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978-1-107-41705-2 - The Right to Reparation in International Law for Victims of Armed Conflict

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Excerpt

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## 1 Introduction

### 1.1 Introduction and context

The rationale for writing this book is the importance of charting the legal standing of the right to reparation for victims of serious violations of human rights and humanitarian law and to explore the challenges associated with the implementation of this right, including the role played by the United Nations (UN) in this regard. This study explores the developing legal norms relating to the rights of victims of serious human rights and humanitarian law violations, identifies implementation gaps in recent international justice accountability initiatives and considers the advancement of the practical implementation of victims' rights, in particular those relating to reparations.

The past few decades have been distinguished by significant advances in the concept of state responsibility for serious violations of human rights and humanitarian law. Progress has been made in various branches of international law and long overdue steps towards implementation have been taken, notably through the development of human rights jurisprudence and the establishment of international criminal tribunals and truth commissions. Based on experiences to date, there is increasing awareness that post-conflict justice initiatives need to be comprehensive, complementary and, in particular, pay due attention to the rights of victims. There is emerging recognition that it is the responsibility of the state to provide justice for victims of armed conflict, and that sustainable justice requires three different components: judicial accountability, truth and reparations.<sup>1</sup> This is reflected in recent

<sup>1</sup> 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, UN Doc. A/RES/60/147, adopted by the General

developments in general international law and *lex specialis* such as human rights and humanitarian law, as well as post-conflict policy initiatives undertaken by international organisations, primarily the UN. However, due to the tensions surrounding state responsibility to provide reparations, this component of justice continues to be overlooked in favour of what are perceived to be more pressing exigencies to establish accountability and rule of law. This book argues that the rights of victims of serious human rights and humanitarian law violations have traditionally been neglected and that there is a pressing need to promote and apply the emerging norms in order for their rights to be realised and to ensure that a 'tripartite' balance of justice is achieved. Considering the standing individuals have gained in international law, the need to translate consequences of serious violations, such as reparations, in favour of individual victims has become an important aspect of affirming the legitimacy and credibility of the international legal order and human rights standards.

The surge of the human rights movement and the progress made towards universal ratification of human rights instruments over the past few decades has influenced the recognition of individuals as subjects under general international law and their rights versus the state. Both at the international and regional levels, rapidly growing jurisprudence confirms state responsibility to provide reparations for human rights violations caused by state agents or by the failure of states to prevent violations by non-state actors. However, as human rights mechanisms were not designed to deal with large-scale violations in conflict situations, the developing doctrine on redress provided for individual victims of human rights violations stands in stark contrast to the inadequate responses that have thus far been offered in practice to the victims of serious human rights and humanitarian law violations. Victims of ordinary crimes are still more likely to receive redress than those who have suffered serious human rights violations, in particular, when the victims are numerous in the context of an armed conflict. Many victims

Assembly 16 December 2005. UN Principles to Combat Impunity, adopted by the UN Commission on Human Rights in 1997, updated in 2005, UN Doc. E/CN.4/2005/102/Add.1. See also, e.g., C. Bassiouni, 'Accountability for Violations of International Humanitarian Law and other Serious Violations of Human Rights', in C. Bassiouni (ed.), *Post-Conflict Justice* (New York: Transnational Publishers, 2002), p. 26; M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston, MA: Beacon Press, 1998) and R. Mani, *Beyond Retribution, Seeking Justice in the Shadows of War* (Cambridge: Polity Press, 2002).

## INTRODUCTION AND CONTEXT

## 3

of serious violations continue to suffer stigma, social exclusion and re-victimisation as a consequence of the lack of reparations and assistance in order to overcome the impact of armed conflict. Among the victims most affected are women, children and victims of torture and sexual violence. For a majority of these victims, the absence of reparations has impeded their ability to resume their lives and move beyond the trauma they have endured.

Humanitarian law primarily contains provisions relating to the protection of victims, that is, civilians during conflict, but also affirms the duty of responsible parties to pay compensation. Historically, the doctrine in international law on inter-state reparations has to a large extent impeded the ability of victims of conflict to seek reparations. States had the discretion to claim reparations against other states for injuries to their nationals. The defendant state's duties were considered to be owed not to the injured alien, but rather to the alien's national state.<sup>2</sup> However, this doctrine has been challenged at the national level by a number of international redress movements, which in turn have been inspired by the gradual erosion of state immunity in relation to human rights violations. The convergence of human rights and humanitarian law norms that cover the same serious violations, such as, for example, violations of the right to life and acts of torture, exposes gaps as victims are able to seek redress through human rights mechanisms, while humanitarian law fails to provide comparable procedures for implementation.

The recent codification of international criminal law has significantly influenced the discourse on post-conflict justice, while legal research on post-conflict justice has been inspired by the rapid developments in international justice mechanisms. As a result, much focus has been on the accountability of perpetrators, in particular, in the application of universal jurisdiction. Victims have largely remained in the background, analogous to their position in municipal criminal law where reparations are seen as part of civil law, and victims are still primarily perceived according to their capacity as witnesses. However, as awareness of the importance of affirming the rights of victims increases, there is a pressing need to identify gaps in their legal protection as well as effective

<sup>2</sup> I. Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1990), pp. 432–76; A. Cassese, *International Law* (Oxford University Press, 2001), pp. 182–210; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (London: Routledge, 1997), pp. 256–7; D. Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2005), pp. 56–83.

modalities that can address their situation in practice. The Rome Statute of the International Criminal Court (ICC) establishes new ground by affirming the rights of victims to reparations. Yet the key challenge of how to transform these rights into practice remains, particularly as the coverage of the ICC, and that of its Trust Fund, will be limited by its jurisdiction and capacity to interact with and reach out to victims.

There is a potential problem in focusing on individual responsibility as it may divert attention away from state responsibility. In practical, as well as conceptual, terms, the issue of reparations for victims of armed conflict is difficult to substantiate in terms of individual responsibility. This research argues that there is a need to reinforce the notion that the state carries the principal responsibility for providing redress. Although a state may not have been directly and solely responsible for all violations in question, responsibility can, as is evidenced in international law and succinctly illustrated by case law from the Inter-American human rights system, result from complicity, omission, as well as failure to prevent and demonstrate due diligence.<sup>3</sup> It is submitted that once peace has been achieved and negotiations concluded, the state assumes responsibilities towards the demobilised opponents with respect to, for example, reintegration measures, and, as a logical consequence, should also be responsible to the victims of these former combatants.<sup>4</sup> As is demonstrated by numerous peace agreements, there is recognition that victims are entitled to receive reparations.<sup>5</sup> Examples of such peace agreements are highlighted and explored in Part II of this study. Authorities in post-conflict scenarios need to consider the harm that has been inflicted upon civilians in a non-discriminatory manner

<sup>3</sup> A. Cançado Trindade, 'Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited', in M. Ragazzi (ed.), *International Responsibility Today, Essays in Memory of Oscar Schachter* (Leiden: Martinus Nijhoff, 2005), pp. 253–69. See further references in case law discussed in Chapter 3 and in particular in relation to jurisprudence of the Inter-American Court relating to Guatemala and Colombia, discussed in Part II.

<sup>4</sup> For a thorough discussion see L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002). See also Y. Sooka, 'Dealing with the Past and Transitional Justice: Building Peace through Accountability', *International Review of the Red Cross*, 88(862) (2006), 324–5; P. De Geiff, 'Contributing to Peace and Justice, Finding a Balance between DDR and Reparations', Paper presented at the conference 'Building a Future on Peace and Justice', Nuremberg, 25–27 June 2007.

<sup>5</sup> C. Bell, *Peace Agreements and Human Rights* (Oxford University Press, 2000). See also Report to the Human Rights Council of the Office of the High Commissioner for Human Rights, 'Analytical Study on Human Rights and Transitional Justice', A/HRC/12/18, 6 August 2009 and its Addendum, 'Inventory of Human Rights and Transitional Justice Aspects of Recent Peace Agreements', A/HRC/12/18/Add.1, 21 August 2009.

irrespective of the perpetrators of the acts, and state practice indicates growing recognition of such responsibility.

As noted above, different branches of law are contributing to the development of norms on victims' rights. The convergence of human rights provisions and those related to war crimes under international humanitarian law and international criminal law, for example, the prohibition of extrajudicial executions, torture, racial discrimination and child recruitment, indicate that victims would benefit from claiming their right to receive reparations with reference to different branches of law. There is recognised value in merging the rights of victims currently found in the different strands of international law;<sup>6</sup> however, the adoption of a legally binding instrument that clearly consolidates the rights of victims<sup>7</sup> and the establishment of effective operative redress mechanisms have yet to be realised.

In 2005, the UN Commission on Human Rights adopted, after some fifteen years of drafting negotiations, the 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 'Basic Principles on the Right to Reparation for Victims' or 'the Principles'). The Principles clearly aim to merge international humanitarian and human rights law, and stress the importance of and obligation to implement domestic reparations for victims of conflict. In March 2006, the Principles were adopted by the General Assembly (GA) of the UN, further strengthening their status even though they are formally non-binding.<sup>8</sup> Significantly, the Principles detail the range of components of which reparations

<sup>6</sup> An example, the ICJ *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Report 2005, affirms the dual and complementary application of human rights and humanitarian law, paras 217–19. Further references on the mutually complementary and reinforcing nature of human rights and humanitarian law: 'Report to the Human Rights Council of the Office of the High Commissioner for Human Rights on the Outcome of the Expert Consultation on the Issue of Protecting the Human Rights of Civilians in Armed Conflict', A/HRC/11/31, 2 June 2009.

<sup>7</sup> T. Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument', *American Journal of International Law*, 77(3) (1983), 589–606; Bassiouni, 'Accountability for Violations of International Humanitarian Law and other Serious Violations of Human Rights', pp. 26–54.

<sup>8</sup> 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, Preamble, adopted by the UN Commission on Human Rights in 2005, UN Doc. E/CN.4/RES/2005/35 and adopted by the General Assembly on 16 December 2005, UN Doc. A/RES/60/147.

consist: namely, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. The Principles, while still in draft form, were already being referred to in the jurisprudence of numerous human rights treaty bodies, figure in several recently adopted international legal instruments<sup>9</sup> and domestic legislation, and have also been applied by a number of truth commissions, as explored in Part II.<sup>10</sup> As will be explored, the Principles largely reflect already established norms in international law and make an important contribution in unifying and reinforcing them. To a significant extent, the Principles draw upon the Articles on State Responsibility adopted by the International Law Commission (ILC) in 2001.<sup>11</sup> This study examines the different elements of reparations and identifies aspects that are deemed to be the most essential by those victims who remain particularly vulnerable after armed conflict. As noted by Nowak and MacArthur: ‘usually, victims of torture are not primarily interested in monetary compensation but in other means of reparation which are better suited to restore their dignity and humanity’.<sup>12</sup>

Although reparations are clearly a state responsibility, the UN plays a considerable role in promoting the rights of victims in conflict mediation and post-conflict peace-building. The authority of the UN, empowered by its Charter with the duty to maintain international peace and security in conformity with the principles of justice and international law, faces a major challenge in promoting normative standards on victims’ rights in its operative work. The expanded role of the UN in peacekeeping missions,<sup>13</sup> and in post-conflict justice initiatives

<sup>9</sup> The Rome Statute of the International Criminal Court (ICC) contains an implicit reference to the principles in Article 75; they are also explicitly mentioned in the International Convention on the Protection of All Persons from Enforced Disappearance, Article 24 (adopted 20 December 2006, entered into force 23 December 2010).

<sup>10</sup> For example, the truth commissions in South Africa and Sierra Leone, as underlined by Ms Yasmin Sooka, former Commissioner in the South African and Sierra Leone TRCs during ‘Workshop to Combat Impunity and Provide Reparations’ at OHCHR Geneva on 19 September 2005. See also Shelton, *Remedies in International Human Rights Law*, p. 350.

<sup>11</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Commission 2001, 53rd session contained in the Official Records of the General Assembly, 56th session, Supplement No. 10, UN Doc. A/56/10, ch. IV.E.I.

<sup>12</sup> M. Nowak and E. McArthur, *The United Nations Convention against Torture, A Commentary* (Oxford University Press, 2008), p. 483.

<sup>13</sup> Report of the Secretary-General to the General Assembly, ‘Investing in the United Nations, for a Stronger Organisation worldwide’, released 7 March 2006, UN Doc. A/60/692 details that: ‘in the first 44 years of the history of the UN, only 18 peacekeeping missions were set up. In the 16 years since 1990, 42 new missions have been authorised’, para. 4.

undertaken over the past fifteen years, underlines its position that state responsibility towards victims should not be abandoned during accountability and reconciliation processes. This study explores the role of the international community, and notably the UN, in ensuring victims' rights in peace negotiations and the establishment and operation of, as well as follow-up to, transitional justice mechanisms. As expressed by Kofi Annan in his 2005 reform proposal, 'we must move from an era of legislation to an era of implementation'.<sup>14</sup> While emphasis during past decades has been on the development of norms and standards in the realm of human rights, today attention should be placed on the importance of ensuring that rights are effectively put into practice.

## 1.2 Aim and objectives of the study

The overall aim of this study is to analyse the international legal standing of the right to reparation for victims of serious human rights and humanitarian law violations, and to assess the degree of practical implementation of that right at the national level through case studies on post-conflict and transitional justice measures. The central objective is to chart and evaluate developments in law, based on comprehensive analysis of provisions and jurisprudence, as well as in practice, in order to substantiate arguments in favour of an emerging customary right for individuals to receive reparations for serious violations of human rights and the corresponding responsibility of states.

Although research on reparations has gained increased attention, considerable research has been compartmentalised and focused on either redress in human rights,<sup>15</sup> international humanitarian law<sup>16</sup> or international criminal law.<sup>17</sup> This study rather promotes the position that victims benefit from a reparations concept that merges provisions, especially since the prohibition of the most serious human rights

<sup>14</sup> Report of the Secretary-General to the General Assembly, 'In Larger Freedom, Towards Development, Security and Human Rights for All', UN Doc. A/59/2005, 25 March 2005, para. 132.

<sup>15</sup> Shelton, *Remedies in International Human Rights Law*.

<sup>16</sup> A. MacDonald, 'Rights to Legal Remedies for Victims of Serious Violations of IHL', Doctoral thesis, Queen's University of Belfast, 2003; L. Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', *International Review of the Red Cross*, 85 (2003), 497–526.

<sup>17</sup> F. McKay, 'Are Reparations Appropriately Addressed in the ICC Statute?', in D. Shelton (ed.), *International Crimes, Peace and Human Rights: The Role of the International Criminal Court* (New York: Transnational Publishers, 2000), pp. 163–78.

violations coincide with provisions in international humanitarian law and international criminal law. The focus on these synergies follows as a natural consequence of increased convergence and cross-referencing regarding victims' rights between the different branches of law. As Bassiouni notes; 'if the victim is our concern and interest, then legal distinctions and technicalities surrounding various classifications of crimes should be re-conceptualised ... such distinctions are of little significance to victims in their quest for redress'.<sup>18</sup> The right of individuals to receive reparations for serious violations is an indispensable corollary to an effective remedy for the violations suffered. The study focuses on the reparations aspects of victims' rights rather than on their right to access to justice and their right to a legal remedy. The objective is to apply a victim-oriented approach by using as a key evaluation tool the comprehensive concept of the victims' right to reparations established in the UN Basic Principles on the Right to Reparation for Victims, rather than referring to the polarised 'truth versus justice' discourse, which until the Basic Principles were adopted tended to dominate in assessments of post-conflict and transitional justice initiatives.<sup>19</sup>

Parallel to legal developments, it is pertinent to scrutinise how actual post-conflict measures on the ground have managed to incorporate victims' rights elements and to what extent this has been achieved by initiatives constructed to promote retributive, transitional or restorative justice. There is a lacuna as the concept of state responsibility has evolved, alongside an emerging customary right to receive reparations, yet in practice a national legal framework and forum to which victims can submit claims commonly remains lacking. Thus, the right cannot be effectively guaranteed. This book aims to assess the degree to which concrete measures have been taken to bridge this gap. The research contrasts legal norms with state practice by exploring a number of case studies of countries recently emerged or emerging from conflict, in

<sup>18</sup> C. Bassiouni, 'International Recognition of Victims Rights', *Human Rights Law Review*, 6 (2006), 204–5.

<sup>19</sup> See, e.g., R. Rotberg and D. Thompson (eds), *Truth v. Justice, The Morality of Truth Commissions* (Princeton University Press, 2000); P. Akhavan 'Beyond Impunity: Can International Justice Prevent Future Atrocities?', *American Journal of International Law*, 95(7) (2002), 7–31; A. Barahona de Brito, C. Gonzalez Enriquez and P. Aguilar (eds), *The Politics of Memory, Transitional Justice in Democratizing Societies* (Oxford University Press, 2001); A. J. McAdams (ed.), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press, 1997); N. Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols (Washington, DC: US Institute of Peace Press, 1995); A. Rigby, *Justice and Reconciliation after Violent Conflict* (Boulder, CO: Lynne Rienner, 2001).

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#### AIM AND OBJECTIVES OF THE STUDY

9

which the UN plays or has played a significant role in peace negotiations, the establishment of transitional justice mechanisms and in their follow-up. The impact of specific provisions on reparations in peace agreements and mandates of UN-supported transitional justice initiatives is examined.

The establishment of numerous truth commissions has sparked considerable interest in their restorative value, in particular, among scholars in the field of political science, sociology and psychology. However, only recently has the contribution of truth commissions become recognised among legal scholars as having a complementary, rather than alternative, function.<sup>20</sup> Approaches to post-conflict analysis have tended to be short-sighted and have failed to pay due consideration to an aspect crucial for the victims: namely, the right to reparation. Therefore, this study sets out from the perspective of the victims, for whom the absence of reparations undermines the concept of justice. The second part of the book assesses the role of the UN in relation to transitional justice mechanisms, both courts and truth commissions, and the degree to which these have managed to influence the national discourse and promote state responsibility and responsiveness to victims' claims for reparations. When applicable, the contributions of international commissions of inquiry are also considered.

Specifically, this study discusses state practice and the extent to which truth commissions have provided a basis for subsequent elaboration of domestic legislation and comprehensive reparations measures. The book furthermore considers to what extent truth commissions have played, and will continue playing, a significant role in promoting the practical implementation of the right to reparation for victims of armed conflict. The case studies aim at identifying which factors are decisive in promoting the right in practice. For this reason, the case studies document the interplay between transitional justice processes and human rights mechanisms, both international and regional, and to what extent these have promoted state responsibility effectively. Finally, the case studies

<sup>20</sup> R. Goldstone, 'Advancing the Cause of Human Rights: The Need for Justice and Accountability', in S. Power and G. Allison, *Realising Human Rights, Moving from Inspiration to Impact* (New York: St. Martin's Press, 2000), pp. 195–221; C. Stahn, 'United Nations Peace-building, Amnesties and Alternative Forms of Justice: A Change in Practice', *International Review of the Red Cross*, 84(845) (2002), 191–205; W. Schabas, 'The Relationship between Truth Commissions and Courts: The Case of Sierra Leone', Paper presented at conference on the 'Inter-Relationship between Truth Commissions and Courts', Galway, 4 October 2002; R. Zacklin, 'The Failings of Ad Hoc International Tribunals', *Journal of International Criminal Justice*, 2 (2004), 541–5.

analyse the degree of engagement and support by the international community, along with geopolitical factors, as these provide key elements in prompting states to recognise and assume their responsibilities vis-à-vis victims of serious human rights violations. With a view towards the future, suggestions for concrete measures, such as the creation of trust funds, are identified and put forward.

### 1.3 Structure and outline

#### 1.3.1 Part I

The first chapter of Part I explores the customary nature of human rights and humanitarian law, outlines the basic premise of state responsibility in relation to violations and identifies the general international norms that establish the obligation to provide reparations. The convergence of norms and legal sources is documented by reference to the status of reparations in relation to individuals, as demonstrated in jurisprudence from the International Court of Justice, the Articles on State Responsibility of the ILC,<sup>21</sup> as well as in provisions in humanitarian and human rights instruments. The influence of international human rights law on general international law is particularly highlighted. The study furthermore examines international standards that are formally non-binding, with emphasis on the Basic Principles on the Right to Reparation for Victims, as these illustrate an emerging fusion in international law in favour of victims. The chapter acknowledges some of the reservations expressed in relation to the status of the right to reparation and notes how such concerns are counteracted by developments in international law.

The second chapter studies in further detail developments in the area of reparations on the basis of the international and regional human rights systems. The chapter charts the evolving concept of reparations for serious human rights violations through a comparative study of case law under the international and regional human rights systems. Focus is set on cases that illustrate elements of reparations for serious human rights violations relating to restitution, no repetition, compensation, satisfaction and rehabilitation, according to the elements as affirmed in the Basic Principles on the Right to Reparation for Victims. Consideration is also given to the operative challenges faced

<sup>21</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, A/56/10, ch. IV.E.I.