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

1. Introduction
This article outlines a theory of victims' rights, reviewing the historical evolution of the concept and elucidating recent developments, and argues for a strengthening of current victims' rights norms. In accordance with these norms, States must respect, ensure respect for and enforce international human rights and humanitarian law norms contained in treaties to which they are a State Party, in customary international law or in domestic law. The obligation to respect, ensure respect for, and to enforce international human rights and humanitarian law includes a State's duty to prevent violations, investigate violations, punish violators, provide victims with equal and effective access to justice and provide for or facilitate reparation to victims.
Even more crucially, this article seeks to fundamentally alter the legalistic frameworks of international human rights and humanitarian law that have traditionally ignored victims' perspectives. By squarely adhering to a victimcentric rather than a conflict-centric perspective, this article reformulates definitions of international crimes, making them dependent on the suffering experienced by victims rather than the nature of the conflict or the context within which such violations took place. The literature on victims is as disparate as are the disciplines concerned with the subject. This includes victimology, criminology, penology, criminal law and procedure, comparative criminal law and procedure, international criminal law and human rights. Each of these disciplines pursues different goals, relies on different methodologies, employs different terminology and provides for different roles and rights for the victim. More importantly, there is a lack of commonly-shared understanding between these disciplines as to the role and rights of victims. If the victim is our concern and interest, then legal distinctions and technicalities surrounding various classifications of crimes against victims should be re-conceptualised. [FN2] For instance, this article's approach would make it irrelevant to focus on whether a victim of torture was abused in the context of an international conflict, an internal conflict or as a result of police brutality outside of any such conflict. Rather, the issue of the torture itself would be central to a legal analysis, and would be framed from a victim's viewpoint. Up to now, international human rights law and humanitarian law have created multiple overlapping sources of law that apply to such victimisation. [FN3] Thus, from a purely legal perspective, victims' fate and the punishment of violators vary and depend on whether lawyers apply international human rights law, international humanitarian law, international criminal law or domestic criminal law. Such distinctions are of little significance to victims in their quest for redress. 

A significant gap exists between international human rights law and international criminal law. [FN4] The parallel nature of these two bodies of law limits the reach of international criminal law to punish fundamental human rights violations. These rights generally remain without effective enforcement, except as provided for in the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACTHR). [FN5] If the concept of victims' redress continues to develop in a compartmentalised fashion with gaps and overlaps, victims' rights will never be effectively addressed. [FN6] So far, international legal instruments have not given victims a greater role than those provided under national law. Nevertheless, international human rights law has sought to slightly expand victims' right to access, disclosure, compensation, reparations, and above all, symbolic recognition in the context of criminal proceedings.

While there is a growing symbolic recognition of the victim in national criminal proceedings, there is only a limited right for the victim to have access to criminal proceedings, except with respect to those crimes for which public criminal action can only start with an individual's complaint. The area where there has been most growth, both at the international and national law levels, has been with respect to victim compensation. However, it should be noted that while victim compensation is sometimes regarded as justice, it is also regarded as a way of inducing victims to participate in the process so as to enhance successful prosecution. Up to this point there is no evidence in international or national law that there is a right to compensation, reparations, and redress other than as a consequence to the establishment of responsibility for the
harm produced. Thus, the idealistic notion of providing compensation, reparations, and redress to a victim on the basis of human or social solidarity is not yet part of mainstream legal thinking, particularly in connection with criminal proceedings. Instead, we find this notion of human and social solidarity in social legislation that provides assistance to those in need and includes victims. However, within this legal context, the person who receives public assistance or support is not considered a victim as in the case of criminal and civil proceedings. Thus, an important distinction must be made between criminal and civil legal proceedings that are driven by the concept of responsibility as opposed to human and social solidarity reflected in social assistance and support programs that are driven by other considerations. This article begins with a discussion of the evolution of victims' rights in international law then sketches the normative framework of a victim's right to reparation under classical international law, and also reviews the jurisprudence of regional and international courts on victims' rights. The article outlines some mechanisms for obtaining reparation for victims, then summarises the history and goals of the Basic Principles and Guidelines on the Right to a Remedy and Reaparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2006 Basic Principles and Guidelines). [FN7] The article ends with reflections on economic and political obstacles to victims' rights.

2. The Evolution of Victims' Rights in International Law
From the early recorded legal systems a private cause of action has existed for persons who have suffered personal harm or material damage at the hands of another. [FN8] The right to redress in its various forms has existed in every *207 organised society. Significantly, no legal system known to humankind has ever denied the right of victims to private redress of wrongs. [FN9] Redress of wrongs is a fundamental legal principle that constitutes both a general principle of law and a customary rule of law recognised and applied in all legal systems. This principle applies to private claims for which the collectivity, tribe or State provides a forum and enforcement of the remedy. If ever there was an implied social contract [FN10] between individuals and their collective entity, it was to provide access to some form of justice, to ensure that the justice process functioned, and to enforce a remedy for the aggrieved party. The right to redress was often based on some concept of responsibility rather than human or social solidarity, but did not extend to claims against the collective entity.

Providing remedies to victims of crimes finds its roots in the earliest societies and in many early religious traditions. Legal systems throughout history have provided different fora for the adjudication of claims. They differed as to access, procedures, remedies and decision-making processes. Some were more readily accessible, such as tribal councils, which are still in existence in certain tribal societies in Africa, Asia, the Arab world, South America and other sub-regions of the world. [FN11] Anthropological studies show that tribal societies had a more advanced concept of social responsibility than that existing in modern societies. Some so-called primitive or tribal systems even provided for what is now called punitive damages as opposed to only restorative damages. [FN12] Provision of remedies to victims of crimes has historically been seen as a way to settle disputes between the offender and the victim, thus preventing individualised vindication and further disturbances of peace. [FN13] *208 However, with the centralising of the
administration of justice by European States, and as retributivism gained increased acceptance as the dominant theory of criminal punishment, victims' rights to redress were marginalised during the 1700s and 1800s. Not until the late 1800s did victims' rights play a more significant role in the administration of justice once more. Better organised victim-oriented institutions and a widespread shift away from a purely retributive theory of criminal justice expanded the role of victims in the legal process and their right to redress. The Age of Enlightenment brought about new concepts such as humanism and the rule of law as the mediator of personal and collective grievances. [FN14]
The 20th century saw the beginning of wars in which new weapons wrought even more devastating human victimisation and material destruction. This culminated in the tragedies of World War I (WWI) [FN15] and World War II (WWII). International law's concern for the protection of the individual is in part a result of legal developments that occurred in the wake of the atrocities of WWII and the international community's subsequent pursuit of individual criminal responsibility. [FN16] Once international law made individuals subjects of that discipline for the purposes of international criminal responsibility, the individual became the subject of international legal rights, which *209 explains, in part, the beginning of international human rights law. [FN17] Until WWII, the rights and obligations of the individual vis à vis the State were the exclusive prerogative of municipal law, and a State was free under international law to treat its own citizens as it pleased. [FN18] The magnitude of human victimisation arising out of WWI and WWII and the conflicts thereafter derived essentially from State action, either intentional or negligent. This new reality brought to the fore the need to extend the same rights and obligations that existed among the individuals within a society to the relationship between the individual victim and his/her victimiser. After WWII, numerous international instruments established protections and rights for individuals, requiring States to enact domestic legislation to protect these rights. [FN19]
The international community's enunciation of internationally protected individual rights was accompanied by efforts to ensure the protection of these rights through a variety of international enforcement mechanisms. [FN20] Indeed, many instruments on the protection of human rights have created special monitoring bodies as well as procedures to receive complaints of violations of individual rights, and to investigate or adjudicate them, or at least to report on such violations. [FN21]
Despite the post-WWII human rights conventions, within 50 years of WWII conflicts of an international and non-international character resulted in *210 casualties double those of the two World Wars. [FN22] An estimated 70-170 million people have died since WWII in over 250 conflicts around the world. [FN23]
However, in the aftermath of WWII, a number of human rights and victims mechanisms continued to flourish. A notable example of this trend is the development of the European human rights system, where individuals can bring claims before the ECtHR for violations of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). [FN24] Classic notions of rights and responsibilities for victim redress were extended beyond private actors to public actors, at least in the doctrine of State responsibility. [FN25] The very nature of large-scale victimisation brought about a new social basis for redress, and its impact on world order reinforced the proposition that prevention is an essential goal of security, which brought about accountability as a component of redress. [FN26]
In addition to regional mechanisms like the ECHR, national mechanisms expanded. The movement in many societies to provide compensation for victims of domestic crimes originated in developed societies whose affluence diminished economic concerns regarding compensation. A 1960s 'victimology' movement grew that was not only concerned with monetary compensation of victims of common crimes but also offered an incentive to governments by linking such compensation to victims' cooperation in the pursuit of criminal prosecutions. Canada and several states within the United States began providing victim compensation for common crimes and thereby encouraged victim participation in criminal prosecutions. [FN27] The movement gained prominence until the 1980s. *211 when experts of victimology and other fields sought to extend monetary compensation to other forms of redress, including medical, psychiatric and psychological treatment and to expand the basis of such compensation and redress modalities to violations committed by State agencies and State officials. [FN28] By the 1980s, the movement of victim compensation started to lose momentum. States were willing to recognise victims' rights when the harm arose from individual action, but not when the harm was a product of State policy or committed by State actors. [FN29] States' reluctance increased significantly when proponents of victims' rights began to claim reparations for historic violations, and were successful in some of these claims. Throughout the 1980s and 1990s, the cause of victims' rights was furthered as a result of the establishment of ad hoc and hybrid tribunals and the International Criminal Court (ICC), various national prosecutions, and the burgeoning truth commission industry. In addition, victims' rights have been fundamentally strengthened by the 2006 Basic Principles and Guidelines. An individual victim's right to redress has increasingly become an indispensable component of efforts to protect individual human rights.


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

A. State Responsibility

The doctrine of State responsibility has long existed. While it comprehends responsibility for wrongful conduct against individuals, the doctrine has historically only applied between States, and has not recognised individual claims against States. Individual claimants have to resort to their State of *212 nationality to espouse their claims, and present them as a State claim against another State. [FN30] From the Peace at Westphalia in 1648 to WWII, the State has been the primary subject of international law. Individuals were deemed objects and not the subjects of rights and obligations that derived not from international law. But before national law the individuals were legal subjects. Individuals who were harmed by a State other than their State of nationality could only claim fulfilment of rights through their own State of nationality. This pre-supposed that the State of nationality would espouse its national's claim and pursue it through diplomatic channels or by judicial means. [FN31] Such an assumption evidences the State-centric nature of international law, whereby injury to a State's citizens is deemed an indirect injury to the State itself. [FN32] Vattel expressed this concept in the late 1700s in Les Droits des Gens, wherein he states: ‘Quiconque maltraite un citoyen offense
indirectement l'état qui doit protéger ce citoyen.' [FN33] This is still the foundation of States' claims on behalf of their nationals. Indeed, a State that presents a claim against another State for injuries to its citizens, does so purely on a discretionary basis. [FN34] States, however, remain averse to committing themselves to accountability to individual victims for obvious political and economic reasons. [FN35] States that resort to the use of force are reluctant to acknowledge even the principle of civil liability for individual harm and property damage. These States argue legal technicalities about the differences of legal sources and their binding obligations, distinguishing between international humanitarian law, human rights law and *213 international criminal law. Moreover, such States almost always rely on traditional doctrines of State sovereignty in international law to oppose responsibility. [FN36]

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

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

The existence of a States duty to provide a remedy is grounded in several international and regional conventions. The Hague Conventions of 1899 [FN37] and 1907 [FN38] were the first international instruments codifying the customary law of armed conflicts. Under these conventions, violations by a State engaged in an international armed conflict that resulted in physical harm or damage to civilians and to civilian property, as well as harm to combatants protected by these customary norms, resulted in the right of the State of nationality to request compensation on behalf of its citizens. [FN39] This recognition gave rise to damages based on the injuries of individuals, but did not give rise to an individual right of legal action against a State. [FN40] In keeping with the law of diplomatic protection, it simply allowed the State of nationality or the territorial State in which the violations of these norms occurred to present a claim against the State that committed these violations.

Since WWII, human rights have been codified in numerous international instruments. [FN41] With respect to violations of international humanitarian law, the following additional conventions implicitly recognise the right to a remedy. These conventions impose a duty on the violating party to provide compensation for violations: (1) the Geneva Convention Relative to the Treatment of Prisoners of *214 War; (2) the Geneva Convention Relative to the Protection of Civilian Persons in Time of War and (3) Protocol I Additional to the Geneva Convention. [FN42]

Moreover, several regional conventions [FN43] also provide for an individual's right to redress or to receive compensation. For example, the ECHR and the American Convention on Human Rights (ACHR) provide for individual compensation for damages arising out of a State's violation of protected rights. [FN44] Likewise, the International Covenant on Civil and Political Rights 1966 (ICCPR) expanded victims' rights. Article 2(3) provides that each State Party to the ICCPR undertakes to:
(a) ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) ensure that the competent authorities shall enforce such remedies when granted.

While the ICCPR does not mandate a State Party to pursue a specific course of action to remedy the violation of protected rights, the language of this provision clearly envisages that the remedy is effective, of a legal nature and enforceable. Significantly, the ICCPR renders the 'act of State' defence inapplicable by ensuring the duty to provide a remedy regardless of whether the violations were committed by persons acting in an official capacity. This limitation is fundamental to ensuring that human rights and international humanitarian law violations are remedied, since these acts are often committed only by States. The State Parties to the ICCPR established the United Nations Human Rights Committee (HRC) in 1976, with the goal of ensuring compliance with the provisions of the ICCPR. The jurisprudence of this body has made considerable contributions to defining and clarifying victims' right to redress arising under the provisions of the ICCPR. [FN45]

*215 The International Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD) also exemplifies an explicit requirement that States provide a remedy. This convention requires States Parties to: assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination. [FN46] Like the ICCPR, ICERD envisages that the remedy be effective and carried out by competent tribunals and officials.

Other conventions also explicitly require that a State provide a remedy for human rights violations or contain provisions regarding the right to some form of reparation, which implies the right to a remedy. [FN47] For example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, contains language identical to the aforequoted provision of the ICCPR. [FN48] In addition to conventions, which create binding obligations on the part of States Parties, numerous international declarations re-affirm the principle that a State has a duty to provide a remedy to victims of human rights abuses and international humanitarian law. The 1993 World Conference on Human Rights emphasised the need for victim reparation stating, '[e]very State should provide an effective framework of remedies to redress human rights grievances or violations'. [FN49]

*216 Several declarations of international and regional organisations reflect the principle that a State has the duty to provide a remedy. For example, the Universal Declaration of Human Rights (Universal Declaration) plainly articulates that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law'. [FN50]
Nations Declaration on the Elimination of All Forms of Racial Discrimination further reflects the concept that 'everyone shall have the right to an effective remedy and protection against any discrimination ... through independent national tribunals competent to deal with such matters'. [FN51] In addition, the Declaration on the Protection of All Persons from Enforced Disappearance envisions a duty to provide 'an effective remedy' as a means of determining the status of such disappeared individuals. [FN52] Furthermore, the Declaration requires 'adequate compensation' for victims. [FN53] The Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires that the victim of official torture be 'afforded redress and compensation in accordance with national law'. [FN54] The American Declaration on the Rights and Duties of Man provides that 'every person may resort to the courts to ensure respect for his legal rights'. [FN55] The Muslim Universal Declaration on Human Rights, issued by the Islamic Council, states that 'every person has not only the right but also the obligation to protest against injustice; to recourse and to remedies provided by the Law in respect to any unwarranted personal injury or loss'. [FN56]

A comprehensive treatment of this duty was also found in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985 Basic Principles of Justice). [FN57] These Principles set forth comprehensive details concerning a State's duty to provide a remedy to individual victims. [FN58] They provide that victims are entitled to redress and recommend that States establish *217 judicial and administrative mechanisms for victims to obtain prompt redress. [FN59] However, the 1985 Basic Principles of Justice are primarily concerned with the victims of domestic criminal law and are only applicable in the event that the domestic criminal law of a given State has incorporated the applicable international human rights or humanitarian norm. [FN60] Specific language in international instruments articulates the duty to provide reparations. With respect to violations of international humanitarian law, the major conventions that regulate armed conflict contain provisions both vesting individuals with the right to claim compensation against State Parties and requiring States to provide reparation for their breaches. [FN61]

Treaty-based and customary law do not impose an explicit duty on States to create special procedures. However, the language of the international instruments noted earlier contemplates that the remedy be 'effective' and administered by 'competent' tribunals and personnel in order to provide 'just' and 'adequate' reparations. Thus, to the extent that a State's existing legal framework is inadequate to handle the claim, it would seem that the State is implicitly in violation of the requirements of the treaty-based law. [FN62] Even in instances where the judicial system has not collapsed, a State may find it advantageous to establish special procedures with respect to situations involving numerous claimants, or with respect to the settlement and distribution of the proceeds of lump sum agreements between States. [FN63] Treaty-based and customary law reflect the principle that States' nationals and aliens should have the right to a remedy for violations committed within a State's territory. [FN64] This is evidenced in treaty-based law by the use of *218 language such as 'any persons' [FN65] and 'everyone within their jurisdiction'. [FN66] Failing to provide an alien with an effective remedy amounts to a denial of justice that subsequently gives rise to an international claim by the alien's State of nationality. Thus, clearly a State must
afford national treatment to aliens in the provision of remedies for violations committed within its territory. The aforementioned declarations also provide that human rights violations shall be remedied. If the State is the author of the violation, the duty to make reparations can fall to no other.

C. State Practice
A survey of contemporary State practice, as evidenced in the substantive laws and procedures functioning in domestic legal systems, confirms the duty to provide a remedy to victims. Contemporary State practice, evident in a survey of various domestic legal frameworks, reinforces the hortatory statements contained in the aforementioned declarations as a norm of customary international law. [FN67] State practice reflects both the legal framework and practice of providing reparations to victims.

*219 In the aftermath of WWII, the first comprehensive restitution and compensation process was undertaken to remedy human rights abuses that took place during the war. Since 1949, the Federal Republic of Germany has undertaken a comprehensive effort to provide compensation for crimes committed by the Nazi regime. Subsequent to WWII, the Allies did not impose reparations or collective sanctions on the German people. However, claims by victims of the Holocaust were made against Germany and were advocated by the newly created State of Israel, even though that State did not exist at the time the victimisation occurred. Germany passed a law entitled 'Wieder Gut Machung,' which provided for individual compensation to Holocaust victims and, for those victims who did not have survivors, their share went to the State of Israel. Subsequently, in the years 2000-2003, Germany made additional victim compensation settlements for the use of slave labour in its industry. Austria similarly compensated victims of the Holocaust and slave labour, and Switzerland compensated victims who held numbered Swiss accounts and who disappeared during WWII. These claims were driven by the World Zionist Organization with strong support from the US government. Some major Jewish organisations had, for years, pursued claims for the WWII Jewish Holocaust. [FN68] In the late 1990's, significant breakthroughs occurred when the World Zionist Organization was able to negotiate a substantial settlement with Swiss banks, followed by similar successful settlements with German and Austrian industries between 1999-2001. [FN69] The German remedies provided in the aftermath of WWII have 'focused both on restitution and on compensation for individual suffering, loss of life, health and liberty'. [FN70] Through a series of laws and agreements (starting with the 1952 Luxembourg Agreement between the Federal Republic of Germany, the State of Israel and the Jewish Claims Conference), the German government and private corporations have provided over $104 billion (US) for compensation to victims of Nazi crimes. [FN71] In addition to providing material compensation for personal injuries, deprivation of freedom and other abuses that have been perpetrated on account of race, religion, political belief, physical disability or sexual orientation, the German government and industry have also provided other forms of remedies including apologies, [FN72] laws providing restitution for lost property, [FN73] compensatory pensions and other compensatory laws and agreements and settlements aimed to supplement the legal framework noted earlier. [FN74] Germany has also entered into a number of bilateral agreements with European nations and the United States pursuant to which further compensation was paid to victims.
and their families. [FN75]
The US government provided redress to American citizens and permanent resident aliens of Japanese ancestry who were forcibly evacuated, relocated and interned by the government during WWII. [FN76] Through the enactment of the 1988 Civil Liberties Act, the United States government provided $20,000 (US) to each Japanese American person interned during WWII who survived until 1986. [FN77] The total cost of the effort to compensate this group of victims is *221 estimated at $1.65 billion (US). [FN78] The US has also provided remedies arising out of the Indian Tribe Land Claims, [FN79] the Tuskegee Syphilis Study [FN80] and the claims of victims arising out of the 1923 Rosewood massacre. [FN81] The US government, however, has not recognised claims made by the descendants of former slaves. [FN82]
In an effort to account for its human rights abuses of past decades, Chile has created a national commission whose goal is to provide compensation to victims' families. [FN83] Reparations include monthly pensions, fixed sum payments and health and educational benefits.
Finally, corporations (such as banks and insurance companies) that have benefited from human rights abuses have also provided material reparations to victims as a result of both class action suits filed against them and media, non-governmental organisation (NGO) and political pressure. [FN84] There is thus *222 some indication that State practice supports a State's duty to provide reparations for serious violations of human rights and international humanitarian law. However, this remains a contested matter, as evidenced by the recalcitrant State practice of countries like Japan. Where Germany sought to compensate Holocaust victims, to deliver justice to war criminals and to bear witness to the historical record, Japan, while providing monetary and developmental aid to the nations it attacked, has not accepted moral responsibility for its past action. [FN85] Japan has faced severe criticism from China and Korea for its post-war policy. Japan has provided some compensation for its use of foreign slave labour during WWII and for other violations of human rights during WWII, [FN86] establishing a private consolation fund for comfort women who claim that they were used as sex slaves during the war, [FN87] and paying monetary reparations to many of the individual nations it invaded (it allocated $3.9 billion (US) to the Philippines, Vietnam, Burma and Indonesia). Many governments, including Thailand and China, have relinquished their claims to Japanese reparations at the inter-governmental level.
However, Japan has consistently rejected individual victims' claims in its domestic courts. In recent years, former slave labourers have brought lawsuits to Japanese courts seeking compensation, however, most claims have been dismissed on the grounds that the relevant statute of limitations has lapsed and those decisions in favour of plaintiffs have yet to result in the payment of compensation. [FN88]
Many of Japan's victims' claims raised in the US courts have failed. [FN89] For example, victims of Japanese slave labour have filed over two dozen lawsuits in the US *223 courts against Japanese corporations that employed slave labour during the war. [FN90] Plaintiffs included both US and Allied POWs, as well as civilians of various countries. [FN91] In a case consolidated in the Northern District of California, [FN92] the court dismissed the lawsuits while relying on the 1951 peace treaty with Japan, [FN93] which provided, in relevant part, for the waiver of all reparations claims by the Allied Powers, other claims of the Allied powers and their nationals arising out of any action taken by
Japan and its nationals in the course of the prosecution of the war'. [FN94] A lawsuit filed by 'comfort women' who acted as sex slaves of the wartime Japanese army was also dismissed in 2001. [FN95]

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

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

A non-State actor perpetrating a violation of human rights and international humanitarian law is individually liable for reparations to victims. [FN96] While it remains a laudable aspiration, a State's duty to provide reparation for violations by non-State actors is best described as an emerging norm. [FN97]

*224 With respect to Europe, the European Convention on the Compensation of Victims of Violent Crimes 1983 [FN98] (European Compensation Convention) mandates this principle in instances when applicable international human rights or humanitarian law norms are incorporated within the domestic criminal law. The European Compensation Convention was established by the Council of Europe to introduce or develop compensation schemes for victims of violent crime, in particular when the offender has not been identified or is without resources. [FN99] At a minimum, the European Compensation Convention mandates that compensation be paid to victims who have sustained serious bodily injury directly attributable to an intentional violent crime, or to the dependants of the persons who have died as a result of such crime, when compensation is not fully available from other sources. [FN100] In these instances, compensation is to be awarded whether the offender is prosecuted or not. [FN101] The European Compensation Convention does not mandate any particular compensation scheme; rather it focuses on establishing minimum provisions. [FN102] As a result, several significant limitations may be placed on a State's duty to provide compensation. Article 3 provides that:

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

Thus, a State Party can deny compensation to a victim who is either a nonresident or a citizen of a State that is not a member of the Council of Europe. [FN103] Furthermore, States may limit compensation in situations where a minimum threshold of damage is not met [FN104] or based on the applicant's financial situation. [FN105] Moreover, compensation can be reduced or refused: (1) on account of *225 the victims' conduct before, during or after the crime; (2) on account of the victims' involvement in organised crime; or (3) if a full award is contrary to a sense of justice or public policy. [FN106]

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

When compensation is not fully available from the offender or other sources, States should endeavor to provide financial compensation to:

(a) victims who have sustained significant bodily injury or impairment of physical or mental health as a result of a serious crime;

(b) the family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization. [FN107]

While this recommendation envisions reparations to victims of crime, it would be applicable in cases where the relevant international violations had been incorporated into the domestic criminal law. A survey of national systems reflects this principle in the growing State practice of providing reparations to victims of crime and their families when the perpetrator is unable to do so. [FN108]

In 1996, the United Nations (UN) surveyed State practice with respect to the implementation of the 1985 Basic Principles of Justice, and received responses from 44 States. [FN109] In Cuba, Denmark, Finland, France, Mexico, Jordan, Romania and Sweden, financial compensation from the State was 100% of the reparations that the victim could claim from the offender. [FN110] Furthermore, 18 States reported that State funds for compensation to victims had been established pursuant to the recommendations in the 1985 Basic Principles of Justice. [FN111]

The concept of providing reparations from sources other than the violator has also been recognised at the international level in the ICC Statute. [FN112] The principle is being put into practice as evinced by the efforts of individual States and the world community (for example, through the trust fund contemplated by the ICC Statute). [FN113] Thus, the groundwork is being laid for establishing collective responsibility that seeks to make victims whole again.

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

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

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

International human rights law instruments contain a general provision that States Parties are under an obligation to respect or secure the rights embodied in the instrument. [FN114] These provisions have been interpreted by international bodies to require that some violations—namely serious violations of physical integrity, such as torture, extra-judicial executions and forced disappearances—must be investigated and those responsible for them brought to justice. A fortiori, this applies to jus cogens international crimes.

The groundbreaking case in which such an interpretation was first adopted is the case of Velásquez-Rodríguez before the IACtHR. [FN115] The case concerned the unresolved disappearance of Velásquez-Rodríguez in Honduras in violation of Article 7 of the ACHR, which, according to the findings of the Inter-American Commission, was committed by persons connected to or acting in pursuance of orders from the armed
forces. The IACtHR interpreted Article 1(1) in conjunction with Article 7 to mean that ‘... States must prevent, investigate, and punish any violation of the rights recognised by the Convention and ... if possible to restore the right violated and provide compensation as warranted for damages resulting from the violation’. [FN116] The Court furthermore indicated that:
the State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation. [FN117]
According to the IACtHR, the obligation not only requires States 'to effectively ensure ... human rights' [FN118] but also requires that investigations be conducted 'in a serious manner and not as a mere formality preordained to be ineffective'. [FN119] The Court concluded that '[I]f the State apparatus acts in such a way that the violation goes unpunished ... the State has failed to comply with its duty to ensure the full and free exercise of those rights to the persons within its jurisdiction.' [FN120]
The IACtHR regarded this due diligence requirement to be binding 'independently of changes of government over a period of time and continuously from the time of the act that creates responsibility to the time when the act is declared illegal', [FN121] Thus, the obligations are equally applicable to new governments that were not in power at the time the violation occurred. Furthermore, the holding of the Court suggests that it is applicable irrespective of the scale of violations and thus even covers cases of a single, isolated violation. [FN122]
While both the IACtHR and the Inter-American Commission confirmed this in later decisions, [FN123] the exact scope of such an obligation to respect and ensure, however, is a matter of discussion, namely as regards the question of whether it implies a duty to conduct criminal proceedings. Some warn not to read too much into the judgment because the Court, in ordering remedies, did not direct the Honduran government to institute criminal proceedings against those responsible for the disappearance despite the fact that the lawyers for the victims' families, the Inter-American Commission and a group of international experts acting as amici curiae had specifically made a request to that effect. In light of the absence of any express reference to criminal prosecution as opposed to other forms of disciplinary action or punishment, the obligation to investigate violations, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation does not appear to exclude non-criminal responses per se, as long as one assumes a broad notion of what constitutes 'punishment.'
On the other hand, the Inter-American supervisory organs have derived additional criteria for the permissibility of such non-criminal responses from the right to a remedy, as provided for in Article 25 of the ACHR, and the right to a judicial process, contained in Article 8, read together with the obligation to ensure respect embodied in Article 1. The due diligence standard set forth by the ACHR excludes some non-criminal responses, namely blanket amnesties, as elucidated by the jurisprudence of the IACtHR and Inter-American Commission, which held that the amnesty laws adopted in El Salvador, [FN124] Argentina, [FN125] Uruguay [FN126] and Peru [FN127] were incompatible with the mentioned obligations flowing from the Convention. [FN128]

B. Jurisprudence of the HRC and ECtHR
While differing in the degree of permissible margins of appreciation in complying with the requirements flowing from the respective instruments, the jurisprudence of the Inter-American supervisory organs was confirmed by *229 the HRC and the ECtHR. The HRC concluded in its General Comment No. 20, [FN129] with respect to the prohibition of torture contained in Article 7 of the ICCPR, that amnesties are incompatible with the duty of States to investigate such acts; to guarantee freedom of such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible. [FN130] The HRC also confirmed its view that amnesties are incompatible with States' obligations under the ICCPR in a number of its communications. [FN131]

In contrast to the Inter-American human rights bodies and the HRC, no jurisprudence with respect to amnesties has emerged in the ECtHR as yet. However, the Strasbourg organs were confronted with the question of States Parties' obligation to investigate and prosecute violations of rights guaranteed by the ECHR. In Selmouni v France, [FN132] the Court had to consider whether an inquiry for alleged acts of torture was effective. The Court affirmed earlier decisions [FN133] and stated that the notion of an effective remedy [FN134] entails the State's thorough and effective investigation capable of leading to the identification and punishment of those responsible. [FN135]

In the recent decision of Al-Adsani v United Kingdom, the ECtHR confirmed this approach. [FN136] However, it did not accept the applicant's claim that the UK was in breach of its obligations under the ECHR by granting State immunity to Kuwaiti authorities, at whose hands the applicant suffered from torture in Kuwait, thus precluding him from civil claims of compensation against the Kuwaiti authorities. While the Court accepted '[ ... ] that the prohibition of torture has achieved the status of a peremptory norm in international law', it observed that the case at hand concerned the immunity of a State in a civil suit for damages in respect of acts of torture within the territory of *230 that State, rather than the criminal liability of an individual for alleged acts of torture. In such a case, the Court considered itself 'unable to discern in the international instruments, judicial authorities or other materials before it any firm basis for concluding that, as a matter of international law, a State no longer enjoys immunity from civil suit in the courts of another State where acts of torture are alleged'. [FN137] However, by stressing the difference between criminal and civil liability, [FN138] it might be argued that the ECtHR would have come to the conclusion that the UK was in breach of the ECHR, had it granted immunity from its criminal jurisdiction to individuals that were responsible for torturing the applicant.

C. The International Criminal Court

One of the most important recognitions of the victim as a subject of international criminal law is contained in the ICC Statute. The Statute's scheme reflects the most advanced position that exists in established international criminal justice. This instrument recognises several significant principles concerning victims: (1) victim participation in the proceedings; (2) protection of victims and witnesses during Court proceedings; (3) the right to reparations or compensation; and (4) a trust fund out of which reparations to victims may be made. [FN139] However, it is uncertain how these provisions will be made operative and how such a right will be funded.
D. The Permanent Court of International Justice
A State's duty to make reparations for its acts or omissions is well-established in treaty-based and customary law. [FN140] The Permanent Court of International Justice affirmed this proposition in the Chorzów Factory Case when it stated:
It is a principle of international law that the breach of an engagement involves an obligation to make reparations in an adequate form. Reparation therefore is the indispensable complement of a failure to *231 apply a convention and there is no necessity for this to be stated in the convention itself. [FN141]

5. Mechanisms for Obtaining Reparation for Victims
The provision of a remedy and reparations for victims of serious violations of international human rights and humanitarian law is a fundamental component of the process of restorative justice. [FN142] States and their national legal systems serve as the primary vehicle for the enforcement of international human rights and humanitarian law. Accordingly, the existence of State duties to provide a remedy and reparations forms the cornerstone of establishing accountability for violations and achieving justice for victims. While monetary compensation may be central to this process, victims often desire that their suffering be acknowledged, their violators condemned and their dignity restored through some form of public remembrance. [FN143] Thus, perhaps the most important goals of this process are the 're-humanisation' of victims and their restoration as functioning members of society. Achieving these restorative goals is fundamental to both the peace and security of any State since it eliminates the potential of future revenge and any secondary victimisation that may result from the initial violation. [FN144]
Notwithstanding the widespread abuses of recent history, few efforts have been undertaken to provide redress to either the victims or their families. This often results from the reality that the provision of remedies and reparations are undertaken by either the violator regime or a successor government *232 that has treated post-conflict justice as a bargaining chip rather than an affirmative duty. However, the international community has become increasingly concerned with providing a legal framework that ensures the redress of violations of international human rights and humanitarian law norms.
Providing victims with a right of reparation is, therefore, an empty victory if there is no corresponding mechanism to provide a victim with a forum to press a claim or obtain an award. One of the cornerstones of a victim's right to reparation is that States have an obligation to have some form of mechanism in place to redress violations of their international and domestic legal obligations.

A. National Prosecutions or Civil Remedies

(i) Universal Jurisdiction
Traditionally, States have enacted criminal laws which provide that their national courts can prosecute anyone accused of committing crimes on their territory, regardless of the nationality of the accused and the victim. [FN145] However, under international law, States can also enact national criminal laws that allow national courts to investigate and prosecute people suspected of crimes committed outside the State's territory, including
crimes committed by a national of the State, crimes committed against a national of the State and crimes committed against a State's essential security interests. There is, however, an all-inclusive form of jurisdiction called universal jurisdiction which provides that national courts can investigate and prosecute a person suspected of committing a crime anywhere in the world regardless of the nationality of the accused or the victim or the absence of any links to the State where the court is located. Certain crimes, including, specifically, genocide, crimes against humanity, war crimes, torture, slavery and slave-like conditions, extrajudicial executions and disappearances are so serious that they amount to an offence against the whole of humanity, and therefore, all States have a responsibility to bring those responsible to justice. This view is illustrated in the Preamble to the ICC Statute. [FN146]

*233 While some States have opened their courts to victims of violations that occurred outside of their borders, this type of remedy is not without difficulties. As a general rule, the 'courts of one country will not sit in judgment on the acts of the government of another done within its own territory'. [FN147] With few exceptions, [FN148] this renders a foreign State immune for its conduct within another State's domestic legal system, regardless of whether the action attributed to the State violates international law. For example, in Siderman de Blake v Argentina, a US court held that Argentina was immune from legal process for its alleged jus cogens violations of international law. [FN149]

Notwithstanding, whilst States have been unwilling to pass judgment on the foreign sovereign, this rule has not prohibited them from sitting in judgment on the acts of citizens of another State, whether State or non-State actors. [FN150] Thus, if the domestic legal system has an adequate basis to assert jurisdiction over the person, then the State of nationality may permit either a civil claim against the violator or a partie civile to complement its own criminal prosecution. In civil law systems, victims having certain rights may also be allowed to join in national prosecutions as partie civile in criminal proceedings. Victims and their heirs should be able to institute legal actions to obtain compensatory damages or to receive some form of injunctive relief, compelling the inclusion of a person in national criminal prosecution or in the category of those subject to lustration laws. [FN151]

*234 A State has limited ability to provide a remedy to non-national victims who were not injured in that State's territory. Still, a limited number of national systems provide access to a remedy for alien victims. The exercise of these domestic remedies is quite limited as a result of both strict jurisdictional requirements and the reality of enforcing the judgment.

(ii) The US Alien Tort Claims Act
Under the Torture Victim Protection Act, [FN152] the United States provides jurisdictional grounds for its nationals to sue an individual for an official act of torture. However, this cause of action is limited by both the claimants' ability to gain in personam jurisdiction over the defendant and their exhaustion of local remedies in the foreign jurisdiction. A requirement of personal jurisdiction over the offender constitutes a serious limitation with respect to the victim's pursuit of a remedy, whether civil or criminal. Unless the offender happens to be in the jurisdiction by chance, this remedy is often meaningless. However, the national's State could request extradition based on a
protective interest theory. Nevertheless, if the victim was unable to obtain a remedy in the foreign State, it is doubtful that the State would either extradite the individual or enforce a foreign civil or penal judgment.

The US Alien Tort Claims Act (ATCA) [FN153] provides that 'the district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'. [FN154] Over the past 20 years, claims have been filed under the ATCA by alien plaintiffs *235 for genocide, [FN155] war crimes, [FN156] slavery, [FN157] torture, [FN158] forced disappearance, [FN159] arbitrary detention, [FN160] summary execution, [FN161] cruel, unusual and degrading treatment [FN162] and environmental damage. [FN163] Under the ATCA, only violators in their individual capacity can be named as defendants and, as such, a violator foreign State is immune. [FN164] Furthermore, the court must be able to exercise in personam jurisdiction over the individual defendant, which requires the defendant to be present in the United States at least for service of process. This requirement presents a unique challenge, and severely limits the ability of a plaintiff to pursue a claim, as personal jurisdiction is often achieved only by chance. For example, in one case, a victim of torture in Ethiopia who was living in exile in the United States stumbled across her former torturer in a hotel in Atlanta where they both happened to work. [FN165]

One of the most important cases interpreting the ATCA is the Kadic case decided by the Second Circuit Court of Appeals in 1995. [FN166] In that case, two groups of victims from Bosnia and Herzegovina brought actions for damages (under the ATCA) against Radovan Karadzic, the then-President of the Serbian part of the Bosnian Federation called Republika Srpska. The victims and their representatives asserted that they were victims of various atrocities including brutal acts of rape, forced prostitution, forced impregnation, torture and summary execution which were carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the war in former Yugoslavia. [FN167] Karadzic's liability was predicated on the fact that the plaintiff's injuries were committed 'as part of a pattern of systematic human rights violations that was directed by Karadzic and carried out by military forces under his command'. [FN168]

*236 The suit was dismissed in September 1994 by a District Court judge who held that 'acts committed by non-state actors do not violate the law of nations'. [FN169] Finding that the 'current Bosnian-Serb warring faction' did not constitute a 'recognized state', [FN170] and that 'the members of Karadzic's faction do not act under the color of any recognized state law,' the District Judge found that 'the acts alleged in the instant action[s], while grossly repugnant, cannot be remedied' through the ATCA. [FN171] The Court of Appeals reversed that decision, holding that the plaintiffs sufficiently alleged violations of customary international law and the laws of war for the purposes of the ATCA. The Court dismissed the argument that the law of nations 'confines its reach to state action'. [FN172] Rather, the Court of Appeals held that 'certain forms of conduct violate the law of nations whether undertaken by those acting under the 'auspices of the state or only as private individuals'. [FN173] Noting that the customary international law of human rights 'applies to states without distinction between recognized and unrecognized states', the Court held that the plaintiffs sufficiently alleged that Republika Srpska was a 'State' and that Karadzic acted under colour of law for the purposes of
international law violations requiring official action. [FN174] Finally, the Court held that Karadzic was not immune from personal service of process while an invitee of the UN [FN175] and that the causes of action brought by the plaintiffs were not precluded by the political question doctrine. [FN176] As a result of these findings, the decision of the District Court was reversed and the cases were remanded for further proceedings. [FN177]

The potential monetary judgments in ATCA cases are substantial. For example, in Mushikiwabo v Barayagwiza, over $100 million (US) was awarded to five plaintiffs against a single defendant arising out of the genocide in Rwanda. [FN178] But the actual likelihood of attaining full satisfaction from the defendant is minimal; unless the defendant has significant assets in the jurisdiction or his State of nationality is willing to enforce the judgment, the victim is likely to receive virtually no compensation. [FN179] ATCA cases illustrate that domestic remedies in a third State can be complicated due to the lack of effective inter-State mechanisms for the recognition of foreign judgments. [FN180] However, it does serve the purposes of documenting the violations and providing, at the very least, a public forum for the victim to expose and denounce the perpetrator. Many domestic courts are not willing or able to fulfil and enforce international and domestic legal obligations. In some cases, a violator regime is still in power or the domestic legal infrastructure has been so devastated by conflict that it is unable to cope with claims. [FN181]

(iii) Specialised National Courts
An example of a national human rights mechanism established by the parties to the conflict in the former Yugoslavia, and pursuant to an internationally-brokered peace agreement, is the Commission on Human Rights (which is comprised of an Ombudsperson and a Human Rights Chamber) established pursuant to the provisions of the Dayton Peace Agreement signed in Paris on 14 December 1995. [FN182] Pursuant to the terms of the Peace Agreement, [FN183] the Human Rights Chamber, had jurisdiction over violations of human rights as provided in the ECHR, as well as 15 other documents provided for in the Peace Agreement. [FN184] The Chamber was composed of 14 members, eight being appointed by the Committee of Ministers of the Council of Europe, four members appointed by the Federation of Bosnia and Herzegovina and two members by Republika Srpska. [FN185] Victims could submit cases to the Chamber either in their individual capacity or through representative organisations and groups. In cases where a violation was found, the Chamber had competence to award reparations which it deemed most appropriate to redress the violation in question, including restitution of illegally taken property and monetary compensation. Although alternative forms of reparation have been awarded in a small number of cases, the principal form of redress awarded by the Chamber has been monetary compensation. [FN186]

B. Regional Commissions and Courts
Several regional mechanisms also exist that provide victims with an alternative venue to pursue a claim. These include the African, American and European human rights commissions and courts. [FN187] These entities provide an important check to national systems. However, it should be noted that they are not venues of first instance as they all
require victims' prior exhaustion of domestic remedies. In the Inter-American System, the victim presents claims first to the Inter-American Commission. [FN188] The Commission investigates the claims and attempts to facilitate a settlement with the offending State. [FN189] If this is not accomplished and there is merit to the claim, then the Inter-American Commission may submit the claim to the IACtHR, if the defendant State has accepted that Court's jurisdiction. [FN190]

While the victim also has a right of access to the ECtHR, the jurisprudence of the EChTR includes many decisions involving several Member States as to the rights of victims with respect to access to national criminal proceedings. This jurisprudence evidences the symbolic nature of victims' participation in domestic legal processes even when such a right is legislatively recognised. However, the EChTR has never recognised that under the ECHR a victim has a right to participate in national criminal proceedings if national law does not provide such a right. Some legal systems allow the victim to initiate a criminal action but through an official channel such as the prosecutor or the judge of instruction. However, even in those cases, the victim does not have the right to examine witnesses or appeal decisions in criminal cases. Criminal proceedings are more limiting than civil proceedings, which are not only initiated by the victim but are carried out by the victim, who is the moving party in the proceedings. The jurisprudence of the EChTR that limits the rights of victims in the course of criminal proceedings is without prejudice to victims' rights with respect to compensation, reparations and other redress modalities as may be provided under national law. The jurisprudence of the IACtHR and the EChTR has played a significant role in clarifying the rights of victims to redress and is reflected in the 1985 Basic Principles of Justice. [FN191]

C. International Claims or Criminal Prosecutions

As noted earlier, victims have limited standing to pursue claims for violations of human rights and international humanitarian law norms. Typically, such claims have had to be presented by the State of nationality or a State with a 'genuine link' to the victim. Even the language of the famous obiter dictum in Barcelona Traction conceived of erga omnes obligations owed to 'the international community as a whole', and did not imply an individual right of enforcement. [FN192] However, international treaty bodies such as the Committee Against Torture, established by the Convention Against Torture, [FN193] provide for different standing thresholds. Movement in this direction is positive but, as yet, incomplete in assimilating the rights of victims and their access to justice.

*240 (i) United Nations Compensation Commission

In 1991, after the war in Iraq, the UN Security Council established a Compensation Fund and UN Compensation Commission (UNCC), under Chapter VII of the UN Charter, to administer and process compensation claims arising out of Iraq's unlawful invasion and occupation of Kuwait. [FN194] The UNCC was not envisioned as a court or tribunal, but rather a 'claims resolution facility'. [FN195] It was designed to deal with property compensation issues arising from unlawful activities and international human rights and humanitarian law violations. The UNCC was the first victim-compensation system ever to be established by the Security Council acting under Chapter VII of the UN Charter. It provided individual victims with a primary role in the process of compensation. In contrast to the established practice of providing compensation only to injured States, the
UNCC compensation scheme provides a pioneering procedure whereby a State is required to provide direct compensation to both individual victims and corporate entities. [FN196] Since its establishment in 1991, the UNCC has received over 2.7 million claims seeking compensation in excess of $350 billion (US). [FN197] The claims were considered and resolved by panels, each of which was made up of three Commissioners who were independent experts, with the assistance of technical experts and consultants with respect to the verification and valuation of the claims. The panel's recommendations on the claims were then submitted to the Governing Council, whose membership was identical to that of the Security Council, for approval. The payment of compensation awards awarded by the UNCC was provided from the Compensation Fund established by the Security Council, which was principally funded by a percentage of the proceeds generated by export sales of Iraqi petroleum and petroleum products. [FN198] The work of the UNCC concluded in June 2005, when the UNCC had approved awards of approximately $52.5 billion (US) in respect of approximately 1.55 million claims, of which $20.6 billion (US) has been made available to the governments and international organisations for distribution to successful claimants. Sadly, while the UNCC provided an interesting model for incorporating victims' voices in mass claims resolutions, [FN199] it also had a major impact upon ordinary Iraqis, in effect, punishing a war-weary and impoverished society for the aggressions of a dictator.

(ii) The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda

In 1993, responding to serious violations of international humanitarian law committed in the former Yugoslavia, the UN Security Council passed a resolution creating the International Criminal Tribunal for the former Yugoslavia (ICTY). Security Council Resolution 827 of 25 May 1993, which contained the Statute of the ICTY, stated in its preambular language that the 'work of the International Criminal Tribunal will be carried out without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of humanitarian law'. [FN200] In 1994, in response to the murder of approximately 800,000 Rwandans, the UN Security Council passed a resolution creating the International Criminal Tribunal for Rwanda (ICTR). [FN201] Although both ad hoc tribunals play a role in the enforcement of international criminal and humanitarian law, they fail to adequately address the issue of victim reparations. The tribunals' statutes and judge-made rules provide only limited guidance on the issue of reparations. In particular, the legal provisions of both tribunals limit reparations to the return of stolen property 'to their rightful owners', without providing redress for personal injuries of a physical or mental nature. [FN202] Rule 106 in both the tribunals' Rules of Procedure allows a victim, or persons claiming through the victim, to bring a legal action in national courts (or other competent body) for compensation, provided that relevant national legislation is available. [FN203] Thus, the structure of the tribunals pre-supposes individual access to national courts on the part of individual victims and leaves the ultimate decision on whether to provide compensation to a victim to national justice systems. [FN204] In post-war Yugoslavia and Rwanda, domestic courts were ill-prepared to handle such cases. [FN204]
The most promising potential for the development of victims' rights lies in the ICC provisions concerning victim compensation. Rule 85 of the ICC Rules of Procedure and Evidence defines victims as: (a) 'Natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court' and (b) 'organizations or institutions that have sustained direct harm to any of their property'. The definition of a victim under the ICC Statute and Rules is broader than those set out in the ICTY and ICTR provisions. It does not require that the victim be a direct target of the crime. Rule 85, therefore, covers all persons who have directly or indirectly suffered harm as a result of a commission of any crime within the jurisdiction of the court. Since the ICC definition also includes 'organizations,' this definition is also broader than the definition contained in the 1985 Basic Principles of Justice that speaks of 'persons' and does not include 'legal persons'. The inclusion of entities in the definition of victims is established through Article 8 of the ICC Statute, which denotes certain objects as forbidden targets of military operations, owners of which may properly be considered victims of reparations. The ICC also has the power to order the payment of appropriate reparation to the victims by the convicted person. The Court, either by request or in exceptional circumstances on its own motion, may determine the scope and extent of any damage, loss and injury to victims. The Court may, then, make an order for reparation (compensation, restitution and rehabilitation) directly against the convicted person. Before making an order, the ICC may invite and take account of representations from or on behalf of the offender, victims and other interested persons or States. By inviting comment from other interested persons, the Court may take into account the needs of the victim and others who might be affected by the award, such as the offender's family or a bona fide purchaser of property that is to be restored. In order to facilitate enforcement of awards, the ICC Statute mandates States Parties to give effect to all decisions entered.

The ICC Statute also envisions a Trust Fund for the benefit of victims and their families. Assets of the Trust Fund may come from money or property collected through fines or forfeiture. The ICC Statute leaves open the determination of what the court may do with forfeitures. The Court may use forfeiture funds to order reparations to victims, or it can turn over the proceeds of forfeitures to the Trust Fund for distribution to victims. The Court is powerless to order reparations from anyone other than the individual violator. Thus, even though the individual offender's acts may be attributed to the State, an order for reparations cannot be imposed on that State. However, nothing in Article 75 is to be interpreted as prejudicing the rights of victims under national or international law; thus these claims can be pursued in other fora.

In addition to the potential for reparation, the ICC Statute contains other victim-centred notions. Specifically, the Statute envisions the creation of a Victims and Witnesses Unit. Victims are allowed to participate in several stages of the proceedings at the discretion of the court, including: (a) the Pre-Trial Chamber's decision to authorise an investigation; and (b) the award of reparation. However, there is a great deal of ambiguity as well as lack of clarity in the mechanisms applicable to victims' access, participation and rights. For example, the ICC Statute uses the term 'participant' and 'party' in addressing victims without regard to the
implications of these terms for the role of victims in the proceedings. If the victim is deemed a 'party', then the victim has certain procedural rights by implication. If the victim is a 'participant', then the victim has only those procedural rights specified in the Statute. As a 'participant', a victim does not have the right to present evidence or to examine and cross-examine witnesses for the prosecution and for the defence. As a 'party', it may by implication have such rights, although there is nothing in the legislative history of the ICC Statute to assume that the victim was to be anything more than a participant. Nevertheless, these ambiguities have given rise to a difference in *246 approach between the Pre-Trial Chamber and the Office of the Prosecutor, as evidenced in two Pre-Trial Chamber decisions (17 January 2006 and 29 June 2006) that are presently on appeal before the Appeals Chamber. An expanded procedural role for the victim may be in contradiction with the role and prerogatives of the Office of the Prosecutor. It should be noted that the ICC Statute's provisions and the Rules of Procedure are very detailed as to the role of the Office of the Prosecutor, and it would be highly inconsistent with the goals and purposes of these provisions to allow the victim a parallel role or one that could be in conflict with the Office of the Prosecutor.

D. Limitations of National, Regional and International Prosecutions

Although the existing national, regional and international mechanisms provide some provisions regarding reparations, there are several reasons why they cannot always ensure victims' access to reparations. [FN224] First, only some of the instruments that exist today (such as the CAT) are binding treaties. Others, such as the 1985 Basic Principles of Justice, are binding only to the degree they reflect principles of customary international law. [FN225] Such instruments are often referred to as 'soft law' because of their non-binding nature. [FN226] It is not uncommon, however, for these to be later turned into treaties or conventions. Even binding treaties that provide for victim reparations can be limited by States' willingness or ability to comply. [FN227] Second, many of the human rights instruments available today lack effective enforcement measures. [FN228] For example, while the CAT gives individuals the right to lodge a complaint with the Committee Against Torture, in order for the Committee to admit and examine the complaint in question the State Party must first expressly recognise the Committee's competence to do so. [FN229] In most cases of State-perpetrated abuses and violence, the State is unwilling to do so. In addition, even if a State does recognise the jurisdiction and competence of the competent body, many States are unable to provide reparations to victims due to a lack of resources. [FN230]

*247 6. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

The 1985 Basic Principles of Justice, [FN231] which are founded, in part, on Article 8 of the Universal Declaration, were the first international instrument to articulate victims' right to access justice and obtain reparation for their injuries. This instrument distinguishes between victimisation that occurs as a result of actions in breach of national criminal law committed by individuals, and those that are the result of an 'abuse of power' by the State. [FN232] Indeed, with respect to victims of crimes committed by other individuals, the Principles fully articulate the steps that States 'should endeavor' to take in
order to provide victims with compensation, restitution and rehabilitation. [FN233]
Although not specifically mentioned, this includes compensation for international crimes.

A. Evolution of the Basic Principles
In 1984, the United Nations Basic Principles of Justice for Victims of Crime and Abuse of Power were prepared by a committee of Experts which I had the honour of chairing, hosted in Ottawa by the Canadian Ministry of Justice. [FN234] The Ottawa draft was quite extensive with respect to the obligations of States for victimisation occurring as the result of a State's 'abuse of power'. However, when the text was adopted at the Seventh United Nations Congress on Crime Prevention and Criminal Justice held in Milan, Italy in 1985, the draft was significantly shortened. [FN235] Governments did not want to assume any responsibility, even for the acts of their own agents, preferring to limit victims' rights to the commission of crimes committed by non-State actors. That position persisted until the adoption of the 2006 Principles. It is also the reason why *248 there has never been a convention on the rights of victims, even though there are many treaties dealing with many other diverse human rights issues.

After the adoption of the 1985 Basic Principles of Justice in Milan, and the General Assembly's Resolution adopting the resolutions of the Seventh United Nations Congress on Crime Prevention, there was a loss of momentum by the NGO community supporting victims' rights, and it took approximately four years for a new momentum to develop to bring about a resolution to implement the 1985 Basic Principles of Justice. However, by then, the focus had shifted away from the work of what was then called the United Nations Centre for Crime Prevention and Criminal Justice located in Vienna (UNOV), to the United Nations in Geneva (UNOG), and more specifically, to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. [FN236]

In 1989, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities entrusted a study concerning the status of the right of reparation for victims of human rights violations to Mr Theo van Boven who, in 1997, prepared the Draft Basic Principles and Guidelines on the Right to Restitution, Compensation and Rehabilitation, for Victims of Gross Violations of Human Rights and Fundamental Freedoms. [FN237] The Commission on Human Rights found this document useful, and circulated the draft among States and interested organisations for comments. The task of finalising a set of basic principles and guidelines based on the comments of interested States and organisations was then entrusted to the author by the Commission on Human Rights pursuant to its Resolution 1998/43. [FN238]

The subsequent drafting process included extensive research of extant international law norms, consultations with representatives of interested governments and organisations, as well as highly respected experts. This resulted in the preparation, by the author, of the Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (2000 Draft Principles and Guidelines), which were presented to the Commission on Human Rights in April 2000. [FN239] Between 2000 and 2002, the Office of High Commissioner for Human Rights *249 (OHCHR) circulated this text, which resulted in comments being received from Member States, inter-governmental organisations and NGOs. [FN240] However, the adoption of the draft text was delayed as a result of the September 2001 World Conference on Racism where the issue of victim compensation was contested by
many States. [FN241] In preparation for the World Conference on Racism, many governments and NGOs advanced the proposition that governments which carried out racist policies, including colonialism and slavery, should be required to pay reparations. [FN242] Major governments with a past of colonialism, slavery and racism joined forces to put the whole question of victims' rights on hold, fearing that claims arising out of their past racial or colonial practices could be raised. The adoption of the 2000 Draft Principles and Guidelines was thus postponed by the Commission until 2001, and then postponed again to 2002.

This was followed by an international consultation convened by the OHCHR with the cooperation of the government of Chile to finalise the text. [FN243] A report on the consultative meeting was submitted to the Commission at its 59th session in 2003, recommending that the Commission establish an appropriate and effective mechanism with the objective of finalising the elaboration of the Draft Principles and Guidelines. [FN244] It was desired by the majority of States that a UN normative instrument on the right to reparation for victims of human rights and humanitarian law violations be adopted. [FN245]

In accordance with Commission resolution 2003/34, the Chairperson-Rapporteur of the consultative meeting, in consultation with Mr Van Boven and myself, prepared a revised version of the 2000 Draft Principles and Guidelines on 14 August 2003. In accordance with the same resolution, a second consultative meeting was held in Geneva on 20-23 October 2003. During this meeting, governments, inter-governmental organisations and NGOs reviewed the revised text and submitted comments that were incorporated by the Chairperson-Rapporteur and the two independent experts into a revised (24 October 2003) version of the text. [FN246]

As noted by the Chairman-Rapporteur in his Report on the Second Consultative Meeting, the Draft Principles and Guidelines 'greatly benefited from the broad consultative process facilitated by the two consultative meetings'. [FN247] The 24 October 2003 version of the guidelines incorporated 'input from various governments, intergovernmental organizations' and NGOs, as well as the 'ongoing efforts and assistance of the two experts.' [FN248] The preparatory work then continued with a third consultative meeting held on 29 September and 1 October 2004 in accordance with Commission resolution 2004/34. The foundation for this consultation was a revised (5 August 2004) version of the guidelines.

In 2005, after some 20 years of work on the text, the Basic Principles and Guidelines were approved by Member States. The resolution was adopted by the Commission by a roll-call vote (requested by the United States) with 40 countries voting in favour, none against and 13 abstentions. [FN249] The 2006 Basic Principles and Guidelines were then placed before the UN General Assembly, which adopted them by consensus.

*251 B. The Goals of the Basic Principles

Rather than creating new substantive international or domestic legal obligations, the 2006 Basic Principles and Guidelines are drafted from a 'victim-based perspective' and provide 'mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law'. [FN250] With the goal of maximising positive outcomes and minimising the diversity of approaches that may cause uneven implementation, the principles 'seek to
rationalize through a consistent approach the means and methods by which victim's rights can be addressed.' [FN251]
The provisions principally address 'gross violations of human rights law' and 'serious violations of international humanitarian law', which involve the protection of life, physical integrity and other 'matters essential to the human person and to human dignity'. In the course of consultations, various governments emphasised the need to differentiate between the terms 'gross violations', 'serious violations' and 'violations.' [FN252] The precise wording of the document evolved over time, and the adopted version refers to 'gross violations of international human rights law and serious violations of international humanitarian law', as opposed to earlier constructions which referred to 'violations of international human rights and humanitarian law'. The evolution of this wording represents an attempt to narrow the focus of the 2006 Basic Principles and Guidelines. However, the terms 'gross violations of international human rights law' and 'serious violations of international humanitarian law' should be understood to qualify situations with a view to establishing a set of facts that may figure as a basis for claims adjudication, rather than to imply a separate legal regime of reparations according to the particular rights violated. [FN253] In addition, the Principles and Guidelines also address separately violations of human rights and humanitarian law that 'constitute international crimes or that require States to take measures associated with criminal violations such as investigation, prosecution, punishment and international cooperation in connection with the prosecution or punishment of alleged perpetrators'. [FN254] Throughout the consultations, some States sought to underscore the differences between international human rights law and international humanitarian law. Some States emphasised that international humanitarian law is a separate body of law that has no place in a human rights instrument. [FN255] The final wording adopted in this respect seems to adopt this viewpoint and seeks to clearly differentiate the two bodies of law. The 2006 Basic Principles *253 and Guidelines refer to two separate bodies of law and apply differing standards in connection with each. [FN256] This wording gives the appearance that these two bodies of law are fully separate and distinct. Principle 2 of the adopted text refers to 'respective bodies of law', which further indicates a substantive division. This view, however, ignores moves towards the union of the two regimes. During consultations in 2003, the government of Chile argued that the ICC Statute already criminalises violations of both the international human rights and humanitarian law, thus setting a precedent for the unification of the two sources of law. Chile also went on to describe a second precedent set when the Security Council established the ICTY which specifies its rulings are 'without detriment to the right of victims to reparation'. [FN257] Throughout the process, the present author emphasised the fact that distinguishing between types of violations diminishes the purpose of the document and its relevance to the victims. The document does not address the substantive claims of human rights and international humanitarian law and it does not enumerate what falls under their respective ambit. It simply says that violations require remedies. [FN258] However, it is clear from the comments and approaches of various Member States and the wording of the 2006 Basic Principles and Guidelines that there is significant resistance to conceptualising international human rights law and international humanitarian law as linked and unified. [FN259]
The relationship between the right to reparation in human rights law and that in relevant international humanitarian law is complex, filled with overlapping norms. Non-derogable human rights, such as the right not to be tortured, killed or enslaved, intersect with norms of international humanitarian law. A normative connection exists between the right to reparation in both international human rights law and international humanitarian law. [FN260] The International Committee of the Red Cross describes international humanitarian law as 'the body of rules which, in wartime, protects people who are not or are no longer participating in the hostilities'. These rules are to be observed by both governments and any other parties involved in the conflict. [FN261] Human rights law stems from the same commonly shared human values as international humanitarian law. There is an overlap between the two legal regimes. The 2006 Basic Principles and Guidelines attempted to create a bridge between international human rights and humanitarian law, because for victims it would be artificial and counterproductive to make separations on the basis of legal definitions. The evolution of international humanitarian law has not always been linear. There have been overlaps and gaps, and it is sometimes difficult to retrace an obligation or right to an initial legal source. [FN262] This article argues that irrespective of how the issue is approached by each source, it is imperative that we consider the violation from the point of view of the victim. [FN263] UN Secretary-General Kofi Annan emphasised the importance of a victim-based perspective in his address to the 2003 Commission on Human Rights:

When we speak of human rights, we must never forget that we are laboring to save the individual man, woman or child from violence, abuse and injustice. It is that perspective—the individual's—which must guide your work, and not the point of view of contending States. [FN264]

C. Defining the Term 'Victim'

An issue of concern during consultations was the precise definition of a 'victim.' Throughout the consultation process it was important that a victim be considered a person and not a moral or abstract entity. That person, however, could be part of a collectivity or group. [FN265] Principle 8 of the 2006 Basic Principles and Guidelines defines 'victims' of gross violations of international human rights law and serious violations of international humanitarian law as follows:

Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. [FN266] The aforequoted definition [FN267] is quite similar to that adopted by the Preparatory Commission on the Establishment of the ICC in its Rules of Procedure and Evidence. [FN268] The definition contemplates four types of victims: (1) those individuals who directly suffer harm; (2) dependents or family of a direct victim who suffer indirectly because of the primary victimisation; (3) individuals injured while intervening to prevent violations; and (4) collective victims such as organisations or entities. [FN269]
The first category of victims includes those individuals who personally are the victims of violations such as torture and arbitrary arrest or property confiscation. The second category includes members of their household or dependants who suffer because of the primary violation. For example, if the primary income earner is ‘disappeared’ or unable to work because of injuries sustained, then the family suffers loss as well. The trauma suffered by the family members of a victim can be severe and have long-lasting implications. According to Huyse, this can include: ‘serious socio-economic deprivation, bereavement, the loss of a breadwinner, missed educational opportunities [and] family breakdown’. [FN270]

*257 The third category includes individuals who are injured trying to intervene on behalf of a victim. Injuries that such a person might suffer are from physically trying to pull a victim from harm’s way, loss of employment or imprisonment for challenging authorities for persecuting a targeted group. [FN271]

The collective victim is, perhaps, best illustrated by organisations or entities who suffer harm to property that is dedicated to religious, educational, humanitarian or charitable purposes. This includes those entities that are in fact the community’s custodians of cultural property, such as historical monuments. [FN272] Collective victims are part of a specific population, targeted as such. This fourth category also includes victims who belong to an identifiable group whose victimisation, irrespective of the merits of the case by and against the causes of the conflicts that gave rise to it, was based on their belonging to a given group. Since WWII, three non-international conflicts have produced an estimated total of five million collective victims. [FN273]

An important step in the recovery and reintegration of a victim into society is that his/her status as a ‘victim’ be acknowledged. Dismissing a victim or placing blame for what Huyse describes as ‘a perceived passivity to their fate’ are attempts to depreciate their pain and suffering. [FN274] Individuals and groups categorised as victims benefit from States' obligation to treat victims with humanity [FN275] and *258 respect, as well as to ensure that appropriate measures are taken for their safety and privacy and that of their family. [FN276] Moreover, inter-governmental organisations, NGOs and private enterprises also serve victims' needs.

D. Protection of Victims, Their Families and Witnesses

The 2006 Basic Principles and Guidelines elaborate on an emerging norm: the protection of victims along with their families and witnesses who participate in judicial, administrative or other proceedings that affect the interests of such victims. This remains largely aspirational, but should be further developed, and has increasingly been recognised in international and regional conventions and instruments. [FN277] In particular, the ICC Statute requires the special protection of victims at trial by allowing such measures as the presentation of evidence by closed-camera or other means, particularly to protect children and victims of sexual violence from re-traumatisation. [FN278] Moreover, the ICC Statute entrusts the Registrar of the Court to establish a Victim and Witnesses programme to provide relevant protection and services. [FN279]

*259 E. Non-Discrimination

The 2006 Basic Principles and Guidelines also stress the need for non-discrimination in the matter of who is categorised as a victim. Principle 26 provides that in application the
Guidelines must 'be without any discrimination of any kind or ground, without exception'. There were several discussions over what to include in this non-discrimination provision. Initial drafts elaborated on types of discrimination, stating the principles must be:

without any adverse distinction founded on grounds such as race, colour, gender, [FN280] sexual orientation, [FN281] age, [FN282] language, religion, political or religious belief, national, ethnic or social origin, wealth, birth, family or other status, or disability. [FN283]

The final version of the 2006 Basic Principles and Guidelines, however, was changed to refer to non-discrimination without listing specific categories.

*260 F. The Rights of Victims

A victim's right to remedies [FN284] for violations of international human rights encompasses three overarching rights. [FN285] The first is equal and effective access to justice. The second is the right to adequate, effective and prompt reparation for the harm suffered. The third is the right to truth. [FN286]

(i) Equal and Effective Access to Justice

Principle 12 of the 2006 Basic Principles and Guidelines describes the right of access to justice as follows:

A victim of a gross violation of international human rights law or a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities, and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

(a) Disseminate, through public and private mechanisms, information about all available remedies for gross violations of international human rights law and serious violations of international humanitarian law;

(b) Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and *261 retaliation, as well as that of their families and witnesses, before, during, and after judicial, administrative, or other proceedings that affect the interests of victims;

(c) Provide proper assistance to victims seeking access to justice;

(d) Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to a remedy for gross violations of international human rights or serious violations of international humanitarian law. [FN287]

Principle 13 adds to the aforequoted as follows,

In addition to individual access to justice. States should endeavor to develop procedures to allow groups of victims to present collective claims for reparation and to receive reparation collectively, as appropriate. [FN288]

The inclusion of Principle 13 in the 2006 Basic Principles and Guidelines indicates recognition that, while the Principles and Guidelines deal 'essentially with individual rights', they do not 'exclude the concept of collective rights or the rights of collectivities'.
As noted in the Chairman-Rapporteur's Report, the issue of collective rights is of particular relevance to the rights of indigenous peoples and 'certain collective communities of victims, who are unable to represent themselves and more so to have their individual members, seek remedies under domestic or international law'. [FN290] The only way to provide for the presentation of such claims is to 'recognize their right to do so in a collective capacity'. [FN291]

The term 'collective rights' is intended to cope with two types of scenarios. The first are the situations where violations are committed against a 'class of persons or an identifiable group, and those who represent that class or group seek to implement or enforce the rights of individuals as members of that class or group'. The second are the situations where violations are committed by States 'in a manner that targets a specific group as a whole'. [FN292] With respect to the former, the term 'collective rights' provides for 'enforcing rights already established in a manner that enhances the capacity of States to address these claims *262 in a collective as opposed to individualised manner'. [FN293] The latter 'gives rise to that group's ability to address procedurally its claims to a State and receive the remedies provided for in these principles and guidelines'. [FN294] Due to the concerns expressed by several States regarding the use of the term 'collective', the word was changed to 'groups'. [FN295]

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The duty of States to make known the availability of remedies has been recognised in Article 5 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, which is supplemental to the United Nations Convention against Transnational Organized Crime. [FN296] This State duty was also affirmed by both the UN Special Rapporteur on Torture [FN297] and the Council of Europe Committee of Ministers. [FN298] Similarly, the State's duty to facilitate assistance to victims seeking access to justice has also been recognised in both the universal *263 treaties [FN299] and the jurisprudence of the ECtHR. [FN300] At present, however, international law does not provide for the modalities pursuant to which a victim may present a claim. [FN301]

A victim's right to access justice includes the State's duty to prosecute those responsible for human rights violations. The duty to prosecute contained in Principle 4 of the 2006 Basic Principles and Guidelines is 'intended to reflect the general international law obligation to proceed under national law or in accordance with the statutes of international judicial organs'. [FN302] The framing of prosecutions as a victim's right has emerged primarily from international human rights tribunals' interpretation of provisions in human rights treaties that establish a right to access to justice or to be heard and the right to an effective remedy. [FN303] A victim's right to prosecution, however, is not a substitute for the State's duty to ensure respect for international human rights and humanitarian law, but rather co-exists with it. [FN304] Victims' claims to prosecution have, therefore, become a justifiable right that victims should be able to claim against a State. [FN305]

A victim's right to prosecution has developed as a remedy for violations of international human rights and humanitarian law. [FN306] The right to criminal *264 prosecution is included in Principle 22(f), which provides for the availability of judicial or administrative sanctions against persons liable for violations, as part of the satisfaction and guarantees of non-repetition. [FN307] Thus, where States fail to conduct effective prosecutions they violate not only their general duty to ensure respect for and enforce human rights, but also the victim's right to an effective remedy. [FN308] The absence of
judicial responsibility and punishment, in turn, undermines a State's legitimacy and its ability to promote the rule of law. [FN309] Criminal accountability for gross human rights violations is essential [265] for achieving the goals of accountability, retribution, and equal treatment under the law. [FN310] In some scholars' view, the victims' right to the truth is best revealed through the criminal process, even in situations where a State offers alternative remedial means such as truth commissions. [FN311]

(ii) Reparation for Harm Suffered
If an individual is a victim of a violation of an applicable international human rights or humanitarian law norm, then effective reparation must be made. [FN312] Such reparations may be made to either the individual victim or other persons, such as, for example, the victim's family and dependants [FN313] as well as those who [266] have 'suffered harm in intervening to assist victims in distress or prevent victimization'. [FN314] The reparation should be proportional to the gravity of the harm suffered. [FN315] In accordance with its domestic and international legal obligations, a State shall provide reparation to victims for its acts or omissions that can be attributed to the State and constitute gross violations of international human rights and humanitarian law. [FN316] In cases where an individual, a legal person or other entity is found liable for reparation to a victim, such a party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim. [FN317] States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligations. [FN318] To such ends, States [267] should seek to establish national programmes, [FN319] in keeping with Article 78 of the ICC Statute [FN320] and with the 2006 Basic Principles and Guidelines' call to establish such programmes. [FN321] The establishment of national funds for reparation was previously contemplated by the 2000 Draft Principles and Guidelines, which also included an explicit principle dealing with reparations owed by successor governments 'in cases where the State under whose authority the violation occurred is no longer in existence'. [FN322] The principle was deleted after delegations expressed concern over whether it was in alignment with relevant international legal principles governing State succession. A State is also required to enforce its domestic judgments for reparations and 'shall endeavor to enforce valid foreign legal judgments'. [FN323] Under their domestic laws, States are to provide effective mechanisms for the enforcement of reparation judgments. [FN324] As stated in the Principles and Guidelines, there are four principal forms of reparation available for violations of international human rights and humanitarian law, namely: (1) restitution; (2) compensation; (3) rehabilitation; and (4) satisfaction and guarantees of non-repetition. [FN325]

*268 Restitution should, whenever possible, restore the victim to the original situation before the gross violation of international human rights law or serious violation of international humanitarian law occurred. [FN326] Restitution includes, as appropriate: restoration of liberty. [FN327] enjoyment of human rights, [FN328] identity, family life and citizenship, [FN329] return to one's place of residence, [FN330] restoration of employment and the return of property. [FN331] Compensation is, in turn, designed for economically assessable damages resulting from a
violation, including physical or mental harm, lost opportunity [FN332] material damages and loss of earnings including earning potential, moral damage and costs associated with presenting a claim. [FN333] During the course of consultations, NGOs like Amnesty International emphasised the important role compensation plays in setting the victim on a path to reintegration in society. With regard to torture, attempts to obtain compensation are important to survivors and their supporters. Often, compensation can be easier to pursue than criminal prosecution because it is less threatening to authorities. Amnesty International strongly supported the view that compensation is a 'tangible recognition of wrong inflicted'. [FN334] Efforts to include concepts of victim compensation in international texts like the statutes of international ad hoc tribunals have met with great resistance. [FN335]

*270 Rehabilitation includes the provision of medical and psychological care as well as legal and social services. [FN336] It is necessary that rehabilitation addresses the victim's psychological needs and empowers them to move past their pain. Silence and repression [FN337] of emotions can lead to the psychological effects of victimisation, especially in cases of torture, being transmitted to subsequent generations. According to Huyse: The second generation, particularly, tends to absorb and retain pain and grief, consciously or unconsciously. They carry traces of the experience into adulthood, and this is a problematic heritage that can threaten the future of a society. [FN338] A victim is also entitled to satisfaction and guarantees of non-repetition which should include, where applicable, any or all of the following:
(a) Effective measures aimed at the cessation of continuing violations; [FN339]
(b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations.
(c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance *271 with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; [FN340]
(d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; [FN341]
(e) Public apology, including acknowledgement of the facts and acceptance of responsibility; [FN342]
(f) Judicial and administrative sanctions against persons responsible for the violations; [FN343]
(g) Commemorations and tributes to the victims; [FN344]

(h) Inclusion of an accurate account of the violations that occurred in international human rights and international humanitarian law training and in educational material at all levels. [FN345]

Moral reparations, including commemorations and tributes, are often more important to the victim than material ones. Danielli states that they help bridge a gap between victims and their community. 'Commemorations can fill the vacuum with creative responses and
may help heal the rupture not only internally but also the rupture the victimisation created between the survivors and their society.’ [FN346] They include a variety of actions, most having to do with a need to share their experiences and see justice being carried out. Reparations are not simply backward-looking but also help ensure a victim's place in the future. They serve to recompense for losses and also to help reintegrate the marginalised and isolated back into society. [FN347] Cohen argues:

There is a need for victimization to be addressed at the community level and not be shouldered entirely by the victim. When the world *273 community takes steps to redress victimization and analyze its causes, this will free the victims and reduce their need to retaliate. [FN348]

Within national legal systems, the guarantees of non-repetition should include, where applicable and as appropriate, any or all of the following: [FN349]
(a) Ensuring effective civilian control of military and security forces; [FN350]
(b) Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality; [FN351]
(c) Strengthening the independence of the judiciary; [FN352]
(d) Protecting persons in the legal, medical and health care professions, the media and other related professions and human rights defenders; [FN353]

*274 (e) Providing on a priority and continued basis, human rights and international humanitarian law education to all sectors of society, including law enforcement officials, as well as military and security forces; [FN354]

(f) Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well by economic enterprises; [FN355]
(g) Promoting mechanisms for preventing and monitoring social conflicts and their resolution; [FN356]

(h) Reviewing and reforming laws contributing to or allowing gross violations of human rights law and serious violations of international humanitarian law. [FN357]

Each of the forms of reparation may be sought either singularly or collectively. [FN358] Moreover, several are not dependant on a judicial proceeding. *275 and indeed may in many cases only come about by decisions of a State's political branches. This is especially true with respect to the elements of satisfaction and guarantees of non-repetition. In addition, inter-governmental organisations and NGOs can assist in providing forms of reparation such as the facilitation of truth and rehabilitation services and commemoration. However, such actions by third parties are in no way a substitute for reparation provided by the principal violator and by the necessary and appropriate redress modalities that a State or international organisation can offer. [FN359]

(iii) The Right to Truth
An important aspect of the guarantee of non-repetition includes the victims' right to
access factual and other relevant information concerning the violation. [FN360]

Understanding and public disclosure of the truth is important to victims because the truth (1) alleviates the suffering of the surviving victims; (2) vindicates the memory or status of the direct victim of the violation; (3) encourages the State to confront its dark past; and (4) through it, seek reform. [FN361]

*276 Truth can help provide an historical record, educate people, promote forgiveness and prevent future victimisation. [FN362] Truth is an imperative, not an option to be displaced by political convenience.

Recent attempts to engage in truth finding have involved the establishment of truth commissions and other forms of fact-finding commissions in a number of countries predominantly in South America and Africa. [FN363] Such efforts include the establishment of the National Commission on Disappeared Persons and an accompanying reparation scheme in Argentina; [FN364] the National Commission on Truth and Reconciliation established in 1990 in Chile, to shed light on human rights violations that occurred during the military dictatorship from 1973 to 1990; [FN365] the Commission on Truth in El Salvador established in 1992 under the direction of the UN, to investigate serious acts of violence that occurred since 1980; [FN366] and the Truth and Reconciliation Commission established in post-apartheid South Africa. [FN367] Although some commissions may have played an important restorative role in the process of reconciliation and peace-building, the work of truth commissions to date has not produced the most effectual results in terms of individual victim redress.

7. Economic and Political Considerations

Victims' right to redress has not been universally guaranteed, but rather has been dependent on States' whims and political exigencies. Even in cases where victims' reparations issues are addressed, a victim-oriented resolution does not always ensue:

Where victims' reparations issues have been eventually addressed, they have been dealt with in the context of peace settlements, national *277 reconciliation programmes or peace-building efforts, but they have often been subordinated or even sacrificed to political or strategic considerations. Worse, victim's reparations have sometimes been bargained away completely in peace negotiations or postponed indefinitely. [FN368]

Economic factors remain critical in any evolution of victims' rights. Who bears the costs? Victims of State violence are often denied their rights when the government that has perpetrated the harm is still in power, or when a new government (perhaps even representing those who have been previously victimised) is impoverished. The post-genocide regime change in Rwanda illustrates the difficulty of this question. Can a Tutsi government with no resources be expected to provide compensation to Tutsi citizens for violations committed by a Hutu regime?

Some feel that there is a duty of human social solidarity requiring the establishment of an international trust fund. Regrettably, this is far from being achievable, either politically or economically. With respect to torture, the UN established a Voluntary Fund for Victims of Torture (Voluntary Fund) in 1981, which is funded by voluntary donations of governments, [FN369] organisations and individuals. Although the Voluntary Fund could address the State compliance problem by pooling the resources of wealthier countries, it does not currently provide direct financial compensation to victims of torture. [FN370] Rather, it provides funding for NGOs that provide 'direct medical, psychological, social,
economic, legal, humanitarian or other forms of assistance to torture victims and members of their family'. [FN371] The Voluntary Fund lacks monetary resources. [FN372] Other examples of UN-sponsored victim redress mechanisms include the UN Voluntary Trust Fund on Contemporary Forms of Slavery; [FN373] *278 and the UNDP Trust Fund for Rwanda established in 1995. [FN374] With regard to terrorism, the Security Council established a working group in 2004 to 'consider the possibility of establishing an international fund to compensate victims of terrorist acts and their families, which might be financed through voluntary contributions, which could consist in part of assets seized from terrorist organisations, their members and sponsors'. [FN375] Efforts to bolster victims' rights through the creation of 'funds' are incremental and will probably remain limited to certain conflicts or categories of victims.

8. Conclusion
The victim's right to reparation has been recognised in numerous international and regional instruments and in the jurisprudence of various adjudicatory and supervisory bodies. States bear the obligation to respect and enforce norms of international human rights and humanitarian law that are incorporated in treaties to which they are parties, found in customary international law, and those that have been incorporated into their domestic legal system. This obligation gives rise to a State's duty to take appropriate legislative, administrative and other measures to prevent violations; investigate violations and take action against those allegedly responsible; provide victims with equal and effective access to justice and provide effective remedies to victims, including reparation. An increasing concern for victims of human rights violations can be traced through the evolution of international law over the course of the last 50 years, especially between 1984 and 2006. The adoption of the 2006 Basic Principles and Guidelines is a monumental milestone in the history of human rights as well as international criminal justice. The road leading to its adoption has been a long and winding one wrought with obstacles and challenges, but its adoption is a step towards putting victims on the road to recovery and reparation. In some instances, legal developments have sparked practical progress to ensure that victims are not denied the basic right of redress for their injuries. There is already evidence that the document is having an effect on State policies. Several Latin American countries have taken the draft version of the Principles and Guidelines into consideration when preparing legislation on reparation for victims. The IACtHR has referred to the draft in several rulings. [FN376] *279 and Article 75 of the Statute of the ICC includes elements of the draft relating to victim reparation. [FN377] The document has also been used as a standard for governments when implementing programmes for victims [FN378] and its effect can be seen in the provisions of both universal and regional instruments. [FN379]

However, despite the positive developments in international law which have taken place, much more is needed to make this academic progress a reality for victims on the ground. While the 2006 Basic Principles and Guidelines are indeed a triumph for victims, the quest for reparation has not yet ended. The realisation of victims' rights requires the establishment of implementation mechanisms and governmental will to take the Principles from being mere words on a page and put them into practice. The international legal system is far from being victim-oriented.

By honouring victims' rights to benefit from remedies and reparation, the international
community expresses solidarity with victims and reaffirms the principles of accountability, justice and the rule of law. Recognising the rights of victims of gross human rights violation is the most crucial imperative of our age. After all, we may one day find ourselves in their place. In the eloquent words of John Donne:
No man is an island, entire of itself; every man is a piece of the continent, a part of the main ... Any man's death diminishes me because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee .... [FN380]

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[FN3]. For the overlap between international humanitarian law and international human rights law, see Bassiouni, 'Humanitarian Law', in Shelton et al. (eds), Encyclopedia of Genocide and Crimes Against Humanity Volume 1 (New York: Macmillan, 2004) 469.


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


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


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


The concept of awarding damages to victims can be found in the ancient Assyrian Code, as well as the Hittite Laws, which provided for specific payments to victims of offenses against life. The Code of Hammurabi (1750 BCE) similarly provided...
for a principle of compensation to victims, but also included an early form of compensation by the community in cases where the offender was unknown. The Code of Hammurabi also provided for compensation against medical practitioners' negligence. See Wigmore, supra n. 8 at 86-93. Roman law accorded a well-defined system of reparation to victims starting with the Lex XII Tabularum, developed in the fifth century BCE. Although in its early form this law provided for victims to seek individualised justice against a particular offender (in all cases except those affecting the public order), the Lex XII Tabularum was later modified to provide a strict system of monetary compensation for many types of offenses, and was followed by a more comprehensive set of remedies found in the Praetorian law (in the second century BCE), and the Lex Aquilia de damno (Aquilian law). In the Roman legal system, the right to private redress of wrongs was based on the responsibility for fault. Roman Law over two millennia ago recognised the two sources of criminal and civil responsibility based on dolus and culpa, the first being intentional and the second being negligence. See Bassiouni, Crimes Against Humanity in International Criminal Law, 2nd edn (The Hague: Kluwer Law International, 1999) at 127 on principles of legality. From these early examples, the rights of victims have been progressively developing in different legal systems throughout the centuries. For instance, the Islamic criminal justice system, whose application started in the days after the Prophet's hejra (migration) from Mecca to Medina in 622 CE, developed the notion of qesas (meaning equality or equivalence), which delineated specific categories of crimes involving violations of the rights of individuals, namely homicide and battery. The sanctions prescribed for such qesas crimes were the talion, the equivalent infliction of physical or bodily harm against the perpetrator, or, in the alternative, diyya (compensation) to be paid to the victim or their family by the perpetrator or their family. A victim, with respect to qesas crimes, is not only the moving party with respect to the prosecution but has the right to present evidence, interrogate witnesses, and also bring the criminal action to a close by accepting the diyya, or victim compensation, as a substitute to prosecution or dismissing the action on the basis of forgiveness. See Bassiouni, 'Qesas Crimes', in Bassiouni (ed.), The Islamic Criminal Justice System (New York: Oceana Publications, 1982) 203; and Bassiouni, 'Les Crimes Relevent du Precepte de Quesas', (1989) 4 Revue Internationale de Criminologie et de Police Technique 484.


[FN15]. After WWI, the Allies imposed collective sanctions on Germany that were in the nature of compensation to the Allies. See US Department of State, The Treaty of Versailles and After (New York: Greenwood Press, 1968) (reprinting and providing commentary on Parts VIII and IX of the Versailles Treaty). The burden of the collective sanctions proved to be both unfair to the German people and unwise as they were a principal cause for the rise of national socialism and the start of World War II. See Gannett (trans.), Schacht, The End of Reparations (New York: Hyperion Press, 1979).

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[FN20]. For a discussion of these enforcement mechanisms, see Lasco, 'Repairing the Irreparable; Current and Future Approaches to Reparations', (2003) 10 Human Rights Brief 18. See also Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights', supra n. 2.

[FN21]. Such monitoring bodies include: the Inter-American Commission on Human Rights (established pursuant to the ACHR), the European Commission on Human Rights (established pursuant to the ECHR) (upon amendment of the ECHR in 1998 with the adoption of Protocol 11, the European Commission ceased to exist); and the African Commission on Human and Peoples' Rights (established pursuant to the AfChHPR).

[FN22]. Since World War II, there have been more than 250 conflicts resulting in 70 million casualties at the low end of estimates, and 170 million casualties at the high end. See Balint, 'An Empirical Study of Conflict, Conflict Victimization and Legal Redress', (1998) 14 Nouvelles Etudes Pénales 101. See also SIPRI Yearbooks 1975-1996; as well as, Jongman and Schmid, 'Contemporary Conflicts: A Global Survey of High and Lower Intensity Conflict and Serious Disputes', (1995) 7 PIOOM Newsletter and Progress Report 14. See also Schmid, 'Early Warning of Violent Conflicts: Casual Approaches', in

[FN23]. According to a study performed by this author, since WWII there have been over 250 conflicts in which an estimated 170 million people have been killed. See Bassiouni, supra n. 16.


[FN25]. See, generally, supra n. 19.

[FN26]. See Bassiouni, supra n. 5.


[FN29]. See X et al v State, Tokyo District Court, Judgment of 27 July 1995, (1996) 39 Japanese Annual of International Law 266, where the Tokyo district court held that 'neither the general practice nor the convictions (opinio juris) that the State has a duty to pay damages to each individual when that State infringes its obligations under international human rights or international humanitarian law can be said to exist'. This decision was later affirmed in two other 2002 Tokyo district court decisions which rejected claims arising from violations committed by the Japanese Germ Warfare Units in
China in 1941-2 and the 1932 massacre of Chinese villagers in Liaoling.

[FN30]. In 2001, the ILC adopted its Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 31 May 2001, A/56/10 (2001) which, in Article 33(2), provide that the ILC's approach to the question of State responsibility does not prejudice 'any rights, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.' Thus, although the Draft Articles primarily deal with reparations from States to other States or the international community as a whole, the inclusion of this language may evidence the possibility that an obligation may be owed to a non-State entity—a principle which is re-affirmed in the ILC Commentary to Article 33. See Crawford. The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (Cambridge: Cambridge University Press, 2002) at 209-10.


[FN32]. See Jennings and Watts (eds), supra n. 18.

[FN33]. Vattel, Le Droit des yens, Principes de la loi naturelle appliquée à la conduite des affaires des nations souverains (1773) at 289.

[FN34]. See, for example, Mavrommati Palestine Concession Case (Greece v UK). Jurisdiction, PCIJ Reports 1924. Series A No. 2, 12. But see the English Court of Appeal's judgment in R (Abassi) v Secretary of State for Foreign Affairs 2002 EWCA Civ 1598 and the South African Constitutional Court's judgment in Kaunda v President of the Republic of South Africa 10 BCLR 1009, in which some limits to a State's discretion were indicated.


[FN37]. Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land 1899.


[FN39]. See, for example, Article 3, 1907 Hague Convention.
[FN40]. For example, 1907 Hague Convention (XII) provided for the establishment of an International Prize Court, in which proceedings could be instituted by individuals against foreign States for claims involving property rights. However, this convention never entered into force.

[FN41]. These include, inter alia, the Universal Declaration; the ICCPR; the International Convention on the Elimination of All Forms of Racial Discrimination 1965, 660 UNTS 195 (ICERD); the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85 (CAT); and the Convention on the Rights of the Child 1989, 1577 UNTS 3 (CRC).

[FN42]. Convention Relative to the Treatment of Prisoners of War 1949 (Geneva Convention III), 75 UNTS 135; Convention Relative to the Protection of Civilian Persons in Time of War 1949 (Geneva Convention IV), 75 UNTS 287;
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