Chapter 1 – The International Law on Reparation

Any search must start somewhere – the search for norms governing reparation in transitional justice being no exception. Since the present study is restricted to state reparation efforts towards individuals, an individual right to reparation provides a natural starting point. It conceptualizes the relationship between the decisive actors and anchors the analysis in human rights law, which is central to transitional justice.[41] Hence, the present chapter will start by tracing the existence of a human right to reparation (A.). Many decisions by international courts, tribunals, bodies, as well as numerous soft law instruments and scholarship, gave shape to this right. They converge towards a set of principles, defining how to repair survivors of human rights violations. These principles govern who (B.) receives what (C.) as reparation and place limits on the reparation to be awarded (D.). They find their philosophical basis in Aristotelian corrective justice (E.). Collectively, these principles form the international law on reparation. Subsequent chapters will show that its focus on singular human rights violations makes it a highly imperfect legal basis for reparation in transitional justice. Nevertheless, it provides a legal basis, which can be adapted to the exigencies of transitional justice. With that purpose in mind, the present chapter does not endeavor to give a comprehensive account of the detailed and complex reparation practice for human rights violations. Instead, it establishes broad principles at the heart of the international law on reparation to provide a stable basis for the subsequent analysis.

A. The Existence of a Right to Reparation

An individual right to reparation can be found primarily in human rights law (I.). Since transitional justice situations revolve around atrocity crimes and often arise out of armed conflict, the fate of reparation in international humanitarian law (II.) and international criminal law (III.) must also receive cursory treatment.

41 See below, ch. 3.

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I. International Human Rights Law

No human rights treaty contains a general right to reparation. Some grant a right to reparation for specific violations only.[42] While the regional treaty systems confer the power to grant reparation upon their respective human rights courts, they do not codify a corresponding right.[43] Nevertheless, every human rights court and treaty body recognizes a right to reparation.[44] They were joined most recently by all independent experts of the Human Rights Council (HRC) special procedures in response to George Floyd's death at the hands of the US police in June 2020.[45] They base the existence of a general right to reparation on the right to an effective remedy. The right to an effective remedy is laid down in Art. 2(3) International Covenant on Civil and Political Rights (ICCPR), Art. 14 European Convention on Human Rights (ECHR), Art. 25(1) American Convention on Human Rights (ACHR). The African hu-

42 Art. 9(5), 14(6) ICCPR; Art. 3, 5(5) ECHR; Art. 10, 21(2) ACHR; Art. 21(2) ACHPR; Art. 6 CERD; Art. 14(1) CAT; Art. 24(4) CED; Art. 15, 16(9), 18(6), 22(5) ICMW.

43 Art. 41 ECHR; Art. 27(1) Protocol to the ACHPR on the Establishment of the ACtHPR; Art. 63(1) ACHR.

44 IACtHR, *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala (Reparations and Costs)*, 2001, para 67; IACtHR, *Garrido and Baigorria v. Argentina (Reparations and Costs)*, 1998, para 40; ACtHPR, *Reverend Christopher R. Mtikila v. The United Republic of Tanzania (Ruling on Reparations)*, 011/2011, 2014, para 29; ACtHPR, *Beneficiaries of Late Norbert Zongo v. Burkina Faso (Judgment on Reparations)*, 013/2011, 2015, para 20; ECOWAS Court of Justice, *Djot Bayi & 14 Others v. Nigeria and 4 Others*, ECW/CCJ/JUD/01/09, 2009, para 45; IAComHR, *Principal Guidelines for a Comprehensive Reparation Policy,* OEA/Ser/L/V/II.131, 2008, para 13; AComHPR, *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi (Represented by Zimbabwe Human Rights NGO Forum) v. Zimbabwe*, 295/04, 2012, para 50, 127; AComHPR, *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v. Democratic Republic of Congo*, 259/2002, 2011, para 88; HRCom, *Concluding Observations of the Human Rights Committee - Central African Republic,* CCPR/C/CAF/CO/2, 2006, para 8; HRCom, *Devon Simpson v. Jamaica*, CCPR/C/73/D/695/1996, 695/1996, 2001, para 9; CAT, *E.N. v. Burundi*, CAT/C/56/D/578/2013, 578/2013, 2015, para 7.8; CERD, *V.S. v. Slovakia*, CERD/C/88/D/56/2014, 56/2014, 2015, para 7.4; CEDAW, *General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women,* CEDAW/C/GC/28, 2010, para 32; CRC, *General Comment No. 5 - General Measures of Implementation of the Convention on the Rights of the Child,* CRC/GC/2003/5, 2003, para 24. The ECtHR was the sole dissenting opinion for a long time, largely based on the reluctant wording of Art. 41 ECHR, ECtHR, *Sunday Times v. The United Kingdom (Article 50)*, 6538/74 (Plenary), 1980, para 15. In more recent judgments, it changed its position, ECtHR, *Naït-Liman v. Switzerland*, 51357/07 (Grand Chamber), 2018, para 97.

45 HRC, *Statement on the Protests Against Systemic Racism in the United States*, 2020.

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man rights system also recognizes it.[46] It has gained the status of customary international law.[47] Unanimously, international jurisprudence argues that a remedy is not effective if it does not give survivors the possibility to obtain reparation.[48] Measuring a remedy's effectiveness against this possible outcome is in line with the object and purpose of the provision as demanded by Art. 31(1) Vienna Convention on the Law of Treaties (VCLT). Human rights would not be adequately protected if the right to an effective remedy were to encompass nothing but the right to bring a claim. On the contrary, having a violation remedied will be more important to the survivor than the procedure which reaches that outcome.

Tomuschat argues against this approach that the conventions contain explicit rights to reparation for specific violations only, showing that states had no intention to codify a general right to reparation.[49] His position could find support in the reluctant wording of the provisions in the ACHR and the ECHR, which allow the European Court of Human Rights (ECtHR) and ACtHR to award reparation only "if necessary" or "if appropriate" and – in the case of the ECtHR – only on the condition that national law does not provide the possibility to receive reparation.[50] However, the cited articles merely delineate the jurisdiction of the two courts. They have no bearing on the existence of a right to reparation. State parties' intentions, while an essential factor for treaty interpretation, do not determine its outcome. Human rights conventions are living instruments that develop with time through state and judicial practice.[51] State practice, relevant to interpretation according to

46 AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa,* DOC/OS(XXX)247, 2003, principle C.

47 Shelton, *Human Rights, Remedies*, in: Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law,* Online Edition 2006, para 5 ff., 24.

48 Roht-Arriaza, *Reparations Decisions and Dilemmas*, 2004 Hastings Intl. Comp. L. Rev. 27(2), 157, 160 ff.; HRCom, *General Comment No. 31 - The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* CCPR/C/21/Rev.1/Add.13, 2004, para 16; IACtHR, *Maria Cristina Reveron Trujillo v. Venezuela*, 2009, para 61 f.; AComHPR, *Principles and Guidelines on the Right to a Fair Trial*, DOC/OS(XXX)247, principle C(b)(ii); ECtHR, *Leander v. Sweden*, 9248/81 (Chamber), 1987, para 77(a). The French version of the judgment uses the less equivocal term "réparation" instead of "redress".

49 Tomuschat, *Reparation for Victims of Grave Human Rights Abuses*, 2002 Tulane J. Intl. Comp. L. 10, 157, 167.

50 Art. 63(1) ACHR; Art. 41 ECHR.

51 ECtHR, *Tyrer v. The United Kingdom*, 5856/72 (Chamber), 1978, para 31; ECtHR, *Magyar Helsinki Bizottság v. Hungary - Concurring Opinion of Judge Sicilianos, Joined by Judge Raimondi*, 18030/11 (Grand Chamber), 2016, para 2 ff.; IACtHR, *Case of the Gómez-Paquiyauri Brothers v. Peru*, 2004, para 165; IACtHR, *Advisory Opinion on the*

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Art. 31(3)(b), 32 VCLT, supports the existence of an individual right to reparation. Many states provide comprehensive reparation for human rights violations and support resolutions acknowledging the existence of a right to reparation.[52] While many survivors, especially of large-scale violations, remain unrepaired, the international community often calls for reparation and puts pressure on the responsible states.[53] It is, therefore, on a firm basis that every human rights court, treaty body, and special mechanism recognizes a right to reparation.

With that interpretation of the right to an effective remedy, international practice and scholarship merely apply a general principle long recognized in the law on state responsibility to state responsibility for individual rights violations. The Permanent Court of International Justice (PCIJ) confirmed in its Chorzów Factory Judgment that

> *"it is a principle of international law [...] that any breach of an engagement involves an obligation to make reparation. [...] Reparation is the indispensable*

Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, OC-16/99, 1999, para 113 ff.; HRCom*, Roger Judge v. Canada*, CCPR/C/78/D/829/1998, 829/1998, 2003, para 10.3; CERD*, Stephen Hagan v. Australia*, CERD/C/62/D/26/2002, 26/2002, 2003, para 7.3.

52 UNGA, *Basic Principles*, A/RES/60/147, para 11(b); UNGA, *Adverse Consequences for the Enjoyment of Human Rights of Political, Military, Economic and Other Forms of Assistance Given to Colonial and Racist Regimes in Southern Africa,* A/RES/33/23, 1978, para 2; UNGA, *The Situation in Bosnia and Herzegovina,* A/RES/46/242, 1992, para 10; UNGA, *Situation of Human Rights in the Territory of the Former Yugoslavia,* A/RES/47/147, 1992, para 11; UNGA, *Measures to Combat Contemporary Forms of Racism and Racial Discrimination, Xenophobia and Related Intolerance,* A/RES/56/267, 2002, para 29; HRC, *Human Rights and Transitional Justice,* A/HRC/RES/21/15, 2012, para 8(b); HRC, *Human Rights, Democracy and the Rule of Law,* A/HRC/RES/19/36, 2012, para 16(vii); Henckaerts/Doswald-Beck, *Customary International Humanitarian Law Vol. I - Rules*, 2005, 541 ff.; ILA, *The Hague Conference (2010) - Reparation for Victims of Armed Conflict*, 2010, 291, 312 ff. See also the state practice cited in ch. 2 and 4.

53 UNGA, *Situation of Human Rights in the Territory of the Former Yugoslavia - Violations of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Coratia and the Federal Republic of Yugoslavia (Serbia and Montenegro),* A/RES/48/153, 1993, para 13; UNGA, *Situation of Human Rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro),* A/RES/49/196, 1994, para 13; UNGA, *Situation of Human Rights in Afghanistan,* A/RES/51/108, 1996, para 11. For condemnation as evidence for customary international law see ILC, *Draft Conclusions on Identification of Customary International Law - With Commentaries,* A/73/10, 2018, concl. 6 para 2, concl. 10 para 4.

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complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself."[54]

The ILC codified this principle in Art. 31 of the Articles on the Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility, ASR), which attained customary status.[55] While the judgment and the ASR concern obligations between states, they emphasize that *any* breach of an engagement warrants reparation.[56] The different nature of the rights holder should not be decisive. Human rights are well-established and occupy a central role in international law today.[57] There is no reason why the general principle should not apply to them. On the contrary, legal logic suggests that the holder of primary rights should benefit from secondary rights common to international law.[58] The International Court of Justice (ICJ) already broadened the obligation to repair and the corresponding right beyond the inter-state realm to include international organizations.[59] Accordingly, all

54 PCIJ, *The Factory at Chorzów (Claim for Indemnity) (The Merits)*, P.C.I.J. Series A 17 No. 7, 1928, para 73; See also ICSID, *Amco Asia Corporation and Others v. Republic of Indonesia, Award*, ARB/81/1, 1984, para 266 f.; IACtHR, *Aloeboetoe et al. v. Suriname (Reparation and Costs)*, 1993, para 43; Such a principle finds support in earliest works on international law, Grotius/Campbell, *The Rights of War and Peace - Including the Law of Nature and of Nations*, Autograph Édition de Luxe 1901, book 2, ch 1, para 1; de Vattel, *The Law of Nations*, 1797, book 2, ch 4, para 51.

55 ILC, *Articles on State Responsibility,* A/56/10, 2001, art. 31; ICJ, *Armed Activities on the Territory of the Congo (Democractic Republic of the Congo v. Uganda) – Reparations,* General List No. 116, 2022, para 70. While the ILC explicitly excluded the question of individual claims to reparation from the scope of the ASR, this only concerns the possibility to claim, ILC, *ASR Commentaries*, A/56/10, art. 33(2), para 4. Regarding substantive questions the ILC considers the Articles to be applicable to violations of human rights, art. 33, para 3, 5.

56 ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts - With Commentaries,* A/56/10, 2001, Ch. 1 General Principles, para 2.

57 van Boven, *Victim's Rights to a Remedy and Reparation - The New United Nations Principles and Guidelines*, in: Ferstman / Goetz (eds.), *Reparations for Victims of Genocide War Crimes and Crimes Against Humanity - Systems in Place and Systems in the Making,* 2nd Edition 2020, 15, 23.

58 Cannizzaro, *Is There an Individual Right to Reparation? Some Thoughts on the ICJ Judgment in the Jurisdictional Immunities Case*, in: Alland et al. (eds.), *Unity and Diversity of International Law - Essays in Honour of Professor Pierre-Marie Dupuy,* 2014, 495, 502; Buyse, *Lost and Regained? Restitution as a Remedy for Human Rights Violations in the Context of International Law*, 2008 Heidelberg J. Intl. L. 68, 129, 135.

59 Buyse, *Lost and Regained?*, 134; ICJ, *Reparations for Injuries Suffered in the Service of the United Nations (Advisory Opinion)*, I.C.J. Reports 1949, 174, 179 ff.

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human rights courts and the ICJ have applied the abovementioned principle to individual rights.[60]

Thus, the existence of a customary and treaty-based human right to reparation follows from the right to an effective remedy and is nothing but the logical extension of a general principle of international law.[61] Taken together with the almost uniform approval of that right in international judicial practice and the consistently supportive state practice, there can hardly be a doubt that it forms part of international human rights law today.

II. International Humanitarian Law

Contrary to human rights law, the existence of a right to reparation for violations of international humanitarian law is fiercely debated.[62] Art. 3 Hague Convention IV[63] and its almost verbatim iteration in Art. 91 First Additional Protocol to the Geneva Conventions of 1949 (AP I)[64] explicitly hold a state party liable to pay compensation for violations of the respective treaty if the case demands. Compensation is generally understood in this case to encompass not only monetary compensation but all forms of reparation.[65] According to the International Committee of the Red Cross (ICRC), the obligation to repair violations of humanitarian law is also part of customary law for

60 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, I.C.J. Reports 2004, 136, para 152; ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment*, I.C.J. Reports 2010, 639, para 161 ff.; ECtHR, *Cyprus v. Turkey*, 25781/94 (Grand Chamber), 2014, para 40 ff.; IACtHR, *Aloeboetoe v. Suriname*, para 43 f.; IACtHR, *Velasquez Rodriguez Case, Compensatory Damages*, 1990, para 25; IACtHR, *Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala (Reparations and Costs)*, 2001, para 78; ACtHPR, *Mtikila v. Tanzania*, 011/2011, para 27.

61 On potential differences between these three sources and their consequences for the present study see below, ch. 4, B.

62 Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 2012; Furuya, *The Right to Reparation for Victims of Armed Conflict - The Intertwined Development of Substantive and Procedural Aspects*, in: Peters/Marxsen (eds.), *Reparation for Victims of Armed Conflict*, 2020, 16, 28 ff.

63 Convention (IV) Respecting the Laws and Customs of War on Land.

64 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protocol of Victims of International Armed Conflict (Protocol I).

65 Pilloud et al., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1987, art. 91 para 3653 f. For the distinction between different measures of reparation and their definitions see below, C.I.-V.

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international and non-international armed conflicts.[66] The travaux préparatoires indicate that the drafters of the Hague Convention IV intended Art. 3 to cover reparation to states as well as to individuals. In the drafting of Art. 91 AP I reparation to individuals played no role.[67] Regardless of the drafter's intentions, state practice immediately following the respective texts' adoption clearly and almost uniformly defies the existence of a right to reparation in international humanitarian law.[68] This has changed to a certain degree.[69] Most importantly, resolutions by the UN General Assembly and the UN Security Council can be read as affirming the existence of a right to reparation in international humanitarian law.[70] However, there are still several states opposing that position.[71] A right to reparation is therefore not established in international humanitarian law.

However, even if survivors have no right to reparation under international humanitarian law, they are not necessarily without remedy.[72] Although their

66 Henckaerts/Doswald-Beck, *ICRC Customary International Law Study Vol. I*, rule 150, p. 537.

67 Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces*, 1991 Intl. Comp. L. Q. 40(4), 827, 830 ff., 844 ff.; Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights - An Overview*, 2003 J. Intl. Crim. Just. 1(2), 339, 341 f. Against this interpretation, even though without much reasoning, Tomuschat, *Reparation in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law*, in: Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution Through International Law - Liber Amicorum Lucius Caflisch,* 2006, 569, 576.

68 Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces*, 835 ff.

69 Henckaerts/Doswald-Beck, *Customary International Humanitarian Law Vol. II - Practice Part 2*, 2005, ch. 42, para 90, 132, 140, 156, 194, 231, 318; ILA, *Reparation for Victims of Armed Conflict*, 313 ff. For a critical analysis of some of the practice mentioned as well as additional practice for and against an individual right to reparation see Correa, *Operationalising the Right of Victims of War to Reparation*, in: Peters/Marxsen (eds.), *Max Planck Trialogues on the Law of Peace and War - Vol. III: Reparations for Victims of Armed Conflict,* 2020, 95 ff.

70 UNGA, *Situation of Human Rights in Afghanistan*, A/RES/51/108, para 11; UNSC, *Resolution 827 (1993),* S/RES/827 (1993), 1993, para 7; UNGA, *Basic Principles*, A/RES/60/147. Most importantly, in its preamble the resolution recognizes Art. 3 of the Hague Convention and Art. 91 AP I as conferring an individual right.

71 German Federal Constitutional Court*, Varvarin Case*, 2 BvR 2660/06, 2 BvR 487/07, 2013; Federal Court of Justice of Germany*, Kunduz Case*, III ZR 140/15, 2016; Henckaerts/Doswald-Beck, *ICRC Customary International Law Study Vol. II Part 2*, ch. 42, para 195 ff., 203; Stammler, *Der Anspruch von Kriegsopfern auf Schadensersatz*, 2009, 159-330.

72 This argument is inspired by and follows in large part Correa, *Operationalising the Right of Victims of War to Reparation*, 110 ff.

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exact relationship to norms of international humanitarian law is disputed, human rights continue to apply in armed conflict.[73] Thus, if a violation of humanitarian law entails a violation of human rights – and it is hardly conceivable otherwise – the road to claim redress based on the human right to reparation is, in principle, open. International humanitarian law stays silent on the matter, and there is no indication that that silence was intended to preclude the application of a human right to reparation. Abrogating the human right to reparation is not necessary to meet the challenges states face in armed conflict. Reparation is a secondary right presupposing the violation of a primary right. Having to provide reparation in the aftermath of a violation hence does not reduce the courses of action a state can legally take during a conflict. The costs of reparation – which could strain a state's budget – can be avoided simply by abstaining from violating human rights, whose demands are already lowered due to the armed conflict. Accordingly, human rights courts and bodies awarded reparation to survivors of violations during an armed conflict.[74]

Still, there are some roadblocks. First, the geographical application of human rights can differ from that of international humanitarian law.[75] Consequently, some survivors of extraterritorial violations of international humanitarian law might not have a claim to reparation based on human rights law against the responsible state. Second, the perpetrating state might have derogated from the relevant human rights treaties because of a state

73 ICJ, *Wall Opinion*, para 104 ff.; ICJ, *Nuclear Weapons Advisory Opinion*, para 25; ECtHR, *Hassan v. The United Kingdom*, 29750/09 (Grand Chamber), 2014, para 102 ff.; IACtHR, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, 2012, para 141; AComHPR, *General Comment No. 4 on the African Charter on Human and Peoples' Rights - The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, 2017, para 62; AComHPR, *Democratic Republic of Congo v. Burundi, Rwanda, Uganda*, 227/99, 2003, para 79 f.; AComHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, 74/92, 1995, para 21. An overview of approaches to the question can be found at Sassòli/Nagler, *International Humanitarian Law - Rules, Controversies, and Solutions to Problems Arising in Warfare*, 2019, para 9.26 ff.

74 ECtHR, *Al Jedda v. The United Kingdom*, 27021/08 (Grand Chamber), 2011, para 107, 111 ff.; IACtHR, *Bámaca-Velásquez v. Guatemala (Merits)*, 2000, para 207 ff., 228; HRCom, *Fulmati Nyaya v. Nepal*, CCPR/C/125/D/2556/2015, 2556/2015, 2019, para 7.3, 9.

75 For an overview of this topic see Wenzel, *Human Rights, Treaties, Extraterritorial Application and Effects*, in: Wolfrum (ed.), *Max Planck Encyclopedia of International Law,* Online Edition 2008; Milanovic, *Extraterritorial Application of Human Rights Treaties - Law, Principles, and Policy*, 2011; Sassòli/Nagler, *International Humanitarian Law*, para 9.21 ff.

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of emergency. The right to an effective remedy can be derogated from.[76] However, the Human Rights Committee (HRCom) specified that while a state party can adjust remedies, it cannot entirely abrogate its obligation to provide an effective remedy.[77] Any derogation from the right to a remedy must not diminish the application of non-derogable rights.[78] Since honoring the obligation to repair does not reduce a state's ability to react to the armed conflict, derogation would also likely not be "strictly required by the exigencies of the situation", as human rights treaties require for a derogation to be lawful.[79] For these reasons, abrogating the right to reparation in a state of emergency usually will not be possible. Even if that were otherwise, derogation is not the necessary consequence of the existence of an armed conflict. The state must declare it. Derogation must be limited to those areas where it is necessary.[80] These factors further diminish the importance of derogation in armed conflict.

In sum, while probably no right to reparation exists in international humanitarian law as of now, many violations will be covered by the human right to reparation.

III. International Criminal Law

Art. 75 RS introduced a right to reparation for survivors of international crimes to international criminal law. It sparked a trend followed by several hybrid tribunals established after the ICC.[81] Thus, there is a basis for asserting

76 Art. 4 ICCPR; Art. 15 ECHR. The situation is less clear for the ACHR, which declares as non-derogable "the judicial guarantees essential for the protection of such rights", Art. 27 ACHR. In a corresponding advisory opinion the IACtHR does not clarify whether reparation falls under these essential guarantees, but held that states must provide redress. Given that the opinion also clarifies that the primary function of essential judicial guarantees is to guarantee the full exercise of conventional rights, redress could primarily mean cessation, see IACtHR, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, OC-9/87, 1987, para 20, 24. Note also that the ACHPR does not allow derogation at all.

77 HRCom, *General Comment No. 29 - Article 4: Derogations During a State of Emergency,* CCPR/C/21/Rev.1/Add.11, 2001, para 14.

78 HRCom, *General Comment No. 36 on the Right to Life,* CCPR/C/GC/36, 2018, para 67.

79 See above, fn. 76.

80 HRCom, *GC 29*, CCPR/C/21/Rev.1/Add.11, para 4.

81 Ambach, *The International Criminal Court Reparations Scheme – A Yardstick for Hybrid Tribunals?*, in: Werle/Zimmermann (eds.), *The International Criminal Court in Turbulent Times,* 2019, 131, 132 f., 137 ff.

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the existence of a general right to reparation, independently of the RS, in international criminal law.[82] This right is, however, directed against individual perpetrators, not states. While the drafters of the RS debated whether Art. 75 should also cover state responsibility to provide reparation, such proposals did not find sufficient support.[83] Given that the present inquiry is limited to state responsibility, the right to reparation in international criminal law cannot serve as a basis for the normative framework to be erected.[84]

B. Beneficiaries of the Right to Reparation

Only survivors have a right to reparation. The definition of "survivor" is therefore crucial to understand the international law on reparation. Many questions revolve around that definition, leading one author to conclude that there are "almost as many definitions as categories of [survivors] envisaged by international norms."[85] There are, however, certain elements most definitions have in common. Among them is the distinction between direct (I.) and indirect (II.) survivors.

I. Direct Survivors

International practice defines three requirements a direct survivor must meet: First, they must have suffered a violation of their rights. Second, they must have suffered harm. Third, the violation must have caused that harm.[86]

82 An excellent examination of the origins and development of a right to reparation in international criminal law is provided by Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, 87 ff.

83 PrepCom, *Report of the Preparatory Committee on the Establishment of an International Criminal Court,* A/Conf.183/2/Add.1, 1998, 117; PrepCom, *Article 66 - Reparations to Victims: Rolling Text,* UD/A/AC-249/1998/WG-4/IP, 1998; Muttukumaru, *Reparation to Victims*, in: Lee (ed.), *The International Criminal Court - The Making of the Rome Statute: Issues, Negotiations, Results,* 1999, 262, 267 ff.

84 The practice of the ICC is still relevant to the inquiry, since the court relies on the human right to reparation when devising its reparation principles and programs. For details see below, ch. 2, D.I.

85 de Casadevante Romani, *International Law of Victims*, 2010 Max Planck Y.B. U. Nations L. 14, 219, 237.

86 Shelton, *Remedies in International Human Rights Law*, 241 f.; Moffett, *Justice for Victims Before the ICC*, 17 ff.; UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,* A/RES/40/34, 1985, para 1; UNGA, *Basic Principles*, A/RES/60/147,

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This study presumes the violation of a primary right, making fuller exploration of the first requirement unnecessary. The notion of harm is understood widely.[87] It encompasses material and non-material harm. The former denotes losses with a directly equivalent market value such as damages to or loss of property, loss of earnings, and costs incurred, e.g., for legal, medical, or psychological assistance. Non-material harm features damages to the well-being of a person, which has no direct equivalent market value. Examples are pain suffered, mental and bodily harm, grievance, and humiliation.[88] Given this broad spectrum of recognized harms, only a few disadvantages do not warrant reparation, for example, general concerns or impaired general interests.[89]

The requirement of causation limits the right to reparation. It must not be equated with a mere sine qua non test. As the Inter-American Court of Human Rights (IACtHR) put it: "To compel the perpetrator of an illicit act to erase all the consequences produced by his action is completely impossible since that action caused effects that multiplied to a degree that cannot be measured."[90] Instead, the causal connection between the violation and the damage must be sufficiently close to warrant reparation. Criteria to assess this requirement are "direct causation", "certainty", "immediate effect", "foreseeability" or "proximity" and may vary with the type of violation and the circumstances of the case.[91]

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para 8; CoE, *Eradicating Impunity for Serious Human Rights Violations - Guidelines Adopted by the Committee of Ministers on 30 March 2011 at the 1110th Meeting of the Ministers' Deputies,* H/Inf (2011) 7, 2011, sec. II, para 5; AU, *Transitional Justice Policy,* 2019, para 21; ACtHPR, *Comparative Study on the Law and Practice of Reparations for Human Rights Violations,* 2019, 16 f. The terms "harm" and "damage" will be used interchangeably throughout this study. Other terms frequently used to denote the same are "injury", "prejudice" and "loss". On some differences between these terms see Wittich, *Non-Material Damage and Monetary Reparation in International Law*, 2005 Finnish Y.B. Intl. L., 321, 323 f.

87 The European Court of Justice (ECJ) determined that the meaning of harm is "common to all international law-subsystems", ECJ, *Axel Walz v. Clickair SA*, C-63/09, 2010, para 27.

88 See below for further detail ch. 2, B.II., C.II., D.III.2.a., D.III.3.a. D.III.4.a., and IComJ, *The Right to Remedy and Reparation for Gross Human Rights Violations - A Practitioners' Guide*, 2nd Revised Edition 2018, 189 ff.

89 ILC, *ASR Commentaries,* A/56/10, art 31, para 5.

90 IACtHR, *Aloeboetoe v. Suriname*, para 48.

91 ILC, *Third Report on State Responsibility by Mr. James Crawford, Special Rapporteur,* A/CN.4/507, 2000, para 28 f.; Shelton, *Remedies in International Human Rights Law*, 40 f.; Wittich, *Compensation*, in: Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law,* Online Edition 2008, para 17; IACtHR, *Aloeboetoe v. Suriname*, para

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International practice increasingly recognizes collectives as potential survivors.[92] Courts and treaty bodies awarded reparation to indigenous communities, groups of persons residing in the same area, and society as a whole.[93] Details surrounding the notion of collective reparation, such as the exact scope and nature of eligible collectives, are unclear. International practice has provided little clarification on these issues.[94] Nevertheless, since collectives can be right holders and certain violations cause collective harm, there is no reason why, in principle, they should not be regarded as survivors under international law.[95]

Aggregating the abovementioned elements, a direct survivor in international law can be defined as every person or collective that suffered harm as a direct result of a violation of their right.

49; ECtHR, *İpek v. Turkey*, 25760/94 (Second Section), 2004, para 223; ICJ, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, I.C.J. Reports 2018, 15, para 32; ICJ, *Armed Activities Reparations*, para 94, 382.

92 ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, *Decision Establishing the Principles and Procedures to be Applied to Reparations*, ICC-01/04-01/06-2904 (TC I), 2012, para 219 ff.; IACtHR, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Merits, Reparations and Costs)*, 2001, para 164 ff.; UNGA, *Basic Principles*, A/RES/60/147, para 8; Peru TRC, *Final Report*, 2003, vol. IX, ch. 2.2.2.2.2.2; SLTRC, *Witness to Truth*, vol. 2, ch. 4; Rosenfeld, *Collective Reparation for Victims of Armed Conflict*, 2010 Rev. Red Cross 92(879), 731, 739 ff. While not entirely clear on this issue, the AComHPR held that the Ogoni society was damaged as a whole. This at least suggests that some reparation measures – especially the clean-up of degraded land – is meant to remedy collective harm, AComHPR, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, 155/96, 2001, para 68 and holding.

93 IACtHR, *The Kaliña and Lokono Peoples v. Suriname*, 2015, para 273; AComHPR, *SERAC and CESR v. Nigeria*, 155/96, para 68 and holding; ACtHPR, *AComHPR v. Republic of Kenya – Judgment on Reparations*, 006/2012, 2022, 4; ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, *Reparations Order*, ICC-01/12-01/15-236 (TC VII), 2017, para 51 ff. Rosenfeld argues that only collectives holding collective rights are collective survivors, Rosenfeld, *Collective Reparation for Victims of Armed Conflict*, 732. This is not supported by international practice.

94 Odier Contreras-Garduno, *Collective Reparations - Tensions and Dilemmas Between Collective Reparations With the Individual Right to Receive Reparations*, 2018, 320.

95 For more details on collective reparation see below, C.VII.

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II. Indirect Survivors

International law recognizes three groups of persons as indirect survivors: the direct survivor's close family members, dependents, and persons who suffered harm while trying to assist the direct survivor or prevent the violation.[96] They all have in common that the original violation was not aimed at but still harmed them. Who counts as a close family member differs from case to case, also depending on cultural differences.[97]

Indirect survivors' own rights can be violated due to the suffering caused by the original violation of the direct survivor's rights. For example, the pain and anguish suffered by a close relative of a disappeared person, coupled with the authorities' inaction and denial of justice, can violate the relative's rights not to be subjected to inhumane treatment.[98] In this constellation, the term indirect survivor is misleading, as the survivor is violated in their own right, albeit through a slightly longer chain of causation.[99] There is hence no principled distinction between indirect and direct survivors in this case.[100]

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96 AComHPR, *GC 4*, para 17; ECtHR, *Colozza v. Italy*, 9024/80 (Chamber), 1985, para 38; IACtHR, *Case of the Gómez-Paquiyauri Brothers v. Peru*, para 118; UNGA, *Basic Principles for Victims of Crime and Abuse of Power*, A/RES/40/34, para 2; UNGA, *Basic Principles*, A/RES/60/147, para 2; CAT, *General Comment No. 3 of the Committee Against Torture - Implementation of Article 14 by States Parties,* CAT/C/GC/3, 2012, para 3; CEDAW, *R.P.B. v. The Philippines*, CEDAW/C/57/D/34/2011, 34/2011, 2014, para 9; ACtHPR, *Beneficiaries of Late Norbert Zongo v. Burkina Faso (Judgment on Reparations)*, 013/2011, para 46 ff.; HRCom, *Quinteros v. Uruguay*, CCPR/C/OP/2, 107/1981, 1983, para 14; ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 195 f.; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, *Redacted Version of "Decision on 'Indirect Victims'"*, ICC-01/04-01/06-1813 (TC I), 2009, para 40 ff., 51; Art. 2(b) European Convention on the Compensation of Victims of Violent Crimes.

97 ICC, *Lubanga Reparations Decision*, ICC-01/04-01/06-2904, para 195; IACtHR, *Aloeboetoe v. Suriname*, para 62.

98 IACtHR, *Myrna Mack Chang v. Guatemala*, 2003, para 232; ECtHR, *Kurt v. Turkey*, 24276/94 (Chamber), 1998, para 130 ff., 175. It must be noted however, that the ECtHR does not apply the concept consistently, often denying reparation to indirect surivors, Rubio-Marín et al., *Repairing Family Members - Gross Human Rights Violations and Communities of Harm*, in: Rubio-Marin (ed.), *The Gender of Reparations - Unsettling Sexual Hierarchies While Redressing Human Rights Violations,* 2009, 215, 232 ff.

99 Accordingly, the Working Group on Enforced or Involuntary Disappearances (WGEID) rejects the distinction between direct and indirect survivors and draws particular attention to its possible gendered impact, WGEID, *General Comment on Women Affected by Enforced Disappearances,* A/HRC/WGEID/98/2, 2013, para 38.

100 IACtHR, *Case of Bámaca-Velásquez v. Guatemala (Merits) - Separate Concurring Opinion of Judge Sergio García Ramírez*, 2000, para 5.

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The IACtHR and ECtHR also award reparation to persons whose own rights were not violated but who suffered harm because of the violation of the direct survivor's rights. This practice is based on a differentiation between survivors and injured parties in the ECHR and ACHR.[101] Since that distinction is peculiar to these two treaties, it cannot be taken to amend the survivor-definition in the international law on reparation. Hence, the notion of an indirect survivor does not add anything to the survivor definition. It merely draws attention to groups of survivors who suffered harm because of a violation of their rights through a longer chain of causation than direct survivors. The notion of indirect survivor must not be confused with reparation family members of deceased direct survivors receive as heirs. [102]

III. Survivors of Violations Committed by Non-State Actors

As a secondary right, the right to reparation arises from violations of primary human rights. Since traditionally, these rights bind states, no right to reparation follows from violations that non-state actors[103] commit. Especially in transitional justice situations, however, non-state actors commit many, if not most human rights violations.[104] Excluding survivors of these violations from

101 Art. 63 ACHR; Art. 41 ECHR; ECtHR, *Aktas v. Turkey*, 24351/94 (Third Section), 2003, para 364; ECtHR, *Cakici v. Turkey*, 23657/94 (Grand Chamber), 1999, para 130; IACtHR, *Loayza-Tamayo v. Peru (Reparations and Costs)*, 1998, para 88 ff.; IACtHR, *Myrna Mack Chang v. Guatemala - Reasoned Concurring Opinion of Judge Sergio García-Ramírez*, 2003, para 57.

102 For an analysis of international jurisprudence on this matter see Rubio-Marín et al., *Repairing Family Members*, 225 ff.; Wühler, *Reparations and Legal Succession – What Happens When the Victims Are Gone?*, 2018 Heidelberg J. Intl. L. 78(3), 597.

103 The term non-state actors covers a broad range of actors, Clapham, *Non-State Actors,* in: Binder et al. (eds.), *Elgar Encyclopedia of Human Rights,* Online Edition 2022, para 1 ff. This section will not narrow it down further, as it should not be decisive at the outset which non-state entity violates a person's human rights. In many cases, non-state armed groups will be the most visible non-state actor violating human rights. But often, that is as much a reflection of the focus of attention as of the quantity and quality of the violations committed. The violations of economic actors, e.g., tend not to be at the center of attention of transitional justice processes.

104 To give examples from the case studies below, Sierra Leone's Truth and Reconciliation Commission found that the Revolutionary United Front (RUF), a non-state actor, committed most violations, Ch. 2 B.II. In Colombia, non-state actors are responsible for a wide array of violations. Paramilitary forces predominantly committed the infamous massacres. While they were closely affiliated with state forces, an attribution of their actions to the state seems at least complicated, Ch. 2 C.I, II. The International

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reparation seems intuitively unfair and detrimental to transitional justice processes. The question hence is whether direct and indirect survivors of human rights violations by non-state actors also have a right to reparation. Such a right can be established against the state if it bears responsibility for the actions of non-state actors through omission or attribution. Beyond that, survivors could have an independent right to reparation directed against non-state actors.

Within human rights doctrine, states are responsible for violations by non-state actors if they fail to discharge their positive obligations to protect and fulfill human rights. These dimensions oblige states to protect individuals against specific threats by private actors and to create conditions under which individuals can enjoy their human rights.[105] The scope of these obligations is contingent on the protection feasible in the given situation. The state only has to do what can reasonably and proportionately be expected under the circumstances.[106]

These standards open two avenues of establishing the responsibility of states for human rights violations by non-state actors based on omission: First, if the state had the possibility to protect individuals against concrete violations with proportionate means it violated its obligation to protect their human rights. Second, if the state failed to prevent or contributed to the situation that gave rise to systematic human rights violations, it failed to fulfill the human rights of those subsequently victimized.[107]

Establishing the state's responsibility for its failure to protect human rights will often fail in situations of systematic human rights violations due to the impossibility to prevent concrete violations. In both Sierra Leone

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Criminal Court so far only ordered reparation against members of non-state actors, Ch. 2 D.2.a, 3.a., 4.a, 5.a.

105 Mégret, *Nature of Obligations*, 103; de Schutter, *International Human Rights Law*, 461; Lavrysen, *Positive Obligations in the Jurisprudence of the Inter-American Court of Human Rights*, 2014 Inter-Am. Eur. Hum. Rts. J. 7, 94, 110; Schabas, *ECHR Commentary*, 90 f.; HRCom, *GC 31*, CCPR/C/21/Rev.1/Add.13, para 7 f.; ECOSOC, *Updated Study on the Right to Food, Submitted by Mr. Asbjorn Eide,* E/CN.4/Sub.2/1999/12, 1999, para 52; ECtHR, *Budayeva and Others v. Russia*, 15339/02 (20 March 2008, First Section), para 128 ff.; ECtHR, *Özel and Others v. Turkey*, 14350/05 (17 November 2015, Second Section), para 170 f.

106 HRCom, *GC 31*, CCPR/C/21/Rev.1/Add.13, para 8; ECtHR, *Budayeva and Others v. Russia*, 15339/02 (20 March 2008, First Section), para 128 ff.; ECtHR, *Özel and Others v. Turkey*, 14350/05 (17 November 2015, Second Section), para 170 f.

107 Cf. HRCom, *GC 36*, CCPR/C/GC/36, para 69; HRCom, *General Comment No. 6 - Article 6 (Right to Life),* HRI/GEN/1/Rev.1, 1982, para 2.

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and Colombia, for example, the states lost control over wide areas of their territories for a significant time.[108] In that situation, they had no proportionate means at their disposal to prevent non-state actors from committing violations in these areas. Further, as a practical problem, this basis to attribute responsibility would require an examination of every single violation and the state's ability to prevent it; which will quickly prove impractical in situations of mass victimization.

In response to the same problem under the law of occupation, the ICJ reversed the burden of proof. In light of the occupying power's obligation to prevent violations of human rights law and international humanitarian law on the occupied territory, the court held that the state must establish that any violation that occurred was *not* due to its failure to take protective measures.[109] It is, however, unclear whether that reversal of the burden of proof can be extended to violations occurring on the territory of the state in question. While one could argue that a state usually has a greater degree of control over its own territory than territory it occupies, the occupation subject to the dispute before the ICJ was itself the result of a wrongful act.[110] Hence, the ICJ could also have based the reversal of the burden of proof on the illegality of the situation. In other cases, the ICJ did not extend the same reversal to violations on the territory of a state.[111] It did not apply it to other positive obligations either.[112] The reversal also drew strong criticism from the bench and – to the knowledge of the author – finds no direct equivalent in human rights jurisprudence.[113] Hence, it remains doubtful whether reversing the burden of proof can circumvent the difficulty to establish the ability of a state to prevent concrete violations in contexts of mass victimization.

108 See below, Ch. 2, B.I., C.I.

109 ICJ, *Armed Activities Reparations,* para 78, 95, 118, 149, 161, 257.

110 ICJ, *Armed Activities,* para 345(1). On the legality of belligerent occupation as such see Benvenisti, *Occupation, Belligerent,* in: Wolfrum (ed.), *Max Planck Encylopedia of International Law,* Online Edition 2009, para 20 f.

111 ICJ*, Corfu Channel Case (Merits)*, I.C.J. Reports 1949, 4, 18, concerning inter alia the positive obligations to not allow one's territory to be used for unlawful acts. For an analysis of the Diallo judgment to the same effect see ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations – Separate Opinion of Judge Yusuf,* para 14.

112 ICJ, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide,* I.C.J. Reports 2007, 43, para 462. The ICJ took care, however, to emphasize that that jurisprudence did not purport to establish standards for all positive obligations either, but only for the obligation to prevent genocide, para 492 and ICJ, *Armed Activities Reparations,* para 96.

113 ICJ, *Armed Activities Reparations – Separate Opinion of Judge Yusuf,* para 6 ff.

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Relying on a state's failure to fulfill human rights avoids this complication. This obligation does not concern the state's ability to prevent single incidents. Instead, the state is responsible for contributing or failing to prevent the mass victimization as a whole. At the outset, this avenue seems promising: Most systematic human rights violations arise out of unjust situations to which the state contributed, for example through an authoritarian government style or oppression of minorities. At least, states often will have failed to act decisively against factors contributing to conflict, such as pervasive inequality. Based on such failures, the Peruvian and Sierra Leonean Truth and Reconciliation Commissions (TRCs) assumed their respective states' responsibility for all violations of international law during the armed conflict they investigated.[114] With that, they followed the Special Rapporteur on reparation for gross violations of human rights.[115] This, however, seems contrary to the requirement of causation in the international law on reparation: Reparation is only owed for consequences that are sufficiently close to the illegal act.[116] The ICJ and the EECC held that a state is not responsible for every harm that occurred during a conflict it caused.[117] Especially when the wrongful act is not deliberately causing a conflict, but merely contributing to or failing to prevent it, many ensuing injuries will not be sufficiently close to that original violation to warrant reparation.[118] Furthermore, many harms of a conflict will be caused more immediately by wrongful conduct of another party to the conflict. While

114 Peruvian Truth and Reconciliation Commission, *Final Report,* 143. On Sierra Leone see below, Ch. 2 B.IV.1.a. On the conflict more generally see below, Ch. 2 B.I., II.

115 Commission on Human Rights, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms – Final Report Submitted by Mr. Theo van Boven, Special Rapporteur*, E/CN.4/Sub.2/1993/8, 1993, para 41.

116 See above, I.

117 ICJ, *Armed Activities Reparations,* para 161, 250, 382; The EECC emphasized though, that its standard does encompass unplanned evolutions of conflicts, even if based on actions of the opposing party, Ethiopian-Eritrea Claims Commission, *Final Award – Ethiopia's Damages Claims,* RIAA XXVI 631, 2009, para 284, 289 f. For further discussion of this topic see the overview in Pobije, *Victims of the Crime of Aggression,* in: Kress / Barriga (eds.), *The Crime of Aggression – A Commentary,* 2017, 816, 834 ff. The EECC emphasized though, that its standard does encompass unplanned evolutions of conflicts, even if based on actions of the opposing party, EECC, *Final Award,* para 298 f., 303, 305.

118 The EECC established a lower threshold for causation for deliberate attacks based on the criterion of foreseeability. Given that states must carefully weigh their decision to deliberately embark upon conflict, they are bound to duly consider all possible consequences. Hence, more consequences can be held to be foreseeable, EECC, *Final Award,* para 290, 297.

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such a concurrent responsibility – be it of a state or non-state actor – does not exclude an obligation to repair of the state causing the conflict, it does bear on the assessment whether the resulting harm is sufficiently close to that original wrongful act.[119] Given these complications, relying on positive human rights obligations to establish an obligation to repair acts of non-state actors will leave accountability gaps.[120]

States can also violate their obligation to respect human rights if the actions of non-state actors are attributable to them. The law on state responsibility provides four avenues to do that. Most importantly, if a state instructs, directs, or controls the conduct of a non-state actor, that conduct is attributed to the state.[121] The high threshold of this mode of attribution makes it hard to apply, though.[122] Exceptionally, non-state actors might assume governmental authority in circumstances that call for such assumption, triggering attribution of their actions under Art. 9 ASR. However, even if of customary status, this article applies to situations of leveé en masse rather than the more common situation of an armed insurrection and will hence be applicable only in exceptional situations.[123] Lastly, non-state actors' "success" can result in attributability, namely if the actor establishes a de facto government, replaces the old government, or forms a new state on part of the old state's territory.[124]

One of these six ways[125] will often establish state responsibility for human rights violations by non-state actors. In that case, the state cannot evade its obligation by pointing to the responsibility of the non-state actor. Generally, the responsibility of a non-state actor does not relieve the state from its re-

119 ICJ, *Armed Activities Reparations,* para 94, 97; EECC, *Final Award,* para 289.

120 Given that this study assumes state responsibility, see above Introduction, B., it will not dive deeper into this complicated topic.

121 Art. 8 ASR.

122 See ICJ, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits,* I.C.J. Reports 1986, 14, para 109 ff. The ICTY established a lower, but still demanding threshold of overall control, ICTY, *Prosecutor v. Duško Tadič, Judgment,* IT-94-1-A (AC), 1999, para 145.

123 ILC, *ASR Commentaries*, A/56/10, art. 9, para 2, 6. Of course that distinction is very difficult to draw and usually depends heavily on the viewpoint. Nevertheless, also given the provision's exceptional character, it wil rarely be applicable.

124 Art. 10 ASR. On its customary status, ILC, *ASR Commentaries*, A/56/10, art. 9, para 4; art. 10, para 3.

125 A violation of the obligation to protect (1) or fulfill (2); the attribution of non-state actors' actions through instruction, direction, or control (3); the assumption of governmental authority (4); formation of a de facto government (5); or establishment of a new government (6).

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sponsibility for the entire harm the survivor sustained.[126] The state, therefore, remains accountable to provide full reparation to the survivor even if a private individual contributed to the human rights violation or committed it.[127]

However, there are scenarios in which none of the six ways serves to establish state responsibility.[128] An ironclad guarantee that all survivors have a right to reparation can thus only be achieved if non-state actors had an independent obligation to repair survivors of their unlawful acts.[129]

Such a right could be the corollary to international obligations non-state actors incur. After all, the PCIJ held that the obligation to repair follows from any breach of an international obligation.[130] Accordingly, that obligation has been extended to international organizations and individuals.[131] However, while non-state actors have international obligations, their scope is unclear. Whether they encompass an obligation to repair remains particularly con-

126 ILC, *ASR Commentaries*, A/56/10, art. 31, para 12 f.; *D. Earnshaw and Others (Great Britain) v. United States (Zafiro Case)*, R.I.A.A. VI, 1925, 160, 164 f. In case of co-responsibility of a plurality of states, the law is less clear. Here it depends on the situation, whether one actor owes reparation for the entire harm or whether the responsibility is allocated, ILC, *ASR Commentaries*, A/56/10, art. 31 para 12 f., art. 47 para 4 ff. The ICJ left that question open in ICJ, *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment,* I.C.J. Reports 1992, 240, para 48, 56. It chose the first alternative in the Corfu Channel Case, ICJ, *Corfu Channel,* para 22 f. In the Armed Activities reparation proceedings it opted for the latter alternative, since two armies acted independently, ICJ, *Armed Activities Reparations,* para 98, 221, 253. As this situation concerned two state actors which beared independent responsibility it cannot be applied without qualification to situations of concurrent responsibility or causation of a state and a non-state actor. The latter will often not bear responsibility under international law. Even if it does, it probably does not incur an obligation to repair, see below in this section.

127 IACtHR, *Ximenes-Lopes v. Brazil*, 2006, para 232; The IACtHR, ECtHR, and HRC award full reparation also for violations of positive obligations, IACtHR, *Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and Their Families v. Brazil*, 2020, 115 ff., 257 f.; HRC, *Martínez et al. v. Colombia*, 3076/2017, CCPR/C/128/D/3076/2017, 2020, para 11; ECtHR, *Berkman v. Russia*, 46712/15 (Third Section), 2020, operative para 7, in which the court awards the 10.000 € claimed by the applicant regardless of the contributions of private actors to the violation.

128 See for example ICJ, *Armed Activities Reparations,* para 82.

129 I am indebted to Olivia Herman for providing me with a copy of her thesis on the topic in advance of publication. The following argument in large part follows her excellent analysis. Interested readers are referred for more detail to Herman, *Righting Wrongs – Non-State Armed Groups and Reparations for Victims of Armed Conflict, With a Case Study of Colombia,* 2021 (on file with the author).

130 PCIJ, *Chorzów Factory Case*, para 73.

131 ILC, *Draft Articles on the Responsibility of International Organizations*, A/66/10, 2011, art. 31; Art. 75 RS.

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troversial.[132] In international humanitarian law, AP II, which is applicable to non-international armed conflict, does not contain a provision on reparation akin to Art. 91 AP I. In any case, as established above, international humanitarian law does not (yet) provide survivors with a right to reparation.[133]

Some scholars argue that at least those non-state actors exercising territorial control assume some obligations under human rights law. Again, though, the extent of these obligations is subject to strong debate.[134] Specifically for reparation, state practice provides little support for the extension of such an obligation to non-state actors[135]:

While in some instances, states obliged non-state actors to provide reparation under the law of belligerency and insurgency,[136] little contemporary practice builds on these attempts.[137] Soft law documents are inconclusive. The Basic Principles and Guidelines on the Right to a Remedy and Reparation (Basic Principles) state that a person, legal person or other entity should repair survivors if found liable.[138] The responsible

132 ICRC, *Commentary on the Third Geneva Convention,* 2020, para 931; Henckaerts/Doswald-Beck, *ICRC Customary International Law Study Vol. I*, rule 150, p. 536, 550; Herman, *Beyond the State of Play – Establishing a Duty of Non-State Armed Groups to Provide Reparations,* 2020 Int. Rev. Red Cross 102(915), 1033, 1037 f.; Heffes/Frenkel, *The International Responsibilityx of Non-State Armed Groups – In Search of the Applicable Rules,* 2017 Goettingen J. Intl. L. 8(1), 39, 65 ff.

133 See above, A.II.

134 The vibrant discussion on the application of human rights law generally to non-state actors is outside the scope of the present study. See as a starting point, Clapham, *Non-State Actors,* in: Moeckli/Shah/Sivakumaran, *International Human Rights Law,* 2nd Ed. 2014, 531, 543 ff.; Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations,* 2006 Intl. Rev. Red Cross 88(863), 491 ff.; Rodenhäuser, *Organizing Rebellion – Non-State Armed Groups Under International Humanitarian Law, Human Rights Law, and International Criminal Law,* 2018, 121 ff.; Murray, *Human Rights Obligations of Non-State Armed Groups,* 2016, 160 ff. Berkes, *International Human Rights Law Beyond State Territorial Control,* 2021, 176 ff.; Clapham, *Non-State Actors,* para 18.

135 Moffett, *Beyond Attribution – Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda,* in: Gal-Or/Ryngaert/Noortman (eds.), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place - Theoretical Considerations and Empirical Finding,* 2015, 323, 328 f.; Iñigo, *Towards a Regime of Responsibility of Armed Groups in International Law,* 2020, 173 f.; Herman, *Righting Wrongs,* 66 f.

136 Herman, *Beyond the State of Play,* 1041.

137 Henckaerts/Doswald-Beck, *ICRC Customary International Law Study Vol. I*, rule 150, p. 549 f.; Herman, *Righting Wrongs,* 86 ff.; Clapham, *Non-State Actors,* para 12 f.; Gillard, *Reparation for Violations of International Humanitarian Law,* 2003 Intl. Rev. Red Cross 85(851), 529, 534 f.

138 UNGA, *Basic Principles*, A/RES/60/147, para 15.

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Special Rapporteur felt that this principle introduced the responsibility and liability of non-state actors.[139] However, the use of the word "should" in the decisive paragraph indicates the lack of a legally binding rule.[140] In contrast to paragraphs establishing state responsibility for reparation,[141] the paragraph on non-state actors fails to mention any basis of liability, leaving the possibility that they are found responsible solely under domestic law. Other UN-documents consistently emphasize the importance of reparation provided for by non-state actors without indicating an international legal obligation to that end.[142]

Taken together, this sparse and unclear practice cannot sustain an international obligation of non-state actors to repair survivors of violations they committed – much less a right of these survivors to claim reparation from non-state actors. If at all, such a concept is only in statu nascendi.[143]

The absence of an independent obligation to provide reparation need not keep states from forcing such an obligation on non-state actors, though. They can do so through domestic law or peace agreements. Several ways exist to involve non-state actors in reparation programs. A prime example is the

139 van Boven, *The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Intenrational Humanitarian Law,* United Nations Audiovisual Library, 2010, 1, 3.

140 ECOSOC, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms – Final Report of Special Rapporteur, Mr. M. Cherif Bassiouni, Submitted in Accordance With Commission Resolution 1999/33*, E/CN.4/2000/62, 2000, para 8.

141 See e.g. UNGA, *Basic Principles*, A/RES/60/147, para 3, 11, 15.

142 UN Commission of Human Rights, *Situation of Human Rights in Afghanistan,* E/CN.4/1998/70, 1998, para 5d; UNGA, *Situation of Human Rights in Afghanistan,* A/RES/53/165, 1999, para 10c; OHCHR, *Situation of Human Rights in Libya, Including the Impilementation of Technical Assistasnce and Capacity-Building and Efforts to Prevent and Ensure Accountability for Violations and Abuses of Human Rights,* A/HRC/40/46, 2019, para 79c; HRC, *Report on Domestic Reparation Programs,* A/HRC/42/45, 2019, para 95. Remarks of the UN Secretary-General are ambiguous, e.g. in UNSC, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict,* S/2009/277, 2009, para 68. While he refers to the responsibility of parties to an armed conflict to comply with international humanitarian law and human rights, he only mentions "the duty to make reparations", without specifying the actors carrying the obligation. The sole exception might be the International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General,* 2005, para 175.

143 See Herman, *Righting Wrongs,* 107 f. and Herman, *Beyond the State of Play,* 1042, coming to that conclusion after a much more comprehensive practice review.

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involvement of the FARC-EP in reparation efforts through the Colombian Peace Agreement from 2016.[144] The guerilla had to hand over an inventory of its asset, which were then used to finance reparation.[145] It committed to contribute to reparation measures, such as infrastructure rebuilding, mine clearance, and the search for disappeared persons.[146] The Special Jurisdiction for Peace (SJP), a special criminal court within Colombia's transitional justice system, can sanction criminally responsible individuals to contribute to reparation efforts as part of the "special sanctions" regime.[147]

The telos of reparation in transitional situations strongly speaks in favor of such a solution, whether state responsibility for the violations can be established or not.[148]

In sum, states bear responsibility for many violations non-state actors commit, either on the basis of their positive obligations to respect and fulfill human rights or through attribution, e.g. when a non-state actor forms a de facto government or fully assumes power. For the remaining cases, international law does not endow survivors with the right to claim reparation from the responsible non-state actor. However, states can and do change that by integrating non-state actors into their reparation programs; be it de facto, based on domestic law or a peace agreement. Thus, in practice, survivors rarely remain without a remedy simply because a non-state actor violated their human rights.

144 *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace*, 2016, e.g. Ch. 5.1.3.2. On details see Herman, *Righting Wrongs,* 246 ff. Regarding the context see below Ch. 2 C. For a similar attempt see *Agreement on Accountability and Reconciliation Between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement*, 2007 para 6.4.

145 Wilson, *FARC During the Peace Process,* Perry Center Occasional Paper, 2020, 18; Bernal et al., *2018 Global Review of Constitutional Law: Colombia,* 2019 Intl. J. Const. L. 17(2), 671, 676. For further ways to involve non-state actors in the financing of reparation programs see below, Ch. 4 E.II.2.a.

146 *Final Agreement*, 5.1.3.2. On problems with mine clearing see Bermúdez Liévano, *Will Colombia's FARC be Allowed to Clear Mines to Repair Their Victims?,* Justiceinfo.net 2020.

147 *Final Agreement,* 5.1.2.III.; Levy, *Can Colombia's Special Jurisdiction for Peace be Considered Slow? A Preliminary Comparative Study of Trials of International Crimes,* Justice in Conflict 2021.

148 Since that telos will only be established in Ch. 3, the author kindly asks readers to simply believe him at this point, acknowledging the breach of scientific standards this entails. Suffice it to say that the telos of reparation is to send the message that human rights are valid, applicable, enforceable and important again. This message is seriously undermined if non-state actors seem excepted from that rule and many survivors do not receive reparation at all.

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C. Content of the Right to Reparation

International practice abounds on how to repair direct and indirect survivors of human rights violations. While the standards employed differ in detail,[149] they arise out of the same fundamental principle and therefore tend to converge around a limited set of the same fundamental rules. These rules detail which forms of reparation are adequate for which situation. The differences in detail are not decisive for adapting the human right to reparation to the transitional justice situation. The present study, therefore, does not embark upon a detailed review of international reparation practice.[150] Instead, it provides an overview of principles common to all international reparation endeavors, which can be condensed to an international law on reparation. At the heart of this international law on reparation lies the principle of full reparation, first and most famously articulated by the PCIJ in its Chorzów Factory Case[151]:

> *"The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish*

149 A strong divergence in terminology lets these differences often appear greater than they actually are in substance. On this general problem see Haasdijk, *The Lack of Uniformity in the Terminology of the International Law of Remedies*.

150 Such a review is provided by ICOmJ, *Practitioners' Guide*.

151 It is by no means clear that the content of the human right to reparation can be determined by looking at general international law. Especially with regard to the ILC ASR this seems questionable, since the ILC explicitly excluded the question of individual claims to reparation from the scope of the ASR, ILC, *ASR Commentaries*, A/56/10, art. 33(2), para 4. This however only concerns the possibility to claim. Regarding substantive questions the ILC considers the Articles to be applicable to violations of human rights, art. 33, para 3, 5. The ILC cites human rights bodies to establish and explain certain obligations, art. 33, para 3; art. 36, para 19. Vice versa, various international bodies, including human rights courts invoke the ARS when determining human rights obligations, IACtHR, *Case of Ruano Torres et al. v. El Salvador,* 2015, para 160; ECtHR, *Big Brother Watch v. The United Kingdom,* 58170/13, 2018, para 420; ACtHPR, *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. The United Republic of Tanzania*, 009&011/2011, 2013, para 108. For more practice see Duffy, *Articles on Responsibility of States for Internationally Wrongful Acts and Human Rights* Practice, EJIL:Talk!, 2021. Lastly, since the principle of full reparation governs both reparation in general international law and in human rights law, it is plausible that any inferences from this principle are valid for both areas of law.

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> *the situation which would, in all probability, have existed if that act had not been committed."*[152]

Since then, the ICJ, the ECtHR, the IACtHR, and the African Court of Human and Peoples' Rights (ACtHPR) cited this judgment as a basis for their reparation jurisprudence.[153] The International Law Commission (ILC) modeled Art. 31 of its Articles on State Responsibility (ASR) on it.[154] Several treaty bodies base their reparation awards on the obligation to provide full reparation.[155]

Full reparation is provided through different forms of reparation. In inter-state disputes, the standard forms are restitution (I.), compensation (II.), and satisfaction (III.).[156] In the field of human rights, rehabilitation (IV.) and guarantees of non-repetition (V.) complement those measures.[157] While general international law also recognizes guarantees of non-repetition as a form of satisfaction and – more importantly – as an independent obligation related to the cessation of an unlawful act,[158] rehabilitation is specific to human rights. The following section provides details on each form of reparation before specifying their relationship (VI.) and turning to the concept of collective reparation (VII.).

I. Restitution

Restitution is most commonly defined as the reestablishment of the situation that had existed before the human rights violation has been committed.[159] Restitution hence addresses harm that can be reversed directly. It can also be

152 PCIJ, *Chorzów Factory Case*, para 125.
153 ICJ, *Armed Activities, Reparations,* para 100; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment*, I.C.J. Reports 2005, 168, para 259; ICJ, *Wall Opinion*, para 152; ECtHR, *Cyprus v. Turkey*, 25781/94, para 41 ff.; IACtHR, *Aloeboetoe v. Suriname*, para 43 f.; ACtHPR, *Mtikila v. Tanzania*, 011/2011, para 27.
154 ILC, *ASR Commentaries*, A/56/10, art. 31, para 2 f.; ICJ, *Armed Activities, Reparation,* para 101.
155 HRCom, *Bakar Japalali and Carmen Baloyo-Japalali v. Philippines*, CCPR/C/125/D/2536/2015, 2536/2015, 2019, para 7.6; CAT, *Saadia Ali v. Tunisia*, CAT/C/41/D/291/2006, 291/2006, 2008, para 15.8.
156 ILC, *ASR,* A/56/10, 2001, art. 31 ff.
157 UNGA, *Basic Principles*, A/RES/60/147, para 18.
158 ILC, *ASR*, A/56/10, art 30; ILC, *ASR Commentaries*, A/56/10, art. 30, para 11.
159 IACtHR, *Annual Report 2011*, 2011, 19; UNGA, *Basic Principles*, A/RES/60/147, para 19; CAT, *GC 3*, CAT/C/GC/3, para 8; AComHPR, *GC 4*, para 36.

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defined as the establishment of the situation that would exist had the breach not been committed. But since that is the goal of full reparation generally, this definition conflates restitution with reparation as such.[160] Typical restitution measures are the return of property, release from detention and return to one's place of residence.[161] Most forms of harm caused by human rights violations do not lend themselves to restitution. It is impossible to restore a survivor to a status quo ante, e.g., before suffering a mental or physical injury. Therefore, restitution is rarely performed in human rights practice. Even if it is, it must usually be accompanied by other forms of reparation.[162]

Restitution raises two conceptual problems: First, it is often difficult to distinguish from cessation. States must cease unlawful acts according to Art. 30 ASR. This often requires the same action as restitution, for example, the release of an unlawfully detained person. Still, both obligations have an independent scope of application. On the one hand, cessation is more limited, as it only concerns ongoing violations. On the other hand, restitution is not required if it involves a burden out of all proportion for the state concerned, while cessation must be performed without exception.[163] The concepts can be distinguished in two steps. First, the violation in question must be ongoing because otherwise, cessation does not apply. This depends on the nature of the violated right and cannot be determined in the abstract.[164] If the violation is ongoing, cessation concerns the violation as such, whereas restitution addresses its consequences. The critical distinguishing question is: Would the survivor continue to suffer harm that can be reversed directly if the responsible state starts to abide by its obligation from now on? If that is the case, restitution is in order. If not, cessation suffices.

The second conceptual problem arises if a lawful state of affairs never existed. Then, the reestablishment of the status quo ante is impossible.[165] This case might occur, for example, if a person is lawfully detained but from day

160 ILC, *ASR Commentaries*, A/56/10, art. 35, para 2.

161 UNGA, *Basic Principles*, A/RES/60/147, para 19; ACtHPR, *Comparative Study on the Law and Practice of Reparations for Human Rights Violations,* 2019, 46 ff. Instructive, IACtHR, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, 2020, para 319 ff.

162 Odier Contreras-Garduno, *Collective Reparations*, 118; Antkowiak, *A Dark Side of Virtue*, 47; IACtHR, *Case of Bámaca-Velásquez v. Guatemala (Reparations and Costs) – Concurring Opinion of Judge Sergio García Ramírez,* 2002, 1 f.

163 ILC, *ASR Commentaries*, A/56/10, art. 30, para 7.

164 ILC, *ASR Commentaries*, A/56/10, art. 30, para 8.

165 A variant of this difficulty gives rise to the call for transformative reparation in transitional justice, which will be discussed below, ch. 4, E.I.

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one in inhuman and degrading circumstances. While the obligation to cede violations will often cover such situations, they can also serve to refine the definition of restitution. Rather than demanding the restoration of the actual situation that existed before the violation was committed, restitution should require establishing an ideal normative conception of the status quo ante.[166]

II. Compensation

Compensation denotes a material benefit equivalent to the value of the harm suffered.[167] It usually takes the form of money but can also consist of other goods.[168] Compensation addresses financially assessable harm, whether material or non-material.[169] Material harm denotes the loss or impairment of a good with direct market value, including a person's ability to work, lost profits, and costs and expenses.[170] Non-material harm refers to "any damage, which is not damage to a person's assets, wealth or income."[171] In more detail, it refers to "mental suffering, injury to (the victim's) feelings, humiliation, shame, degradation, loss of social position or injury to his credit or reputation."[172]

This comprehensive notion of harm can complicate the assessment of the amount of compensation owed to a survivor. The task is straightforward in principle for material harm, even though many practical difficulties occur: The directly equivalent economic value can be calculated and reimbursed. The valuation methods differ with the kind of good lost or impaired and with the violation.[173] Non-material harm cannot be treated the same because

166 The concept will not be further developed here. Suffice it to say that the normative ideal will often be obvious when measured against human rights standards.

167 UNGA, *Basic Principles*, A/RES/60/147, para 20; PCIJ, *Chorzów Factory Case*, para 125; AComHPR, *GC 4*, para 38; IComJ, *Practitioners' Guide*, xiii f.

168 ILC, *ASR Commentaries*, A/56/10, art 36 para 4; IACtHR, *Goiburú et al. v. Paraguay*, 2006, para 156.

169 Material and non-material damage is often referred to as pecuniary and non-pecuniary damage. Non-material damage is also termed moral damage.

170 UNGA, *Basic Principles*, A/RES/60/147, para 20; CAT, *GC 3*, CAT/C/GC/3, para 9 f.; AComHPR, *GC 4*, para 37 ff.; PCIJ, *Chorzów Factory Case*, para 125; ILC, *ASR Commentaries*, A/56/10, art. 36, para 16.

171 Wittich, *Non-Material Damage and Monetary Reparation in International Law*, 329.

172 United States - German Mixed Claims Commission, *Lusitania Case*, R.I.A.A. VII, 1923, 32, 40. See above, fn. 170.

173 For different valuation methods see ILC, *ASR Commentaries*, A/56/10, art. 36, para 21 ff.; Marboe, *Compensation and Damages in International Law - The Limits of Fair*

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it has no direct equivalent economic value. Instead, international courts and treaty bodies award compensation based on equity, considering all the circumstances of the case at hand.[174] The most important basis for that determination is the gravity of the violation and of the harm suffered.[175] Beyond that, international jurisprudence considers many factors related to the violation, the responsible state, the survivor, and the prevailing circumstances. Regarding the violation, courts, tribunals, and treaty bodies take into account the duration of the suffering[176], the importance of the right violated[177], a denial of justice after the violation[178], the amount of time passed since the violation occurred[179] , and the treatment of the survivor after the violation occurred.[180] Intent on behalf of the responsible state usually leads to higher amounts of compensation.[181] The IACtHR lowers the amount of

Market Value, 2006 J. World Investment Trade 7(5), 723, 735 ff.; ICJ, *Armed Activities Reparations;* ACtHPR, *Comparative Study on the Law and Practice of Reparations for Human Rights Violations,* 2019, 78 ff.

174 ACtHPR, *Beneficiaries of Late Norbert Zongo v. Burkina Faso (Judgment on Reparations)*, 013/2011, para 61; ECtHR, *Varnava and Others v. Turkey*, 16064/90 (Grand Chamber), 2009, para 224; ECtHR, *Practice Directions - Just Satisfaction Claims*, 2007, para 14; IACtHR, *Velásquez-Rodríguez v. Honduras (Reparations and Costs)*, 1989, para 27; IACtHR, *El Amparo v. Venezuela (Reparations and Costs)*, 1996, para 37; ICJ, *Armed Activities Reparations,* para 164; ICJ, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Compensation, Judgment,* I.C.J. Reports 2012, 324, para 24; ECtHR, *Al Jedda v. The United Kingdom*, 27021/08, para 114; *Affaire Campbell (Royaume-Uni Contre Portugal)*, R.I.A.A. II, 1931, 1145, 1158. For a valuation method based on economic considerations see Geistfeld, *Placing a Price on Pain and Suffering - A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 1995 Cal. L. Rev. 83(3), 773, 818 ff.

175 HRCom, *Wilson v. The Philippines*, CCPR/C/79/D/868/1999, 868/1999, 2003, para 9; ECtHR, *Mentes and Others v. Turkey*, 23186/94 (Grand Chamber), 1998, para 20; CEDAW, *Inga Abramova v. Belarus*, CEDAW/C/49/D/23/2009, 23/2009, 2011, para 7.9; CEDAW, *R.P.B. v. The Philippines*, 34/2011, para 9; see also: UNGA, *Basic Principles*, A/RES/60/147, para 20.

176 ACtHPR, *Beneficiaries of Late Norbert Zongo v. Burkina Faso (Judgment on Reparations)*, 013/2011, para 62; ECtHR, *Price v. The United Kingdom*, 33394/96 (Third Section), 2001, para 34.

177 Peters et al., *Measuring Violations of Human Rights - An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage Under the European Convention on Human Rights*, 2016 Heidelberg J. Intl. L. 76(1), 1, 18 f.

178 IACtHR, *Fernández Ortega et al. v Mexico*, 2010, para 293; ECtHR, *Varnava and Others v. Turkey*, 16064/90, para 224.

179 IACtHR, *Fernández Ortega et al. v Mexico*, para 293.

180 IACtHR, *Fernández Ortega et al. v Mexico*, para 293.

181 ECtHR, *Price v. The United Kingdom*, 33394/96, para 34.

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compensation when the state accepts its responsibility.[182] Factors related to the survivor are their age[183], a subsequent change of living conditions[184] , and contribution to the damage.[185] In the case of indirect survivors, the closeness of their relationship to the direct survivor plays a role.[186] Other than that, the general economic situation at the place the violation occurred is factored in.[187] The ECtHR refrained from awarding compensation to homeless persons and terrorists based on the morality of their previous lifestyle.[188] Needless to say, this practice cannot be justified because reparation addresses harm and does not reward or punish personal traits arbitrarily perceived as moral or immoral by the ECtHR. Lastly, in inter-state cases, the ICJ and the Ethiopia-Eritrea Claims Commission (EECC) held that because in situations of mass violations a reduced evidentiary standard applies[189] the resulting uncertainties allows reducing the level of compensation.[190]

To a certain extent, the lack of a directly equivalent economic value necessarily makes the determination of the amount of compensation for non-material damage arbitrary.[191] Courts and treaty bodies have devised different strategies to deal with this problem. Many refrain from determining com-

182 Pasqualucci, *Victim Reparations in the Inter-American Human Rights System - A Critical Assessment of Current Practice and Procedure*, 1996 Mich. J. Intl. L. 18(1), 1, 35.

183 IACtHR, *Caracazo v. Venezuela (Reparations and Costs)*, 2002, para 102; ECtHR, *Kostovska v. the Former Yugoslav Republic of Macedonia*, 44353/02 (Fifth Section), 2006, para 60.

184 IACtHR, *Fernández Ortega et al. v Mexico*, para 293.

185 ECtHR, *Practice Directions - Just Satisfaction Claims*, para 2.

186 Rubio-Marín et al., *Repairing Family Members*, 240 f.

187 ECtHR, *Practice Directions - Just Satisfaction Claims*, para 2.

188 Ichim, *Just Satisfaction Under the European Convention on Human Rights*, 2014, 168 ff. Correa sees a similar tendency in a recent judgment of the IACtHR, although the court did not provide an explicit reasoning for limiting reparation, Correa, *Inter-American Court's Dangerous Precedent in Limiting Insurgents' Right to Reparations,* JusticeInfo.net, 2 September 2015.

189 See below, Ch. 4 D.II.

190 ICJ, *Armed Activities Reparations,* para 107; EECC, *Final Award,* para 38. The EECC relies on practice of the UNCC and others.

191 The internal criticism that the ICJ drew with its fixation of global sums in the Armed Activities case shows that this is especially salient in cases of mass violations, given that then a scarcity of evidence often compounds the problem: ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations – Declaration of Judge Tomka,* para 8 ff.; ICJ, *Armed Activities Reparations – Separate Opinion of Judge Yusuf,* para 24, 35 f.; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations – Separate Opinion of Judge Robinson,* para 4 ff.

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pensation amounts completely and leave this either to negotiations between the parties or national court systems.[192] This delegation does not make international law indifferent to the amount of compensation. Compensation must still be "fair", "proportionate", "just", or "adequate", indicating that international law establishes a corridor of adequate compensation within which the parties or national courts can determine the exact amount due.[193] The ECtHR uses tables indicating a medium amount of compensation for particular harms suffered, which can be tailored to the circumstances of the case.[194] Previous case law often orients the courts or treaty bodies.[195] These approaches cannot erase the fundamental arbitrariness of determining the value of non-material harm; they can merely ensure that "the arbitrariness [is] at least uniform."[196] Given that this problem lies in the highly subjective nature of non-material harm, it probably does not lend itself to more precise calculation.

Another aspect of compensation rarely receives attention: International jurisprudence has established a gravity threshold non-material financially assessable harm must reach to warrant compensation. All international courts and tribunals frequently hold that a judicial finding of a violation – a form of satisfaction – constitutes sufficient reparation for less severe violations.[197] Thus, even though survivors suffered non-material but financially assessable damage, they do not receive compensation if that damage remains below a certain threshold.

192 AComHPR, *Groupe de Travail sur les Dossiers Judiciaires Stratégiques v. Democratic Republic of Congo*, 259/2002, para 88; HRCom, *Guidelines on Measures of Reparation Under the Optional Protocol to the International Covenant on Civil and Political Rights,* CCPR/C/158, 2016, para 9.

193 HRCom*, Sterling v. Jamaica*, CCPR/C/57/D/598/1994, 598/1994, 1996, para 10; CAT*, Hajrizi Dzemajl et al. v. Yugoslavia*, CAT/C/29/D/161/2000, 161/2000, 2002, para 11.

194 Ichim, *Just Satisfaction Under the ECHR*, 121.

195 ECtHR, *Practice Directions - Just Satisfaction Claims*, para 14; IACtHR*, Suárez-Rosero v. Ecuador (Reparations and Costs)*, 1999, para 67.

196 Plant, *Damages for Pain and Suffering Symposium - Personal Injury Litigation*, 1958 Ohio St. L. J. 19(2), 211. A more detailed critique of the approaches listed above can be found in Geistfeld, *Placing a Price on Pain and Suffering*.

197 ECtHR*, Öcalan v. Turkey*, 46221/99 (Grand Chamber), 2005, para 212; ECtHR, *Golder v. United Kingdom,* 4451/70 (Grand Chamber), 1975, para 50; ECtHR, *Varnava and Others v. Turkey,* 16064/90 (Grand Chamber), 2009, para 224; IACtHR, *Case of "The Last Temptation of Christ" (Omedo-Bustis et al.) v. Chile,* 5 February 2001, para 99; ICJ, *Armed Activities Reparations,* para 387; ACtHPR, *AComHPR v. The Republic of Kenya – Judgment on Reparations,* 006/2012, 2022, 7. On declaratory judgments as satisfaction see below, III.

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In sum, states must compensate all financially assessable damage by giving the survivor a benefit equal to the value of the harm suffered – usually money. The amount of compensation for material damage can be calculated. Compensation for non-material damage is based on equity considering all factors of the case. If non-material damage remains below a certain gravity threshold, satisfaction suffices.

III. Satisfaction

There is no agreed-upon definition of satisfaction in international law. It usually refers to the performance of a symbolic act to remedy damage that is not financially assessable.[198] The main question is hence which damage is not financially assessable. Most often, satisfaction remedies damage to dignity, honor, or reputation.[199] Some authors further contend that "an injury [...] is necessarily inherent in every violation of a [...] right [...]" and that this alleged "legal damage" lends itself to satisfaction.[200] The concept of legal damage, however, erases the distinction between the violation of a primary obligation and the secondary obligation to repair. This does not concord with international practice, which still requires the positive determination that survivors suffered harm to be eligible for reparation.[201] Consequently, legal damage has only found sporadic use in international jurisprudence[202] and does not form part of the international law on reparation.[203]

198 ILC, *ASR Commentaries*, A/56/10, art. 37, para 3.

199 Wyler/Papaux, *The Different Forms of Reparation - Satisfaction*, in: Crawford et al. (eds.), *The Law of International Responsibility,* 2010, 623, 625; ILC, *Second Report on State Responsibility, by Mr. Gaetano Arangio-Ruiz, Special Rapporteur,* A/CN.4/425, 1989, para 13; *Rainbow Warrior* R.I.A.A. XX, 1990, 215, para 122, citing the second report on state responsibility by Arangio-Ruiz. Ramírez, *La Jurisprudencia de la Corte Interamericana de Derechos Humanos en Materia de Reparaciones*, in: Inter-American Court of Human Rights (ed.), *La Corte Interamericana de Derechos Humanos - Un Cuarto de Siglo: 1979-2004,* 2005, 1, 80.

200 ILC, *Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur,* A/CN.4/246, 1971, para 74; ILC, *Second Report on State Responsibility by Special Rapporteur Arangio-Ruiz*, A/CN.4/425; Hoss, *Satisfaction*, in: Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law,* Online Edition 2011, para 9 ff.

201 See above, Introduction, C.

202 *Rainbow Warrior Case*, para 122.

203 Wittich, *Non-Material Damage and Monetary Reparation in International Law*, 348 ff.; McIntyre, *Declaratory Judgments of the International Court of Justice*, in: Kok/Lavranos (eds.), *Hague Yearbook of International Law,* 2013, 107, 149 ff.

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Satisfaction takes a wide variety of forms. The most common ones are official apologies and the acknowledgment of wrongdoing.[204] Other forms include the naming of streets, plazas, and schools after survivors, monuments, radio broadcasts, and the publication of a judgment finding a violation.[205] International practice gives little guidance on what forms of satisfaction are adequate in which case. It depends on the nature and the consequences of the violation. The resulting flexibility of this instrument allows judicial bodies to tailor satisfaction to the needs of survivors, redressing their harm as effectively as possible.

Four forms of satisfaction warrant further discussion: Declaratory judgments, truth, prosecution, and punishment. A judgment declaring the conduct in question to be unlawful belongs to the most common forms of satisfaction.[206] Yet, it does not fit into the general concept of reparation without difficulty since a neutral entity performs it, not the state responsible. This conceptual difference evinces a punitive function of satisfaction.[207] Declaratory judgments facilitate a reparatory transaction. They punish the responsible state through a loss of reputation, from which the survivor receives satisfaction.

Truth, prosecution, and punishment are a form of satisfaction and independent obligations under human rights law.[208] Even if prosecution and

204 UNGA, *Basic Principles*, A/RES/60/147, para 22(e); HRCom, *Reparation Guidelines*, CCPR/C/158, para 11(e); IACtHR, *Rosendo Cantú et al. v. Mexico*, 2010, para 226; ILC, *ASR*, A/56/10, art. 37(2).

205 Correa, *Artículo 63,* in: Christian Steiner et al. (eds.), *Convención Americana Sobre Derechos Humanos - Comentario,* 2nd Edition 2019, 1019, 1057; Correa, *Artículo 63*, in: Steiner/Uribe (eds.), *Convención Americana Sobre Derechos Humanos - Comentario,* 2014, 817, 850.

206 Amerasinghe, *Jurisdiction of International Tribunals*, 2003, 419 ff.; ECtHR, *Öcalan v. Turkey*, 46221/99 (Grand Chamber), 2005, para 212; IACtHR, *Victor Neira-Alegría et al. v. Peru (Reparations and Costs)*, 1996, para 56; IACtHR, *Ríos et al. v. Venezuela*, 2009, para 403; IACtHR, *Perozo et al. v. Venzuela*, 2009, para 413; UNGA, *Basic Principles*, A/RES/60/147, para 22(d). A well-founded critique of this measure of satisfaction is provided by McIntyre, *Declaratory Judgments of the International Court of Justice*.

207 Wyler/Papaux, *The Different Forms of Reparation - Satisfaction*, 623 ff.; McIntyre, *Declaratory Judgments of the International Court of Justice*, 153 ff.

208 ILC, *ASR Commentaries*, A/56/10, art. 37, para 5; ICJ, *Armed Activities Reparations,* para 389 f.; UNGA, *Basic Principles*, A/RES/60/147, para 22(b), (f); AComHPR, *GC 4*, para 44; HRCom, *GC 31*, CCPR/C/21/Rev.1/Add.13, para 16; HRCom, *Reparation Guidelines*, CCPR/C/158, para 11(b); IACtHR, *Myrna Mack Chang v. Guatemala*, para 274; IACtHR, *Radilla-Pacheco v. Mexico*, 2009, para 336. But see also the Court's indication to the contrary in IACtHR, *Case of the "Street Children" (Villagrán-Morales*

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punishment were also individual rights[209], any individual's responsibility would first have to be determined through a trial compatible with international standards. Prosecution and punishment remain within the hands of the state. Survivors can merely demand that it be carried out thoroughly.[210]

IV. Rehabilitation

Rehabilitation is a form of reparation specific to human rights law. The concept was introduced in the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[211] and is now widely used by different human rights courts and treaty bodies. It addresses harm to an individual's independence and integration into society by helping them restore or acquire skills.[212] Understood narrowly, rehabilitation means the provision of medical and psychological care.[213] The more extensive notion which most international courts and tribunals follow, at least in practice, also includes legal and social care, including vocational training and education.[214] Rehabilitation bears some resemblance to restitution since it encompasses

et al.) v. Guatemala (Reparations and Costs), para 99. A perfect example of the unclear status of prosecution and punishment is provided by the IACtHR, which frequently puts the obligation to prosecute and punish under the heading of "Other Forms of Reparation", but gives the impression in the respective text of the judgment that the obligation is not connected to reparation. See as an example IACtHR, *Case of the Miguel Castro-Castro Prison v. Peru (Merits, Reparations and Costs)*, 2006, para 436. On truth see OHCHR, *Study on the Right to Truth,* E/CN.4/2006/91, 2006, 112 ff.; Shelton, *Remedies in International Human Rights Law*, 107 ff.

209 The HRCom denies survivors such a right, while the ECtHR and IACtHR grant it, HRCom, *Mohamed Rabbae, A.B.S. and N.A. v. The Netherlands*, CCPR/C/117/D/2124/2011, 2124/2011, 2017, para 10.3; HRCom, *H.C.M.A. v. The Netherlands*, CCPR/C/35/D/213/1986, 213/1986, 1989, para 11.6; ECtHR, *Aksoy v. Turkey*, 21987/93 (Chamber), 1996, para 98; IACtHR, *Trujillo-Oroza v. Bolivia (Reparations and Costs)*, 2002, para 100.

210 IACtHR, *Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala (Merits)*, 1998, para 178; HRCom, *Rodger Chongwe v. Zambia*, CCPR/C/70/D/821/1998, 821/1998, 2000, para 7; ECtHR, *Gül v. Turkey*, 22676/93 (Fourth Section), 2000, para 88.

211 UNGA, *Basic Principles for Victims of Crime and Abuse of Power*, A/RES/40/34, para 14 ff. The Principles use the term assistance. The term rehabilitation was introduced by Art. 14 CAT.

212 Redress, *Rehabilitation as a Form of Reparation Under International Law*, 2009, 8 ff.; CAT, *GC 3*, CAT/C/GC/3, para 11; AComHPR, *GC 4*, para 40 f.

213 IACtHR, *Annual Report 2011*, 19; HRCom, *Reparation Guidelines*, CCPR/C/158, para 8.

214 UNGA, *Basic Principles*, A/RES/60/147, para 21; CAT, *GC 3*, CAT/C/GC/3, para 11; AComHPR, *GC 4*, para 41; Correa, *Art. 63*, 1068.

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measures that directly reverse harm. However, while the two coincide, rehabilitation has a broader approach to redress: It seeks to empower the survivor through medical, psychological, and social means. For example, providing a disabled survivor with a wheelchair or crutches does not directly reverse the violation's consequences, but it does restore their independence and thus mitigates the violation's consequences.

Sometimes the state pays money dedicated to cover the costs of medical or psychological assistance.[215] For conceptual clarity, this form of reparation should only be considered rehabilitation if the payment is made upfront and restricted to enable the survivor to get the services they need. If the payment reimburses the survivor for costs of services they already incurred or if the survivor can freely decide how to spend the money, it is better considered compensation for material damage.

V. Guarantees of Non-Repetition

Guarantees of non-repetition aim at preventing future violations. They often address underlying structural causes for a violation.[216] They take many different forms, including institutional and legislative reform, training of public officials, and the elaboration of codes of conduct.[217] Because of their strong preventive dimension, guarantees of non-repetition cannot easily be categorized as reparation. While providing reassurance to survivors, guarantees of non-repetition are mostly directed at society as a whole or hypothetical future survivors. They are predicated on the risk of repetition of the violation, not on damage arising from it.[218] Consequently, their categorization is far

215 IACtHR, *Loayza-Tamayo v. Peru (Reparations and Costs)*, para 129(b), (d); ECtHR, *Z and Others v. The United Kingdom*, 29392/95 (Grand Chamber), 2001, para 127.

216 IACtHR, *Annual Report 2011*, 20; IACtHR, *Atala Riffo and Daughters v. Chile*, 2012, para 267; AComHPR, *Malawi African Association and Others v. Mauritania*, 54/91, 2000, operative para 5; CAT, *GC 3*, CAT/C/GC/3, para 18; AComHPR, *GC 4*, para 45.

217 UNGA, *Basic Principles*, A/RES/60/147, para 23.

218 Sullivan, *Changing the Premise of International Legal Remedies - The Unfounded Adoption of Assurances and Guarantees of Non-Repetition*, 2002 UCLA J. Intl. L. Foreign Aff. 7, 265, 269; Colandrea, *On the Power of the European Court of Human Rights to Order Specific Non-Monetary Measures - Some Remarks in Light of the Assanidze, Broniowski and Sejdovic Cases*, 2007 Hum. Rts. L. Rev. 7(2), 396, 409; Tigroudja, *La Satisfaction et les Garanties de Non-Repetition de l'Illicite*, in: Société de Législation Comparée - Unité Mixte de Recherche de Droit Comparé de Paris (ed.), *Réparer les Violations Graves et Massives des Droits de l'Homme - La Cour*

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from uniform: The African Commission on Human and Peoples' Rights (AComHPR), the International Tribunal on the Law of the Sea (ITLOS), Art. 24(5) Convention on the Elimination of All Forms of Discrimination (CERD) and the Basic Principles treat them exclusively as a form of reparation.[219] The ICJ and the ACtHPR do not specify their legal basis.[220] While the HRCom and the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) generally categorize guarantees of non-repetition as reparation, they usually separate them from orders of reparation in their communications, treating them as an independent obligation.[221] The IACtHR, the Committee Against Torture (CAT), and the ILC expressly follow this approach. The former two base guarantees of non-repetition on the obligation to repair and the obligation to prevent violations.[222] The ILC primarily sees them as an independent obligation but also affirms that they can serve as satisfaction.[223]

Based on this ambiguous practice, guarantees of non-repetition seem to have a dual nature: They do form part of the international law on reparation

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Interaméricaine, Pionnière et Modèle?, 2010, 69; HRC, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, Pablo de Greiff,* A/HRC/30/42, 2015, para 26.

219 AComHPR, *Kazingachire et al. v. Zimbabwe*, 295/04, para 130; ITLOS, *The M/V "Saiga" (No.2) Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS Reports 1999, 10, para 171; UNGA, *Basic Principles*, A/RES/60/147, para 23; ILC, *Second Report on State Responsibility by Special Rapporteur Arangio-Ruiz*, A/CN.4/425, 148 ff.

220 ICJ, *LaGrand (Germany v. United States of America)*, I.C.J. Reports 2001, 466, para 124; ICJ, *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J. Reports 2004, 12, para 149 ff. The ACtHPR included guarantees of non-repetition in its ruling on reparations in the case concerning Reverend Mtikila. However, it merely reiterated an order it made in the judgment on the merits in which it explicitly found that it could not decide on reparation, since the applicant did not claim any reparation at that stage of the proceedings, ACtHPR, *Mtikila v. Tanzania*, 011/2011, para 42 f.; ACtHPR, *Tanganyika Law Society, the Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. The United Republic of Tanzania*, 009&011/2011, 2013, para 124, 126.

221 HRCom, *GC 31*, CCPR/C/21/Rev.1/Add.13, para 16; HRCom, *Reparation Guidelines*, CCPR/C/158, para 2; HRCom, *Guillermo Ignacio Dermit Barbato et al. v. Uruguay*, CCPR/C/OP/2, 84/1981, 1990, para 11; HRCom, *Beatriz Weismann Lanza and Alcides Lanza Perdomo v. Uruguay*, CCPR/C/9/D/8/1977, 8/1977, 1980, para 17; HRCom, *William Torres Ramirez v. Uruguay*, CCPR/C/10/D/4/1977, 4/1977, 1980, para 19; CEDAW, *General Recommendation 28*, CEDAW/C/GC/28, para 32.

222 CAT, *GC 3*, CAT/C/GC/3, para 2, 18; Schönsteiner, *Dissuasive Measures and the Society as a Whole - A Working Theory of Reparations in the Inter-American Court of Human Rights*, 2007 Am. U. Intl. L. Rev. 23(1), 127, 145 ff.

223 ILC, *ASR Commentaries*, A/56/10, art. 30, para 11.

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and at the same time exist as an independent legal obligation. However, international practice is unclear under which circumstances they may be ordered as reparation and to which kind of damage they respond.[224]

VI. The Relation Between the Different Forms of Reparation

The five forms of reparation are not neatly separate. They overlap, and in practice, some reparation measures cannot be categorized clearly as one or the other. Since the concepts differ nonetheless, the question of their relationship arises. Restitution takes primacy over other forms of reparation because it comes closest to the overall goal of full reparation to erase all consequences of the violation. Other forms of reparation only come into play if or insofar as restitution is impossible or inadequate.[225] The relation between the remaining forms of reparation is unclear. The ILC submits that compensation takes precedence over satisfaction.[226] However, according to the definitions sketched out above, the two forms address different harms. They are, therefore, complementary rather than placed in a hierarchical order.[227] The same holds for guarantees of non-repetition. Rehabilitation can address the same harm as compensation. Here, the question of relationship turns into the question of who gets to choose adequate forms of reparation.

The ILC assumes that the survivor has – in principle – a right to choose their preferred mode of reparation, regardless of what is objectively required to mitigate the harm suffered.[228] It finds limited support in the jurisprudence of the ICJ,[229] but not in international human rights practice. On the contrary, the ECtHR held that „if restitutio in integrum is in practice impossible the respondent States are free to choose the means whereby they will comply

224 An exploration of the practice is provided by El-Zein/Langmack, *Conceptualizing Guarantees of Non-Repetition - Chances and Risks for Human Rights Jurisprudence,* presented at: AHRI Conference 2018 (Edinburgh) (on file with the author).

225 Shelton, *Remedies in International Human Rights Law*, 298; IACtHR, *Compendium,* OEA/Ser.L/V/II.Doc. 121, para 167; ACtHPR, *Comparative Study on the Law and Practice of Reparations for Human Rights Violations,* 2019, 50.

226 ILC, *ASR*, A/56/10, art. 37(1).

227 Kerbrat, *Interaction Between the Forms of Reparation*, in: Crawford et al. (eds.), *The Law of International Responsibility,* 2010, 573, 581; IACtHR, *Compendium,* OEA/Ser.L/V/II.Doc. 121, para 167.

228 ILC, *ASR Commentaries*, A/56/10, art. 34, para 4.

229 ICJ, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, I.C.J. Reports 2012, 99, para 137.

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with a judgment […], and the Court will not make consequential orders or declaratory statements in this regard."[230] According to the court, a state's freedom to choose between adequate reparation measures is the necessary corollary of the freedom to choose how to comply with the primary obligations under the convention.[231] This freedom does not apply to restitution and monetary compensation, which the court frequently orders without leaving the state any room to choose. Hence, in the ECtHR practice, the state is only free to choose between different forms of rehabilitation, satisfaction, and guarantees of non-repetition. This finds some support in further international practice.[232] The majority of human rights courts and treaty bodies neither leaves the survivor nor the state any explicit room to choose. Instead, they determine adequate reparation measures based on both parties' arguments, which must be implemented regardless of either party's preferences.[233] There is often some automatic leeway in implementing reparation awards, which the states enjoy as the implementing agent.[234] But international practice grants a right to choose neither to the survivor nor the state responsible. Rather, the adequate forms of reparation are determined on an objective basis. According to the principle of effectiveness, they must be chosen to overcome the harm suffered as effectively as possible.[235]

VII. Collective Reparation

Corresponding to the rise of collectives as potential survivors, collective reparation is now firmly entrenched in the law on reparation.[236] Rather than being a particular form of reparation, the term designates reparation to collectives, reparation through collective goods, as well as a mode of distribution of individual reparation.[237] It can encompass restitution, compensation,

230 ECtHR, *Papamichalopoulos and Others v. Greece (Article 50)*, 14556/89 (Chamber), 1995, para 34.
231 ECtHR, *Papamichalopoulos v. Greece*, 14556/89, para 34.
232 HRCom, *Bariza Zaier v. Algeria - Individual Opinion of Gerald L. Neumann (Concurring)*, CCPR/C/112/D/2026/2011, 2026/2011, 2014, para 6.
233 Contreras-Garduno, *Collective Reparations,* 145.
234 This aspect will receive further treatment below, ch. 4, B.III.
235 On that see below, ch. 4, E.II.3.
236 See above, B.I.
237 HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 38.

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rehabilitation, satisfaction as well as guarantees of non-repetition.[238] As with the exact scope of collective beneficiaries of reparation, the exact content of the concept and its relation to the international law on reparation is unclear.[239] These challenges are complex and have received detailed treatment elsewhere.[240] For this study, it suffices to establish that the international law on reparation obliges states to repair collective harm and enables them, where appropriate, to distribute individual reparation collectively and to repair through collective goods.

D. Limits of the Right to Reparation

Reparation is only adequate if it is proportionate to the gravity of the harm and the violations suffered.[241] The proportionality requirement is best conceived of as an overarching principle placing different limits on the obligation to provide reparation. Under certain circumstances, it allows awarding less reparation than the damage incurred.[242] Beyond that, proportionality limits certain forms of reparation. According to Art. 35(b) ASR, restitution must not be performed if it places a disproportionate burden on the state. While this is not reflected overtly in human rights practice, the IACtHR held that restitution is not always appropriate, even though it did not elaborate under which

238 Odier Contreras-Garduno, *Collective Reparations*, 138 ff.; HRC, *Report of the Special Rapporteur on Transitional Justice on Reparation*, A/69/518, para 38 ff.

239 Odier Contreras-Garduno, *Collective Reparations*, 320.

240 A further examination of collective reparation is outside the scope of the present study. For that see Odier Contreras-Garduno, *Collective Reparations*; Rosenfeld, *Collective Reparation for Victims of Armed Conflict*; Mégret, *The Case for Collective Reparations Before the International Criminal Court*, in: Wemmers (ed.), *Reparation for Victims of Crimes Against Humanity,* 2014, 171; Brodney, *Implementing International Criminal Court-Ordered Collective Reparations - Unpacking Present Debates*, 2016 J. Oxford Centre Socio-L. Stud., 1; ACtHPR, *Comparative Study on the Law and Practice of Reparations for Human Rights Violations,* 2019, 69 ff.

241 CEDAW, *R.P.B. v. The Philippines*, 34/2011, para 9; CEDAW, *Inga Abramova v. Belarus*, 23/2009, para 7.9; AComHPR, *GC 4*, para 34; UNGA, *Basic Principles*, A/RES/60/147, para 15; ECSR, *Syndicat de Défense des Fonctionnaires v. France (Merits)*, 73/2011, 2012, para 59; CAT, *GC 3*, CAT/C/GC/3, para 6; IACtHR, *Castillo-Paéz v. Peru (Reparations and Costs),* 27 November 1998, para 51.

242 Gray, *Remedies*, in: Cesare et al. (eds.), *Oxford Handbook of International Adjudication,* 2013, 871, 891. See also below, ch. 4, E.II.4.b.

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circumstances it is not.[243] Proportionality plays an obvious role in the equitable assessment of compensation for immaterial damage. It limits compensation to the reimbursement of actual losses, excluding, e.g., punitive compensation.[244] The requirement of proportionality also excludes remote damage from reparation.[245] It would place a disproportionate burden on the responsible state if it had to repair all the damage the unlawful act caused. Third, it plays a role in assessing the scope of reparation in cases of concomitant causes and contributory negligence.[246] The rights of third parties also limit reparation. Reparation easily conflicts with third-party rights, for example, if land is to be restituted to an original owner even though the current owner acquired the land lawfully. Such conflicts will be treated at length below.[247] Suffice it to say for now that the international law on reparation leaves enough room for solutions tailored to the specific circumstances of the case.

E. The Theoretical Foundation of the International Law on Reparation

The theoretical foundation of reparation in transitional justice, which will be discussed below,[248] is best understood compared to the theoretical foundation of reparation in non-transitional contexts. The international law on reparation rests on the theory of corrective justice Aristotle developed in his Nicomachean Ethics: Corrective justice serves to reverse unjust transactions. Unjust transactions deviate from the state of equality, in which each party possesses what they are morally entitled to.[249] Corrective justice requires the restoration of the state of equality by using the perpetrator's unjust gain to

243 IACtHR, *Aloeboetoe v. Suriname*, para 49; Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights,* 2nd Edition 2013, 192.

244 IACtHR, *Velásquez-Rodríguez v. Honduras (Reparations and Costs)*, para 37 f.; ECtHR, *Mentes and Others v. Turkey*, 23186/94, para 21; ICJ, *Armed Activities Reparations,* para 102.

245 See above, B.I.

246 This function is beyond the scope of this chapter. For more detail see ILC, *Second Report on State Responsibility by Special Rapporteur Arangio-Ruiz*, A/CN.4/425, para 44, 89. See also below, ch. 4, E.II.2.a.

247 See below, ch. 4, B.II.2, E.II.4.

248 See below, ch. 3.

249 Weinrib, *Corrective Justice in a Nutshell*, 2002 U. Toronto L. J. 52(1), 349, 349, 354. For a broader understanding of corrective justice see Polansky, *Giving Justice its Due*, in: Polansky (ed.), *The Cambridge Companion to Aristotle's Nicomachean Ethics,* 2014, 151, 161.

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restore the survivor to the situation that would exist had the violation not been committed.[250] Aristotle compares this operation to a set of lines. If one of the lines exceeds the other's length, the judge has to transfer half of the exceeding length to the shorter line so that both are equally long.[251] Corrective justice is thus an arithmetic operation that takes an unjust gain away from the perpetrator to remedy the unjust loss the survivor of an unjust transaction suffered. Notably, the terms "transaction", "gain", and "loss" do not only refer to economic goods. According to Aristotle, "gain" and "loss" are merely the terms used to estimate damage, no matter whether material or immaterial. "Gain" should not be interpreted literally as an addition to the perpetrator's assets. It merely denotes the amount of reparation the perpetrator owes the survivor.[252] Corrective justice is therefore not only applicable to economic injustices but also assaults, murders, etc.[253] While corrective justice is usually taken as the basis for tort law and other private law constellations, the international law on reparation for human rights violations also developed from its principles.[254] In addition to this primary purpose of corrective justice, reparation also serves condemnation and deterrence.[255]

F. Summary: The International Law on Reparation

Even though many details remain unresolved, international practice converges towards an international law on reparation based on the principle of full reparation. Individuals have a customary and treaty-based human right to reparation, which, in principle, is also applicable in international and non-international armed conflicts. The right is a logical extension of a recognized general principle of international law and finds a basis in the right to an effective remedy. It places an obligation of result on the state to

250 Miller, *Justice*, in: Zalta (ed.), *Stanford Encyclopedia of Philosophy,* Online Edition 2017, 2.2.
251 Aristotle/Rackham, *Nicomachean Ethics*, 2014, 277 f.
252 Aristotle/Rackham, *Nicomachean Ethics*, 275.
253 Weinrib, *The Gains and Losses of Corrective Justice*, 1994 Duke L. J. 44(2), 277, 282 ff.
254 Shelton, *Remedies in International Human Rights Law*, 19 f.; Buti, *Reparations, Justice Theories and Stolen Generations*, 2008 U. W. Australia L. Rev. 34(1), 168, 171 f. This overlap is no coincidence, since the international law on reparation developed from private law principles, IACtHR, *Loayza-Tamayo v. Peru (Reparations and Costs) - Joint Concurring Opinion of Judges A.A. Cançado Trindade and A. Abreu-Burelli*, 1998, para 6.
255 Shelton, *Remedies in International Human Rights Law*, 20 ff.

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achieve full reparation: erasing all consequences of the illegal act by putting the survivor in the position they would be in had the violation not occurred. The state owes this obligation to every person who suffered harm due to a violation of their rights, be it directly, indirectly, individually, or collectively, as long as the harm is not caused too remotely. In many cases, the state will also owe reparation to survivors of violations by non-state actors based on its positive human rights obligations or on the attribution of the actions of the non-state actor to the state.

How to achieve full reparation depends on the damage the survivor suffered. Different forms of reparation are adequate for different types of damages. Directly reversible damage must be repaired through restitution – the act of restoring the survivor to the position they were in before the violation was committed. Insofar as that is impossible or inadequate, the state must resort to compensation, satisfaction, rehabilitation, and guarantees of non-repetition. Compensation is a material benefit – most often money – which addresses financially assessable damage of material and non-material nature. Material damage must be compensated according to its economic value, non-material damage that crosses a certain gravity threshold based on equity. Satisfaction repairs damage that is not financially assessable, as well as financially assessable damage below said gravity threshold. International law equips states with a laundry list of mostly symbolic measures to accomplish that task. Rehabilitation denotes the provision of medical and psychological care as well as legal and social assistance to repair impairments to the survivor's independence and integration in society. Guarantees of non-repetition address the risk that the violation recurs. Again, a laundry list of measures is available to states for that aim.

The principle of proportionality limits reparation. Principally, reparation must be proportionate to the violation, and the harm suffered. This requirement limits reparation to the damage incurred and excludes remote damage.

This short chapter cannot and does not pretend to reflect all details of reparation in international law. It established basic principles according to which states need to repair survivors of human rights violations. These principles demand a lot. Assessing, calculating, and erasing all the damage caused by human rights violations can require a tremendous amount of time and resources. Only a few entry points exist in the law on reparation to alleviate this heavy burden. In principle, that is warranted: The state voluntarily violated the survivor's human rights. It, not the survivor, needs to bear the consequences of that action. However, as the following chapter will evince, the rigor of the international law on reparation makes it difficult

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to accommodate the unique challenges reparation faces in the transitional justice situation.

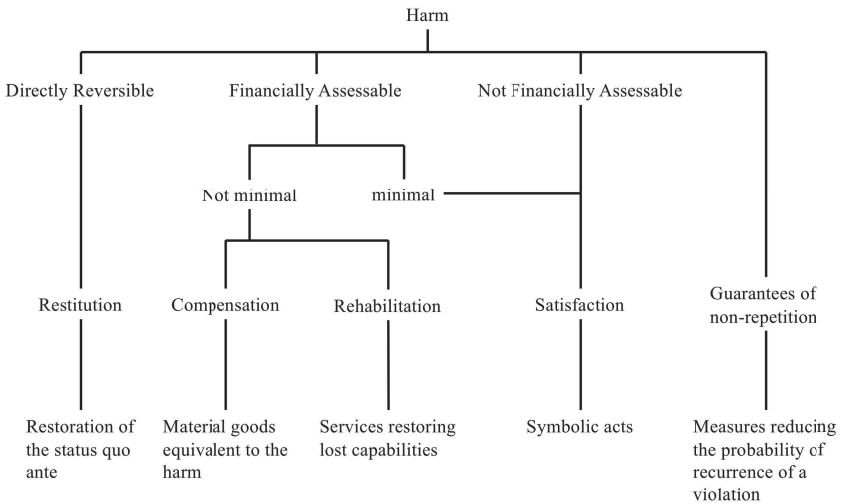

Figure 1: The International Law on Reparation – Overview (created by the author)

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