Reparation for Victims of Grave Human Rights Violations

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I. INTRODUCTION

Few would argue that persons suffering a grave breach of their human rights should not have a right to full reparation. This rule would seem to belong to the body of natural justice. The law of torts was already highly developed in ancient times. Roman jurists had no doubt that, in principle, the person responsible for an act causing injury was under a duty to compensate his victim.[1] Therefore, why should individuals whose rights have been infringed by their government not have a reparation claim as well? Furthermore, because humankind has entered the international stage, why should such a claim not be rooted in international law? Because today states are obligated to comply with human rights and fundamental freedoms not only vis-à-vis their citizens, but vis-à-vis everyone under their jurisdiction or under their control (and perhaps even towards everyone affected by their conduct), it would appear logical that a further step must be taken. Under national domestic

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1. *See* MAX KASER, DAS RÖMISCHE PRIVATRECHT 129 (1959).

systems, as well as under traditional international law, the breach of a primary substantive rule entails, automatically, the emergence of secondary rules.[2] The damage caused by an unlawful act is generally deemed to require reparation. Little imagination is needed to extend this simple rule to the "new" international law, the human-being-oriented international law, which is still developing and has yet to be fully realized.

In fact, the classical doctrines have long since been overcome. In 1905, Lassa Oppenheim stated in the first edition of his famous treatise: "Since the Law of Nations is a law between States only, and since States are the sole exclusive subjects of International Law, individuals are mere objects of International Law, and the latter is unable to confer directly rights and duties upon individuals."[3]

Similarly, in 1906, the well-known author Dionisio Anzilotti wrote: "*la conduite d'un État, toute contraire qu'elle soit au droit international, ne saurait jamais donner naissance à un droit de l'individu à la réparation du dommage souffert.*"[4] Such dogma has lost its foundation. If and when the existence of individual reparation claims under international law might be denied still today, other grounds would have to be adduced to justify such denial. Albeit to a limited extent, in the contemporary world the individual can derive many entitlements directly from international law. This is particularly true in the field of human rights. Because states are bound (by primary obligations) to respect and ensure basic rights of human beings, it seems to require only a small step to conclude that, in the case of a breach of such obligations, a (secondary) duty to make reparation arises from the same legal source.

II. NEW TRENDS

Those who wish to tread progressive paths can find considerable encouragement. To begin, one may refer to the now venerable opinion of the International Court of Justice (ICJ) in the *Bernadotte* case of 1949.[5] For the first time in international judicial practice, the ICJ acknowledged that, like a state seeking redress for damage inflicted upon one of its nationals, an international organization may claim reparation if one of its

2. CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 3 (1928) ("Obligation, simply put, is the owing of a duty; and, behind it, claiming the performance of that duty, is responsibility.").

3. 1 LEONARD OPPENHEIM, INTERNATIONAL LAW § 149, at 200 (1905).

4. Dionisio Anzilotti, *La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers*, 13 REVUE GÉNÉRALE DE DROIT INT'L PUB. 5 (1906).

5. *See* Advisory Opinion, Reparation for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr. 11).

agents becomes the victim of a wrongful act by a classic subject of international law, i.e., a state.[6] Thus, the road seems to be well-paved. To the extent that new subjects of international law emerge, one might conclude that they will enjoy the same rights as traditional subjects, provided that the nature of the rights at issue permits the rights to be conferred upon the new subjects. The rules on international responsibility seem to embody the type of regulation that can be moved easily from its original scope of application *ratione personae* to other, noninter-state relationships.

The United States has a strong propensity to argue in accordance with the intellectual framework just outlined. If international law had not provided a fitting background, U.S. tribunals would never have construed the Alien Tort Claims Act (ATCA), with the boldness that has characterized their jurisprudence.[7] The statute grants U.S. courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[8] Instead of strictly construing the ATCA, it has been interpreted as providing a substantive cause of action.[9] This has stimulated further U.S. legislation.

A 1996 amendment to the Foreign Sovereign Immunities Act, the Antiterrorism and Effective Death Penalty Act, created a large opening through which claims may be brought against foreign states.[10] States officially certified by the United States as sponsors of terrorism were denied the traditional protection of state immunity. Furthermore, the amendment intended to create a cause of action.[11] One of the most spectacular cases to arise under this framework is *Flatow v. Islamic Republic of Iran*, in which the District Court for the District of Columbia awarded financial compensation in the amount of US$247 million in a proceeding against Iran.[12] Michelle Flatow, a U.S. student, had been killed by a suicide terrorist attack during her stay in Israel.[13] The judgment was based on the assumption that the terrorist group

6. *Id.* at 183-84.
7. *See* Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (1993).
8. *Id.*
9. *See* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 242 (2d ed. 2001); Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980) (interpreting the ATCA as providing a substantive cause of action); *cf.* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 87-89 (1999) (discussing Xuncax v. Gramajo, 866 F. Supp. 162 (D. Mass. 1995)).
10. *See* Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 1605(a)(7) (1994 & Supp. 2000).
11. *See id.*
12. 999 F. Supp. 1 (D.D.C. 1998).
13. *Id.* at 7-8.

perpetrating the fatal attack had been financed by Iran.[14] More recently, U.S. courts have awarded punitive damages of US$300 million, almost as a matter of routine.[15] Such excesses, though, have little to do with international law because they appear to be driven by political motives. Such motives fail to take into account international practice outside the United States.

Significantly, a draft of a major set of rules has been pending before the U.N. Commission on Human Rights for several years. The Dutch lawyer Theo van Boven, former head of the U.N. Center for Human Rights, began preparing a draft on "[t]he right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms," the final version of which was submitted by the rapporteur in 1997.[16] Through resolution 1998/43, the well-known U.S./Egyptian lawyer Cherif Bassiouni was entrusted with continuing that work.[17] Bassiouni produced a final report in January of 2000, which answers all prayers, as victims would be granted all conceivable rights.[18] Bassiouni suggests that, "States should provide victims of violations of international human rights and humanitarian law the following forms of reparation: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition."[19]

Bassiouni has followed the modalities of reparation known from inter-state law as reflected in the Draft Articles of the International Law Commission (ILC) on Responsibility of States for internationally wrongful acts.[20] Bassiouni wishes to see the modalities applied in relationships between states and individuals, despite the fact that the ILC did not touch upon individual reparation claims in that draft.[21] Indeed, states are quite reluctant to accept such a regime. For example, in 2000, the response to a call by the U.N. Commission on Human Rights to comment upon the draft was extremely modest. Only six states replied,

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14. *See id.* at 8.

15. *See* Sutherland v. Islamic Republic of Iran, 151 F. Supp. 2d 27, 53 (D.D.C. 2001); Jenco v. Islamic Republic of Iran, 154 F. Supp. 2d 27, 39 (D.D.C. 2001); Anderson v. Islamic Republic of Iran, 90 F. Supp. 2d 107, 114 (D.D.C. 2000).

16. U.N. ESCOR, 53d Sess., Annex, Agenda Item 8, at 2, U.N. Doc. E/CN.4/1997/104 (1997).

17. E.S.C. Res. 1998/43, U.N. ESCOR, 54th Sess., 52nd mtg., Supp. No. 3, at 151, U.N. Doc. E/CN.4/RES/1998/43 (1998).

18. U.N. ESCOR, 56th Sess., Agenda Item 11(d), U.N. Doc. E/CN.4/2000/62 (2000).

19. *See id.* Annex ¶ 21.

20. Draft Articles on Responsibility of States for internationally wrongful acts, *Report of the ILC on the work of its 53rd session* (23 April - 1 June and 2 July - 10 August 2001), U.N. doc. A/56/10, p. 43 (final version adopted on second reading).

21. *See id.*

and the replies seem to have been so discouraging that it was decided not to issue them in documentary form. They can be consulted only "by approaching the Secretariat."[22] One may therefore conclude that the van Boven/Bassiouni rules do not, as of yet, enjoy the support of the international community.[23]

III. THE BALANCE SHEET

A. International Instruments

In fact, an examination of the relevant international treaties on protection of human rights reveals a much more cautious attitude.

1. The Universal Declaration of Human Rights does not mention any kind of reparation, confining itself to providing in article 8 that, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[24] It is not clear whether this proposition includes a right to reparation when a primary entitlement has been encroached upon.

2. The European Convention on Human Rights took a further step by empowering the European Court of Human Rights to grant "just satisfaction" in cases in which the internal law of a state—found to be in breach of its obligations under the Convention—permits only partial reparation to be made (article 41).[25] However, no link has evolved between the finding of a violation and the granting of "just satisfaction" that the court has interpreted to mean financial compensation.

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22. U.N. ESCOR, 57th Sess., Agenda Item 11(d), ¶ 4, U.N. Doc. E/CN.4/2001/61 (2000).

23. *See* E.S.C Res. 2000/41, U.N. ESCOR, 60th mtg., U.N. Doc. E/CN.4/RES/2000/41 (2000) (deciding that the matter would be considered at its next session under the topic "Independence of the judiciary, administration of justice, impunity"; however, no mention of the relevant issues can be found in resolution 2001/39 of April 23, 2001, under that title); Felipe H. Paolillo, *On Unfulfilled Duties: The Obligation to Make Reparation in Cases of Violation of Human Rights*, *in* LIBER AMICORUM GÜNTHER JAENICKE-ZUM 85. GEBURTSTAG 291, 295-302 (1998) (outlining the reasons for widespread noncompliance with van Boven/Bassiouni principles); Menno Kamminga, *Legal Consequences of an Internationally Wrongful Act of a State Against an Individual*, *in* THE EXECUTION OF STRASBOURG AND GENEVA HUMAN RIGHTS DECISIONS IN THE NATIONAL LEGAL ORDER 65, 69, 74 (T. Barkhuyen et al. eds., 1999) (stating that although "every internationally wrongful act of a state resulting in the infringement of the rights of an individual entails the international responsibility of that state" vis-à-vis the individual concerned, the victim may have difficulty enforcing these entitlements due to courts' unfamiliarity with the rights, as well as an absence of harmonization).

24. Universal Declaration of Human Rights, G.A. Res. 217A, art. 8, U.N. Doc. A/RES/271A(III) (1948).

25. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, *reprinted in* 33 I.L.M. 960, 963 (1994) (entered into force Nov. 11, 1998).

According to the terms of article 41, the court shall grant just satisfaction only "if necessary."[26] In other words, the court does not believe it is obligated to compensate an injured party under all circumstances. Thus, it enjoys a broad measure of discretion.

Consistent with this discretionary power, the court has many times held that a judicial pronouncement alone, declaring a state's breach of its commitments, will constitute sufficient redress.[27] In a few cases, shocking results have occurred. In *McCann v. United Kingdom*, the court denied any financial compensation to the families of three persons who had been killed by a British antiterrorist unit in Gibraltar.[28] The victims were suspected terrorists who belonged to the Irish Republican Army. Authorities in Gibraltar had been warned beforehand of their arrival in the British colony.[29] It was feared that they would carry out a major attack with explosive devices.[30] However, instead of arresting the three suspects, the police unit killed them as soon as they were spotted.[31]

The justification advanced by British authorities was that the three men were much too dangerous to be dealt with according to "normal" rules.[32] Rightly, however, the court found that even a presumed terrorist enjoys a right to a fair trial and cannot simply be gunned down.[33] Consequently, it concluded that the three persons' right to life had been violated.[34] Nonetheless, the court failed to grant any financial compensation because the victims had been intending to plant a bomb.[35] Thus, the State's violation of the individuals' right to life remained uncompensated. By taking this course of action, the court belittled the fundamental value of the right to life. In addition, it defied the notion that states infringing human rights are necessarily liable for the harm caused by them.

More recently, the European Court of Human Rights seems to have followed a less erratic course, one less permeated by motives of moral reprobation. And yet, it has remained faithful to its position that not every violation should give rise to compensation. In *Sürek v. Turkey*, a

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26. *Id.*
27. *See* Christian Tomuschat, *Just Satisfaction Under Article 50 of the European Convention on Human Rights*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE. STUDIES IN MEMORY OF ROLV RYSSDAL 1409-30 (2000) (reviewing the relevant cases).
28. McCann v. United Kingdom, App. No. 18984/91, 21 Eur. H.R. Rep. 97 (1996).
29. *Id.* at 103.
30. *Id.* at 106.
31. *Id.* at 114-15.
32. *See id.* at 144-45.
33. *Id.* at 142.
34. *Id.* at 151.
35. *See id.* at 177-78.

Turkish citizen appealed his fines and conviction for disseminating separatist propaganda on the grounds that, inter alia, "his conviction and sentence constituted an unjustified interference with his right to freedom of expression."[36] The citizen petitioned the court for "just satisfaction" to compensate for his nonpecuniary damage; however, the court found that its declaration of a violation alone provided sufficient redress to the victim.[37] In other words, the successful applicant won a moral victory, but he was not compensated for the economic injury, in particular the nonpecuniary damage suffered.[38]

It may well be that the rule now enunciated in article 41 dates back to the early stages of the emergence of human rights in international law. But when the Member States amended the Convention in 1998, they refrained from amending what had been in force for nearly fifty years.[39] In other words, they gave their implicit approval to the restrictions inherent in article 41. Therefore, the most progressive human rights system in the world does not acknowledge a right to financial compensation in all instances of violations of human rights, irrespective of the gravity of the breach. The court holds, though, that a recognition of the injury through a pronouncement of the court may provide the "just satisfaction" for the breach.

On another issue, the European Court of Human Rights has recently made a number of considerable strides forward. The court had held for many years that its powers were limited to granting financial compensation in appropriate cases. However, it did not feel empowered to order the taking of measures seeking to undo harm caused. This cautiousness could put the court in a terrible dilemma in cases where an unlawful situation persisted during the relevant court proceeding. For example, imagine a person being kept in detention without any valid grounds simply for political reasons—or even worse—a defendant sentenced to death, based upon a deeply flawed proceeding. The court could have insulted itself by ordering the responsible government to pay financial compensation to the surviving family members, while allowing the state to execute the applicant. Fortunately, to date the court has been spared such extreme challenges. But these examples are not far-fetched intellectual games. Rather, they reflect realities that have been displayed

36. Sürek v. Turkey, 1999-IV Eur. Ct. H.R. 355, 365, 377.
37. *Id.* at 388.
38. *Id.*
39. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 25.

before the practice of the Human Rights Committee under the International Covenant on Civil and Political Rights.[40]

Acknowledging the inadequacies of its jurisprudence, the European Court of Human Rights embarked on a new course in 1995. In *Papamichalopoulos v. Greece*, concerning an expropriation case, the court stated that

> a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.
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> . . . If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it . . . .[41]

This finding was confirmed in 1998 in *Akdivar v. Turkey*.[42] The applicant argued that the Turkish Government should "remove any obstacle preventing the applicants from returning to their village."[43] According to the findings in an earlier judgment on the merits of the case, Turkish military units had destroyed Akdivar's house and driven him and his family away from their hometown.[44] On earlier occasions of a similar nature the court had flatly rejected such requests, stating that under article 50 of the Convention (now article 34) it was prevented from making such a declaration.[45] However, in *Akdivar*, the court recognized the persuasiveness of the applicant's argument and held:

> The Court recalls that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to such breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, if *restitutio in integrum* is in practice impossible the respondent States are free to choose the means whereby they will comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard.[46]

However, the court was hesitant to represent this as a significant shift in its case law. In *Akdivar*, besides invoking *Papamichalopoulos*, the court

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40. Referring to the Human Rights Committee under the International Covenant on Civil and Political Rights. *See* The International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR 3d Comm., 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) [hereinafter International Covenant on Civil and Political Rights].

41. App. No. 14556/89, 21 Eur. H.R. Rep. 439, 451 (1996); *see also* Brumarescu v. Romania, judgement of Jan. 23, 2001 (unpublished).

42. Akdivar v. Turkey, 1998-II Eur. Ct. H.R. 711.

43. *Id.* at 723.

44. *See* Akdivar v. Turkey, App. No. 21893/93, 23 Eur. H.R. Rep. 143, 188-89 (1997).

45. *See* Tomuschat, *supra* note 27, at 1412.

46. *Akdivar*, 1998-II Eur. Ct. H.R. at 723-24.

also referred to its decision in *Miloslavsky v. United Kingdom*.[47] Yet this case does not confirm what it was intended to, namely, that *Akdivar* was the continuation of a previous line of judicial decisions.

Although groundbreaking, the new jurisprudence remains to some extent unsatisfying. In the first place, to date the duty to make reparation appears in the *dispositif* of the relevant judgments only in two cases of restitution of property (*Papamichalopoulos* and *Brumarescu*). In all other cases, that duty remains confined to the reasons given in the judgment. Second, even where the court explicitly held that certain objects should be returned to their former owners, the court has opened the door for the respondent states to disobey that order by providing for an alternative solution ("failing such return"). However, the court adds that even such a finding of secondary rank will be placed under the supervision of the Committee of Ministers,[48] which is entrusted with monitoring the execution of the judgments handed down by the court. As a result, one could conclude that the court has advanced its case law in a most discrete manner.

3. It is not surprising that the American Convention on Human Rights of 1969,[49] which is largely predicated on the European Convention for the Protection of Human Rights and Fundamental Freedoms, also contains a provision on reparation to victims that closely resembles article 41 of the European Convention.[50] Article 63 enjoins the Inter-American Court of Human Rights to "rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."[51]

The phrase "if appropriate" introduces, once again, a measure of discretion that allows the court to decide whether compensation should be paid to the victim. In another respect, however, article 63 is more courageous than its model in that it permits the court to order remedial measures. What took the European Court almost forty years to accept, and only in a veiled form, was envisaged under the Inter-American system from the very outset.

It is furthermore a matter of common knowledge that the Inter-American Court of Human Rights chose a victim-friendly course from

47. *Id.* at 724 (citing Miloslavsky v. United Kingdom, App. No. 18139/91, 20 Eur. H.R. Rep. 442 (1995)).

48. *Id.* at 723.

49. *See* American Convention on Human Rights, *adopted* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1998) [hereinafter American Convention].

50. *Id.* art. 63.

51. *Id.* art. 63(1).

its very first decision on the merits of a controversial case. In *Velásquez Rodríguez v. Honduras*, the court held that in instances of human rights violations, the state concerned had to carry out a serious investigation, identify those responsible, impose the appropriate punishment, "and to ensure the victim adequate compensation."[52] This sweeping statement suffers because of its excessive generality, although it was clearly justified by the circumstances of the case at hand. Velásquez Rodríguez had disappeared (and in all likelihood was murdered) while being detained.

However, it must be recognized that not all cases of human rights violations must end with the criminal prosecution of the responsible government agents. Where freedom of expression has been curtailed, for instance, it may suffice for the court to make a corresponding finding; in other instances, disciplinary measures may have to be imposed on the bad actors. Only where the life and personal integrity, or the freedom of a victim has been injured can it be deemed to be compulsory to institute criminal proceedings. The court seems to have been pushed to make its sweeping statement by assuming that article 63 embodies the customary rule of classical international law. Namely, inter-state law, according to which any damage caused by a breach of a rule of international law must be made good by the wrongdoer. In fact, in its judgment in *Aloeboetoe v. Suriname*[53] the court refers to the famous *Chorzów* case of the Permanent Court of International Justice.[54] However, neither the Permanent Court of International Justice nor its successor, the ICJ, has ever said that states are under an obligation to compensate their own citizens in cases where they have suffered harm at the hands of public authorities. Thus, one may conclude that the jurisprudence of the Inter-American Court is predicated on a basic misunderstanding.[55]

The same objections may be raised against the proposition that invariably a human rights violation must entail compensation—meaning financial compensation—to the aggrieved party. Where the victim has essentially suffered moral injury by a breach of his or her rights, a

52. *Inter-American Court of Human Rights: Judgment in Velásquez Rodríguez Case*, 28 I.L.M. 291, 325 (1989); Judgment July 29, 1988, Inter-Am. Ct. H.R. (ser. C) No. 4 (1988).

53. *See* Case 15, Inter-Am. C.H.R. 70, OAS/ser. L./V/111.29, doc. 4 (1994).

54. *See* Factory at Chorzów, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

55. *See* FRANCISCO VILLAGRÁN KRAMER, SANCIONES INTERNACIONALES POR VIOLACIONES A LOS DERECHOS HUMANOS 216 (1995); *see also* Kamminga, *supra* note 23, at 69 (endorsing the jurisprudence of the court without any comment); Antônio Augusto Cançado Trindade, *Current State and Perspectives of the Inter-American System of Human Rights Protection at the Dawn of the New Century*, 8 TUL. J. INT'L & COMP. LAW 5, 22 (2000); SHELTON, *supra* note 9, at 173-75 (regarding such judgments providing for reparation).

finding to that effect by the court will provide adequate redress in the same way as within the European system. To date, the court has not handled cases regarding trivial matters; all have been of a serious character. As a result, the court has not had the opportunity to introduce the necessary distinctions according to the gravity of the cases it dealt with. Regardless, one should note that the empirical basis for the court's decisions invariably included egregious violations of an abhorrent character.

4. The Human Rights Committee under the International Covenant on Civil and Political Rights has also created a doctrine of full reparation for any damage caused by a breach of the commitments flowing from the Covenant.[56] It has done so although neither the Covenant nor the Optional Protocol contains any explicit provision to that effect. On the contrary, one could even have derived an argument *e contrario* from two articles of the Covenant, which provide specific measures of reparation only in two instances. According to article 9(5), "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation,"[57] and article 14(6) prescribes that in case of a miscarriage of justice, the victim of a conviction "shall be compensated according to law."[58] Neither of these rules establishes an individual right, but rather they invite Member States to enact appropriate national legislation.[59] It could even be argued that, aside from these two instances, under the law of the Covenant, individuals are not meant to enjoy a right to reparation or compensation. Additionally, it is certainly not by accident that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in article 14(1) that each State Party "shall ensure in *its* legal system" that victims of an act of torture obtain redress and have an enforceable right to fair and adequate compensation.[60]

The Human Rights Committee, however, did not draw that conclusion. It embarked on a bold course, grounding itself in article 2(3) of the Covenant, which sets forth a right to an "effective remedy" in case

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56. *See* International Covenant on Civil and Political Rights, *supra* note 40, art. 2(3) (stating that each signatory to the Covenant undertakes "[t]o ensure that any person whose rights or freedoms as herein recognized are violated *shall* have an effective remedy") (emphasis added).

57. *Id.* art. 9(5).

58. *Id.* art. 14(6).

59. *See* Riccardo Pisillo-Mazzeschi, *International Obligations to Provide for Reparation Claims?*, *in* STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 149 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

60. Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment, Dec. 10, 1984, *reprinted in* 23 I.L.M. 1027 (1984), *modified by* 24 I.L.M. 535 (1985) (emphasis added).

of a violation of a person's individual rights.[61] The appropriateness of this approach is rather doubtful. In English, the word "remedy" has a two-fold meaning. On the one hand it connotes a legal action which can be brought before a judicial or other body entitled to settle the dispute concerned; or it could mean a measure designed to make good for damages caused. Since in the French version of the Covenant the word *recours* is used, and in the Spanish version the word *recurso*, one is inclined to conclude that the former is the correct meaning.

However, the Human Rights Committee, at an early stage in its jurisprudence, concluded that the state concerned was to desist from the unlawful practice, both in the case at hand, as well as in similar cases, and to compensate the victim for any damage sustained.[62] The relief granted under this jurisprudence reached its climax when the Human Rights Committee stated that persons who had been convicted and sentenced to death under irregular circumstances, as well as those who spent long years on death row, should be granted the benefit of a commutation of their sentence or even be released.[63] In developing this straightforward jurisprudence, the Committee was likely guided away from the flawed literal construction of article 2(3) of the Covenant—and led towards the general customary law governing the consequences of internationally wrongful acts in an inter-state context.

As can be gleaned from the Committee's reports, states often ignore its findings. Indeed, these findings are simply recommendations because the Optional Protocol designates them as "views." Views differ from decisions in that they lack any binding force. Although the Human Rights Committee urges states to respond to its views within ninety days, it has not been able to persuade them that they are placed under an institutional requirement to do so.[64] Thus, the record of achievement is a fairly mixed one. It does not prove conclusively that states have an obligation to make good for harms caused by a violation of human rights.

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61. International Covenant on Civil and Political Rights, *supra* note 40, art. 2(3); *see also* SHELTON, *supra* note 9, at 142-44.

62. Weismann v. Uruguay, Communication No. 8/1977, *reprinted in* Human Rights Committee Selected Decisions Under the Optional Protocol 45, 49 (1985).

63. Official Records of the Human Rights Committee 1988/89 II, U.N. GAOR, Hum. Rts. Comm., 35th Sess., at 419, 423, U.N. Doc. CCPR/8/Add.1 (1995) (discussing Pratt v. Jamaica, Communications Nos. 210/1986 and 225/1987); Official Records of the Human Rights Committee 1989/90 II, U.N. GAOR, Hum. Rts. Comm., 39th Sess., at 405, 407, U.N. Doc. CCPR/9/Add.1 (1995) (discussing Pinto v. Trinidad and Tobago, Communication No. 232/1987).

64. *See Report of the Human Rights Committee*, U.N. GAOR, 55 Sess., Supp. N.40, at 91-97, U.N. Doc. A/55/40 (2000) (vol. I) (illustrating a worrisome picture of nonrespect of its views on individual communications).

5. Currently, there exists only one system of international law where individuals benefit to the same degree as states from the orthodox logic of state responsibility, to wit, the legal order of the European Communities. It is generally accepted today that breaches of substantive rules, both of the rules laid down in the treaties themselves and also of the mass of secondary legislation enacted by Community institutions, entail a duty to make reparation. The first step in this direction was taken in 1963 when the Court of Justice of the European Communities held in *van Gend & Loos*[65] that any obligations incumbent upon states could also be invoked by individuals, provided those obligations (1) were sufficiently clear and precise ("direct effect") and (2) directly benefited the claimant.

For decades, the European case law stopped at this point. A vast amount of energy was spent on identifying the rules of Community law suitable for direct application. On the other hand, the system of responsibility was split. According to an explicit provision of the E(E)C Treaty (former article 215(2), current article 288(2)), the Community itself was—and still is—responsible for damages caused to private individuals by unlawful conduct.[66] But a corresponding provision governing state acts contrary to Community law was lacking. In some Member States, action seeking financial compensation could be brought under the national regime of state responsibility, but the legal position was less than clear. In particular, many states did not provide for a remedy where legislative bodies had failed to enact legislation for the implementation of Community directives. Understandably, these differences were not to the liking of the Court of Justice. Cutting through all of the complexities, it held for the first time in *Francovich v. Italian Republic* that Community law provides for an unwritten cause of action holding Member States accountable for violations of Community law.[67] This decision, which concerned the failure of Italy to establish a compensation fund for the benefit of workers employed by a defaulting undertaking, was initially highly controversial. After a few years, however, the holding was accepted, and it now belongs to the daily practice of Community lawyers.

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65. *See* Case 26/62, N.V. Algemene Transport—en Expeditie Onderneming van Gend & Loos v. Administration Fiscale Néerlandaise, 1963 E.C.R. 1, 25 (1962).

66. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 215, *reprinted in* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY 168 (Secretariat of the Interim Committee for the Common Market and Euratom, 1957).

67. *See* Joined Cases C-6/90 and C-9/90, Francovich v. Italian Republic, 1991-9 E.C.R. I-5357, I-5414 (1991).

It is this last example in particular which demonstrates that the connection between a breach of a primary norm by public authorities and the creation of a secondary reparation claim is not automatic. Individuals have enjoyed, from the establishment of the European Community, the right to challenge acts and measures deemed to be incompatible with the supranational legal order. If a breach was found, the act or measure at issue was annulled or was otherwise deprived of its legal effect. However, strong resistance existed to imposing sanctions for such breaches in the form of financial compensation. Doubts arose because a failure to implement Community law correctly could affect thousands and even millions of Community citizens. Some questioned whether compensation should also be owed to victims in such instances where the individual did not suffer the same direct harm that others were exposed to, but were a part of a larger economic sector that was nonetheless adversely affected.

Thus, in this climate, the court in *Francovich* held that Italy must grant compensation to all workers who had not received their salaries during the last weeks before the financial breakdown due to their employers' bankruptcy.[68] Similarly, in *Dillenkofer v. Federal Republic of Germany*, Germany had to grant financial compensation to all tourists who had incurred financial losses due to the delay in implementing a directive providing for an insurance system guaranteeing down payments made to travel agencies which had defaulted.[69] Again, this was a measure of consumer protection designed to shield ordinary people from the harsh consequences of bankruptcies. Until that time, financial compensation was unavailable in Germany for instances of sloppy conduct of legislative bodies.[70]

6. Attempting to draw a general conclusion from the picture just outlined, one cannot overlook certain factors. First, the relevant provisions of the two most advanced international regimes in the field of human rights protection, the European Convention on Human Rights and the American Convention of Human Rights, are drafted in guarded language, leaving a significant amount of discretion up to the courts, discretion which the European Court, in any event, has constantly made use of. Second, it must be noted that these regimes are based on conventional instruments and do not accurately reflect international practice which would be required as the factual basis for a rule of

68. *See Francovich*, 1991-9 E.C.R. at I-5416.

69. *See* Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 & C-190/94, Dillenkofer v. Fed. Republic of Germany, 1996-10 E.C.R. I-4845, I-4878 (1996).

70. *See* FRITZ OSSENBÜHL, STAATSHAFTUNGSRECHT 509 (5th ed. 1998).

customary law.[71] A cursory glance at the tragic events unfolding daily in many parts of the world shows that victims of grave breaches of human rights rarely receive adequate reparation for the wrongs they have suffered. It would be futile to engage in a lengthy account of public mismanagement caused by passiveness and ineptitude or even deliberate criminal practices of certain governments. All of this is amply documented by Amnesty International, by the Annual Reports of the United States Department of State, and the reports submitted to the UN Commission on Human Rights and the U.N. General Assembly. Current examples, such as Afghanistan, the Congo, and Palestine, come to mind easily.

Guatemala is one example that illustrates the discrepancies that exist between state practices in general and cases that have come before one of the international courts charged with reviewing compliance with human rights and fundamental freedoms.

I was the coordinator of the national truth commission of that country, whose official title was Comisión para el Esclarecimiento Histórico (Commission for Historical Clarification). After an investigation which lasted nearly two years, the Commission concluded that Guatemala had lost roughly 200,000 human lives, mostly by intentional killing, during their thirty-four-year civil war.[72] Many individuals had disappeared, been tortured and/or assassinated just because they were considered political opponents of the right-wing military governments of 1962 to 1996. The Commission even found that genocide was committed.[73] In the last part of its report, the Commission made cautious proposals for reparation to the most severely hit victims.[74] The report was presented to the main actors on February 25, 1999, including the Government of Guatemala, the former guerrilla forces, the Secretary-General of the United Nations, and last but not least, the people of Guatemala.[75] The report was greeted with enthusiasm. However, the outgoing government of President Arzú showed little interest in implementing its recommendations. The current Head of State, President Portillo, made generous promises during his campaign in the autumn of 1999. He affirmed that he would implement all of the

71. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 575 U.N.T.S. 160 (largely relied upon by Menno Kamminga).

72. *See* GUATEMALA MEMORIA DEL SILENCIO (Informe de la Comisión para el Esclarecimiento Histórico, 1999) (12 volumes).

73. *See id.*

74. *See id.*

75. *See id.*

recommendations made by the Commission. However, because of infighting in his government, he has not been able to advance even the slightest prospect of assistance to the victims. Thus, even those whose next-of-kin were massacred cannot rely on any public payments to alleviate their hardship.[76]

On the other hand, a limited number of cases have gone to the Inter-American Court of Human Rights. To date, Guatemala has been the respondent in no more than four proceedings. In each of these, a final judgment on the charges brought against Guatemala has already been handed down, assuming the information carried by the court's Web site is correct.[77] In *Paniagua Morales*, the court decided that "fair compensation" must be paid.[78] Likewise, in *Bámaca Velásquez* the court found that the government must indemnify the family members of the victim.[79] But only in the case of *Blake* has a definitive amount been fixed.[80] Nicholas Chapman Blake, a journalist of U.S. nationality, was murdered in March 1985 by one of the infamous "patrullas de autodefensa civil" set up by the Army during the armed confrontation.[81] The court concluded that the assassination of Blake was not a private criminal act since the patrols were under the control of the state and were supposed to act in the pursuance of public objectives.[82] Therefore, it granted US$222,000 as reparation for the substantive and immaterial damage caused by the killing.[83]

Thus, the observer is faced with a paradox. As already indicated, 200,000 people lost their lives during the internal strife in Guatemala,

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76. *See* Paolillo, *supra* note 23, at 301-02 (discussing other Latin American countries where national legislation provides for financial compensation to the victims of human rights violations).

77. *See* Case 36 (Blake Case I), Judgment, Inter-Am. Ct. H.R. (ser. C) (Jan. 24, 1998), *at* http://www.corteidh.or.cr/seriecing/C_36_ENG.html; Case 37 (Paniagua Morales Case), Judgment, Inter-Am. Ct. H.R. (ser. C) (Mar. 8, 1998), *at* http://www.corteidh.or.cr/seriecing/C_37_ENG.html (last visited May 23, 2002); Case 63 (Villagrán Morales Case) (the "Street Children" case), Judgment, Inter-Am. Ct. H.R. (ser. C) (Nov. 19, 1999), *at* http://www.corteidh.or.cr/seriecing/C_63_ENG.html (last visited May 23, 2002); Case 70 (Bámaca Velásquez Case), Judgment, Inter-Am. Ct. H.R. (ser. C) (Nov. 25, 2000), *at* http://www.corteidh.or.cr/seriecing/C_70_ENG.html (last visited May 23, 2002).

78. *See* Paniagua Morales Case, *supra* note 77, ¶ 181.

79. *See* Bámaca Velásquez Case, *supra* note 77, ¶ 230; *see also* (Villagrán Morales Case), *supra* note 77, ¶ 253 (deciding "to open the phase of reparations and costs and authorize the President to adopt the corresponding procedural measures").

80. *See* Case 48 (Blake Case II), Reparations Judgment, Inter-Am. Ct. H.R. (ser. C) ¶ 75 (Jan. 22, 1999), *at* http://www.corteidh.or.cr/seriecing/C_48_ENG.html (last visited May 23, 2002).

81. *See* Blake Case I, *supra* note 77, ¶ 52.

82. *See id.* ¶¶ 75-78.

83. *See* Blake Case II, *supra* note 80, ¶ 75.

and almost all of the victims were Guatemalans. However, the only person granted a definite amount of compensation in accordance with article 63 of the American Convention was a U.S. citizen. As the very small number of pending cases shows, the great majority of Guatemalans who have suffered injury at the hands of criminal governments have no chance whatsoever of seeing their reparation claims adjudicated by the court. Indeed, no individual can bring a case to the supreme judicial organ of the Inter-American system for the protection of human rights on his or her own initiative. Only the State Parties and the Inter-American Commission on Human Rights are entitled to do so (article 61).[84] In other words, no individual can pursue his or her own case. He or she depends in that respect on decisions made in accordance with diplomatic methods outside of his or her sphere of influence. Regarding Guatemala, one case decided by the court stands out against thousands, which are likely never to leave the limbo in which they are stuck. Given that aleatory situation, it would be preposterous to derive an individual right of reparation from article 63 of the American Convention.

B. International Customary Law

Pursuant to article 38 of the Statute of the International Court of Justice, a customary rule must be based on two elements: a widespread and consistent practice, and *opinio juris*.[85] An impartial and objective observer of modern history can hardly find that these two elements are present.[86] By formulating an individual right of reparation under international law, one would engage in progressive development of the law and not in codification of existing rules. In this connection, it should be recalled that the Draft Articles of the ILC, which were finalized during its 2001 session, do not address the issue. According to the version of the text placed before the U.N. General Assembly,[87] only states are acknowledged as holders of reparation claims.[88] It is not suggested that the ILC wished to find that individuals could never hold such claims. However, the fact that the ILC never thought of delving into this subject

84. American Convention, *supra* note 49, art. 61(1).

85. Statute of the International Court of Justice art. 38, *reprinted in* Shabtai Rosenne ed., DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE, at 61 (2d ed. 1979).

86. *See* Rebecca J. Cook, *State Responsibility for Violations of Women's Human Rights*, 7 HARV. HUM. RTS. J. 125 (1994) (assembling a mass of data, but insufficiently analyzing such materials).

87. *See supra* note 20, at 43-59.

88. *See id.* art. 33, at 51 ("This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.").

matter speaks for itself. The ILC was of the opinion that the law of state responsibility would be sufficiently well-ordered by devising rules governing inter-state relationships. It was also decided that the responsibility of international organizations would be tackled at another time.[89] However, at no time was attention focused on the individual in this connection.

IV. THE UNDERPINNINGS OF THE APPLICABLE REGIME OF INTERNATIONAL LAW

A. Necessary Distinctions

The foregoing has been more of an empirical stocktaking than an attempt to explain conceptually the negative attitude of most states. We shall now try to probe more deeply into the problem. From the outset, it should be emphasized that moral reparation in the form of apologies or acknowledgement of past wrongs should never be denied to the victims of grave human rights violations. Even the least affluent state is able to afford that type of redress, and no entity is driven to the brink of default by admitting the guilt of an earlier regime.

With regard to financial compensation, different factual patterns must be distinguished in order to picture clearly the difficulties which stand in the way of formulating sweeping legal propositions as suggested by van Boven and Bassiouni.

Things would be easy if one could proceed from the assumption that violations of human rights constitute no more than accidental occurrences in otherwise well-regulated systems of governance. If injury is caused from time to time by negligence, reparation for the harm done will probably not encounter any major obstacles. In most states, legal rules exist which provide for adequate remedies for the damages victims sustained.

Yet, any lawyer attempting to build a sustainable regime has to take into account all conceivable situations, including actions of mass injustice under a dictatorial system of government, as well as armed conflicts where human suffering becomes a daily occurrence. Whenever chaos and anarchy set in, the magnitude of the sums required for effective reparation makes it imperative not only on economic, but also on legal grounds, to call into question the seemingly invincible proposition that reparation must wipe out all of the negative consequences of an injurious act.

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89. *See Report of the ILC on the work of its 52nd session (1 May - 9 June and 10 July - 18 August 2000)*, U.N. doc. A/55/10, p. 290 para. 726.

B. Internal Conflict

Let us first focus on situations of internal conflict, a few examples of which may suffice to illustrate the dilemma. In South Africa, the Black population was, for decades, the victim of ruthless apartheid policies. Everyone of black skin was adversely affected. As long as white supremacy prevailed, there could be no question of obtaining reparation for the manifold measures of discrimination. After the white regime had given up its claim to exclusive political power, the question arose as to how past injustices could be remedied. Because restitution was impossible, the only viable alternative could have been financial compensation. But an absurd situation would have arisen: since financial compensation must be paid from public funds, i.e., from taxpayers' money, the same people would have become both the contributors and the recipients of aid, and large parts of the monies available would have been spent on a bureaucratic apparatus. Thus, financial compensation was conceivable only for the most egregious instances of injury.[90]

In Guatemala, as already noted, the findings of the Historical Clarification Commission were even more dramatic. With regard to instances of genocide, the survivors, widows, and incomeless parents would have been the natural beneficiaries of financial compensation. But the requisite funds would have to be taken from the national budget, which even under normal circumstances, without the impact of any special program, is hard strained. To date, no comprehensive program of rehabilitation has been launched. With the passage of time, chances for the realization of such a program dwindle.

Even a "rich" country like the Federal Republic of Germany has difficulties coping with massive injustices of the past. After the fall of the Berlin wall in 1990, the needs of the people persecuted by the communist regime had to be addressed. A considerable number of dissidents spent long periods of time in prisons, just because of their political views. In other cases, planning for life had been compromised. Children of dissidents had not been admitted to universities, sometimes not even to secondary schools, and were deliberately compelled to stay at an elementary education level. These cases created even more difficulties. The parliamentary bodies enacted a number of statutes

90. *See, e.g.*, Lovell Fernandez, *Reparation for Human Rights Violations Committed by the* Apartheid *Regime in South Africa, in* STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 173-87 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

which could not really "wipe out" the harm inflicted upon the victims. In particular, the sums allocated for every month in prison were quite derisory. But the financial burden entailed by the process of reunification was so tremendous that it was felt that a line had to be drawn somewhere, and that it was more important to tackle the tasks of the present in order to be able to master the future.[91]

The examples show that international law cannot prescribe fixed parameters for internal situations of large-scale injustices occurring during a national cataclysm. It must be left to the people to decide, in the exercise of their right of self-determination, how they wish to deal with such a past. Of course, moral rehabilitation should never be denied, but in financial terms certain choices must be made. As a rule, full compensation is not a realistic alternative since the wealth of every nation is limited. Additionally, even victims of human rights violations must participate to the greatest extent possible in the general effort of reconstruction, which has to be undertaken after a repressive system of governance has disappeared. All these reflections, however, pertain more to the realm of legal policy. There is no firm basis for assuming that a general rule of customary international law has come into being.

C. International Armed Conflict

Lastly, situations of international armed conflict have to be taken into consideration where the citizens of one country have been injured by noncompliance with the applicable rules of humanitarian law on the part of foreign military forces. One could even go a step further: since war was banned by the Kellogg-Briand Pact of 1928,[92] a prohibition extended by the U.N. Charter to any use of force,[93] it could be argued that every person injured by the unlawful use of force in an armed conflict may be regarded as the victim of a violation of international law and therefore should have an individual right to reparation. This would be the penultimate of doctrines in human rights law. A decision of the Greek Areopag, by which Germany was enjoined to pay individual compensation to a great number of the inhabitants of the Greek village of

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91. For a comprehensive overview, see Bardo Fassbender, *Rehabilitation and Compensation of Victims of Human Rights Violations Suffered in East Germany (1945-1990), in* STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 251-79 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

92. General Treaty for the Renunciation of War as an Instrument of National Policy (Briand-Kellogg Pact of Paris), Aug. 27, 1928, art. I, 46 Stat. 2343, 2345-46.

93. *See* U.N. Charter art. 1.

Distomo, reflects this logic in an exemplary fashion.[94] In early 1944, a German military unit committed an atrocious massacre in that village in response to an attack by Greek partisans, which left a dozen German soldiers dead.[95] This killing of women and children in retribution was a barbaric and unpardonable overreaction, which has left deep scars to this day.

For a short moment, we should first consider the consequences of this concept which seeks to individualize the settlement of war damages. Unfortunately, reference must be made here to the darkest pages of Germany history. Ruthlessly, the Nazi leadership of Germany in 1939 unleashed the Second World War. It has been estimated that the war took the lives of sixty million people. Not less than twenty million Soviet citizens were among the dead. In many instances, the German military forces scrupulously heeded the rules of humanitarian warfare. In other instances however they did not. New levels of ruthlessness and brutality were reached on the eastern front, where special police units and other security forces operated behind front lines.

Now the key question arises: could the events of all these frightening years be "settled" by acknowledging an individual right of reparation to be enjoyed by everyone having suffered harm during the war, particularly as a consequence of a violation of rules governing the conduct of warfare? The answer clearly is no. How could a system that would rely on individual claims operate? Further, it would be highly debatable which judicial system should govern these claims. In conjunction with the thesis of the Greek Areopag that state immunity does not cover grave violations of humanitarian law, millions of suits could be brought against a wrongdoing state. One need only mention the *Flatow* case, in which US$247 million was granted to the parents of one victim.[96] If we assume hypothetically that ten million people perished during the Second World War resulting from breaches of the rules of warfare and systematic persecution of racial minorities, the sums sought would be so large that the German people would never have been able again to join the family of nations. On the other hand, German citizens could not then be denied the right to bring counter claims on account of crimes committed by the military forces of the Allied Powers. Nobody would be able to disentangle such a spiral of claims and counterclaims.

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94. *See* Prefecture of Voiotia v. Fed. Republic of Germany, Case No. 11/2000, Areios Pagos (Hellenic Sup. Ct.), May 4, 2000, *reprinted in* 95 AM. J. INT'L L. 198, 201-04 (2001).

95. *See id.* at 200.

96. *See* Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 5 (D.D.C. 1998).

In the history of international law the settlement of war has always been effected in global terms. In peace treaties, lump sums were agreed upon which the loser had to pay to the victorious party. This was also the approach taken in the Potsdam Accords by the Allied Powers.[97] It was determined that Germany should be compelled "to compensate to the greatest possible extent for the loss and suffering that she has caused to the United Nations and for which the German people cannot escape responsibility."[98]

In the Potsdam Accords, the basic assumption is that only states have a right to reparation. The relevant section starts out referring to "[r]eparation claims of the U.S.S.R.,"[99] which were to be met by removals from the occupation zone of the U.S.S.R. The Accords then address "the reparation claims of the United States, the United Kingdom and other countries entitled to reparations," which were to be "met from the Western Zones and from appropriate German external assets."[100] The responsibility of Germany for the war and its consequences was also the basis for the decision to deprive Germany of one fourth of its territory, allocating it to the U.S.S.R and to Poland.[101] At no place in the Potsdam Accords was there mention that individuals could have personal claims against Germany.

Practice thus refutes the thesis of article 3 of the Hague Convention IV, which establishes an individual right of victims for any violation of the laws of war: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces".[102] There may well have been some intention among the drafters to move beyond the current understanding of the international legal order in that epoch.[103] In fact, article 3 has never been relied upon by private individuals vindicating reparation for injuries suffered. Similarly, the International Committee of the Red Cross (ICRC) official Commentary on the Additional Protocols of 1977 regarding the proper interpretation of article 91 of Protocol I suggested

97. *See* INGO VON MÜNCH, DOKUMENTE DES GETEILTEN DEUTSCHLAND 32 (1968).
98. *Id.* at 39.
99. *Id.*
100. *Id.*
101. *See id.*
102. *See* The Hague Convention of 1907 (IV) Respecting the Laws and Customs of War On Land, Oct. 18, 1907, art. 3, *reprinted in* THE HAGUE CONVENTION AND DECLARATIONS OF 1899 AND 1907, at 103 (3d ed. 1918).
103. *See* Frits Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond*, 40 INT'L & COMP. L.Q. 827, 830-33 (1991).

that an individual right of victims exists for any violation of the laws of war.[104] However, this hint at such a right has received no further confirmation and has no explicit basis in the text of that provision.

Regarding Germany's responsibility after the Second World War, individual claims were later introduced on the basis of agreements between the Federal Republic of Germany and the Allied Powers, in particular regarding property illegally taken away from its rightful owners.[105] Furthermore, Germany enacted legislation to provide assistance to persons who had been persecuted on racial grounds. As a result, the value of reparations exceeds any judicial reward in history granted with a view to compensating the horrific consequences of a war.[106]

The reparation regime for the settlement of the financial consequences of Iraq's aggression against Kuwait, which was set up under Security Council Resolution 687, is possibly the first example of an attempt to determine the amounts owed by a responsible state by punctiliously adding all the reparation claims raised by individuals, business undertakings, and foreign states.[107] This method of calculating the costs to be borne was not implicit in the preceding determination by the Security Council that Iraq was responsible for the damage it had

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104. *See* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1056 (Yves Sandoz et al. eds., 1987) (suggesting that "nationals" of the parties to a conflict may have a claim).

105. *See*, in particular, the Convention on the Settlement of Matters Arising out of the War and the Occupation (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris on 23 October 1954), [German] Bundesgesetzblatt 1955, Part II, p. 405: Chapter Four: Compensation for Victims of Nazi Persecution; Chapter Five: External Restitutions.

106. For a statistical breakdown, see Bernd Josef Fehn, *Die deutschen Wiedergutmachungs- und Kriegsfolgeleistungen nach 1945 unter dem Blickwinkel der Reparationsfrage*, *in* KARL DOEHRING, BERND JOSEF FEHN, HANS GÜNTER HOCKERTS, JAHRHUNDERTSCHULD—JAHRHUNDERTSÜHNE. REPARATIONEN, WIEDERGUTMACHUNG, ENTSCHÄDIGUNG FÜR NATIONALSOZIALISTISCHES KRIEGS—UND VERFOLGUNGSUNRECHT 53-89 (2001).

107. On the work of the U.N. Compensation Commission, see Sonja Boelaert-Suominen, *Iraqi War Reparations and the Laws of War: A Discussion of the Current Work of the United Nations Compensation Commission with Specific Reference to Environmental Damage During Warfare*, 50 AUSTRIAN J. OF PUB. & INT'L L. 225-316 (1996); Marco Frigessi di Rattalma, *Le régime de responsabilité internationale institué par le Conseil d'administration de la Commission de compensation des Nations Unies*, 101 REVUE GÉNÉRALE DE DROIT INT'L PUB. 45-90 (1997); Veijo Heiskanen & Robert O'Brien, *UN Compensation Commission Panel Sets Precedents on Government Claims*, 92 AM. J. INT'L L. 339-50 (1998). *But cf.* Bernhard Graefrath, *International Crimes and Collective Security*, *in* INTERNATIONAL LAW: THEORY AND PRACTICE: ESSAYS IN HONOUR OF ERIC SUY 237, 245 (Karel Wellens ed., 1998) (contesting the lawfulness of the establishment of the Commission "was clearly outside the competence of the Security Council, and its creation was simply an *ultra vires* act"); Gaetano Arangio-Ruiz, *On the Security Council's "Law-Making,"* 83 RIVISTA DI DIRITTO INTERNAZIONALE 609, 719 (2000).

caused. The sums to be paid could have been set at a level in consonance with the economic potential of the country. The result now is a total failure. The small claims have been satisfied, but there is no prospect that the major claimants will ever be compensated.

D. Assessment

It is now time to draw conclusions from the preceding considerations. International practice has almost invariably resorted to a method of global settlement when formally putting an end to armed conflict by treaty arrangements. Balanced solutions could never have been found on the basis of a system of individual reparation claims. In the first place, as in the case of internal conflict, the economic capacity of the wrongdoing state must be taken into account. Global reparation claims must be set at a realistic level in order to become effective. Fantastic amounts, as allocated by juries in the United States, will not produce suitable results.

Second, it must also be kept in mind that states are not abstract entities, but rather are made up of human beings. More often than not, war results from capricious and irrational decisions of a leadership which leads its people into chaos and anarchy. The individual member of a wrongdoing state is frequently as innocent as the citizen of a foreign country, and has little chance to influence decisions made at the national level. Furthermore, generations of human beings come and go. In Germany, for instance, almost no one who played a decisive role during the Nazi era is a part of the working population today. Likewise, in Iraq, during the ten years since the aggression against Kuwait the population has changed, and young children now suffer the consequences of events that happened before their births.[108] Attention should be drawn in this connection to the former article 42(3) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, according to which "in no case shall reparation result in depriving the population of a State of its own means of subsistence."[109]

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108. *See* Christian Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law, in* STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 1-25 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

109. *Report of the International Law Commission on the work of its forty-eight session*, 51 U.N. GAOR Supp. (No. 10), U.N. Doc. A/51/10 (1996), *reprinted in* [1996] II/2 Y.B. Int'l L. Comm'n 63, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2). Lamentably, that provision has disappeared from the final version of the Draft Articles on State Responsibility.

V. CLAIMS UNDER INTERNATIONAL LAW AGAINST INDIVIDUAL PERPETRATORS?

State responsibility should not be confused with individual responsibility, which constitutes a different chapter of international law. It is in this field that dynamic developments may occur, although the practical effects of emerging concepts might be rather modest. Just as persons committing grave crimes against the peace and security of mankind incur direct penal responsibility under international law for their deeds,[110] the question may be raised whether such persons should not be liable in terms of civil responsibility vis-à-vis the victims that have suffered injury at their hands.

The logic inherent in such a conceptual construction seems to be almost unchallengeable. Crimes against the peace and security of mankind, or simply "international crimes," are offenses stigmatized by international law, which no national legal order can ever justify. This means that the victims of such a wrongful attack enjoy a right of resistance.[111] In case their primary entitlements have been breached, they should have a secondary right to reparation against the perpetrator. In principle, there is no reason why individuals should not be made accountable for the offenses committed by them. In contrast to states, which for well-grounded reasons are shielded from private suits by immunity, individuals do not normally enjoy immunity. Heads of state may be protected *ratione personae*,[112] but no immunity *ratione materiae* or *ratione functionis* can be claimed by a government agent who engages in atrocities to be characterized as international crimes.[113] Civil

110. This is the conceptual basis of the two international tribunals established by the UN Security Council as well as of the future International Criminal Court under the Rome Statute. *See* Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183, *reprinted in* 37 I.L.M. 1002 (1998) [hereinafter Rome Statute].

111. *See* Christian Tomuschat, *The Right of Resistance and Human Rights*, *in* VIOLATIONS OF HUMAN RIGHTS: POSSIBLE RIGHTS OF RECOURSE AND FORMS OF RESISTANCE 23-30 (Unesco ed., 1984).

112. At its Vancouver session in August 2001, the Institut de droit international confirmed in a resolution the comprehensive character of the immunity enjoyed by a head of state with regard to criminal prosecution by national authorities. The Institut does not deny that even a head of state may be tried by an international court.

113. *See Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, THE WORK OF THE INTERNATIONAL LAW COMMISSION, 167 U.N. Sales No. E.95.V.6 (1996); *Draft Code of Crimes Against the Peace and Security of Mankind*, [1996] II/2 Y.B. Int'l L. Comm'n 17, art. 7, at 26-27, U.N. Doc. A/CN.4/SER.A./1996/Add.1 (Part 2); Rome Statute, *supra* note 110, at 1017.

responsibility would seem to be a natural corollary of criminal responsibility.[114]

In this sense, after more than 200 years of existence, the United States' ATCA may be viewed as a precursor of a development that will mature in the coming decades. However, proceeding from the premises just outlined, the "new" claim to reparation would be founded on international, rather than on domestic law. To acknowledge an international law relationship between private persons is a somewhat unorthodox idea, hardly compatible with classical concepts of international law. Nonetheless, the idea cannot be ruled out altogether.

However, obvious difficulties cannot be overlooked. First of all, although not totally lacking, practice is extremely scarce. There are a few instances where suits were brought under the ATCA against defendants who could be identified as being responsible for specific crimes. *Filártiga v. Pena-Irala*[115] stands out as the most prominent case in point. Recently it has been reported that family members of the Chilean military commander René Schneider have brought a suit against members of the Nixon Administration, including former National Security Advisor Henry Kissinger and former Central Intelligence Agency Director Richard Helms, because Schneider, while still under the government of Salvador Allende, was allegedly abducted and killed by right-wing terrorists supported by the United States.[116] But it would have been useless to implead a person like Adolf Hitler, claiming reparation for all the suffering he inflicted upon the people of the world. If arrested, he would have been tried, convicted and sentenced to death, yet he possessed almost no personal belongings. On the other hand, it is certainly unacceptable that a former dictator enjoys a life of luxury in a foreign country granting him asylum. Under the circumstances of such large-scale crimes, some default mechanism would be needed to ensure a fair distribution of the available assets, the best solution being to return those assets to the victimized country.

It is significant that the rules that apply to proceedings before the current international criminal tribunals do not provide for adjudication of private claims by victims of proven crimes. According to rule 106(B) of the Rules of Procedure and Evidence of the International Criminal

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114. *See* Christian Dominicé, *La question de la double responsabilité de l'Etat et de son agent*, *in* LIBER AMICORUM JUDGE MOHAMMED BEDJAOUI 143, 147 (Emile Yakpo & Tahar Boumedra eds., 1999) (considering, alongside state responsibility, criminal responsibility of agents acting wrongfully).

115. *See* 630 F.2d 876 (2d Cir. 1980).

116. *Chilenen verklagen Kissinger und Helms*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 12, 2001, at 9.

Tribunal for the former Yugoslavia, after an accused has been found guilty, victims may bring an action in a national court to obtain compensation "[p]ursuant to the relevant national legislation."[117] The Rome Statute of the International Criminal Court, however, has moved one step further by providing, in article 75(2), that the Court may "make an order directly against a convicted person specifying appropriate reparation to, or in respect of, victims, including restitution, compensation and rehabilitation."[118] It stands to reason that such orders will be predicated on international law. Generally, however, the monies thus granted would be channeled through a trust fund to be established under article 79 of the statute, which will collect fines or property transferred to it by forfeiture.[119] Once it comes into being, this mechanism will be well-suited to ensure that the available assets are distributed according to criteria of equality and fairness. It should be kept in mind, however, that the relevant provisions tread upon new ground.

VI. GENERAL CONCLUSION

At the present time there exists no general rule of customary international law to the effect that any grave violation of human rights creates an individual reparation claim under international law. As shown above, such a claim has no basis in practice as far as mass-scale injustices are concerned, whether they result from internal or international patterns of violations of human rights. With regard to individual cases of breaches of the law in an otherwise well-ordered environment, it is understandable and reasonable to advocate for an individual right to reparation. However, as shown by the reluctance in the text of the European Convention of Human Rights and the case law of the European Court of Human Rights, even a highly developed system of judicial protection of human rights has refrained from creating an automatic link between breaches of primary rules and recognition of a secondary right to reparation. Consequently, the inference must be drawn that the existence of a customary rule cannot be affirmed, even in this more modest dimension. The van Boven/Bassiouni draft project might pave the way for a new—and almost revolutionary—approach to the issue. But significantly enough, it has sat on the agenda of the U.N. Commission on Human Rights for many years. This is not the outcome

117. U.N. I.C.T.Y. Rules of Procedure and Evidence, Rule 106(B), U.N. Doc. IT/32/REV.22 (2001).

118. Rome Statute, *supra* note 110, at 1045.

119. *See id.* at 1047.

of the stubborn backwardness of the governments acting in the Commission, but rather results from more complex reasons, some of which we have tried to explain.