and it is possible to explain to the affected community the difference in those circumstances. However, as Perelman remarks:

> When people are heard complaining of having been unjustly treated (…) nobody will suppose that these people were identical with those to whom they compare themselves (…) The fact is, they claim that *certain* elements, regarded as *essential,* and nothing else, ought to have been taken into consideration. The decision is said to be unjust because it has failed to take account of them or because it was taken by reference to irrelevant factors having nothing to do with the case.[656]

The 'likeness' argument does not claim that collateral damages of war are exactly the same as damages from war crimes, neither is it to reject the fact that reparation can be used as a sanction for a wrongful conduct – as a punitive measure. As the ICC Trial Chamber I noted, reparation can express a 'disapproval and condemnation of the wrongdoing.'[657] However, insisting on achieving the punitive benefits of reparation at the expense of its other fundamental role of dealing with or wiping out the consequences of harm caused to the victim is unfair. This is what Reisman calls confusing 'two entirely different sanction objectives: punishing the law violator, on the one hand, and succoring the victims who suffer, on the other, whether or not the cause of their injury was a violation of the law of war.'[658] Distinguishing between the lawfulness and unlawfulness of the harm is to confuse the interest of punishing bad behaviour with the interest of repairing the harm. Reparation does not only punish the bad behaviour, but also repairs the damage.

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656 Ch. Perelman, *The Idea of Justice and the Problem of Argument*, 81.

657 ICC Trial Chamber I, 'Situation in the Democratic Republic of Congo in the case of the *Prosecutor v. Thomas Lubanga Dyilo*: Decision on the Defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations' [no.: ICC-01/04-04-01/06 of 29 August 2012] § 23.

658 Michael W. Reisman, 'The Lessons of Qana', 397.

7.2 Reparation on humanitarian grounds: A Logical Expectation

The claim established so far in the above section (7.1) is that it is unfair to discriminate victims of collateral damage because of their likeness to victims of violations of laws of war. The likeness is established on the fact that victims of collateral damage suffer similar consequences as victims of violations of laws of war, so it is fair that both categories be treated equally in terms of reparation. This argument essentially identifies a problem in the existing legal reasoning, but it does not answer to the other fundamental part of the question: if there are indeed no good reasons for the exclusion of victims of collateral damage, on which ground is their right to reparation justifiable under the laws of war. This is very fundamental because reparation for violations of law is based on the wrongfulness of the conduct, which collateral damage is not, therefore there is a need to find a ground that justifies reparation beyond the similarity in suffering, an explanation that is coherent with the laws of war. This section claims that justifications for reparation of collateral damage are found in humanitarian ideals underpinning the laws of war. For purposes of clarity, it is important to distinguish between humanitarianism and international humanitarian law. Humanitarianism is a concern for the wellbeing of an individual as a human being. It is humanitarianism, the desire to reduce human suffering during war which has contributed to the development of not only humanitarian assistance, aid/relief services to victims of war, and international humanitarian law but also humanitarian interventions,[659] or concepts such as the responsibility 'to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.[660]

Distinction – the basic rule of the laws of war – requires those at war to 'ensure respect for and protection of the civilian population and civilian objects, (…) distinguish between the civilian population and combatants and between civilian objects and military objectives and (…) direct their operations only against military objectives.'[661] Kalshoven argues that '"respect" and "protection" are complementary notions. "Respect" as a passive element, indicates an obligation not to harm, not to expose suffering, not to kill a protected person; "protection", as the active element, signifies a duty to ward off dangers and prevent harm.'[662] The basis for this protection is a humanitarian desire to reduce effects of war

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[659] J. Crowe and K. Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar 2013) 1-3, 29-30 & 115; F. Bouchet-Saulnier, *The Practical Guide to Humanitarian Law* (3rd edn., Rowman & Littlefield 2014) 310-316; Pictet, *Development and Principles of International Humanitarian Law,* 68-71; D. Fisher, *Morality and War: Can War be Justice in the Twenty-First Century?* (Oxford University Press, 2011) 221-242.

[660] United Nations General Assembly, 'Implementing the responsibility to protect: Report of the Secretary-General' (12 January 2009, A/63/677) § 1.

[661] Article 48, Additional Protocol I; see also Durham, 'International Humanitarian law and the Gods of War: The Story of Athena versus Ares', 256.

[662] Frits Kalshoven, *Constraints on the Waging of War* (Martinus Nijhoff Publishers 1987) 42.

on non-combatants.[663] Pictet notes that humanitarian law combines two aspects; legal and moral. It is 'inspired by a feeling for humanity and centered on the protection of the individual in time of war.'[664] Teitel considers humanitarianism as an 'aspiration for human security' that goes beyond legalistic perspectives.[665]

Two elements are crucial for understanding how reparation to victims of collateral damage should be justified on a humanitarian ground: (1) protection of civilians is based on their innocence (non-combatance status) and certainly that innocence continues even after the harm. (2) The purpose of the laws of war, particularly of International Humanitarian Law, is 'to respect individual persons and minimize human sufferings.'[666] The logical meaning of 'minimizing human suffering' should entail an understanding that this goal becomes absolutely necessary after the failure of the initial protection. After the cause of harm the injurer should adopt measures to minimize the suffering. Ordinarily, once you have injured someone unintentionally, what is left for you is to apologize and ask the victim if there is any assistance you can provide. As Walker notes, 'saying "sorry" and having the other say "it is okay" and both being done with a small aggravation is not only an efficient way to clear the path ahead, but it's a way that allows for the contrite and the forgiving parties to feel good (...).' As she reminds us, this is something '[w]e all learn the very simplest – "Say you're sorry" – at mother's knees.'[667] Bennett on 'Morality and Bad Luck' notes that actual consequences fall into two parts: 'One part is not much like blame, it involves coolly holding a person responsible for actual consequences while knowing that he is not to blame for them.' (And another part) is 'in which morally faulty behaviour is met with a heightened degree of rage, [and] resentment (...).'[668] Therefore, in case of harm and fault the responsible party should be punished in addition to providing reparation while in the situation of blameless harm (collateral damage) the responsible party should be asked to simply repair the damage.

To recognize the concept of providing reparation to victims of collateral damage would require the willingness to separate civilian damages from state

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663 Article 50(1), Additional Protocol I; see also ICRC, Customary IHL Database, 'Rule 1: the principle of The Principle of Distinction between Civilians and Combatants' http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 accessed on 25 February 2014.

664 Pictet, *Development and Principles of International Humanitarian Law*, 1.

665 R. G. Teitel (ed.), *Globalizing Transitional Justice: Contemporary Essays* (Oxford University Press 2014) 146-147.

666 Anthony E. Hartle, 'Humanitarianism and the Laws of War' (1986)61:235 *Philosophy* 109, 109; see also Emily Crawford, 'Blurring the Lines between International and Non-International Armed Conflicts - The Evolution of Customary International Law Applicable in Internal Armed Conflicts' (2008) 15:1 *Australian International Law Journal* 29, 38ff; David Kretzmer, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42:1 *Israel Law Review* 8, 12-20.

667 Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing*, 196-197.

668 Bennett, *The Act Itself*, 58-59.

damages. It would mean that reparation is provided for the benefit of individual victims and not their states. This is where at least human rights law could provide a useful inspiration. Individualized reparation is well developed under human rights law compared to the laws of war.[669] The use of 'human rights' here, however, is different from human rights law as a specific field of law. The use of human rights in this case is to emphasise that reparations should benefit individuals, those who suffered harm, but the ground on which it is provided should remain humanitarian, the same justification that prohibits targeting non-combatants.[670] This suggestion is an appreciation of the fact that it is through adopting measures that provide direct benefits to those individual victims that their sufferings can either be wiped out or reduced.

It is also important to note that the idea of providing reparation on humanitarian grounds is different from providing reparation as an act of benevolence. The term humanitarian in this sense denotes the same connotation and strictness that is applicable in the laws of war. The protection of civilians is not left to the sympathy of belligerents and the same could apply to reparation for victims of collateral damage. The same spirit that compels even an aggressed nation to fight justly – not to target innocent civilians of an aggressor nation[671] – should be the same spirit that justifies providing reparation to victims of collateral damage as a consequence once the damage is caused. Logically, minimizing the suffering of innocent persons is truly possible in the sense that once the protection fails – accidently or incidentally – the injurer provides reparation. As Crowe and Weston-Scheuber note, 'humanitarianism brings moral limits back into war by seeking to moderate the effects of warfare in the name of human ideals.'[672] The suggestion therefore is that humanitarianism could provide the ground on which justifications for reparation of collateral damage can be integrated into the laws of war. By covering victims of collateral damage, International Humanitarian Law would truly fulfil its stated mission of ensuring 'respect for the most basic human values, such as dignity, community and freedom from suffering.'[673] In brief, the spirit behind the codification of laws of war – in particular Geneva Law or International Humanitarian Law – was the human desire to reduce the suffering of others especially the weak.[674] It should be the same spirit to justify reparation for victims of collateral damage.

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[669] Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*,18-19.

[670] The development of laws of war was about 'humanity' as opposed to 'rights', see Cordula Droege, 'Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', 313.

[671] Laws of war 'applies in cases of armed conflict whether the conflict is lawful or unlawful in its inception under the *jus ad bellum*.' See Roberts and Guelff, *Documents on the Laws of War*, 1.

[672] Crowe and Weston-Scheuber, *Principles of International Humanitarian Law*, 2.

[673] Ibid, 3.

[674] Beat Schweizer, 'Moral Dilemmas for Humanitarianism in the era of "Humanitarian" Military Interventions' (2004) 86:855 *Review of International Committee of Red Cross*, 547-548.

However, the principle of humanitarianism can be very difficult to use in a context of war where interpretation of rules and principles is often strict. If indeed the humanitarian spirit – the feeling for the suffering of others – is a convincing ground (justification) for providing reparation to victims of collateral damage, shouldn't we have included soldiers, those who get injured or killed during the fighting? As Newton and May observe, there is an increasing voice among the human rights theorists arguing that; 'necessity and proportionality considerations dictate that soldiers cannot merely be treated as cannon fodder (…). … [t]hose initiating war, and those prosecuting a war, must take account of combatant as well as civilians casualties, because all people have rights.'[675] To put it differently, the right to reparation that is discriminatory against victims of collateral damage equally excludes soldiers, so if there is an effort to correct that injustice, in all fairness, it should consider *all* victims including soldiers because they too suffer the same consequences of harm as victims of collateral damage. In fact, it is the soldiers that are most directly affected.[676] Outwardly, this is true. It is allowed to harm a non-combatant accidently or incidentally (collateral damage) as well as it is lawful to target and kill or injure a combatant. It is also true to argue that a combatant will suffer harm in the same way as a non-combatant. However, if we could put those two similarities aside, and without considering the fact that being a soldier is a profession that has its well-known risks (including death),[677] most armies have means in form of packages, pensions or allowances, benefiting their wounded soldiers or their family members (heirs), in case of death. It is therefore inaccurate to conclude that soldiers are in the same predicament as victims of collateral damage.

As already noted, the existing general practice – where victims of collateral damage have received some reparation as amends, condolence/*ex gratia* payments, assistance etc. – is still very limited to suggest an emerging customary norm. Therefore, as we come closer to the end of this book, the question to answer is: what should be done next to address this situation (legal vacuum)? I suggest that two things should happen concurrently: (1) Efforts should be made on the international level to amend the Additional Protocol 1, especially Article 91. (2) At the domestic level, States should adopt measures, especially legislations, providing reparation to *all* victims of war. For instance, the US is not a party to Additional Protocol 1, but recently, the US Congress adopted Section 8127 of the Consolidated Appropriations Act, 2014, granting ex-gratia payments to 'friendly foreign civilians' harmed in 'combat operations of the Armed Forces in a foreign country.' The Act clearly stipulates that the payment of ex-gratia is not 'an admission or acknowledgement of any legal obligation to compensate for any

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675 M. Newton and L. May, *Proportionality in International Law* (Oxford University Press, 2014) 121.

676 *Ibid*, 128.

677 Every profession has its own risks, some are more dangerous than others of course, we often read and watch news about people trapped underneath in mines, or stories about work related diseases.

damage, personal injury, or death.'[678] Certainly, this is not the best legislation we could have, but it is (to a certain extent) an indication that what could be slow to achieve on the international level can be done on national level. The adoption of Section 8127 improves the often improvised and sometimes discretionary practices used in Iraq and Afghanistan (as discussed in Chapter 5). As Muhammedally notes; '[t]his acknowledgement and funding for civilian harm presents the Pentagon with an opportunity to create a longstanding program that will help war victims far into the future.'[679] This suggestion might not convince some sceptics who are likely (for obvious reasons) to question the point of amending Article 91 of Additional Protocol 1 to include victims of collateral damage when in reality not all victims of violations are receiving reparations. This is a depressing reality of course, but as Orend rebukes, this 'challenge is akin to saying that because no one adheres to the speed limits on the road, there should be no speed limits at all.'[680] It would be a good thing if all the existing individual rights were fully respected, but unfortunately this is not always the case. The question of whether victims of collateral damage should (not) have a right to reparation concerns a theoretical and normative inquiry whereas the implementation part of it belongs to practice, where practitioners ought to find pragmatic solutions.

7.3 Practical Challenges to Reparation for Victims of Collateral Damage

The challenge that is often raised when discussing reparation to victims of war is the issue of lack of sufficient resources. In order for the right to reparation to go beyond being a mere statement on a piece of paper is that it should be implementable. The reality is that wars cause massive destruction which makes it difficult to provide individual reparations.[681] Post-conflict countries are often left with weak economies. The delicate balance is therefore about ensuring that reparation to victims does not significantly undermine the capacity of a given post-conflict state to deliver other services to the general public.[682] This is certainly

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[678] An act making consolidated appropriations for the fiscal year ending September 30, 2014, and for other purposes, as enacted by the Senate and House of Representatives of the United States of America in Congress assembled. (One Hundred Thirteenth Congress of the United States of America, 2nd session, 3 January, 2014, Washington, accessed at https://beta.congress.gov/113/bills/hr3547/BILLS-113hr3547enr.pdf on 15 September 2014).

[679] Sahr Muhammedally, 'Civilian War Victims Receive Recognition in US Law' (Just Security: 3 April 2014, accessed at http://justsecurity.org/8882/civilian-war-victims-receive-recognition-law/ on 3 September 2014).

[680] Brain Orend, 'Justice After War: Towards a New Geneva Convention' in E. Patterson (ed.), *Ethics Beyond War's End* (Georgetown University Press, 2012) 178.

[681] Christian Tomuschat, 'Reparation for Victims of Grave Human Rights Violations' (2002) 10 *Tulane Journal of International and Comparative Law* 157, 175-180; Roger P. Alford, 'On War as Hell' (2002) 3:1 *Chicago Journal of International Law* 207.

[682] United Nations, 'Reports of the International Arbitral Awards: Eritrea-Ethiopia Claims Commission - Final Award - Ethiopia's Damages Claims' [2009] Volume XXVI: 631-770 §§18-27.

an important challenge to consider while contemplating providing reparation to victims of collateral damage. Nonetheless, the challenge of scarcity of resources is not specific to victims of collateral damage because the same can be said about reparation to victims of war crimes. Furthermore, not all wars necessarily produce huge numbers of victims and not all parties to wars have weak economies. It should also be noted that it would be misleading to reduce everything about the failure to provide reparation to a lack of resources. The willingness of parties too plays an important role. This is not to reject the fact that under certain circumstances resources might be very limited necessitating some kind of categorization of victims or prioritization. In case there are compelling reasons to prioritize among victims, categorization should not be based on whether the harm resulted from lawful or unlawful incidents but rather on the needs of victims such as vulnerable orphans, widows or victims of serious injuries. In making such a factual based prioritization, it is possible that, for instance, vulnerability might include both victims of lawful and unlawful conduct.

The second challenge that is connected to the huge number of war victims is the determination of 'adequate reparation'. The Executive Summary of the Amsterdam International Law Clinic report on 'Monetary Payments for Civilian Harm in International and National Practice' which was commissioned by the Center for Civilians in Conflict, starts with a question: *how much is a life worth?*[683] This question is both easy and difficult to answer. Easy because it can be argued that in every society, country or community, there are rules, customs or practices addressing relations between individuals in case of a human loss and that such practices should be used (or at least be inspirational) in assessing reparations for war victims. However, it is difficult because of the number of cases involved in war situations. Ideally, reparation should cover physical damages such as body injuries and human loss, economic loss such as loss of properties, earnings or lost opportunities and moral or mental loss such as pain and grief.[684] Reparation in case of a human loss is not about whether we should put a price tag on each dead body because losing a person is an irreparable harm. Reparation should attempt as much as feasible to wipe out the consequences of the harm.[685]

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[683] Amsterdam International Law Clinic, 'Monetary Payments for Civilian Harm in International and National Practice' [2013] http://civiliansinconflict.org/uploads/files/publications/Valuation_Final_Oct_2013pdf.pdf accessed on 16 October 2013, 4.

[684] Ibid, 9.

[685] Maria Suchkova, 'The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation' [2011] University of Essex, Reparations Unit, Briefing Paper No.5 http://www.essex.ac.uk/tjn/documents/Paper_5_Participation_Large.pdf accessed on 17 October 2013; Lisa J. Laplante, 'Negotiating Reparation Rights: The Participatory and Symbolic Quotients' [2012] 19*Buffalo Human Rights Law Review* 217; Cristián Correa, Julie Guillerot, Lisa Magarrell, 'Reparations and Victim Participation: A Look at the Truth Commission Experience' in Carla Ferstman, Mariana Goetz and Alan Stephens(eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill Academic Publishers 2009) 385.

The Third challenge is that reparations are not just about resources, they are also related to 'who' is responsible. The conclusion of this book so far is that it is the injurer who is responsible, plain and simple. This answer is more or less straightforward when we consider wars as something happening between States (IACs). However, it would be naive not to acknowledge the complexities involved in some of the current wars, where the injurer might be an 'independent Non-state Actor' or a private military contractor. As it is noted in the ILA's 3rd draft report on Non State Actors, 'reparations are particularly appropriate in horizontal relationships between States. (…) It is doubtful whether a reparation regime for armed groups should mirror the regime for States and International Organizations.'[686] The most recent liberal views however are moving towards accepting that rebels (Non-State Actors) too should provide reparation to victims of their violations especially when they become a new government or through civil actions against individual members before national courts.[687] In some situations, violations of Non-State Actors can be attributed to States or International Organizations for their complicity in violations or in case of their omission to protect people.[688] Despite the fact that the responsibility of Non-State Actors is still an ongoing debate,[689] I think the proposed approaches, perhaps not all, could be used in cases of collateral damage, after a right to reparation is established.

The Fourth challenge relates to the question on whether reparation to victims of collateral damage affects the primary obligation – the protection offered to non-combatants – under the laws of war. The ILA warns against rendering 'the distinction between lawful and unlawful conduct meaningless (…)', and

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[686] Cedric Ryngaert and Jean D'Aspremont (co-rapporteurs), 'Non State Actors' (ILA Washington Conference 2014) 10 http://www.ila-hq.org/en/committees/index.cfm/cid/1023 accessed on 23 May 2014.

[687] ILA, Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive issues), Article 5 (responsible party), commentary, (Conference Report, The Hague 2010), 11-13; Emanuela-Chiara Gillard, 'Reparation for violations of international humanitarian law' (2003)85:851 *International Review of the Red Cross,* 545—548.

[688] *Ibid.*

[689] Andrew Clapham, 'The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement' (2010) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636 accessed on 20 May 2014; Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88: 863 *International Review of the Red Cross* 491;Annyssa Bellal & Stuart Casey-Maslen, 'Enhancing Compliance with International Law by Armed Non-State Actors' (2011) 3:1 *Goettingen Journal of International Law* 175; Elizabeth Holland, 'Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts' (2011) 34:1 *Suffolk Transnational Law Review* 145; Orla Marie Buckleyt, 'Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara' (2012)37:3 *North Carolina Journal of International Law and Commercial Regulation* 793.

encourages the adoption of 'pragmatic solutions' to repair lawful damages.[690] It is argued that whereas the attacking party might adopt precautionary measures to reduce harm, reparation of collateral damage could 'reduce incentives for victims to take precautions, and create incentives for adversaries to put victims in harm's way.'[691] If we understand reparation as an attempt to put matters in the *status quo ante*, it is implausible that potential victims (civilians) will risk their lives and properties for the sake of compensation. What is possible though is that some belligerents could use civilians as human shields. However, the use of civilians to protect military objectives is prohibited in Articles 51(7) and 58 of the Additional Protocol 1, and it is a well-established principle of international law that any violation of an international obligation – in this case, the duty not to put 'intentionally' civilians in harm's way – entails a duty to repair.

In a nutshell, providing reparation to victims of collateral damage could promote principles of human dignity, equality and fairness. It might benefit efforts of social cohesion and reconciliation initiatives. And, in case of an ongoing war, prompt reparation is seen as a military strategy that might win the trust of the civilian population. However, the strength of these values and benefits makes more sense when are incorporated into the laws of war, and the best way to do so is through a humanitarian spirit that gives sense to the protection of non-combatants in war.

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[690] ILA, International Committee on Reparation for Victims of Armed Conflict, 'The Hague Conference 2010: Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)' Commentary on Article 4 (Victim).

[691] Scott T. Paul, 'The Duty to make Amends to Victims of Armed Conflict' 110 (footnote 125); Ronen, 'Avoid or Compensate?', 197-202, &223ff.; Reisman, 'The Lessons of Qana', 398.

Bibliography

Books

- Atkinson R, *Crusade: The Untold Story of the Persian Gulf War* (Houghton Mifflin company 1993)

- Baderin MA and Ssenyonjo M (eds.) *International Human Rights Law: Six Decades after the UNDHR and Beyond* (Ashgate Publishing Limited 2010)
- Bassiouni M C, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Vol I., Martinus Nijhoff 2005)
- Baudrillard J, *The Gulf War Did Not Take Place* (Indiana University Press 1995)
- Bello E, *African Customary Humanitarian Law* (Oyez, 1980)
- Bennett J, *The Act Itself* (Clarendon Press 1995)
- Best G, *War and Law since 1945* (Clarendon 1994)
- Bidwell S and Graham D, *Fire-Power: British Army Weapons and Theories of War 1904-1945* (George Allen & Unwin 1982)
- Bouchet-Saulnier F, *The Practical Guide to Humanitarian Law* (3rd edn., Rowman & Littlefield 2014)
- Brian O, *Michael Walzer on War and Justice* (University of Wales Press 2000)
- Byers M, *War Law: Understanding International Law and Armed Conflict* (Grove Press 2005)
- Byrnes R M (ed), *Uganda: A Country Study* (2nd edn, Library of Congress 1992)

- Cavanaugh T A, *Double – Effect Reasoning, Doing Good and Avoiding Evil* (Clarendon Press 2006)
- Coleman J, *The Practice of Principle: In Defence of a Pragmatic Approach to Legal Theory* (Oxford University Press 2001)
- Coleman J, *Risks and Wrongs* (Oxford University Press 2003)
- Combs N A, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge University Press 2010)
- Conway-Lanz S, *Collateral damage: Americans, Non-Combatant Impunity and Atrocity after World War II* (Routledge Taylor & Francis Group 2006)
- Crawford J, *State Responsibility: General Part* (Cambridge University Press 2013)
- Crowe J and Weston-Scheuber K, *Principles of International Humanitarian Law* (Edward Elgar 2013)
- Cryer R and others, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press 2007)

- Dane M N, *Overheidsaansprakelijkheid voor schade bij legitiem strafvorderlijk handelen* (, Leiden University 2009, Doctoral Thesis)
- Dijkhoff K, *War, Law, and Technology* (Wolf Legal Publishers 2010)
- Dinstein Y, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edition, Cambridge University press 2010)
- di Rattalma M F and Treves T (eds), *The United Nations Compensation Commission: a handbook* (Kluwer Law International 1999)
- D'Argent P, *Les réparations de guerre en droit international public: la responsabilité internationale des États à l'épreuve de la guerre* (Emile Bruylant 2002)
- Dörmann K, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (International Committee of the Red Cross, 2003)
-
- Evans C, *The Right to Reparation in International Law for Victims of Armed Conflict* (Cambridge University Press 2012)

- Fairgrieve D, *State Liability in Tort: A Comparative Law Study* (Oxford University Press 2003)
- Finnis J, *Natural Law and Natural Rights* (Oxford University Press 1980)
- Fleck D (ed), *The Handbook of International Humanitarian Law* (2nd edn, Oxford University Press 2008)
- Fleischacker S, *A short History of Distributive Justice* (Harvard University Press 2004)
- Fried C, *Right and Wrong* (Harvard University Press 1978)

- Garcia-Amador FV, Sohn L B and Baxter R R, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (Oceana publicans, Inc. 1974)
- Garner B A (ed), *Black's Law Dictionary* (8th edition, West Publishing Company 2004)
- Gillman A and Johnson W (eds.), *Operational Law Handbook* (International and Operational Law Department, US Army, 2012) 287-300 – Chapter 18: Foreign and Deployment Claims –http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2012.pdf (accessed on April 4, 2013)

- Hale W B, *Handbook on the Law of Torts* (West Publishing co., 1896)
- Hart H L A, *The Concept of Law* (Oxford University Press 1961)
- Hartigan R S, *The Forgotten Victim: A History of Civilian* (Precedent Publishing Inc. 1982)
- Hayner P B, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge 2011)
- Henckaerts J M and Doswald-Beck L, *Customary International Humanitarian Law* (Vol. I. Rules, International Committee of Red Cross 2009) 3
- Holtzmann H and Kristjansdottir E (eds.), *International Mass Claims Process: Legal and Practical Perspectives* (Oxford University Press 2007)

- Hoover H C and Gibson H, *The Problems of Lasting Peace* (Doubleday Doran & Company Inc. 1942)
- Horbach N L J T, *Liability versus Responsibility under International Law: Defending Strict State Responsibility for Transboundary Damage* (Rijksuniversiteit Leiden 1996)

- Jorgensen C and others (eds), *Fighting Techniques of the Early Modern World AD 1500 to AD 1763* (The History Press 2005)

- Kalshoven F, *Constraints on the Waging of War* (Martinus Nijhoff Publishers 1987)
- Keen M, *The Laws of War in the Late Middle Ages* (Rutledge and Paul Kegan 1965)
- Kennedy D, *Law of War* (Princeton University Press 2006)
- Keren-Paz T, *Torts, Egalitarianism and Distributive Justice* (Ashgate 2007)
- Khadhuri M, *War and Peace in the Law of Islam* (John Hopkins Press 1955)
- Kionka E J, *Torts in a Nutshell* (4th edn, Thomson/West 2005)
- Kritz N J (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (United States Institute of Peace Press 1995) Volumes I-III

- Lesaffer R, European Legal History, A Cultural and Political Perspective (Cambridge University Press 2009)
- Levie H S (ed), *The Law of Non-International Armed Conflicts, Protocol II to the 1949 Geneva Conventions* (Martinus Nijhoff Publishers 1987)
- Lillich R B (ed), *The United Nations Compensation Commission: Thirteenth Sokol Colloquium* (Transnational Publishers, Inc. 1995)
- Lovell D W and Primoratz I (eds), *Protecting Civilians during Violent Conflict: Theoretical and Practical Issues for the 21st Century* (Ashgate Publishing Limited 2012)

- May L, *After War Ends: A Philosophical Perspective* (Cambridge University Press 2012)
- Mckeogh C, *Innocent Civilians: The Morality of Killing in War* (Palgrave Macmillan, 2002)
- Moir L, *The Law of Internal Armed Conflict* (Cambridge University press 2002)
- Murphy S D, Kidane W and Snider T R, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (Oxford University Press 2013)

- Nabulsi K, *Traditions of War, Occupation, Resistance, and the Law* (Oxford University Press 1999)
- Neff S C, *War and the Law of Nations: A General History* (Cambridge University Press 2005)
- Neff S C, *War and the Law of Nations: A General History* (Cambridge University Press 2008)

- Newton M and May L, *Proportionality in International Law* (Oxford University Press 2014)
- Nozick R, *Anarchy, State, and Utopia* (Basic Books, Inc. 1974)

- Olawala E T, *The Nature of African Customary Law* (Manchester University Press 1965)

- Perelman C h, *The Idea of Justice and the Problem of Argument* (Routledge & Kegan Paul 1977)
- Perreau-Saussine A, and Murphy J B, *The nature of customary law: Legal, historical and philosophical perspectives* (Cambridge University Press 2007)
- Pham P N and others, *When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda* (International Center for Transitional Justice 2007)
- Phillipson C, *The International law and Customs of Ancient Greece and Rome* (vol. 1 Macmillan 1911)
- Pictet J, *Development and Principles of International Humanitarian Law* (Martinus Nijhoff Publishers 1985)
- Posner R A, *The Economics of Justice* (Harvard University Press 1981)
-
- Raaflaub K A, *War and Peace in the Ancient World* (1st edn, Blackwell 2006)
- Ramsey P, *The Just War, Force and Political Responsibility* (Rowman & Littlefield 1983)
- Rahman H, *The Making of the Gulf War: Origins of Kuwait's Long-Standing Dispute with Iraq* (Garnet Publishing Limited 1997)
- Rawls J, *A Theory of Justice* (Oxford University Press 1971)
- Roberts A and Guelff R (eds), *Documents on the Laws of War* (2nd edn, Oxford University Press 1989)
- Rockel S J and Halpern R (eds), *Inventing Collateral Damage: Civilian Causalities, War, and Empire* (Between the Lines 2009)
- Rothbart D and Korostelina KV, *Why They Die* (The University of Michigan Press 2011)

- Sandel M J, *Justice, What's the Right Thing to Do?* (Farrar, Straus and Giroux 2009)
- Searle J R, *Intentionality: an Essay in the Philosophy of Mind* (Cambridge University Press 1983)
- Shavell S, *Economic Analysis of Accident Law* (Harvard University Press 1987)
- Slim H, *Killing Civilians, Method, Madness and Morality in War* (Hurst & Company 2007)
- Stahn C and Kleffner J K (eds.), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (T.M.C. Asser Press 2008)
- Solis G D, *The Law of Armed Conflict: International humanitarian Law in war* (Cambridge University Press 2010)

- Taylor P M, *War and the Media: propaganda and persuasion in the Gulf War* (2nd edn, Manchester University Press 1998)
- Tjepkema M K G, *Nadeelcompensatie op basis van het égalitébeginsel : een onderzoek naar nationaal, Frans en Europees recht* (Leiden University 2010, Doctoral thesis)
- Teitel R G (ed.), *Globalizing Transitional Justice: Contemporary Essays* (Oxford University Press 2014)
- Tomuschat C, *Human Rights between Idealism and Realism* (2nd edn, Oxford University Press 2008)

- Vandeginste S, *Reconciliation after Violent Conflict: A Handbook* (International Institute for Democracy and Electoral Assistance 2003)
- van Dongen Y, *The Protection of Civilian Populations in Time of Armed Conflicts* (University of Michigan Press 1991)
- van Gerven W, Lever J and Larouche P, *Tort Law* (Hart Publishing 2000)
- van Houtte H, Delmartino B and Yi I, *Post-War Restoration of Property Rights under International Law* (Vol. 1, Cambridge University Press2008)
- Vattel E d, *The law of Nations or the Principles of Natural Law : Applied to the Conduct and to the Affairs of Nations and of Sovereigns* 1758 (C G Fenwick trans. Slatkine Reprints – Henry Dunant Institute 1983)
- Veraart W and Winkel L (eds.), *The post-war restitution of property rights in Europe: comparative perspectives* (Kloof Booksellers 2011)
- Viswanatha S V, *International Law in Ancient India* (Longmans Green 1925)
- Von Clausewitz C, *On War* (M Howard and P Paret eds, and Trans Princeton University Press 1976)

- Walker M U, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (Cambridge University Press 2006)
- Walzer M, *Just and unjust wars: A Moral Argument with Historical Illustrations* (Basic Books, 1977)
- Walzer M, *Just and Unjust Wars, A moral Argument with Historical Illustrations* (revised edition, Basic Books 2006)
- Weller M, *Iraq and Kuwait: The Hostilities and Their Aftermath [Cambridge International Documents Series]* (Cambridge University Press 1993)
- Weinrib E J, *The Idea of Private Law* (Harvard University Press 1995)
- White N D and Henderson C, *Research Handbook on International Conflict and Security Law: Jus Ad Bellum, Jus in Bello and Jus Post Bellum* (Edward Elgar Publishing 2013)
- Williams G L and Hepple B A, *Foundations of the Law of Tort* (2nd edn, Butterworths 1984)

Chapters

- Aldrich G H, 'The Work of the Eritrea-Ethiopia Claims Commission' in McCormack T, McDonald A (eds), *Yearbook of International Humanitarian Law* (Vol. 6, T.M.C Asser Instituut 2003)

- Cassel Jr. D W, 'International Truth Commissions and Justice', in Kritz N J (ed), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes I* (United States Institute of Peace Press 1995)
- Correa C, Guillerot J and Magarrell L, 'Reparations and Victim Participation: A Look at the Truth Commission Experience' in Ferstman C, Goetz M and Stephens A (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill Academic Publishers 2009)

- Daly K and Proietti-Scifoni G, 'Reparation and Restoration' in Michael Tonry (ed), *The Oxford Handbook of Crime and Criminal Justice* (Oxford University Press 2011) 207
- De Greiff P, 'Justice and Reparations' in De Greiff P (ed), *The Handbook of Reparations* (Oxford University Press 2006)

- Eser A, 'The Importance of Comparative Legal Research for the Development of Criminal Sciences' in Blancpain R, *Law in Motion: Recent Developments in Civil Procedure, Constitutional, Contract, Criminal, Environmental, Family & Succession, Intellectual Property, Labour, Medical, Social Security, Transport law* (Kluwer Law International 1997)

- Fenrick W J, 'The Law Applicable to Targeting and Proportionality after Operation Allied Force: a View from the Outside' in Fischer H and McDonald A (eds), *Yearbook of International Humanitarian Law* (Vol. 3, T. M. C. Asser Instituut 2000)
- Ferstman C and Rosenberg S P, 'Reparation in Dayton's Bosnia and Herzegovina' in Ferstman C, Goetz M and Stephens A (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in Making* (Martinus Nuhoff Publishers 2009)

- Gribetz J and Reig S C, 'The Swiss Banks Holocaust Settlement' in Ferstman C, Goetz M and Stephens A (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in Making* (Martinus Nuhoff Publishers 2009)
- Groenhuijsen M S and Pemberton A, 'Genocide, Crimes Against Humanity and War Crimes: A Victimological Perspective on International Criminal Justice' in Letschert R and other (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011)

- Haldemann F, 'Drawing the Line: Amnesty, Truth Commissions and Collective Denial' in Letschert R and other (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011)
- Holewinski S, 'Making Amends: A New Expectation for Civilian Losses in Armed Conflict' in Rothbart D, Korostelina K V and Cherkaoui M D (eds) *Civilians and Modern War: Armed Conflict and the Ideology of Violence* (Routledge 2012)
- Holland J, 'Military Objective and Collateral Damage: Their Relationship and Dynamics' in McCormack T and McDonald A (eds), *Yearbook of International Humanitarian Law* (Vol. 7, T. M. C. Asser Instituut 2004)
- Hoskins E, 'The Humanitarian Impact of Economic Sanctions and War in Iraq' in Weiss T G and others, *Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions* (Rowman & Littlefield Publishers, Inc. 1997)

- Kalmanovitz P, 'Corrective Justice versus Social Justice in the Aftermath of War' in Bergsmo M and others (eds), *Distributive Justice in Transitions* (Torkel Opsahl Academic EPublisher 2010)
- Kiss A and Shelton D, 'Strict Liability in International Environmental Law' in Ndiaye T M and Wolfrum R (eds) *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Menshah* (Koninklijke 2007)

- Lee L T, 'The Right of Victims of War to Compensation', in Macdonald R St. J (ed), *Essays in Honour of Wang Tieya* (Kluwer Academic Publishers 1994)
- Lesaffer R, 'Peace Treaties from Lodi to Westphalia' in R Lessaffer (ed), *Peace Treaties and International Law in European History, From the Late Middle Ages to World War One* (Cambridge University Press 2004)
- Lesaffer R, 'Siege Warfare in the Early Modern Age: A study on the customary laws of war' in Perreau-Saussine A and Murphy J B (eds), *The Nature of Customary Law: Legal, historical and philosophical perspectives* (Cambridge University Press 2007)
- Lesaffer R, 'Alberico Gentili's *ius post bellum* and Early Modern Peace Treaties' in Kingsbury B and Straumann B (eds), *The Roman Foundations of the law of nations: Alberico Gemtili and the Justice of Empire* (Oxford University Press 2010)
- Lesaffer R, 'The Classical Law of Nations (15th to 18th Centuries)' in Orakhelashvili A (ed), *Research Handbook on the Theory and History of International Law (Research Handbooks in International Law Series)* (Edward Elgar 2011)
- Lesaffer R, 'A Schoolmaster abolishing Homework?: Vattel on Peacemaking and Peace Treaties' in Chetail V and Haggenmacher P (eds), *Vattel's International Law in a XXIst Century Perspective = Le droit international de Vattel vu du XXIe siècle* (Martinus Nijhoff Publishers 2011)
- Lesaffer R, 'From War as Sanction to the Sanctioning of War' in Weller M (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2014)

- Letschert R and Van Boven T, 'Providing Reparation in Situations of Mass Victimization: Key Challenges Involved' in R. Letschert and other (eds), *Victimological Approaches to International Crimes: Africa* (Intersentia 2011)

- Mani R, 'Reparation as a Component of Transitional Justice: Pursuing 'Reparative Justice' in the Aftermath of violent Conflict' in De Feyter K and others (eds) *Out of the Ashes Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005)
- Momtaz D, 'Israel and the Fourth Geneva Convention: On the ICJ Advisory Opinion Concerning the Separation barrier' in McDonald A and McCormack T (eds), *Yearbook of International Humanitarian Law* (Vol. 8, T. M. C. Asser Instituut 2005)

- Neuman N, 'Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality' in Schmitt M N and Arimatsu L (eds), *Yearbook of International Humanitarian Law* (Vol.7, T. M. C. Asser Instituut, 2004)

- Orend B, '*Jus Post Bellum*: A Just War Theory Perspective' in Stahn C and Kleffner J K (eds), *Jus Post Bellum: Towards a Law of Transition From Conflict to Peace* (T.M.C. Asser Press 2008)

- Parmentier S and Sullo P, 'Voices from the Field: Empirical Data on Reconciliation in Post War Bosnia and Their Relevance for Africa' in Letschert R and other (eds) *Victimological Approaches to International Crimes: Africa* (Intersentia 2011)

- Rombouts H, Sardaro P and Vandeginste S, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights', in De Feyter K and others (eds), *Out of the Ashes Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005)

- Sandoz Y, 'International Humanitarian Law in the Twenty-First Century' in McCormack T and McDonald A (eds), *Yearbook of International Humanitarian Law* (Vol. 6, T.M.C Asser Instituut 2003)
- Schabas W A, 'Reparation practices in Sierra Leone and The Truth and Reconciliation Commission' in De Feyter K and others (eds.) *Out of the Ashes Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005)
- Schaefer H and Mueller-Langer F, 'Strict Liability versus Negligence in Faure M (ed), *Tort Law and Economics* (Vol.1 Encyclopedia of Law and Economics, 2nd edn, Edward Elgar Publishing limited 2009)
- Smart M I, 'Compensation for Civilian Casualties in Armed Conflicts and Theory of Liability' in Goldsmith B E, Brauer J (ed) *Economics of War and*

Peace: Economic, Legal, and Political Perspectives (Emerald Group Publishing Limited 2010)
- Steigner H, 'Peace Treaties from Paris to Versailles' in R Lessaffer (ed), *Peace Treaties and International Law in European History, From the Late Middle Ages to World War One* (Cambridge University Press 2004)

- Taylor G, Schneider G and Kagan S, 'The Claims Conference and the Historic Efforts for Holocaust – Related Compensation and Restitution' in Ferstman C, Goetz M and Stephens A (eds), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in Making* (Martinus Nuhoff Publishers 2009)

- Watkin K, 'Assessing Proportionality: Moral Complexities and Legal Rules' in McDonald A and McCormack T (eds), *Yearbook of International Humanitarian Law* (Vol.8, T. M. C. Asser Instituut, 2005)
- Whetham D, 'Remote Killing and Drive-By Wars' in D. W. Lovell and I. Primoratz (eds.) *Protecting Civilians during Violent Conflict: Theoretical and Practical Issues for the 21st Century* (Ashgate Publishing Limited 2012)

Articles

- Abebe A M, 'Displacement of Civilians during Armed Conflict in the Light of the Case Law of the Eritrea-Ethiopia Claims Commission' [2009] *22 Leiden Journal of International Law* 823
- Aldrich G.H., 'Commentary: Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol 1' (1986) 26:3 *Virginia Journal of International Law* 693
- Alexy R and Peczenik A, **'**The Concept of Coherence and Its Significance for Discursive Rationality' (1990) 3:1 *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law* 130
- Alford R P, 'On War as Hell' (2002) 3:1 *Chicago Journal of International Law* 207
- Amaya A, 'Legal Justification by Optimal Coherence' (2011)24:3 *Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law* 304
- Amone-P'Olak K, 'Coping with Life in Rebel Captivity and the Challenge of Reintegrating Formerly Abducted Boys in Northern Uganda' (2007) 20:4 *Journal of Refugee Studies* 641

- Badar M E, 'The Mental Element in the Rome Statute of the International Criminal Court: A Commentary from a Comparative Criminal Law Perspective' (2008) 19:3-4 *Criminal Law Forum* 473
- Barnett M, 'What Is the Future of Humanitarianism?' (2003) 9:3 *Global Governance* 401

- Barnidge Jr. R P 'A Qualified Defense of American Drone Attacks in Northwest Pakistan under International Humanitarian Law' (2012) 30 *Boston University International Law Journal* 409
- Bass G J, 'Jus Post Bellum' (2004) 32:4 *Philosophy & Public Affairs* 384
- Bassiouni M C, 'World War I: "The War to end all Wars" and the Birth of a Handicapped International Criminal Justice System' (2002) 30 *Denver Journal of International Law and Policy* 244
- Beau S and Aronsson M, 'Drone Attacks, International Law, and the Recording of Civilian Casualties of Armed Conflict' (2012) 35:2 *Suffolk Transnational Law Review* 255
- Bederman D J, 'The U.N. Compensation Commission and the Tradition of International Claims Settlement' (1994) 27:1 *New York University Journal of International Law and Politics* 1
- Beljan R, 'Afganistan: Lessons Learned from an ISAF Perspective' [2013] *Small Wars Journal* 1
- Bellal A & Casey-Maslen S, 'Enhancing Compliance with International Law by Armed Non-State Actors' (2011) 3:1 *Goettingen Journal of International Law* 175
- Bender L, 'Tort Law's Role as a Tool for Social Justice Struggle' (1998) 37 *Washburn Law Journal* 249
- Benvenisti E, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians' (2006) 39:2 *Israel Law Review* 81
- Berdahl C A, 'Myths about the Peace Treaties of 1919-1920' (1942) 21:411 *International Conciliation* 411
- Bilkova V, 'Victims of War and Their Right to Reparation for Violations of International humanitarian law' (2007) 4:1 *Miskolc Journal of International Law* 1
- Bonee III J L, 'Caesar Augustus and the Flight of the Asians - The International Legal Implications of the Asian Expulsion from Uganda during 1972' (1974) 8:1 *International Lawyer* 136
- Bothe M, 'The Protection of Civilian Population and NATO Bombing on Yugoslavia: Comments on the Report to the Prosecutor of the ICTY' (2001) 12:3 *European Journal of International Law* 531
- Boyle Jr. J M, 'Towards Understanding the Principle of Double Effect' (1980) 90:4 *Ethics* 527
- Boyle A E, 'State Responsibility and International Liability for Injurious Consequences of Acts not prohibited by International Law: A Necessary Distinction?' (1990) 39:1 *International and Comparative Law Quarterly* 1
- Borchard E M, 'Opinions of the Mixed Claims Commission, United States and Germany (Part II)' (1926) 20:1 *The American Journal of International Law* 69
- Bridgeman C, 'Reconciling Strict Liability with Corrective Justice in Contract Law' (2007) 75:6 *Fordham Law Review* 3013
- Buckleyt M O, 'Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara' (2012)37:3 *North Carolina Journal of International Law and Commercial Regulation* 793

- Bugnion F, '*Droit de Genève et droit de La Haye*' (2001) 83: 844 *Revue Internationale de la Croix-Rouge* 901
- Buxbaum R M, 'A Legal History of International Reparations' (2005) 23:2 *Berkeley Journal of International Law* 320

- Calabresi G and Hirschoff J T, 'Toward a test for strict liability in torts' (1972) 81:6 *The Yale Law Journal* 1055
- Cane P, 'Distributive Justice and Tort Law' [2001] 4 *New Zealand Law Review* 401
- Caron D D and Morris B, 'The UN Compensation Commission: Practical Justice, not Retribution' (2002) 13:1 *European Journal of International Law* 183
- Cassese A, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11:1 *European Journal of International Law* 187
- Chatlani H, 'Uganda: A Nation in Crisis' (2007) 37:277 *California Western International Law Journal* 277
- Clapham A, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (2006) 88:863 *International Review of the Red Cross* 491
- Coleman J and Ripstein A, 'Mischief and Misfortune' (1995)41:1 *McGill Law Journal* 91
- Coleman J, 'Corrective Justice and Wrongful Gain' (1982) 11:2 *The Journal of Legal Studies* 421
- Crawford E, 'The Modern Relevance of the Martens Clause' (2007) 6 ISIL *Yearbook of International Humanitarian and Refugee Law* 1
- Crawford E, 'Blurring the Lines between International and Non-International Armed Conflicts - The Evolution of Customary International Law Applicable in Internal Armed Conflicts' (2008)15:1 *Australian International Law Journal* 29
- Culhane J G, 'Tort, Compensation, and Two Kinds of Justice' (2003) 55:4 *Rutgers Law Review* 1027

- Daming C V, 'When in Rome: Analyzing the Local Law and Custom Provision of the Foreign Claims Act' (2012) 39:309 *Washington University Journal of Law & Policy* 309
- Dannenbaum T, 'The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims' (2011) 28:2 *International Law Journal* 234
- Daponte B O, A Case Study in Estimating Causalities from War and Its Aftermath: the 1991 Persian Gulf War' (1993) 3:2 *Physicians for Social Responsibility Quarterly* 57
- Daponte B O, 'Wartime Estimates of Iraqi Civilian Causalities' (2007) 89:868 *International Review of Red Cross* 943
- Desmet E, The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation: a landmark or window-dressing? An analysis with special attention to the situation of indigenous peoples (2008) 24:1 *South Africa Journal on Human Rights* 71

- de Waal A, Jens Meierhenrich, and Conley-Zilkic, 'Bridget How Mass Atrocities End: An Evidence-Based Counter-Narrative', (2012) 36:1 *Fletcher Forum of World Affairs* 1
- Diaz P C, 'ICC in Northern Uganda: Peace First, Justice Later' (2005) 2:1 *Eyes on the ICC* 17
- Doswald-Beck L, 'The right to life in armed conflict: does international humanitarian law provide all the answers?' (2006) 88:864 *International Review of the Red Cross* 881
- Downes A B, 'Desperate Times, Desperate Measures: The Causes of Civilian Victimization in War' (2006) 30:4 *International Security* 152
- Droege C, 'Elective affinities? Human Rights and Humanitarian Law'(2008) 90:871 *International Review of the Red Cross* 501
- Droege C, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict' (2007) 40:2 *Israel Law Review* 310
- Dudley L and Witt U, 'Arms and the Man: World War I and the Rise of the Welfare State' (2004) 57:4 *Kyklos* 475
- Duguit L, 'C–Administrative Law: Compensation for Losses of War' (1919)13:3 *Law Review* 565
- Durham H, International Humanitarian law and the Gods of War: The Story of Athena versus Ares' (2007) 8:248 *Melbourne Journal of International Law* 247
- Dybnis A, 'Was the Eritrea-Ethiopia Claims Commission Merely a Zero-Sum Game?: Exposing the Limits of Arbitration in Resolving Violent Transitional Conflict' (2011) 33:255 *Loyola of Los Angeles International and Comparative Law Review* 255
- Dyzenhaus D, 'Survey Article: Justifying the Truth and Reconciliation Commission' (2000) 8 :4 *The Journal of Political Philosophy* 470

- Englard I, 'The Basis of Tort Liability: Moral Responsibility and Social Utility in Tort Law' (1990) 10:89 *Tel Aviv University Studies in Law* 89
- Epstein R A, 'Toward a general theory of tort law: Strict liability in context' (2010) 3:1 *Journal of Tort Law* 1
- Escorihuela A L, 'Humanitarian Law and Human Rights Law: The Politics of Distinction' (2011)19:2 *Michigan State Journal of International Law* 299
- Evans V L, 'The Foreign Claims Act – Interpretive and Procedural Guidelines' (1966) 21 *JAG Journals* 87

- Fassin D, 'Humanitarianism as a Politics of Life' (2007) 19:3 *Public Culture* 499
- Fellmeth A X, 'Questioning Civilian Immunity' (2007) 43:453 *Texas International Law Journal* 453
- Ferring R L, 'The Austrian State Treaty of 1955 and the Cold War' (1968) 21:4 *The Western Political Quarterly* 651
- Fletcher G P, 'Fairness and Utility in Tort Theory' (1972) 85:3 *Harvard Law Review* 537

- Fox M B, 'Imposing Liability for losses from Aggressive War: An Economic Analysis of UN Compensation Commission' (2002) 13:1 *European Journal of International Law* 201

- Gadler A, 'Armed Forces as Carrying both the Stick and the Carrot? Humanitarian Aid in US Counterinsurgency Operations in Afghanistan and Iraq' (2011) 3:1 *Goettingen Journal of International Law* 217
- Gardam J, 'Proportionality as a Restraint on the Use of Force' (1999) 20 *Australian Year Book of International Law* 161
- Gattini A, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations' (2002) 13:1 *European Journal of International Law* 161
- Gray C, 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?' (2006) 17:4 *The European Journal of International Law* 699
- Grayzel S R, '"The Souls of Soldiers": Civilians under Fire in First World War France', (2006) 78:3 *The Journal of Modern History* 588
- Gibson J L, 'The Contribution of Truth to Reconciliation' (2006) 50:3 *Journal of Conflict Resolution* 409

- Halliday D, 'Responsibility to Protect – Why Not?' (2009) 53:82 *Development Dialogue*: *Responses to Mass Violence – Mediation, protection, and prosecution* 83
- Hanke H M, 'The 1923 Hague Rules of Air Warfare — A Contribution to the Development of International Law Protecting Civilians from Air Attack.' (1993) 33:292 *International Review of the Red Cross* 12
- Hartle A E, 'Humanitarianism and the Laws of War' (1986)61:235 *Philosophy* 109
- Hatfield E, Salmon M, and Rapson R L, 'Equity Theory and Social Justice' (2011) 8 *Journal of Management, Spirituality, and Religion* 101
- Hayner P B, 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study' (1994) 16:4 *Human Rights Quarterly* 597
- Haynes P, 'On the Battlefield of women's bodies: An Overview of the Harm of War to Women' (2004) 27:5-6 *Women's Studies International Forum* 431
- Hills A, 'Defending Double Effect' (2003) 116:2 *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition* 133
- Hink H R, 'Governmental Liability for Risk under French and Germany Law' (1965) 19:3 *Rutgers Law Review* 472
- Holewinski S, 'Do Less Harm: Protecting and Compensating Civilians in War' (2013)19 *Foreign Affairs* 14
- Holland E, 'Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts' (2011) 34:1 *Suffolk Transnational Law Review* 145
- Hurka T, 'Proportionality in the Morality of War' (2005) 33:1 *Philosophy & Public Affairs* 34

- Jabbari-Gharabagh M, 'Type of State Responsibility for Environmental Matters in International Law' (1999)33:59 *Revue Juridique Themis* 103
- Jain S K, 'Efficiency of liability rules: A reconsideration' (2006) 15:3 *The Journal of International Trade & Economic Development: An International and Comparative Review* 359
- Joseph J, 'Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments' (2007) 23:3 *Negotiation Journal* 219
- Junod S S, 'Additional Protocol II: History and Scope' (1983) 33:29 *American University Law Review* 29

- Kalshoven F, 'State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of the 1907 to Article 91 of Additional Protocol I of the 1977 and Beyond' (1991) 40:827-858 *International and Comparative Law Quarterly* 827
- Kammerhofer J, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15:3 *European Journal of International Law* 523
- Keating G C, 'Tort, Rawlsian Fairness and Regime Choice in the Law of Accidents' (2004) 72:5 *Fordham Law Review* 1857
- Kelley J D, 'So what's your excuse? An analysis of force majeure excuses' (2007) 2:1 *Texas Journal of Oil, Gas, and Energy Law* 91
- Kidane W, 'Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea – Ethiopia Claims Commission in The Hague' (2008) 25:1 *Wisconsin International Law Journal* 23
- Klein N, 'State Responsibility for International Humanitarian Law Violations and the Work of the Eritrea Ethiopia Claims Commission So Far' (2004) 47 *German Yearbook of International Law* 214
- Kretzmer D, 'Rethinking the Application of IHL in Non-International Armed Conflicts' (2009) 42:1 *Israel Law Review* 8
- Krieger H, 'A conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study' (2006) 11:*2 Journal of Conflict & Security Law* 265
- Kruize P and Wijmer D J, 'The Use of Force in Daily Police Procedure in The Hague' (1991) 14:121 *Police Studies: International Review of Police Development* 121
- Kunz J L, '*Bellum Justum* and *Bellum Legale*' (1951)45:*3 The American Journal of International Law* 528

- Laplante L J and Theidon K, 'Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru' (2007) 29:228-250 *Human Rights Quarterly* 228
- Laplante L J, 'Negotiating Reparation Rights: The Participatory and Symbolic Quotients' [2012] 19 *Buffalo Human Rights Law Review* 217

- Leich M N, 'Denial of Liability: Ex-Gratia Compensation on a Humanitarian Basis' (1989) 83: 2 *The American Journal of International Law* 319
- Leich M N, 'Contemporary Practice of the United States Relating to International Law' (1989) 83:905 *The American Journal of International Law* 905
- Leibig A, 'Girl Child Soldiers in Northern Uganda: Do Current Legal Frameworks Offer Sufficient Protection' (2005) 3:1 *Northwestern University Journal of International Human Rights* 1
- Lewis M W, 'Drones and the Boundaries of the Battlefield' (2012) 47:*2 Texas International Law Journal* 293
- Licgtenberg J, 'War, Innocence, and the Doctrine of Double Effect' (1994) 74:3 *Philosophical Studies* 347
- Lloyd-Bostock S M, 'Common Sense Morality and Accident Compensation' (1980) 1980:6 *Insurance Law Journal* 331
- Lowenfeld A F, 'Looking Back and Looking Ahead' (1989) 83: 2 *The American Journal of International Law* 336
- Lyons T, 'The Ethiopia – Eritrea Conflict and the Search for Peace in the Horn of Africa' (2009) 36:120 *Review of African Political Economy* 167

- Maier H G, 'Ex Gratia Payments and the Iranian Airline Tragedy' (1989) 83:2 *The American Journal of International Law* 325
- Maisel M P, 'Have Truth and Reconciliation Commissions Helped Remediate Human Rights Violations Against Women? A Feminist Analysis of the Past and Formula for the Future' (2011) 20:143 *Cardozo Journal of International and Comparative Law* 143
- Marmor A, 'Should Like Cases Be Treated Alike?' (2005) 11:01 *Legal Theory* 27
- May L, 'Killing Naked Soldiers: Distinguishing between Combatants and Noncombatants' (2005)19:3 *Ethics and International Affairs* 39
- McCracken K, '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) 76:1 *Revue internationale de droit penal* 77
- McDonald B C, 'Use of Force by Police to Effect Lawful Arrest' (1966/67) 9:435 *Criminal Law Quarterly* 435
- McGovern F E, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14:171 *Harvard Negotiation Law Review* 171
- McMahan J, 'The Ethics of Killing in War' [2004] 114 *Ethics* 693
- McMillan N, 'The Tactical Payment Scheme: Configurations of Life and Death in the Context of War' (2012) 23:3 *Current Issues in Criminal Justice* 316
- Meron T, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience' (2000) 94:1 *The American Journal of International Law* 78
- Meron T, 'The Humanization of Humanitarian Law' (2000) 94:2 *The American Journal of International Law* 239

- Moussa J, 'Can jus ad bellum override jus in bello? Reaffirming the separation of the two bodies of law' (2008)90:872 *International Review of Red Cross*, 963
- Mundkur R, Mucchetti M J and Christensen D C, 'The Intersection of International Accounting Practices and International Law: The Review of Kuwaiti Corporate Claims at the United Nations Compensation Commission' (2001) 16:5 *The American University International Law Review*1195
- Murphy R, 'Responses to the Ten Questions' (2011) 37:5 *William Mitchell Law Review* 5064

- Nagel T, 'War and Massacre' (1972) 1:2 *Philosophy and Public Affairs* 123
- Nolan D, 'Suing the State: Governmental Liability in Comparative Perspective' (2004) 67:5 *The Modern Law Review* 844
- Notar S, 'Introductory note to Eritrea-Ethiopia Claims Commission, Decision 7 Regarding Jus Ad Bellum Liability' (2007) 46:1119 *International Legal Materials* 1119
- Nurick L, 'Distinction between Combatant and Noncombatant in the Law of war' (1945) 39:4 *The American Journal of International Law* 680

- O'Connell M E, 'Debating the Law of Sanctions' (2002) 13:1 *European Journal of International Law* 63
- O'Connell M E, 'Preserving the Peace: The Continuing Ban on War between States' (2008) 38:1 *California Western International Law Journal* 41

- Parish M, 'On Necessity' (2010)11:2 *The Journal of World Investment & Trade* 169
- Patterson E M, 'Effect of Economic Policies of Post War Period' (1940) 20:272 *International Conciliation* 272
- Paul S T, 'The Duty to make Amends to Victims of Armed Conflict' (2013) 22:1 *Tulane Journal of International and Comparative Law* 87
- Prud'homme N, '*Lex Specialis*: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40:2 *Israel Law Review* 355

- Rajan M S, 'The UN Security Council and the Iraq – Kuwait Conflict (1990): an Exercise in Hypocrisy by Member Nations' (1997) 37:4 *Indian Journal of International Law* 595
- Rau M, 'State Liability for Violations of International Humanitarian Law – The Distomo Case before the German Federal Constitutional Court' (2005) 07:07 *German Law Journal* 701
- Reder M, 'Citizen Rights and the Cost of Law Enforcement' (1974) 3:2 *The Journal of Legal Studies* 435
- Reeves J S, 'The Neutralization of Belgium and the Doctrine of Kriegsraison' (1915) 13 *Michigan Law Review* 179
- Reisman M W, 'The Lessons of Qana' (1997) 22 *Yale Journal of International Law* 381

- Reisman M W, 'Compensating Collateral Damage in Elective International Conflict' (2014) 8:1 *Intercultural Human Rights Law Review* 1
- Reiter D and Meek C, 'Determinants of Military Strategy, 1903-1994: A Quantitative Empirical Test' (1999) 43:2 *International Studies Quarterly* 363
- Renaud B and Fanny C, 'The Fight of a 'Citizen Economist' for Peace and Prosperity: Keynes and the Issues of International Security' (2008) 19:5 *Defence and Peace Economics* 361
- Resodihardjo S L, van Eijk C J A and Carroll B J, 'Mayor vs. Police Chief: The Hoek van Holland Riot' (2012) 20:4 *Journal of Contingencies and Crisis Management* 231
- Roberts A, 'Lives and Statistics: Are 90% of War Victims Civilians?' (2010) 52:3 *Survival: Global Politics and Strategy* 115
- Robinson P, '"Ready to Kill But Not To Die": NATO Strategy in Kosovo' (1999) 54:4 *International Journal* 671
- Rombouts H and Parmentier S, 'The International Criminal Court and its Trust Fund are Coming of Age: Towards a Process Approach for the Reparation of Victims' (2009) 16:149 *International Review of Victimology* 149
- Ronen Y, 'Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict' (2008) 42:181 *Vanderbilt Journal of Transitional Law* 189
- Rose C, Looking Beyond Amnesty and Traditional Justice and Reconciliation Mechanisms in Northern Uganda: A Proposal for Truth-Telling and Reparations' [2008] *28*:345 *Boston College Third World Law Journal* 345
- Rosenfeld F, 'Collective Reparation for Victims of Armed Conflict' (2010) 92:*879 International Review of the Red Cross* 731
- Rummel R J, 'Libertarianism and International Violence' (1983) 27:1 *Journal of Conflict Resolution* 27
- Rwelamira M R, 'Human Rights and International Humanitarian Law: The Link or Common Ground Revisited' [1992] 3 *Stellenbosch Law Review* 329

- Sacouto S & Cleary K, 'The Gravity Threshold of the International Criminal Court' (2007) 23:5 *American University International Law Review* 807
- Sassòli M, 'State responsibility for violations of international humanitarian law' (2002) 84:846 *International Review of Red Cross* 401
- Sasso'li M and Olson L M, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts' (2008) 90:871 *International Review of the Red Cross* 599
- Schabas W A, '*Lex Specialis*? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum (2007) 40:2 *Israel Law Review* 592
- Scherr K M, 'Public Liability for Administrative Acts under French Law' (2008)14:213 *European Public Law* 213

- Schmitt M N, 'Precision Attack and International Humanitarian Law' (2005) 87:859 *International Review of Red Cross* 445
- Schwager E, 'The Right to Compensation for Victims of an Armed Conflict,' (2005) 4:2 *Chinese Journal of International Law* 417
- Schwartz B, 'Public Tort Liability in France' (1954) 29:1432 *New York University Law Review* 1432
- Selassie B H, 'Self-Determination in Principle and Practice: The Ethiopian-Eritrean Experience' (1997) 29:91 *Columbian Human Rights Law Review* 91
- Sepulveda C, 'Interrelationships in the Implementation and Enforcement of International Humanitarian Law and Human Rights Law (1984) 33:117 *The American University Law Review* 117
- Shamash H E, 'How Much is Too Much? An Examination of the Principle of Jus in Bello Proportionality' (2006) 2 *Israel Defence Force Law Review* 1
- Shelton D, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96:4 *the American Journal of International Law* 833
- Shue H and Wippman D, 'Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions', (2002) 35:559 *Cornell International Law Journal* 559
- Simcock J, 'Unfinished Business: Reconciling the Apartheid Reparation Litigation with South Africa's Truth and Reconciliation Commission' (2011) 41:1 *Stanford Journal of International Law* 239
- Simpson G, "Stop calling it aggression': War Crime' (2008) 61(1): 191-228 *Current Legal Problems* 191
- Skaar E, 'Reconciliation in a Transitional Justice Perspective' (2012) 1:1 *Transitional Justice Review* 54
- Slim H, 'Why Protect Civilians? Innocence, Immunity and Enmity in War', (2003) 79:3 *International Affairs* 481
- Smart M I and Majima S, 'The Moral Grounds for Reparation for Collateral Damage in Expeditionary Interventions: Beyond the Just War Tradition' (2012)22:2 *International Journal of Applied Philosophy* 183
- Smith G, 'Every Complaint Matters: Human Rights Commissioner's Opinion Concerning Independent and Effective Determination of Complaints against the Police' (2010) 38:2 *International Journal of Law, Crime and Justice* 59
- Smith G, 'Actions for Damages against the Police and the Attitudes of Claimants' (2003) 13:4 *Policing and Society: An International Journal of Research and Policy* 413
- Solf W A, 'Protection of Civilians Against the effects of hostilities under customary International Law and Under Protocol 1' (1986) 1: 1 *American University International Law Review* 117
- Ssenyonjo M, 'Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court' (2005) 10:405 *The Journal of Conflict & Security Law* 405
- Stahn C, "Jus Ad Bellum', 'Jus in Bello' . . . 'Jus Post Bellum'? - Rethinking the Conception of the Law of Armed Force' (2006) 17:5 *European Journal of International Law* 921

- Stewart J G, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict' (2003) 85:850 *International Review of the Red Cross* 313
- Sweney G, 'Saving Lives: The Principle of Distinction and the Realities of Modern War' (2005) 39:3 *The International Lawyer* 733
- Simons K W, 'The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives' (2008) 17 *Widener Law Journal* 719
- Spieker H, 'The International Criminal Court and Non-International Armed Conflicts' (2000) 13:2 *Leiden Journal of International Law* 395

- Terry J P, 'Gulf War Syndrome: Addressing Undiagnosed Illnesses from the First War with Iraq' [2009] 1 *Veterans Law Review* 167
- Thagard P and Verbeurgt K, 'Coherence as Constraint Satisfaction' (1998) 22:1 *Cognitive Science* 1
- Tomuschat C, 'Darfur – Compensation for the Victims' (2005) 3: 579-589 *Journal of International Criminal Justice* 579
- Tomuschat C, 'Reparation for Victims of Grave Human Rights Violations' (2002) 10 *Tulane Journal of International and Comparative Law* 157
- Townsend G, 'The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & (and) US Remedies' (1995) 17:193 *Loyola of Los Angeles International and Comparative Law Review* 973

- Valentino B, Huth P and Balch-Lindsay D, '"Draining the Sea": Mass Killing and Guerrilla Warfare' (2004) 58:2 *International Organization* 375
- Valentino B, Huth P, and Croco S, 'Covenants Without the Sword, International Law and the Protection of Civilians in Times of War' (2006) 58:3 *World Politics* 339
- Val – Garijo F, 'Reparations for Victims as a Key Element of Transnational Justice in the Middle East Occupied Territories' (2010) 6:4 *International Studies Journal* 39
- Verdeja E, 'A Normative Theory of Reparations in Transitional Democracies' (2006) 37:3-4 *Metaphilosophy* 449
- Vick D W, 'Interdisciplinarity and the Discipline of Law' (2004) 31:2 *Journal of Law and Society* 163
- Viner J, 'German Reparations Once More' (1943) 21:4 *Foreign Affairs* 659
- Vogel R J, 'Drone Warfare and the Law of Armed Conflict' (2011) 39:1 *Denver Journal of International Law and Policy* 101
- von Kuhlmann R, 'Germany and France: The problem of Reconciliation' (1932) 11:137 *Foreign Affair* 137

- Walerstein J, 'Coping with Combat Claims: An analysis of the Foreign Claims Act's Combat Exclusion' (2009)11:319 *Cardozo Journal of Conflict Resolution* 319
- Walt S, 'Eliminating Corrective Justice' (2006) 92:1311 *Virginia Law Review* 1311

- Walzer M, 'The Triumph of Just War Theory (and the Dangers of Success)' (2002) 69:4 *Social Research* 925
- Walzer M, 'The Crime of Aggressive War' (2007) 6:635 *Washington University Global Studies Law Review* 635
- Walzer M, 'Coda: Can the Good Guys Win?' (2013) 24:1 *The European Journal of International Law* 433
- Wassgren H, 'The UN Compensation Commission: Lessons of Legitimacy, State Responsibility, and War Reparations' (1998) 11:3 *Leiden Journal of International Law* 473
- Weinrib E J, 'Civil Recourse and Corrective Justice' (2012) 39:273 *Florida State University Law Review* 273
- Weinrib E, 'The Special Morality of Tort Law' (1989) 34:3 *McGill Law Journal* 403
- White E N, 'Making the French pay: The costs and consequences of the Napoleonic reparations' (2001) 5 *European Review of Economic History* 337
- Wilson N S, 'Is Corrective Justice Subsidiary to Distributive Justice? Which Answer Better Captures the Meaning of Tort Law Practice? (2007) 10:44 *Trinity College Law Review* 54
- Witt J F, 'Form and substance in the Law of Counterinsurgency Damages' (2008) 41:1455 *Loyola of Los Angeles Law Review* 1455
- Winston K I, 'On Treating Like Cases Alike' (1974) 62:1 *California Law Review* 1
- Wuerzner C, 'Mission Impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals' (2008) 90:872 *International Review of Red Cross* 907

- Xinmin M, 'Statement on "Prevention of Transboundary Harm from Hazardous Activities and Allocation of Loss in the Case of Such Harm"' (2008)7:2 *Chinese Journal of International Law* 567

- Yntema H E, 'The Treaties with Germany and Compensation for War Damage' (1923) 23: 6 *Columbia Law Review* 511

- Zegeye A and Tegegn M, 'The Post-War Border Dispute between Ethiopia and Eritrea: On the Brink of Another War?' (2008) 24:2 *Journal of Developing Societies* 245
- Zegveld L, 'Remedies for victims of violations of international humanitarian law' (2003) 85 *International Review of the Red Cross* 851
- Zehfuss M, 'Killing Civilians: Thinking the Practice of War' (2012) 14 *The British Journal of Politics and International Relations* 423
- Zondi S and Réjouis E, 'The Ethiopia-Eritrea Border Conflict and the Role of the International Community'(2006) 6:2 *African Centre for the Constructive Resolution of Disputes/African Journal on Conflict Resolution* 69
- Zwanenburg M, 'Van Boven/Bassiouni Principles: An Appraisal' (2006) 24:4 *Netherlands Quarterly of Human Rights* 641

Reports and other publications

- Abebe T K, 'Ethiopia's Sovereign Right of Access to the Sea under International Law' (2007) LLM Theses and Essays Paper 81 http://digitalcommons.law.uga.edu/stu_llm/81 (accessed on 07 February 2012)
- Akwenyu J and others, '"The dust has not yet settled". Victims' Views on the Right to Remedy and Reparation' (UN High Commissioner for Human Rights/Uganda Human Rights Commission, 2011) http://www.ohchr.org/Documents/Press/WebStories/DustHasNotYetSettled.pdf (accessed 20 August 2012)
- Amsterdam International Law Clinic, 'Monetary Payments for Civilian Harm in International and National Practice' [2013] http://civiliansinconflict.org/uploads/files/publications/Valuation_Final_Oct_2013pdf.pdf (accessed on 16 October 2013)
- Amnesty International, 'Federal Republic of Yugoslavia (FRY) /NATO: "Collateral damage" or unlawful killings? Violations of the Laws of War by NATO during Operation Allied Force' http://www.amnesty.org/en/library/info/EUR70/018/2000 (accessed on 06 September 2011)
- Amnesty International, 'Eritrea – Amnesty International Report 2010' http://www.amnesty.org/en/region/eritrea/report-2010 (accessed on 23 February 2012)

- Blank L R, 'A New Twist on an Old Story: Lawfare and the Mixing of Proportionalities' (2011) 43:3 *Case Western Reserve Journal of International Law* (Emory Public Law Research Paper No. 11-149)
- Blum G and Lockwood N J, 'Earthquakes and Wars: The Logic of International Reparations' (30 June 2012) Harvard Public Law Working Paper No. 12-30 http://dx.doi.org/10.2139/ssrn.2096811 (accessed on 20 May 2014)

- Campaign for Innocent Victims in Conflict (CIVIC), 'Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces' (2010) http://reliefweb.int/sites/reliefweb.int/files/resources/Addressing_civilian_harm_white_paper_2010.pdf (accessed 6 May 2013)
- Childers A, 'Legal Foundations for "Making Amends" to Civilians Harmed by Armed Conflict' (International Human Rights Clinic, Harvard Law School, February 2012) http://harvardhumanrights.files.wordpress.com/2012/02/making-amends-foundations-paper-feb-2012-final.pdf (accessed on 7 May 2013)
- Cohen A, 'Proportionality in the Modern Law of War: An Unenforceable Norm, or the Answer to Dilemma?' (Perspectives Paper No. 20 2006) http://www.biu.ac.il/SOC/besa/perspectives20.pdf (accessed on 13 November 2011)
- Coleman J and Mendlow G, 'Theories of Tort Law', *The Stanford Encyclopaedia of Philosophy* (Fall 2010 Edition), Edward N. Zalta (ed.) http://

plato.stanford.edu/archives/fall2010/entries/tort-theories/ (accessed on 19 May 2014)
- Council of Europe, 'Opinion of the Commissioner for Human Rights Concerning Independent and Effective Determination of Complaints against Police of 12 March 2009' (CommDH(2009))
- Enough, 'Wanted by the ICC: The LRA's leaders: Who they are and what they've done' http://www.enoughproject.org/files/pdf/lra_leaders.pdf (accessed on 7 November 2012)
- Gardner J, 'What is tort Law for? Part 1: The Place of Corrective Justice' (2010 Oxford Legal Studies Research Paper No. 1/2010)
- Gardner J, 'What is Tort Law For? Part 2. The Place of Distributive Justice' (2013 Oxford Legal Studies Research Paper No. 62/2013)
- Grubeck N, 'Civilian Harm in Somalia: Creating an Appropriate Response' (CIVIC, 2011) http://civiliansinconflict.org/uploads/files/publications/Somalia_Civilian_Harm_2011.pdf (accessed on 7 May 2013)
- Harvey R and MugnaiE, 'The 'Right To Life': Commentary on Article 2' [2002] http://www.childrenslegalcentre.com/userfiles/file/Right%20to%20life%20rich%20text%20format.pdf (accessed on 26 June 2013)
- Hofmann R, 'Compensation for Victims of War – Substantive Issues: Do Victims of Armed Conflicts Have an Individual Right to Reparation?' in ILA Toronto Conference (2006) 4-15 'Compensation for victims of War'
- Hudig K, '(Analysis) Netherlands: Increased use of Firearms by Dutch police' (2012) 22:2/3 *Statewatch journal* http://www.statewatch.org/analyses/no-213-holland-police-firearms.pdf (accessed on 23 October 2013)
- Human Rights Watch, 'The Christmas Massacres: LRA attacks on Civilians in Northern Congo' (February 2009) http://www.hrw.org/sites/default/files/reports/drc0209webwcover_1.pdf (accessed on 22 November 2012)
- Human Rights Watch, 'International Justice: Unfinished Business, Closing Gaps in the Selection of ICC Cases' (New York 2011) http://www.hrw.org/sites/default/files/reports/icc0911webwcover.pdf (accessed on 22 November 2012)
- Human Rights Watch, 'No End to LRA Killings and Abductions' [May 23, 2011] http://www.hrw.org/sites/default/files/related_material/LRA_NoEnd_May2011%20EN.pdf (accessed on 22 November 2012)
- ICC Assembly of State Parties, 'Report to the Assembly of State Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the period 16 July 2004 to 15 August 2005' [ICC-ASP/4/12 of 29 September 2005]
- ICC Assembly of State Parties, 'Report to the Assembly of State Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims 2003-2004' [ICC-ASP/3/14 of 29 July 2004]

- ICC Assembly of State Parties, 'Regulations of the Trust Fund for Victims' [Resolution ICC-ASP/4/Res.3 adopted 3 December 2005]
- International Committee of Red Cross, 'Opinion Paper: How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (March, 2008) http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf (accessed on 20 November 2013)
- International Committee of Red Cross, Customary IHL Database, 'Rule 1: the principle of The Principle of Distinction between Civilians and Combatants' http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule1 (accessed on 25 February 2014)
- International Criminal Tribunal for the former Yugoslavia (ICTY), 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia' http://www.icty.org/x/file/About/OTP/otp_report_nato_bombing_en.pdf (19 May 2014)
- International Human Rights Clinic, 'Legal Foundations for "Making Amends" to Civilians Harmed by Armed Conflict' [2012] Harvard Law School http://civiliansinconflict.org/uploads/files/publications/Harvard_Making_Amends_Foundations_Paper_Feb_2012(WFInal2.10.12).pdf (accessed on 10 May 2014)
- International Law Commission, 'Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (Report of the International Law Commission on the work of its fifty-third session, 2001)
- International Law Association, International Committee on Reparation for Victims of Armed Conflict, 'The Hague Conference 2010: Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)' as prepared by Professor Rainer Hofmann (Co-Rapporteur) http://www.ila-hq.org/download.cfm/docid/4E702C99-897E-46A9-AA505E7FF291AFB7 (accessed on 18 November 2011)
- International Law Association, 'The Hague Conference 2010' Commentary by Hofmann on Article 6 (Right to reparations) http://www.ila-hq.org/download.cfm/docid/4E702C99-897E-46A9-AA505E7FF291AFB7 (accessed on 17 November 2011)
- International Law Association (Ryngaert C and D'Aspremont J (co-rapporteurs), 'Non State Actors' (ILA Washington Conference 2014) 10 http://www.ila-hq.org/en/committees/index.cfm/cid/1023 accessed on 23 May 2014.

- Jabbari-Gharabagh M, 'Type of State Responsibility for Environmental Matters in International Law' (1999) 33:59 *Revue Juridique Themis* 59
- James-Allen P, Weah A and Goodfriend L, 'Beyond the Truth and Reconciliation Commission : Transitional Justice Options in Liberia' [May 2010] International Center Transitional Justice http://www.ictj.org/sites/default/files/ICTJ-Liberia-Beyond-TRC-2010-English.pdf (accessed on 16 August 2012)

- Keenan M B and Tracy J, 'US Military Claims System for Civilians' (2008) Center for Civilians in Conflict http://civiliansinconflict.org/uploads/files/publications/2008_Civilian_Casualties_White_Paper.pdf (accessed on 2 May 2013)
- Klamberg M, 'Fact Finding in International Criminal Procedure: How Collection of Evidence may Contribute to Testing of Alternative Hypotheses' (working papers series: presented during a lecture at the Amsterdam Center for International Law (ACIL) on 30 May 2011)

- Lesaffer C H R and Broers E, 'Private Property in the Dutch – Spanish Peace Treaty of Münster (30 January 1648)' [2007] Tilburg University Legal Studies Working Paper http://ssrn.com/abstract=1002389 (accessed on 17 November 2011)
- Lucas C, 'What difference does it make' [2006] http://www.calresco.org/wp/differ.htm (accessed on 22 September 2011)

- McChrystal S A, (Commander) NATO/ISAF, Afghanistan, US Forces, 'COMISAF's Initial Assessment' (30 August 2009) http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf (accessed on 29 May 2013)
- McDonald A, 'The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the increased Participation of civilians in Hostilities' (background working paper for a presentation at the University of Teheran in April 2004) http://www.asser.nl/Default.aspx?site_id=9&level1=13337&level2=13379 (accessed on 12 March 2012)
- Moreno-Ocampo L, The ICC Chief Prosecutor, 'OTP Letter of 9 February 2006 in response to communications received about Iraq' http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (accessed on 17 November 2011)
- Moreno-Ocampo L, 'Keynote Address: Integrating the Work of the ICC into Local Justice Initiatives' (2006) 21:4 *American International Law Review*
- Muleefu A, 'Beyond the Single Story: Rwanda's Support to the March 23 Movement (M23)' (2013) 5:1 *Amsterdam Law Forum*

- Office of the Special Inspector General for Iraq Reconstruction, 'Commander's Emergency Response Program in Iraq Funds Many Large-Scale Projects' [SIGIR-08-006, 25 January 2008] http://www.sigir.mil/files/audits/08-006.pdf (accessed on 1 May 2013)
- Ojok B and others, 'Killing Every Living Thing: Barlonyo Massacre in Uganda' [Justice and Reconciliation Gulu District NGO Forum, Field Note IX February 2009] http://www.scribd.com/doc/12854297/Killing-Every-Living-Thing-Barlonyo-Massacre (accessed on 19 May 2014)

- Oxford Institute for Ethics, Law and Armed Conflict, 'Workshop Report: Proportionality in War [2009] http://www.elac.ox.ac.uk/downloads/ProportionalityinWarWorkshopReport.pdf (accessed on 20 October 2010)

- Parisciani E,'Protected persons and grave breaches in non international armed conflict' [2012] http://adh-geneva.academia.edu/EmanuelaParisciani/Papers/338298/Protected_persons_and_grave_breaches_in_non_international_armed_conflict (accessed on 22 February 2012)
- Pham P and others, 'When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in Northern Uganda' [Human Rights Center at University of California Berkeley, December 2007]
- Pham P and Vinck P, 'Transitioning to Peace: A population-Based Survey on Attitudes about Social Reconstruction and Justice in Northern Uganda' (Human Rights Center University of California Berkeley, December 2010)

- Refugee Law Project, 'Behind the Violence: Causes, Consequences and Search for solutions to the War in Northern Uganda' [Refugee Law Project Working Paper N°.11 2004] http://www.refugeelawproject.org/working_papers/RLP.WP11.pdf (accessed on 5 December 2012)
- Refugee Law Project, 'Untreated Wounds: Communities deeply injured by the armed conflict' (RLP, 2012) http://76.12.144.233/video_advocacy2.php?vidName=untreated_wounds1&vidId=179 (accessed on 28 January 2013)
- RS Documentation Center for War Crimes Research, 'Children – Victims of War and Peace: Reports of Participants from *Republika Srpska* at an International Conference Sarajevo' (Banja Luka 2001) http://www.rs-icty.org/PUBLIKACIJE/children-wictims_of_war.pdf (accessed 14 November 2011)

- Shah A, 'World Military Spending' (Global Issues, May 2012) http://www.globalissues.org/article/75/world-military-spending (accessed on 7 May 2013)
- Sierra Leone Truth and Reconciliation Commission, 'The Final Report (2004)' http://www.sierra-leone.org/TRCDocuments.html (accessed on 19 May 2014)
- Smith M N, 'War, Technology, and International Humanitarian Law' [2005] 4, Occasional paper series Harvard University Program on Humanitarian Policy and Conflict Research http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper4.pdf (accessed on 15 May 2012)
- Strauss D A, 'Must Like Cases Be Treated Alike?' [May 2002] University of Chicago, Public Law Research Paper No. 24 http://www.law.uchicago.edu/files/files/24.strauss.like-cases.pdf (accessed on 5 August 2013)

- Suchkova M, 'The Importance of a Participatory Reparations Process and its Relationship to the Principles of Reparation' [2011] University of Essex, Reparations Unit, Briefing Paper No.5 http://www.essex.ac.uk/tjn/documents/Paper_5_Participation_Large.pdf (accessed on 17 October 2013)

- The Eritrea-Ethiopia Boundary Commission decision regarding delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia http://www.pca-cpa.org/showpage.asp?pag_id=1150 (accessed on 08 February 2012)
- The Center for Law and Military Operations, 'Legal Lessons Learned from Afghanistan and Iraq:Volume II: Full Spectrum Operations (2 May 2013 – 30 June 2004)' http://www.fas.org/irp/doddir/army/clamo-v2.pdf (accessed on 1 May 2013)
- The Housing and Property Claims Commission (HPCC), 'Final Report' (Pristina, 2007) http://www.pca-cpa.org/upload/files/HPCCFinalReport.pdf (accessed on March 13, 2012)
- The Joint Communique of the Government of Japan and the Government of the People's Republic of China, 29 September 1972) http://www.global-alliance.net/SFPT/SinoJapanJointCommunique29Sept1972.htm (accessed on 5 March 2012)
- The Kingdom of Netherlands, Ministry of the Interior and Kingdom Relations, Police and Safety Regions Department 'Policing in The Netherlands' (January 2009)
- The Kingdom of Netherlands, Ministry of Health, Welfare and Sport, Department of Victims and Remembrance WWII (ed.) 'World War II and its Aftermath in The Netherlands' (June, 2009) http://www.christies.com/pdf/services/2011/ministry-of-health-welfare-and-sport-netherlands.pdf (accessed on 10 April 2014)
- The Republic of Liberia, Truth and Reconciliation Commission Volume II: Consolidated Final Report (30 June 2009) http://trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf (accessed on 22 August 2012)
- The Republic of Uganda, Justice Law and Order Sector, 'Final Study Report on Traditional Justice and Truth Telling and National Reconciliation' (Kampala, 2012)
- The Republic of Uganda, Ministry of Justice and Constitutional Affairs, 'The Report of the Uganda Constitutional Commission: Analysis and Recommendations (Kampala, 1993)
- The Republic of Uganda: The Justice Law and Order Sector, 'Traditional Justice and Truth Telling and National Reconciliation' [Study Report: Final Draft July 2012]
- Tracy J, 'Compensating Civilian Casualties: "*I am Sorry for your Loss, and I wish you well in a Free Iraq*"' (A Research Report Prepared for the Carr Center for Human Rights Policy and the Center for Civilians in Conflict, 2008) http://civiliansinconflict.org/uploads/files/publications/compensating-civilian-casualties_nov_2008.pdf (accessed on 19 April 2013)

- Trust Fund for Victims, 'Recognizing Victims & Building Capacity in Transitional Societies: Spring 2010 Programme Progress report' http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Spring%202010.pdf (accessed 19 May 2014)
- Trust Fund for Victims, 'Programme Progress Report November 2009' http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20November%202009.pdf (accessed October 24, 2012)
- Trust Fund for Victims, 'Empowering Victims and Communities towards Social Change: Programme Progress Report Summer 2012' http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20PPR%20Summer%202012%20ENG%20Final_.pdf (accessed on October 24, 2012)
- Truth and Reconciliation Commission of South Africa, (1998) 'Report: Volume 5' http://www.justice.gov.za/trc/report/finalreport/Volume5.pdf (accessed 19 May 2014)
- Trust Fund for Victims, 'Earmarked Support at the Trust Fund for Victims: Programme Progress Report' [winter 2011] http://www.trustfundforvictims.org/sites/default/files/imce/TFV_Programme_Progress_Report_Winter_2011_USA_PRINTING.pdf (accessed on 27 November 2012)
-
- United Nations Assistance Mission in Afghanistan (UNAMA), 'Afghanistan: Annual Report 2011, Protection of Civilians in Armed Conflict' (February 2012) http://www.refworld.org/docid/4f2fa7572.html (accessed 19 May 2014)
- United Nations, 'Report of the Secretary – General Pursuant to Paragraph 19 of Security Council Resolution 687 of 2 May 1991 (S/22559)'
- United Nations Security Council, Decision Concerning the Return of Undistributed Funds taken by the Governing Council of the United Nations Compensation at its 75th meeting, held on 2 February 1998 at Geneva (S/AC.26/Dec.48 (1998))
- United Nations Peace Building and Recovery Assistance Programme for Northern Uganda 2009-2011 (UNPRAP) http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/CA4908551F8D0E8EC12575F9003B76EE/$file/UNPRAP+FINAL+NARRATIVE.DOC (accessed on 22 November 2012)
- United Nations Office of the High Commissioner for Human Rights, 'Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda', (August 2007) http://www.unhcr.org/refworld/docid/46cc4a690.html [accessed on November 22, 2012]
- United Nations Office of the High Commissioner for Human Rights, 'Rule of Law Tools for Post-Conflict Societies: Reparations programmes (HR/PUB/08/1)' (2008) http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf (accessed on 22 August 2012)

- United Nations Office of the High Commissioner for Human Rights, 'Making Peace Our Own: Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda' (August 2007) http://www.unhcr.org/refworld/docid/46cc4a690.html (accessed on 22 November 2012)
- United Nations Office on Drugs and Crime (UNODC), 'The Handbook on Police Accountability, Oversight and Integrity' (UNODC, Criminal Justice Series, 2011)
- United States Government Accountability Office (GAO) Report to Congressional Requesters, 'Military Operations: The Department of Defense's Use of Solatia and Condolence Payments in Iraq and Afghanistan' [May 2007, GAO-07-699 Military Operations] http://www.gao.gov/new.items/d07699.pdf (accessed on 19 May 2014)
- United States of America, Proposal submitted by the United States of America: 'Draft Elements of Crimes, Addendum' to the Preparatory Commission for the International Criminal Court (4 February 1999, PCNICC/1999IDP .4/Add.2)

- van Boven T, 'Introductory Note: The United Nations 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' [2010] United Nations http://untreaty.un.org/cod/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf (accessed on 18 September 2013)
- Vattel E de, The Law of Nations or Principles of the Law of Nature applied to Conduct and Affairs of Nations and Sovereigns by J. Charity (New Edition) Book III: Of War http://www.constitution.org/vattel/vattel_03.htm (accessed on 23 February 2012)

- Walzer M, 'Responsibility and Proportionality in State and Non-State War' [2009] *Parameters* 40 (Remarks delivered on 5 February 2009 at the US Army War College) http://www.carlisle.army.mil/usawc/parameters/articles/09spring/walzer.pdf (accessed on 13 November 2011)
- Wyman R H, 'The First Rules of Air Warfare' [1984] *Air University Review* http://www.airpower.maxwell.af.mil/airchronicles/aureview/1984/mar-apr/wyman.html (accessed on 14 May 2014)

Normative Instruments

- The Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907)
- The Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949)
- The Convention (III) relative to the Treatment of Prisoners of War; article 158 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949)
- The Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949)
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 2), 8 June 1977
- The Convention on Cluster Munitions of May 30, 2008
- 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 (A/Res/60/147 of 16 December 2005), ix(18)-(23)
- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (A/RES/40/34 of 29 November 1985), A (I)
- The UN Security Council Resolution 1483 (2003) adopted at the Security Council 4761st meeting, on 22 May 2003 (S/Res/1483 (2003))
- United Nations Compensation Commission Governing Council, 'Provisional Rules for Claims Procedure' (S/AC.26/1992/10 of 26 June 1992)
- The United Nations General Assembly Resolution 56/83 (A/RES/56/83) of 12 December 2001 (Responsibility of States for Internationally Wrongful Acts)
- The United Nations General Assembly (A/61/10): Draft principles on the allocation of loss in the case of Transboundary Harm arising out of Hazardous Activities
- United Nations, 'Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries 2001
- The Rio Declaration on Environment and Development as adopted in the United Nations Conference on Environment and Development, at Rio de Janeiro from 3 to 14 June 1992
- UN General Assembly Code of Conduct for Law Enforcement Officials (resolution 34/169 of 17 December 1979)

- UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990)
- The 1948 Universal Declaration of Human Rights
- The 1965 International Convention on the Elimination of all forms of Racial Discrimination
- The 1966 International Convention on Civil and Political Rights
- The 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
- The Rome Statute of the International Criminal Court (A/CONF.183/9 of 17 July 1998) as amended up-to-date
- The ICC Rules of Procedure and Evidence ((ICC-ASP/1/3 and Corr.1)
- ICC, ICC Elements of Crimes as amended up-to-date
- The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms
- The 1981 African (Banjul) Charter on human and Peoples' Rights
- The 1969 American Convention on Human Rights 'Pact of San Jose, Costa Rica'
- The 1966 International Convention on Civil and Political Rights
- The African (Banjul) Charter on Human and Peoples' Rights (1986)
- The European Code of Police Ethics: Recommendation Rec(2001)10 adopted by the Committee of Ministers of the Council of Europe on 19 September 2001 and explanatory memorandum (Council of Europe, March 2002)
- Text as Issued by Department of State, 'United States, France, United Kingdom, Netherlands, Belgium, Yugoslavia, Luxemburg, Final Act and Annex of the Paris Conference on Reparations' (1946) 40:4 *The American Journal of International Law Supplement: Official Documents* 117
- United States of America, One Hundred Thirteenth Congress, 2nd session, 3 January, 2014, Washington, accessed at https://beta.congress.gov/113/bills/hr3547/BILLS-113hr3547enr.pdf on 15 September 2014).

List of Court/Tribunal and Arbitral Commission Decisions

- ICJ, *The Factory at Chorzów* (publications of ICJ, series A.-nº.17 of 13 September 1928, Collection of Judgments: number 13, Claim for indemnity (merits))
- ICJ, *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion of 8 July 1996, 1.C.J. Reports 1996, 226)
- ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion of 9 July 2004, I. C. J. Reports 2004, 136)
- ICJ, *'Jurisdictional immunities of the state (Germany v. Italy: Greece intervening)* (Judgment of 3 February 2012, I.C.J. Reports 2012, 99)
- ICTY, *Prosecutor v. Dusko Tadic* 1 (ICTY-94-1) Appeals Chamber's Decision on Defence Interlocutory Appeal on Jurisdiction, 2 October 1995
- ICTY, *Prosecutor v. Zejnil Delalić et al.* ("*Čelebići*"), Case No. IT-96-21-T (Trial Judgement, 16 November 1998)
- ICC Pre-Trial Chamber I, Situation Democratic Republic of Congo, 'Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund' (ICC-01/04-492 11-04-2008)
- ICC, The Situation of the Democratic Republic of Congo, *Prosecutor V. Thomas Lubanga Dyilo*, on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (ICC-01/04-01/06-1432 11-07-2008)
- ICC Pre-Trial Chamber II, Situation in the Central African Republic, 'Decision on the Submission of the Trust Fund for Victims dated 30 October 2009' (ICC-01/05 of 16 November 2009)
- ICC Pre-Trial Chamber I, 'Situation in Darfur, Sudan, in the case of *the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al-Bashir"):* Decision on 8 Applications for Victims' Participation in the Proceedings' (ICC-02/05-01/09 of 9 July 2010)
- ICC Pre-Trial Chamber I, 'Situation in Darfur, Sudan in the case of *the Prosecutor v. Abdallah banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*: Decision on Victims' Participation at the Hearing on the Confirmation of the Charges' (ICC-02/05-03/09 of 29 October 2010)
- ICC Trial Chamber I, 'Situation in the Democratic Republic of Congo in the case of *the Prosecutor v. Thomas Lubanga Dyilo*: Decision establishing the principles and procedures to be applied to reparations' (ICC-01/04-01/06 of 7 August 2012)
- ICC Trial Chamber I, 'Situation in the Democratic Republic of Congo in the case of the *Prosecutor v. Thomas Lubanga Dyilo:* Decision on the Defence request for leave to appeal the Decision establishing the principles and procedures to be applied to reparations' (ICC-01/04-04-01/06 of 29 August 2012)

- European Court of Human Rights (Grand Chamber), *Case of McCann and Others v. the United Kingdom*: *Application no. 18984/91*(Judgment, Strasbourg, 27 September 1995)
- European Court of Human Rights, *Case of Güleç v. Turkey*: *[54/1997/838/1044]* (Judgment, Strasbourg, 27 July1998)
- European Court of Human Rights, *Isayeva v. Russia; Yusupova v. Russia; Bazayeva v. Russia*, (57947/00; 57948/00; 57949/00, 24 February 2005) http://www.refworld.org/docid/422340c44.html [accessed 26 June 2013]
- United Nations, Reports of International Arbitral Awards, Samoan Claims (Germany, Great Britain, United States), 14 October 1902, (2006) http://untreaty.un.org/cod/riaa/cases/vol_IX/23-27.pdf (accessed on 18 November 2011)
- United Nations 'Reports of International Arbitral Awards, Mixed Claims Commission United States-Venezuela 17 February 1903' (2006) http://untreaty.un.org/cod/riaa/cases/vol_IX/113-318.pdf (accessed on 18 November 2011)
- United Nations, 'Reports of International Arbitral Awards, Mixed Claims Commission (United States and Germany) (1 November 1923 – 30 October 1939)' (2006) http://untreaty.un.org/cod/riaa/cases/vol_VII/1-391.pdf see also Appendices in Vol. VIII http://untreaty.un.org/cod/riaa/cases/vol_VIII/469-511.pdf (accessed on 18 November 2011)
- United Nations, Reports of International Arbitral Awards, Execution of German – Portuguese Arbitral Award of June 30th 1930 (Germany – Portugal), 16 February 1933, (2006) http://untreaty.un.org/cod/riaa/cases/vol_III/1371-1386.pdf (accessed on 18 November 2011)
- United Nations Compensation Commission (UNCC), Governing Council Decisions concerning the Iraq-Kuwait war of 1990/91http://www.uncc.ch/decision.htm#_1991 (accessed on 20 May 2014)
- Eritrea-Ethiopia Claims Commission (EECC), decisions concerning the 1998-2000 war between Eritrea and Ethiopia http://www.pca-cpa.org/showpage.asp?pag_id=1151 (accessed on 20 May 2014)
- The Kingdom of Netherlands, Court decisions concerning lawful damages: HR 30 March 2001, ECLI: NL: HR: 2001:ABO801; HR 17 September 2004, ECLI: NL: HR: 2004:AO7887; HR 2 October 2009, ECLI: NL: HR: 2009:BJ1708; HR 13 September 2013, ECLI: NL: HR: 2013:BZ7396
- United States Court of Appeals, Ninth Circuit., 976 F.2d 1328 1994 A.M.C 1514, 61 USLW 2233, Mitra KOOHI; Iman Koohi, minor daughter; Kosar Koohi, minor daughter; Hassan Almassi; Iran Air Flight 655, Plaintiffs-Appellants, v. US of America; United States Department of Navy, Defendants-Appellees. Elizabeth H. BAILEY, as the personal representative, et al., Plaintiffs-Appellants, v. VARIAN ASSOCIATES, INC.; General Electric Co.; GE Aerospace; RCA Corp; Harnischfeger Industries; Syscon Corp.; Computer Sciences Corporation; John Connor, Defendants-Appellees. (Nos. 90-16107, 90-16159) decided 8 October 1992 https://bulk.resource.org/courts.gov/c/F2/976/976.F2d.1328.90-16159.90-16107.html (accessed 24 May 2013)

Electronic

- Afghans: US paid $50,000 per shooting spree victim (Associated Press, 25 March 2012) http://usatoday30.usatoday.com/news/nation/story/2012-03-25/afghanistan-shooting-compensation/53765298/1 (accessed on 24 May 2013)
- Bell J, 'Government Liability: Some Comparative Reflections' (Barcelona, 2006) http://www.indret.com/pdf/322_en.pdf (accessed on 23 May 2014)
- Bovard J, 'Iraqi Sanctions and American Intentions: Blameless Carnage? Part 2' [2004] The Future of Freedom Foundation http://fff.org/explore-freedom/article/iraqi-sanctions-american-intentions-blameless-carnage-part-2/ (accessed on 3 January 2012)
- Center for Civilians in Conflict, 'Amends campaign' http://civiliansinconflict.org/our-work/amends/ (accessed on 7 May 2013)
- Clemons S C, ' Recovering Japan's Wartime Past – and Ours' (New York Times 4 September 2001) http://www.nytimes.com/2001/09/04/opinion/recovering-japan-s-wartime-past-and-ours.html?pagewanted=all (accessed on 5 March 2012)
- Doswald-Beck L and Vité S, 'International Humanitarian Law and Human Rights Law' [1993] 293 *International Review of the Red Cross http://www.icrc.org/eng/resources/documents/misc/57jmrt.htm* (accessed on 22 May 2014)
- Garfield R, 'Morbidity and Mortality among Iraqi Children from 1990 through 1998: Assessing the Impact of the Gulf War and Economic Sanctions' [1999] CASI Internet Version http://www.casi.org.uk/info/garfield/dr-garfield.html (accessed on 3 January 2012)
- Hersh S, 'Annals of War, Overwhelming Force: What happened in the final days of the Gulf War?' (The New Yorker, 22 May 2000) http://cryptome.org/mccaffrey-sh.htm (accessed on 3 January 2012)
- Péninou J L, 'The Ethiopian – Eritrean Border Conflict' [1998] IBRU Boundary and Security Bulletin https://www.dur.ac.uk/resources/ibru/publications/full/bsb6-2_peninou.pdf (accessed on 10 February 2012)
- Relatives of Afghan Shooting victims paid compensation (ABC Radio Australia, 26 March 2012) http://www.radioaustralia.net.au/pacific/2012-03-26/relatives-of-afghan-shooting-victims-paid-compensation/595260 (accessed on 24 May 2013)
- Steven E, 'Rights Group Says NATO Bombing in Yugoslavia Violated Law' *New York Times* (June 08, 2000) http://www.nytimes.com/2000/06/08/world/rights-group-says-nato-bombing-in-yugoslavia-violated-law.html (accessed on 06 September 2011)
- The Global Alliance for Preserving the History of WWII in Asia, 'San Francisco Peace Treaty: Has Justice Been Served and Peace Secured?' http://www.global-alliance.net/SFPT/SFPTSanFranciscoPeaceTreatyIntroduction.htm (accessed on 5 March 2012)

- Muhammedally S, 'Civilian War Victims Receive Recognition in US Law' (Just Security: 3 April 2014, accessed at http://justsecurity.org/8882/civilian-war-victims-receive-recognition-law/ on 3 September 2014).
- The Claims Conference http://www.claimscon.org/ (accessed on 5 March 2012)
- The Eritrea-Ethiopia Boundary Commission, Press Release of 12 September 2007 http://www.pca-cpa.org/showpage.asp?pag_id=1150 (accessed on 13 February 2012)
- TFV, 'Projects' http://www.trustfundforvictims.org/projects (accessed on 17 January 2014)
- The Refugee Law Project: Beyond Juba, 'Briefing notes 1-6' http://www.beyondjuba.org/NRTJA/index.php (accessed on 23 May 2013)
- The American Civil Liberties Union (ACLU), information provided by the US Department of the Army in response Freedom of Information Act Request https://www.aclu.org/sites/default/files/webroot/natsec/foia/log.html (accessed on 5 November 2013)
- The Foundation "Remembrance, Responsibility and Future" http://www.stiftung-evz.de/eng/about-us/ (accessed 5 March 2012)
- The Sykes-Picot Agreement signed between the French and British governments (1916) http://www.jewishvirtuallibrary.org/jsource/History/sykes_pico.html (accessed on 3 January 2012)
- The United Nations Compensation Commission information http://www.uncc.ch/theclaims.htm (accessed on 13 December 2011)
- The Eritrea-Ethiopia Boundary Commission, Press Release of 12 September 2007 http://www.pca-cpa.org/showpage.asp?pag_id=1150 (accessed on 13 February 2012)
- The United States Institute of Peace: Truth Commissions Digital Collection http://www.usip.org/publications/truth-commission-digital-collection (accessed on 14 August 2012)
- The Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR - the Portuguese acronym) http://www.cavr-timorleste.org/ (accessed on 14 August 2012)
- The Beyond Juba Project http://www.beyondjuba.org/ (accessed on 23 November 2012)
- The African Youth Initiative Network (AYINET) http://www.africanyouthinitiative.org/ (accessed on 31 October 2012)
- The North East Chili producers' Association (NECPA) http://apf-uganda.ning.com/group/north-east-chilli-producers-association-necpa (accessed on 31October 2012)
- United States Holocaust Museum, 'Treaty of Versailles, 1919: Impact of the World War I' http://www.ushmm.org/wlc/en/article.php?ModuleId=10005425 (accessed on 12 March 2012)

Compensatie voor Slachtoffers van Nevenschade: Een Normatief en Theoretisch Onderzoek

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Oorlogswetten dienen onder meer ter bescherming van burgers tegen de gevolgen van oorlog. Zo is het strijdende partijen verboden om burgers en burgerdoelen direct aan te vallen en hierdoor bijkomende schade te veroorzaken die evident excessief is in verhouding tot het militaire doel. Bij overtreding van deze regel hebben slachtoffers recht op compensatie. Echter, oorlogswetten bieden geen volledige bescherming; burgers kunnen onopzettelijk of onvoorzien schade ondervinden of hun bezittingen kunnen vernietigd worden zonder dat daarbij sprake is van ongeoorloofde daden (dit noemen we nevenschade oftewel collateral damage in het Engels). Het feit dat het recht op compensatie gebaseerd is op de schending van een ander (basis)recht, sluit nevenschade impliciet uit van compensatie. De huidige oorlogswetten over de vraag of slachtoffers van nevenschade al dan niet recht hebben op compensatie.

De verklaring voor deze omissie is te vinden in het verleden. Bij het opstellen van de huidige oorlogswetten lag de focus te veel op het voorkomen en bestraffen van bepaald gedrag en veel minder op de belangen van het slachtoffer. Nadat men zich realiseerde dat het onmogelijk was onschuldige burgerdoden te voorkomen en vernietiging van burgerdoelen te vermijden, richtte de focus zich op de wens de schade te beperken in verhouding tot het gestelde militaire doel. Dat verklaart waarom oorlogswetten eerder overtredinggericht (misdaden) zijn dan gericht op ondervonden leed. Aan het einde van de 19e en het begin van de 20e eeuw vormde het concept 'oorlogsmisdaden' een eerste aantasting van het oude paradigma van de legale of wettelijke oorlog – het soevereine recht van staten om oorlog te voeren (*jus ad bellum*) en het recht om burgers en hun bezittingen voor deze oorlog in te zetten. Daarmee werd alle oorlogsschade gezien als schade gericht tegen staten, die vaak afzagen van het claimen van compensatie. Het besef dat oorlogsmisdaden bestraft konden worden en in aanmerking konden komen voor compensatie, werd voor het eerst formeel vastgelegd in de Haagse Conventie (compensatie) en het Vredesverdrag van Versailles (vergelding en compensatie), en werd bevestigd door de Neurenberg- en Tokyoprocessen. Vanaf dat moment is het *jus ad bellum* drastisch veranderd en accepteren we niet langer dat staten – laat staan andere actoren – de levens en eigendommen van burgers in gevaar brengen. De focus van de Geneefse Conventies en bijbehorende Protocollen op de bescherming van burgers illustreert dat de aandacht verschuift naar het respecteren van individuele rechten in oorlogstijd, maar deze verandering heeft nog niet geleid tot het recht op compensatie voor alle oorlogsslachtoffers. Paul zegt hierover dat 'protocol 1 reiterated The Hague

compensation language verbatim in 1977, even when normative background and assumptions had radically changed.'1 Met andere woorden, de oude argumenten om compensatie voor oorlogsslachtoffers te beperken hebben hun historisch-theoretische grondslag verloren.

De stelling van dit boek is dat discriminatie van slachtoffers van nevenschade zowel onjuist als onverdedigbaar is. Deze claim is gebaseerd op het feit dat er geen duidelijk onderscheid te maken is tussen slachtoffers van nevenschade en slachtoffers van oorlogsmisdaden (in het laatste geval worden de oorlogswetten geschonden). Het grootste struikelblok bij het maken van dit onderscheid is dat er subjectieve elementen meespelen zoals inzicht in of begrip voor de bedoelingen van de aanvallende partij. Daarbij speelt de vraag hoe goed je in staat bent deze oorlogssituatie in gedachten te reconstrueren. De essentie van de claim is dat slachtoffers van nevenschade vergelijkbare gevolgen ondervinden van de oorlog als slachtoffers van oorlogsmisdaden. En aangezien laatstgenoemden recht hebben op compensatie en eerstgenoemden daarvan uitgesloten zijn, is dat onterecht. Een slachtoffer van een oorlogsmisdaad verschilt niet van een slachtoffer van nevenschade, omdat het vereiste onderscheid gezocht moet worden in het gedrag van de militaire bevelhebber en niet in dat van het slachtoffer. Aangezien compensatie tot doel heeft de gevolgen van leed – dat beide categorieën slachtoffers ondergaan – te verzachten, zouden beide groepen gelijk behandeld moeten worden. De basis van de claim is dat nevenschade schade is die burgers lijden als gevolg van het streven naar bepaalde gemeenschappelijke belangen, al dan niet denkbeeldig. Daarom zouden degenen die profiteren van dat gemeenschappelijk belang ook de lasten ervan naar evenredigheid moeten dragen.

Het boek bespreekt tevens argumenten of gronden die compensatie voor slachtoffers van nevenschade zouden kunnen rechtvaardigen. Zo vormt menselijke waardigheid – een belangrijk concept binnen het mensenrechtenkader, eveneens onderdeel van oorlogswetten – een gedegen rechtvaardiging. Toekenning van compensatie aan slachtoffers van nevenschade ondersteunt de overtuiging dat 'all human beings have a right to live and to enjoy their property.'2 Bovendien is compensatie voor nevenschade te rechtvaardigen wanneer we oorlogen beschouwen als gevaarlijke activiteiten, wat ze daadwerkelijk zijn. Met als gevolg dat alle oorlogsschade (rechtmatig of onrechtmatig) compenseerbaar wordt binnen het kader van de wettelijke aansprakelijkheid. Militaire noodzaak is – met het oog op het gelijkheidsbeginsel – geen sterk argument om compensatie voor nevenschade te weigeren. Volgens het gelijkheidsbeginsel vormt het gemeenschappelijk belang – in dit geval militaire noodzaak – de rechtvaardiging om slachtoffers van rechtmatige publieke schade te compenseren. Doet men dit

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[1] Schott T. Paul, 'The Duty to Make Amends to Victims of Armed Conflict' (2013) 22:1 *Tulane Journal of International & Comparative Law* 87, 99 (paraphrased).

[2] Michael W. Reisman, 'Compensating Collateral Damage in Elective International Conflict' (2014) 8:1 *Intercultural Human Rights Law Review* 1, 9.

niet, dan worden sommige leden van de samenleving (slachtoffers) onevenredig zwaar belast in een kwestie die eigenlijk de staat betreft. Bovendien kan compensatie van nevenschade bepaalde maatschappelijke voordelen hebben. Zo kan het bijdragen aan verzoening en sociale samenhang binnen de getroffen gemeenschap en kan het een gunstig effect hebben op de samenwerking tussen militairen en burgers in een actuele oorlog.

Echter, geen van de genoemde argumenten of voordelen voorziet in een coherente rechtvaardiging binnen de huidige oorlogswetten. Compensatie voor nevenschade kan niet volledig gerechtvaardigd worden binnen de kaders van de mensenrechten omdat compensatie binnen mensenrechtenwetgeving gebaseerd is op overtreding van juridische normen. (Internationale) wettelijke aansprakelijkheid die van toepassing is op 'gevaarlijke activiteiten' voorziet niet in een duidelijke rechtvaardiging van nevenschadecompensatie omdat motieven om een oorlog te beginnen verschillen van redenen om economische activiteiten te ontplooien. Onrechtmatige daad wetgeving is ook ongeschikt omdat deze in het leven is geroepen om kwesties tussen privépersonen af te wikkelen. Al deze normen (menselijke waardigheid, rechtvaardigheid, gelijkheid, wettelijke aansprakelijkheid en onrechtmatige daad wetgeving) zouden een inspiratiebron kunnen zijn voor de invoering van nevenschadecompensatie, maar de uitvoering ervan moet altijd plaatsvinden binnen de kaders van de oorlogswetten.

Als er inderdaad geen goede argumenten meer zijn om slachtoffers van nevenschade uit te sluiten, op welke gronden is hun recht op compensatie dan binnen de oorlogswetten te rechtvaardigen? Dit is een zeer fundamentele vraag omdat compensatie voor wetsovertredingen is gebaseerd op de onrechtmatigheid van bepaald gedrag terwijl dat bij nevenschade niet het geval is. Het is daarom noodzakelijk een onderscheidende reden te vinden die – meer nog dan het vergelijkbare lijden – compensatie rechtvaardigt, een verklaring die in lijn is met de oorlogswetten. Dit boek komt tot de slotsom dat de rechtvaardiging van compensatie van nevenschade te vinden is in de humanitaire overwegingen die het fundament vormen van oorlogswetten.

De humanitaire wens om menselijk lijden in tijden van oorlog te minimaliseren vormt de basis voor de bescherming van burgers. De betekenis van 'minimaliseren van menselijk lijden' moet impliceren dat het een noodzakelijk doel wordt zodra blijkt dat de initiële bescherming gefaald heeft. Na het veroorzaken van leed moet de veroorzaker maatregelen nemen om het leed te minimaliseren. Uiteraard mag het duidelijk zijn dat opzettelijk leed onderscheiden moet worden van onopzettelijk leed. De suggestie is hier dat in het geval van leed én schuld, de verantwoordelijke partij gestraft moet worden en daarnaast verplicht moet worden tot compensatie. In het geval van schuldloos leed (nevenschade), daarentegen, dient de verantwoordelijke partij de schade te compenseren.

De term 'humanitair' heeft hier dezelfde betekenis en strikte toepasbaarheid als binnen de oorlogswetten. In dezelfde geest als een aangevallen natie een 'eerlijke' oorlog voert, namelijk door geen onschuldige burgers aan te vallen, past ook de rechtvaardiging van nevenschadecompensatie nadat deze schade

eenmaal is veroorzaakt. Redelijkerwijs kan het leed van onschuldige burgers daadwerkelijk geminimaliseerd worden in die zin dat – daar waar de bescherming onopzettelijk of onvoorzien gefaald heeft – de veroorzaker dit leed compenseert.

Wanneer men het idee van compensatie voor slachtoffers van nevenschade onderkent, vereist dit tevens de bereidheid om burgerschade te onderscheiden van schade voor de staat. Dit houdt in dat compensatie aan individuele slachtoffers ten goede komt, en niet aan de staat. Hier kan in elk geval het mensenrechtenkader een nuttige inspiratiebron zijn. In vergelijking met de oorlogswetten is individuele compensatie goed uitgewerkt. Echter, het gebruik van de term 'mensenrecht' heeft hier een andere betekenis dan in het specifieke juridische vakgebied van *human rights law*. De term 'mensenrecht' wordt in het bestek van dit onderzoek gebruikt om te benadrukken dat compensatie ten goede moet komen aan individuele slachtoffers, maar dat het toegekend wordt op humanitaire gronden; dezelfde uitgangspunten die verbieden dat burgers worden aangevallen. Deze aanbeveling is een erkenning van het feit dat door het nemen van maatregelen die directe voordelen bieden aan individuele slachtoffers, hun leed kan worden weggenomen of verzacht – met als resultaat de *raison d'être* van oorlogswetten.

Reparation for Victims of Collateral Damage: A Normative and Theoretical Inquiry

Alphonse Muleefu

The laws of war protect non-combatants against the adverse effects of war. Belligerents are prohibited from attacking non-combatants or civilian properties directly and causing incidental damage that is excessive in relation to the military objective. In case of a violation, victims have a right to reparation. However, the laws of war do not provide total protection; non-combatants can be accidently or incidentally harmed or their properties destroyed without making that conduct a violation. Since reparation is tied to violations of existing laws of war, victims of lawful incidents (collateral damage) are excluded. This book discursively investigates the basis for this normative discrimination and examines grounds (moral, policy and legal) on which reparation to victims of collateral damage could be (un) justifiable.

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