

# Bridging Fault Lines: Exploring an Obligation under International Law to Assist Victims of Armed Conflict

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## INTRODUCTION

Despite considerable efforts over recent decades to develop practicable responses to address harm faced by victims of war, international law has not proven an effective tool for addressing the immense suffering caused by contemporary armed conflicts. According to recent estimates, 850 million people,<sup>1</sup> including almost 450 million children,<sup>2</sup> are living in conflict-affected areas. Exposure to war not only harms individuals directly, but it also damages the social fabric of a community, threatening “development, decent work, the pursuit of livelihoods, the promotion of gender equality, [and] poverty alleviation.”<sup>3</sup> Yet of those individuals and communities harmed in conflict, only a very small proportion receive any form of reparation,<sup>4</sup> resulting in many victims worldwide whose needs remain unmet.

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1. U.N. HIGH COMM'R FOR REFUGEES, GLOBAL TRENDS: FORCED DISPLACEMENT IN 2021 5 (June 2022), <https://www.unhcr.org/en-au/publications/brochures/62a9d1494/global-trends-report-2021.html> [<https://perma.cc/6EAV-KR7N>] (estimating that 23 countries—with a combined population of 850 million people—currently face high- or medium-intensity conflict).

2. SAVE THE CHILDREN, STOP THE WAR ON CHILDREN: THE FORGOTTEN ONES 4 (2022), <https://resourcecentre.savethechildren.net/pdf/stop-the-war-on-children-the-forgotten-ones.pdf> [<https://perma.cc/MB9Z-ZAAH>] (noting that, globally, one child in six lived in a conflict zone in 2021).

3. Eugenia Date-Bah et al., *Gender and Armed Conflicts: Challenges for Decent Work, Gender Equity and Peace Building Agendas and Programmes* 1, (March 2001), [https://www.ilo.org/wcmsp5/groups/public/—ed\\_emp/—emp\\_ent/—ifp\\_crisis/documents/publication/wcms\\_116392.pdf](https://www.ilo.org/wcmsp5/groups/public/—ed_emp/—emp_ent/—ifp_crisis/documents/publication/wcms_116392.pdf) [<https://perma.cc/A4XR-6628>]; Prosecutor v. Germain Katanga, ICC-01/04-01/07-3762-tENG, Office of Public Counsel for Victims: Observations on the Trust Fund for Victims' Draft Implementation Plan Relevant to the Order for Reparations, ¶ 6 (Sep. 11, 2017), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018\\_05190.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_05190.PDF) [<https://perma.cc/PM27-KKHU>] (discussing the harm exposure to armed conflict causes to individuals and the social fabric).

4. See, e.g., Pablo de Greiff (Special Rapporteur on the Promotion of Truth, Justice, Reparation, and Guarantees of Non-Recurrence), *Report by the Special Rapporteur on the Promotion of Truth, Justice, Repara-*

This failure to meet victims' needs is problematic in itself and can also lead to stigma, social exclusion, and re-victimization.<sup>5</sup> It also risks perpetuating and spreading conflict,<sup>6</sup> making an effective response of utmost importance. Humanitarian crises in places such as Syria, Yemen, and the Sahel demonstrate the extreme human insecurity and instability that can result when the damage wrought by armed conflict is not effectively addressed.<sup>7</sup>

Existing measures to redress the suffering of victims under international humanitarian law (IHL), the law that regulates the conduct of war, represent an inadequate response to the immediate and long-term harm caused by armed conflict. In recent years, there has been considerable focus on victims' rights to reparations and remedies for violations of the law, on both an individual and, increasingly, a collective basis.<sup>8</sup> However, the ability of reparations under IHL to meet the needs of victims of war is limited. IHL seeks to regulate conduct in the most chaotic and violent of human-made situations. It is singularly adapted to armed conflict and tolerates a significant degree of destruction,<sup>9</sup> giving relatively little attention to the consequences—or victims—of the lawful conduct of war.<sup>10</sup> Although a significant number of civilian lives are lost in conflict directly through inten-

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*tion and Guarantees of Non-Recurrence*, U.N. Doc. A/69/518 ¶ 3, 81 (Oct. 8, 2014) (using the term reparations in the broad sense of “large-scale administrative programmes intended to respond to a large universe of cases”).

5. CHRISTINE EVANS, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT* 3 (2012) (noting that women, children, and victims of torture and sexual violence are most affected by lack of reparations and assistance); see also *id.* at 225, 229.

6. See, e.g., U.N. Trust Fund for Human Security, *Human Security Handbook: An Integrated Approach for the Realization of the Sustainable Development Goals and the Priority Areas of the International Community and the United Nations System* 7–8, 13 (Jan. 2016), <https://www.un.org/humansecurity/wp-content/uploads/2017/10/h2.pdf> [<https://perma.cc/HD4G-YJFC>] (explaining the importance of addressing the root causes of human insecurity, such as economic and health vulnerabilities, in order to “stem the persistence of violence”); cf. Babatunde F. Obamamoye, *State Weakness and Regional Security Instability: Evidence from Africa's Lake Chad Region*, 13 INT'L J. OF CONFLICT AND VIOLENCE 1, 3–4 (2019) (discussing how state weakness, which involves an inability to provide for the needs, and protect the rights, of citizens, increases the risk of conflict).

7. See U.N. Off. for the Coordination of Humanitarian Affs., *Ten crises to watch in 2021* (Feb. 9, 2021), <https://unocha.exposure.co/ten-crisis-to-watch-in-2021> [<https://perma.cc/THU2-T4SE>].

8. For scholarship addressing the right of victims of armed conflict to reparation or compensation, see Elka Schwager, *Reparation for Individual Victims of Armed Conflict*, in RESEARCH HANDBOOK ON HUMAN RIGHTS AND HUMANITARIAN LAW 628–60 (Robert Kolb & Gloria Gaggioli eds., 2013); Paola Gaeta, *Are Victims of Serious Violations of Int'l Humanitarian Law Entitled to Compensation?*, in INT'L HUMANITARIAN LAW AND INT'L HUMAN RIGHTS LAW 305–27 (Orna Ben-Naftali ed., 2011); Christian Tomuschat, *State Responsibility and the Individual Right to Compensation Before National Courts*, in THE OXFORD HANDBOOK OF INT'L LAW IN ARMED CONFLICT 811–39 (Andrew Clapham & Paola Gaeta eds., 2014); Friedrich Rosenfeld, *Collective Reparation for Victims of Armed Conflict*, 92 INT'L REV. RED CROSS 731 (2010).

9. See, e.g., Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49 (1994) (arguing that IHL legitimates wartime violence).

10. This is evident in the fact that just one of 102 provisions in Additional Protocol I addresses post-conflict reparation, and it is directed towards states rather than individual victims. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 91, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

tional violent attacks,<sup>11</sup> a greater proportion suffer as a result of the general conduct of armed conflict, including where war is lawfully fought.<sup>12</sup> Civilians may be direct victims of lawful conduct, for example, if they are incidental victims of attacks on legitimate military targets.<sup>13</sup> They may also be indirect victims of lawful conduct, for instance where civilian institutions such as houses, schools, and places of worship become dual-use sites, and therefore legitimate military targets.<sup>14</sup> The lawful conduct of war may also lead to disruption of food and medical supplies,<sup>15</sup> an increase in gender violence or subjugation of vulnerable populations within the community,<sup>16</sup> family separations, and physical and mental health problems.<sup>17</sup> However, those who suffer because of the lawful conduct of war fall beyond the scope of reparations based on violations of the law.<sup>18</sup> While victims of armed conflict have invoked international human rights law (IHRL), its applica-

11. See, e.g., Therése Pettersson, Stina Högbladh & Magnus Öberg, *Organized Violence, 1989-2018 and Peace Agreements*, 56 J. PEACE RES. 589, 591, 593 (2019) (noting that in 2018 there were over 53,000 battle-related deaths and 4,500 civilians killed in deliberate attacks in one-sided conflict).

12. See, e.g., Hazem Adam Ghobarah et al., *Civil Wars Kill and Maim People—Long After the Shooting Stops*, 97 AM. POL. SCI. REV. 189, 189 (2003) (describing the immediate and direct casualties of civil wars as “only the tip of the iceberg of their longer-term consequences for human misery”); Scott Gates et al., *Development Consequences of Armed Conflict*, 40 WORLD DEV. 1713, 1713 (2012); cf. Yaël Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 VAND. J. TRANSNAT’L L. 181, 183 (2009) (noting the growth in (lawful) incidental injury during armed conflict); Scott T. Paul, *The Duty to Make Amends to Victims of Armed Conflict*, 22 TUL. J. INT’L & COMPAR. L. 87, 100 (2013) (noting the “significant collateral harm” caused by the lawful conduct of war).

13. See Ronen, *supra* note 12, at 184–85; cf. Additional Protocol I, *supra* note 10, art. 51(5)(b). Attacks on civilians who are directly participating in hostilities may also be lawful. See Additional Protocol I, *supra* note 10, art. 51(3); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13(3), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

14. Civilian objects may lawfully be attacked as dual-use objects if being used for military purposes. See, e.g., Additional Protocol I, *supra* note 10, art. 52; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOL 1: RULES 34*, rule 10 (2005) [hereinafter *CUSTOMARY IHL STUDY*]; see also U.N. Office for the Coordination of Humanitarian Affairs, *World Humanitarian Data and Trends 2018*, at 44–45 (Dec. 4, 2018), [https://www.unocha.org/sites/unocha/files/WHDT2018\\_web\\_final\\_singles.pdf](https://www.unocha.org/sites/unocha/files/WHDT2018_web_final_singles.pdf) [<https://perma.cc/LBQ6-2NKG>] (discussing military use of, and attacks against, schools). On the risk to schools more generally, see UNESCO Global Education Monitoring Report Team, *The Hidden Crisis: Armed Conflict and Education*, 15 (2011), <https://unesdoc.unesco.org/ark:/48223/pf0000190743> [<https://perma.cc/Q7BF-33PK>].

15. See, e.g., Elisabeth Mahase, *Living in a War Zone Increases Heart Disease and Stroke Risk Years After Conflict Ends, Study Finds*, 365 BMJ (2019), <https://doi.org/10.1136/bmj.l2367> [<https://perma.cc/VN67-CZ2N>] (describing relation between the lawful conduct of war and medical supplies). See generally S.C. Res. 2417 (May 24, 2018) (describing relation between lawful conduct of war and food).

16. See, e.g., Fionnuala Ní Aoláin et al., *Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice*, 28 HARV. HUM. RTS. J. 97, 111–12 (2015).

17. See, e.g., Mahase, *supra* note 15; see also Int’l Red Cross and Red Crescent Conf., *Resolution 2 – Addressing Mental Health and Psychosocial Needs of People Affected by Armed Conflicts, Natural Disasters and Other Emergencies*, 33IC/19/R2 (Dec. 2019) [hereinafter *Resolution Addressing Mental Health and Psychosocial Needs*] (identifying “the unmet mental health and psychosocial needs of people affected by armed conflicts” as an issue demanding an urgent response).

18. See Paul, *supra* note 12, at 100; Ronen, *supra* note 12, at 186; Emily L. Camins, *Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law*, 10 INT’L J. TRANSITIONAL JUST. 126, 139 (2016); see also *infra* Section II.C.2.

tion is subject to IHL as the *lex specialis*<sup>19</sup> and particularly fraught in the context of extra-territorial application.<sup>20</sup> These complexities render IHL of prime significance. Moreover, the promise of reparations, whether under IHL or IHRL, remains largely unfulfilled.<sup>21</sup> Individuals lack reliable procedural mechanisms at the international level to claim reparations under IHL,<sup>22</sup> human rights mechanisms were not created to deal with large numbers of victims arising from armed conflict,<sup>23</sup> and practical impediments make claims under either branch of law challenging.<sup>24</sup> Despite these deficiencies, states have declined to adopt the issue of reparations for victims of violations as a development priority under IHL.<sup>25</sup>

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19. On IHL as the *lex specialis* (specific law that overrides the general law) applicable in armed conflict, see, for example, Int'l L. Comm'n, Rep. on the Work of Its Sixty-Third Session, U.N. Doc. A/66/10, at 181–83 (Apr.–Aug. 2011); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 25 (July 8); see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 106 (July 9) [hereinafter Israeli Wall Advisory Opinion]. On the complexities of IHL as *lex specialis*, see, for example, MARCO SASSÒLI, INTERNATIONAL HUMANITARIAN LAW: RULES, CONTROVERSIES, AND SOLUTIONS TO PROBLEMS ARISING IN WARFARE 423–43 (2019).

20. See, e.g., Georgia v. Russia (II), App. No. 38263/08, ¶¶ 114–15, 126 (Jan. 21, 2021), <https://hudoc.echr.coe.int/fre?i=001-207757> [<https://perma.cc/UQW8-3RCD>]; Andrea Gioia, *The Role of the European Court of Human Rights in Monitoring Compliance with Humanitarian Law in Armed Conflict*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 201, 206–10 (Orna Ben-Naftali ed., 2011); Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 U.S. NAVAL WAR COL. INT'L L. STUD. (BLUE BOOK) SER. 349, 351 (2010) (suggesting that the parallel application of IHL and human rights law might inadvertently limit the capacity of the law to protect civilians).

21. See, e.g., de Greiff, *supra* note 4, ¶ 6 (noting that despite normative progress, “most victims of gross violations of human rights and serious violations of international humanitarian law, still do not receive any reparation” (emphasis in original)). On the inextricability of substantive and procedural rights to reparations, see Shuichi Furuya, *The Right to Reparation for Victims of Armed Conflict: The Intertwined Development of Substantive and Procedural Aspects*, in REPARATION FOR VICTIMS OF ARMED CONFLICT 90 (Anne Peters & Christian Marxsen eds., 2020).

22. See Elka Schwager, *The Right to Compensation for Victims of an Armed Conflict*, 4 CHINESE J. INT'L LAW 417, 435 (2005); see also *infra* Section II.C.2.

23. EVANS, *supra* note 5, at 127; see also *infra* Section II.C.

24. See, e.g., Ruth Rubio-Marín & Pablo de Greiff, *Women and Reparations*, 1 INT'L J. TRANSITIONAL JUST. 318, 322 (2007) (discussing the practical difficulties women may face in accessing justice).

25. The issue of reparations was discussed at the 31st International Conference of the Red Cross and Red Crescent but not adopted as a priority. See Int'l Comm. of the Red Cross and the Int'l Fed'n of Red Cross and Red Crescent Soc'ys, *Report of the 31st International Conference of the Red Cross and Red Crescent*, at 169 (Nov. 28–Dec. 1, 2011) [hereinafter ICRC 2011 Report] (“[T]he question of reparations for the victims of violations of IHL is not included in this proposal for strengthening compliance mechanisms. Whereas some States were of the view that further work on the issue of reparations would be necessary, others did not seem to consider it a priority for the time being.”), <https://library.icrc.org/library/docs/DOC/icrc-002-1129.pdf> [<https://perma.cc/NQL4-9JAY>]; cf. The Int'l Comm. of the Red Cross, *Strengthening Legal Protection for Victims of Armed Conflicts: Draft Resolution & Report for 31st International Conference of the Red Cross and Red Crescent*, 31IC/11/5.1.1, at 13–16 (Oct., 2011) [hereinafter ICRC Draft Resolution] (noting the need to clarify and strengthen the mechanisms for making reparation for violations of IHL); *id.* at 5 (noting the Report would be deliberated at the International Conference plenary session).

Concomitantly, the range and extent of victims' post-conflict needs have been increasingly recognized.<sup>26</sup> Proceedings at the 2019 International Conference of the Red Cross and Red Crescent suggest a readiness to address survivors' mental health and psychosocial needs.<sup>27</sup> One of the few resolutions agreed upon called on states to "increase efforts to ensure early and sustained access to mental health and psychosocial support services by people affected by armed conflicts . . . ."<sup>28</sup> In pockets of IHL and related areas, states have demonstrated their willingness to address victims' suffering even more holistically.<sup>29</sup> The Convention on Cluster Munitions (CCM), for example, includes a victim assistance (VA) provision requiring states to provide cluster munition victims within their jurisdiction or control with "age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, as well as provide for their social and economic inclusion."<sup>30</sup> The CCM defines cluster munition victims to include not only persons directly impacted by cluster munitions, but also their affected families and communities,<sup>31</sup> and prohibits discrimination "between cluster munition victims and those who have suffered injuries or disabilities from other causes."<sup>32</sup> It also establishes an implementation framework with steps states must take to fulfill their obligations, including consulting with, and assessing the needs of, cluster munitions victims; developing national laws and policies; and mobilizing resources.<sup>33</sup> The Treaty on the Prohibition of Nuclear Weapons (TPNW) contains a similar, but less comprehensive, VA provision.<sup>34</sup> These models seek to spread the burden of assisting victims across states parties (and other entities) by requiring international cooperation and assistance in implementing VA.<sup>35</sup>

These VA regimes provide useful tools for addressing the harm to certain victims, and this Article proposes expanding the model to victims of armed conflict more broadly. Extending VA in this way could help overcome several key shortcomings of the existing legal framework. It would provide a

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26. On the importance of strengthening the legal response to victims of armed conflict see ICRC 2011 Report, *supra* note 25, at 24–25; *see also* ICRC Draft Resolution, *supra* note 25, at 16 (noting "[t]he thinking must be comprehensive, combining various complementary approaches").

27. *See* Resolution Addressing Mental Health and Psychosocial Needs, *supra* note 17.

28. *Id.* at 3.

29. *See, e.g.*, Harv. L. Sch. Hum. Rts. Program and Action on Armed Violence, *Acknowledge, Amend, Assist: Addressing Civilian Harm Caused by Armed Conflict and Armed Violence* 20 (Bonnie Docherty ed., 2015); *see also* Rome Statute of the International Criminal Court art. 79, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (establishing a victim assistance regime).

30. Convention on Cluster Munitions art. 5, Dec. 3, 2008, 2688 U.N.T.S. 39 [hereinafter CCM].

31. *Id.* art. 2(1). This is set out in *infra* note 40.

32. *Id.* art. 5(2)(e); *see also* Markus Reiterer & Tirza Leibowitz, *Article 5: Victim Assistance, in THE CONVENTION ON CLUSTER MUNITIONS: A COMMENTARY* 328, 431–32 ¶¶ 5.26–5.27, 355 ¶¶ 5.60–5.61 (Gro Nystuen & Stuart Casey-Maslen eds., 2010).

33. CCM, *supra* note 30, art. 5(2)(a), (b), (d), (f).

34. Treaty on the Prohibition of Nuclear Weapons art. 6, Sep. 20, 2017, A/CONF.229/2017/8 [hereinafter TPNW].

35. CCM, *supra* note 30, art. 6; TPNW, *supra* note 34, art. 7; ICC-ASP/4/Res.3, Regulations of the Trust Fund for Victims, Part II (Dec. 3, 2005) [hereinafter Regulations of the Trust Fund for Victims].

minimum baseline standard for addressing key needs of all victims of armed conflict, including those who are harmed in armed conflict but not entitled to or able to access violation-based forms of redress afterward. Moreover, by focusing on victims' needs rather than on legal violations, it might avoid political objections to providing reparations; and by spreading the obligation to assist victims more broadly, it could overcome the claims of scarcity that often preclude redress.<sup>36</sup> Such an approach could help address key needs of victims of armed conflict, thereby providing an important measure for easing social tensions and moving towards peace.<sup>37</sup> To this end, the VA model proposed here is intended as a basic framework for expanding VA beyond disarmament treaties and into a wider response to victims of armed conflict. It aims to supplement, not supplant, existing measures, including reparations.<sup>38</sup> While momentous, the proposed model is not radical, building largely on existing mechanisms, frameworks, and measures to strengthen and particularize obligations.<sup>39</sup>

This Article contains three main Parts. Part II provides background information and identifies the gaps between the harm suffered by victims of armed conflict and how the law responds to these victims, pinpointing the main deficiencies of current approaches. Part III then identifies two key fault lines—assumptions that underpin the existing legal response and limit its potential for addressing the harm to, and needs of, people affected by conflict. It argues that international law's response to victims of war should aim to connect war with peace and seek to separate the obligation to address harm from other responsibilities based on violations of the law. Building on this discussion, Part IV proposes an extended VA model as a safety net to support those who suffer due to armed conflict. It also briefly

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36. See, e.g., de Greiff, *supra* note 4, ¶ 62 (explaining the reluctance of states to admit responsibility); *id.* ¶ 51 (describing claims that reparations are unaffordable); see also *infra* Section II.C.2.c.

37. See, e.g., Larry May, *Reparations, Restitution and Transitional Justice*, in MORALITY, JUS POST BEL-LUM, AND INTERNATIONAL LAW 43 (Larry May & Andrew Forcehimes eds., 2012) (explaining the importance of meeting victims' needs to the establishment of peace). On the importance of maintaining and reestablishing peace in international law, see, for example, U.N. Charter art. 1, ¶ 1. See also U.N. Dep't of Econ. & Soc. Affs., *Transforming Our World: The 2030 Agenda for Sustainable Development*, ¶ 35 (2015), <https://sdgs.un.org/2030agenda> [<https://perma.cc/9T5P-9339>] (describing the importance of resolving and preventing conflict); Cecilia M. Bailliet, *Peace is the Fundamental Value that International Law Exists to Serve*, 111 PROC. OF THE ASIL ANN. MEETING 308 (2017).

38. On the importance of distinguishing between assistance and justice, see REDRESS, *Articulating Minimum Standards on Reparations Programmes in Response to Mass Violations: Submission to the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, at 8–9 (July, 2014), <https://redress.org/wp-content/uploads/2017/12/submission-to-special-rapporteur-on-reparations-programmes-public.pdf> [<https://perma.cc/2ELK-Q3A6>]; Liesbeth Zegveld, *Victims as a Third Party: Empowerment of Victims?*, 19 INT'L CRIM. L. REV. 321, 340 (2019).

39. See *infra* Part IV. In any case, as Menno Kamminga writes, “[w]hen the political climate is ripe, even the most radical proposals may suddenly gain momentum.” Menno T Kamminga, *Towards a Permanent International Claims Commission for Victims of Violations of International Humanitarian Law*, 25 WINDSOR Y.B. ACCESS TO JUST. 23, 29 (2007) (citing the establishment of the International Criminal Court and the United Nations High Commissioner for Human Rights).

addresses some considerations of form, oversight, and funding, setting out options for further development.

## I. CONTEXT AND SHORTCOMINGS

### A. Definitions Used in This Article

In this Article, the term “victim” will generally be used to refer to “those who have suffered harm, individually or collectively, including physical injury, mental injury, emotional suffering, economic loss, or the significant impairment of basic legal rights”<sup>40</sup> as a result of armed conflict. Unless otherwise stated, the word “victim” includes victims of harm caused by both lawful and unlawful conduct.<sup>41</sup> The term “harm” is used to denote “hurt, injury and damage.”<sup>42</sup> While harm need not be direct, it must be personal to the victim.<sup>43</sup> Unless otherwise indicated, the term “reparations” refers to measures awarded under international law to redress the harm that victims have suffered as a consequence of violations of the law.<sup>44</sup> The term “administrative reparations programs” is used to refer to “coordinated sets of reparative measures” with extensive coverage, generally under domestic legislation.<sup>45</sup> Finally, unless otherwise indicated, “armed conflict” is used

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40. This definition is an amended version of that proposed in M. CHERIF BASSIOUNI, *THE CHICAGO PRINCIPLES ON POST-CONFLICT JUSTICE* 44 (2007), [https://law.depaul.edu/about/centers-and-institutes/international-human-rights-law-institute/projects/Documents/chicago\\_principles.pdf](https://law.depaul.edu/about/centers-and-institutes/international-human-rights-law-institute/projects/Documents/chicago_principles.pdf) [<https://perma.cc/G49J-EL3C>] [hereinafter CHICAGO PRINCIPLES]. This definition resonates in critical respects with CCM, *supra* note 30, art. 2, which defines “cluster munition victims” as “all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalisation or substantial impairment of the realisation of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities.”

41. This may be contrasted with definitions of victim based on unlawful conduct, including Int’l Crim. Ct., *Rules of Procedure and Evidence*, rule 85 (2019), <https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf> [<https://perma.cc/JL52-Y5ZK>] [hereinafter ICC Rules of Procedure and Evidence]; Prosecutor v. Lubanga (*Lubanga Reparations Decision (Appeals Chamber)*), Case No. ICC-01/04-01/06-3129, Judgment on Appeals, ¶ 1 (Mar. 3, 2015), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015\\_02631.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_02631.PDF) [<https://perma.cc/8V94-5D8G>]. See also G.A. Res. 60/147, 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, art. 8 (Dec. 16, 2005) [hereinafter U.N. Basic Principles]; Int’l L. Ass’n Res. 2/2010, Declaration of International Law Principles on Reparation, for Victims of Armed Conflict (Substantive Issues), art. 4 (Aug. 15–20, 2010) [hereinafter ILA Declaration (Substantive Issues)]. The CHICAGO PRINCIPLES, *supra* note 40, at 45, ¶ 3.3, also tie reparations to violations, despite adopting a broader definition of victim.

42. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1432, Judgment on Appeals, ¶ 31 (July 11, 2008).

43. *Id.* ¶¶ 32, 34 (noting that personal harm includes “[m]aterial, physical, and psychological harm . . . if they are suffered personally by the victim” and that harm could be both personal and collective in nature).

44. See Pablo de Greiff, *Justice and Reparations*, in *THE HANDBOOK OF REPARATIONS* 451, 452–53 (Pablo de Greiff ed., 2006).

45. *Id.* Most administrative reparations programs have sought to address unlawful conduct. See, e.g., OFF. OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, *RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES: REPARATIONS PROGRAMMES* 19 (2008) (noting that it is likely a uniform definition of victim based on violations of international law will be adopted by future programs). Examples of administra-

to refer to either international or non-international armed conflict. As defined by the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber in *Tadić*, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>46</sup> The term “war” is used interchangeably.

### B. *The Harm Suffered by Victims of Armed Conflict*

While the harm endured by victims of armed conflict is varied and multifaceted, the types of harm generally fall within the interlinked categories of physical, mental, and psychosocial harm; lost opportunities; material damage and loss of earnings; and moral damage.<sup>47</sup> Also included are costs for “legal or expert assistance, medicine and medical services, and psychological and social services.”<sup>48</sup>

Physical injury or death is a common corollary of armed conflict.<sup>49</sup> Examples of injuries caused by violence include: blast or bullet wounds from the use of conventional weapons; anti-personnel mines and improvised explosive devices;<sup>50</sup> incapacitation or harm due to chemical or biological weapons;<sup>51</sup> and physical trauma, sexually transmitted infections, gynecological complications, infertility, or unwanted pregnancy due to rape or sexual violence.<sup>52</sup> Non-fatal injuries often result in ongoing disability, traumatic brain injury, or both.<sup>53</sup>

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tive reparations programs include the German (post-Holocaust) and Chilean (1990-2003) reparations programs.

46. Prosecutor v. *Tadić*, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

47. See U.N. Basic Principles, *supra* note 41, ¶ 20. See also Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-3129, Judgment on Appeals, ¶ 191 (Mar. 3, 2015), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015\\_02631.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_02631.PDF) [<https://perma.cc/K23F-9GMF>]. The RSTFV describes “diminished educational opportunities and disadvantaged employment prospects” as “sociological and material losses.” See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-3177-AnxA, Draft Implementation Plan for Collective Reparations to Victims, Submitted to the Amended Reparations Order of 3 March 2015, ¶ 16 (Nov. 3, 2015).

48. See U.N. Basic Principles, *supra* note 41, ¶ 20(e).

49. See, e.g., Eran Bendavid et al., *The Effects of Armed Conflict on the Health of Women and Children*, 397 THE LANCET 522, 522 (2021); A Kadir et al., *The Effects of Armed Conflict on Children*, 142 PEDIATRICS 1, 1–2 (2018).

50. Kadir et al., *supra* note 49, at 4–5. See also Prosecutor v. Germain Katanga, ICC-01/04-01/07, Order for Reparations Pursuant to Art. 75 of the Statute, ¶¶ 223–26 (Mar. 24, 2017) (awarding reparation for bullet wounds). The relevant parts of the judgment were upheld on appeal. See Prosecutor v. Germain Katanga (*Katanga Reparations Order (Trial Chamber II)*), ICC-01/04-01/07, Judgment on Appeal Against Order of the Trial Chamber II, ¶ 260 (Mar. 8, 2018).

51. See, e.g., Kadir et al., *supra* note 49, at 5.

52. *Lubanga*, ICC-01/04-01/06-3129, Judgment on Appeals, ¶ 191; Prosecutor v. Lubanga, ICC-01/04-01/06-3177-AnxA, Annex A: Trust Fund for Victims Draft Implementation Plan, ¶ 40 (Nov. 3, 2015). See also Prosecutor v. Lubanga (*RSTFV Filing on Reparations (Lubanga)*), ICC-01/04-01/06-3177-Red, Filing on Reparations and Draft Implementation Plan, ¶ 65 (3 November 2015); Kadir et al., *supra* note 49, at 5.

53. Bendavid et al., *supra* note 49, at 527–28.



The secondary effects of armed conflict also cause extensive damage to health.<sup>54</sup> Indeed, the very experience of living in a war zone has been found to be harmful to health.<sup>55</sup> Damage to health infrastructure, healthcare personnel, and interruptions to supplies render basic health care difficult or impossible to access.<sup>56</sup> At the same time, conflict-affected regions often suffer infectious disease outbreaks, and chronic and non-communicable diseases may be prevalent.<sup>57</sup> Moreover, conflict can severely hamper agricultural activities and food production, leaving populations to face acute food insecurity and malnutrition.<sup>58</sup>

Exposure to armed conflict can also cause significant mental and psychosocial harm.<sup>59</sup> Being subjected to violent attacks, or even bearing witness to them, can result in psychological trauma.<sup>60</sup> Mental and psychosocial harm can also result from experiencing the death of loved ones,<sup>61</sup> displacement,<sup>62</sup> and the loss of childhood, opportunities, relationships, or culture.<sup>63</sup> Certain categories of victims may suffer particular damage. Conflict frequently leads to an increase in sexual and gender-based violence, with victims (disproportionately women and girls) suffering psychological distress, social stigmatization, ostracism, and reprisals.<sup>64</sup> Child soldiers have likewise been found to suffer—in addition to psychological trauma and the development of psychological disorders—interruption and loss of schooling, separation from families, exposure to an environment of violence and fear, difficulties socializing within their families and commu-

54. *Id.*

55. See, e.g., Mahase, *supra* note 15.

56. Bendavid et al., *supra* note 49, at 527–28. See also *Stopping Attacks on Health Care*, WORLD HEALTH ORGANISATION, <https://www.who.int/emergencies/attacks-on-health-care/en/> [https://perma.cc/6V6N-6SNA].

57. Bendavid et al., *supra* note 49, at 528.

58. See, e.g., Food Security Information Network, *Global Report on Food Crises*, at 28–32 (2018), <https://www.wfp.org/publications/global-report-food-crises-2018> [https://perma.cc/8KHV-VQUZ]; FOOD AND AGRIC. ORG. & WORLD FOOD PROGRAMME, MONITORING FOOD SECURITY IN COUNTRIES WITH CONFLICT SITUATIONS (Jan. 2019), <http://www.fao.org/3/CA3113EN/ca3113en.pdf> [https://perma.cc/57TR-DNXZ]; Bendavid et al., *supra* note 49, at 530.

59. See, e.g., Bendavid et al., *supra* note 49, at 529 (noting that “[e]xposure to armed conflicts is associated with increased prevalence of anxiety disorders, such as post-traumatic stress disorder, and depression among children, adolescents, and women, both during and after conflicts”).

60. Prosecutor v. Germain Katanga, ICC-01/04-01/07, Order for Reparations Pursuant to Art. 75 of the Statute, ¶¶ 227–36 (Mar. 24, 2017). See also Prosecutor v. Al Mahdi, ICC-01/12-01/15, Reparations Order, ¶ 85–89 (Aug. 17, 2017).

61. *Katanga*, ICC-01/04-01/07, ¶¶ 231–32.

62. Bendavid et al., *supra* note 49, at 529.

63. Al Mahdi, ICC-01/12-01/15, ¶¶ 85–90.

64. Statement from the ICRC Dir. of Int’l L. and Policy to U.N. Security Council on Protection Challenges and Needs Faced by Women and Girls in Armed Conflict and Post-Conflict Settings (Jan. 30, 2015), <https://www.icrc.org/en/document/protection-challenges-and-needs-faced-women-and-girls-armed-conflict-and-post-conflict> [https://perma.cc/42FJ-86MY]; *RSTFV Filing on Reparations (Lubanga)*, ICC-01/04-01/06-3177-Red, Filing on Reparations and Draft Implementation Plan, ¶¶ 62–65 (3 November 2015) (noting, also, more specific harms including a perceived loss of “dignity and social status as a result of being raped or assumed to be raped” (as former child soldiers) and a loss of capacity to become self-reliant due to children conceived while child soldiers).

nities, difficulties in controlling aggressive impulses, and the non-development of civilian life skills.<sup>65</sup> Some of these losses would apply to all children affected by armed conflict.<sup>66</sup>

In addition, there is extensive material harm to individuals and communities. Material harm may include the destruction of houses, buildings, furniture, personal effects, business premises, wares, fields, harvests, and livestock.<sup>67</sup> It may extend to economic loss such as lost actual and potential earnings.<sup>68</sup>

Finally, armed conflict also has a more nebulous, long-term effect on societies, with ongoing harm to survivors. The collapse of social structures, institutions, and norms can lead to significant and extensive suffering and difficulties in asserting basic human rights.<sup>69</sup> As Eugenia Date-Bah and others have observed, armed conflicts “pose immense threats to development, decent work, the general pursuit of livelihoods, the promotion of gender equality, poverty alleviation and observance of international standards. They hamper societal and human security and progress.”<sup>70</sup> Exposure to violence not only harms the individual victim; it gravely damages the social fabric.<sup>71</sup>

### C. Extant Legal and Quasi-Legal Measures

This Section discusses the main legal responses to the harm armed conflict causes to victims, identifying several limitations in their capacity to respond to harm in a meaningful way. After outlining key primary obligations under IHL and IHRL,<sup>72</sup> it considers secondary obligations of reparations and remedies for violations of IHL and core human rights during

65. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-3129, Judgment on Appeals, ¶ 191 (Mar. 3, 2015), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015\\_02631.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_02631.PDF) [<https://perma.cc/S4BM-YGAH>]; see also Prosecutor v. Lubanga, ICC-01/04-01/06-3177-Red, ¶ 62 (noting the former child soldiers displayed delinquent, violent, and at-risk behavior, drug addiction and gender-based violence).

66. See, e.g., U.N. Secretary-General, *Children and Armed Conflict*, ¶¶ 4–9, U.N. Doc. A/75/873–S/2021/437 (May 6, 2021)). In relation to education, see also Press Release, Glob. Coal. to Protect Educ. from Attack, Education Suffered Over 14,000 Armed Attacks in Last 5 Years (May 26, 2019), <https://protectingeducation.org/news/education-suffered-over-14000-armed-attacks-in-last-5-years> [<https://perma.cc/X6NK-MGUV>].

67. See, e.g., Prosecutor v. Germain Katanga, ICC-01/04-01/07, Order for Reparations Pursuant to Art. 75 of the Statute, ¶¶ 193–222 (Mar. 24, 2017).

68. See, e.g., Al Mahdi, ICC-01/12-01/15, ¶ 104.

69. See generally Date-Bah et al., *supra* note 3, at 1; Gates et al., *supra* note 12, at 1713 (discussing the damage war causes to institutions and development).

70. See, e.g., Date-Bah et al., *supra* note 3, at 1.

71. Office of Public Counsel for Victims, *supra* note 3, ¶ 6.

72. For present purposes, reparations mechanisms under international criminal law, particularly those established by the Rome Statute, are considered as means for enforcing IHL and IHRL obligations rather than as a standalone branch of law.

conflict, *ex gratia* amends payments,<sup>73</sup> and existing victim assistance and trust fund regimes.

1. *Primary Obligations Owed to Victims of Armed Conflict*
  - a. *International Humanitarian Law*

International humanitarian law imposes several obligations on parties to a conflict to safeguard the survival of the civilian population and others not participating in hostilities during conflict and occupation. These include: protection of, and medical care for, the sick and wounded and other people *bors de combat*;<sup>74</sup> measures to protect food, water, agriculture<sup>75</sup> and the environment;<sup>76</sup> and provision for humanitarian relief for the civilian population.<sup>77</sup> States occupying another state (that is, exercising effective control over foreign territory without consent)<sup>78</sup> are held to a higher duty and are required, “to the fullest extent of the means available” to them, to ensure food and medical supplies and the provision of clothing, bedding, means of shelter, and other essential supplies.<sup>79</sup> IHL also regulates education and employment conditions of protected persons in situations of occupation.<sup>80</sup> In addition to the general rules of IHL, in recent years states have adopted a number of weapons conventions, which include VA obligations of varying strength and detail (discussed below).<sup>81</sup>

General IHL obligations, while critical to ensure the survival of the civilian population and others during war, are limited in scope. First, there are significant temporal limitations. With limited exceptions (particularly re-

73. This refers to “voluntary payments offered to express sympathy” to civilians injured or killed in armed conflict. Lesley Wexler & Jennifer K. Robbennolt, *Designing Amends for Lawful Civilian Casualties*, 42 YALE J. INT’L L. 121, 128 (2017).

74. A person is *bors de combat* (outside the fighting) if they are: in the power of an adverse party; sick, wounded or shipwrecked; or clearly trying to surrender. See CUSTOMARY IHL STUDY, *supra* note 14, at 164, rule 47; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 3(2), 12, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 3(2), 12, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War arts. 3(2), 13, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 3(2), 16, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]; Additional Protocol I, *supra* note 10, art. 41; Additional Protocol II, *supra* note 13, art. 7. Under Additional Protocol I, *supra* note 10, art. 8(a), “wounded” and “sick” means persons “who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility.”

75. Additional Protocol I, *supra* note 10, art. 54; Additional Protocol II, *supra* note 13, art. 14.

76. Additional Protocol I, *supra* note 10, art. 55. There is no equivalent provision applicable in non-international armed conflict. Cf. CUSTOMARY IHL STUDY, *supra* note 14, at 151, rule 45.

77. Additional Protocol I, *supra* note 10, arts. 68–70; Additional Protocol II, *supra* note 13, art. 18.

78. Eyal Benvenisti, *Occupation, Belligerent*, in MAX PLANCK ENCYCLOPEDIAS OF INT’L L. (Rüdiger Wolfrum ed., 2009).

79. Fourth Geneva Convention, *supra* note 74, arts. 55, 56; Additional Protocol I, *supra* note 10, art. 69.

80. Fourth Geneva Convention, *supra* note 74, arts. 39, 40, 50, 51.

81. See *infra* Section II.C.4.

lated to those in the power of the enemy),<sup>82</sup> obligations under IHL cease to apply once the conflict ends,<sup>83</sup> notwithstanding the ongoing needs of victims.<sup>84</sup> Second, as necessitated by the circumstances in which they apply, they are pragmatically directed at short-term survival rather than longer-term recovery.<sup>85</sup> This is evident in the context of mental health. As the International Committee of the Red Cross (ICRC) notes, “psychological trauma has long been seen as an inevitable consequence of conflict.”<sup>86</sup> Accordingly, while the Geneva Conventions and Additional Protocols require the provision of medical care for the wounded and sick (which includes those with mental disorders) during conflict,<sup>87</sup> there is no wider or ongoing obligation to provide psychological assistance or social reintegration.<sup>88</sup> Nor does IHL contemplate post-conflict economic or social measures, such measures going beyond those considered essential for wartime survival.<sup>89</sup> Third, in keeping with its origins as a body of law focused on interstate conflict, IHL is concerned primarily with protecting enemy civilians, imposing less-extensive obligations on a state’s treatment of its own citizens.<sup>90</sup> For instance, while the Fourth Geneva Convention requires occupying states to facilitate the proper working of institutions devoted to care and education of children,<sup>91</sup> there is no corresponding obligation in favor of a state’s own civilians. Likewise, while attacks on healthcare facilities are prohibited, there is no specific right or corresponding obligation to ensure adequate provision of health care to a state’s own citizens (though states must allow

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82. See, e.g., Additional Protocol I, *supra* note 10, art. 75; Additional Protocol II, *supra* note 13, art. 2(2).

83. See, e.g., First Geneva Convention, *supra* note 74, art. 2; Second Geneva Convention, *supra* note 74, art. 2; Third Geneva Convention, *supra* note 74, art. 2; Fourth Geneva Convention, *supra* note 74, art. 2; Additional Protocol I, *supra* note 10, art. 1(3); Additional Protocol II, *supra* note 13, art. 1(1); Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

84. See *infra* Section II.C.

85. See Helen Durham, *International Humanitarian Law and the Gods of War: The Story of Athena versus Ares*, 8 MELB. J. INT’L L. 248, 253 (2007) (describing the Geneva Conventions as “pragmatic documents which relate to bare survival during the most horrific condition humans can manufacture—armed conflict”).

86. ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommending to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions* 17 (October, 2019) (noting, also, that some recent military manuals suggest that psychological effects should be considered in the conduct of hostilities).

87. See *supra* note 74.

88. An exception is the Convention on the Rights of the Child art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CROC] (requiring states’ Parties to promote psychological recovery and social reintegration of a child victim of armed conflict).

89. See, e.g., GILLES GIACCA, ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN ARMED CONFLICT 32 (2014).

90. See Fourth Geneva Convention, *supra* note 74, art. 4(1) (definition of “protected persons”); see also MARCO SASSOLI ET AL., HOW DOES LAW PROTECT IN WAR? VOL I, pt. 1, ch. 14, 5–6 (3rd ed. 2014) (noting the interstate origins of IHL and its traditional focus on enemy nationals).

91. Fourth Geneva Convention, *supra* note 74, art. 50.

relief actions where supplies are inadequate).<sup>92</sup> Finally, as discussed further below, implementation mechanisms under IHL are relatively underdeveloped, leaving victims of armed conflict with limited means for enforcing obligations.<sup>93</sup> These limitations are addressed to some extent, though by no means fully, by IHRL.

### *b. International Human Rights Law*

While IHL is the predominant applicable law in armed conflict, it is now widely accepted that IHRL also continues to apply.<sup>94</sup> This application is, however, complex and subject to caveats,<sup>95</sup> particularly in relation to the extra-territorial application of IHRL.<sup>96</sup> Core civil and political rights under the International Covenant on Civil and Political Rights (ICCPR)—such as the arbitrary deprivation of the right to life and freedom from torture—largely reflect obligations contained in IHL and may not be derogated from in situations of emergency, such as armed conflict.<sup>97</sup> The obligations in the International Covenant on Economic and Social Rights (ICESCR), including the right to primary health care and basic education,<sup>98</sup> are less absolute. They require a state party to “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means.”<sup>99</sup> While these obligations are not suspended in armed conflict or occupation,<sup>100</sup> there is tacit recognition that states have a lower level of obligation,

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92. Additional Protocol I, *supra* note 10, art. 70 (discussing provision of relief operations); Additional Protocol II, *supra* note 13, art. 18 (discussing relief actions where essential supplies are inadequate). On the higher obligations towards civilians in occupied territory, see Additional Protocol I, *supra* note 10, art. 69, and see generally Fourth Geneva Convention, *supra* note 74.

93. See Hans-Joachim Heintze, *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, 86 INT'L REV. RED CROSS 789, 798 (2004). Implementation is a recurring theme at Red Cross Red Crescent Conferences. See generally Int'l Conf. of the Red Cross and Red Crescent Resol., *Bringing IHL Home: A Road Map for Better National Implementation of International Humanitarian Law*, 33IC/19/R1 (Dec. 9–12 2019). See also *infra* Section II.C.2.

94. See, e.g., *Georgia v. Russia (II)*, App. No. 38263/08, ¶ 141 (Jan. 21, 2021), <https://hudoc.echr.coe.int/fre?i=001-207757> [<https://perma.cc/UQW8-3RCD>]; Israeli Wall Advisory Opinion, *supra* note 19, ¶ 106.

95. *Supra* note 94; *Hassan v. United Kingdom*, 2014-VI Eur. Ct. H.R. 1, ¶¶ 77, 104–05 (2014) (noting the European Convention on Human Rights should be interpreted in harmony with IHL). The relationship between IHL and IHRL in situations of armed conflict is complex and “highly contextual.” ICRC, *Introduction, in Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* ¶ 39 (2016).

96. See *supra* note 20.

97. International Covenant on Civil and Political Rights art. 4(2), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Hum. Rts. Comm., General Comment No. 29, ¶ 7, U.N. Doc. CCPR/C/21/Rev1/Add11 (Aug. 31, 2001) [hereinafter General Comment No. 29].

98. Off. of the High Comm'r for Hum. Rts., General Comment No. 3, ¶ 10, U.N. Doc. E/1991/23 (Dec. 14, 1990) [hereinafter General Comment No. 3].

99. International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

100. General Comment No. 3, *supra* note 98, ¶ 12; see also Israeli Wall Advisory Opinion, *supra* note 19, ¶ 136 (on occupation).

particularly during armed conflict.<sup>101</sup> Moreover, there is significant scope for arguing that in situations of armed conflict involving the decimation of the economy, resources do not extend to the realization of these rights.<sup>102</sup> In practice, such rights are often neglected during armed conflict.<sup>103</sup> Indeed, the Committee on Economic and Social Rights has spoken of the need for “an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one” to help achieve the realization of economic and social rights.<sup>104</sup>

As societies recover from conflict, there may be greater capacity for the application of economic, social, and cultural rights and obligations.<sup>105</sup> These include such responsibilities as ensuring the right to work (which includes the obligation to provide vocational training opportunities and policies to achieve economic, social, and cultural development and productive employment),<sup>106</sup> measures to protect children from economic and social exploitation,<sup>107</sup> the right to an adequate standard of living,<sup>108</sup> the right to enjoy the highest attainable standard of physical and mental health,<sup>109</sup> and the right to education.<sup>110</sup> These provisions are of potential relevance to many survivors of armed conflict. However, several factors render overreliance on IHRL problematic. First, there remains a lack of clarity regarding the interaction of IHL and IHRL, particularly when IHRL obligations cease and come back into full force following an armed conflict or where states have derogated from obligations.<sup>111</sup> States are often quick to invoke emergency powers and more reluctant to acknowledge the existence of armed conflict on their territory.<sup>112</sup> The tendency of contemporary conflicts to persist at a low level may therefore delay the application of non-core IHRL obligations, particularly those allowing non-fulfilment based on lack of re-

101. General Comment No. 3, *supra* note 98, ¶¶ 9–10 (describing art. 2(1) as a “flexibility device, reflecting realities of the real world” and noting that “any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned”); Comm. on Econ., Soc. and Cultural Rights, General Comment No. 14, ¶ 12, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (noting the relevance of the “conditions prevailing” in a state to the application of the right to health); GIACCA, *supra* note 89, at 43–46 (acknowledging that recent armed conflict may hinder compliance with the ICESCR by placing serious claims on a state’s resources).

102. GIACCA, *supra* note 89, at 38–39.

103. See generally GIACCA, *supra* note 89, at ch. 1.

104. General Comment No. 3, *supra* note 98, ¶ 14.

105. See generally Christine Chinkin, *The Protection of Economic, Social and Cultural Rights Post-Conflict* (2008), [https://www2.ohchr.org/english/issues/women/docs/Paper\\_Protection\\_ESCR.pdf](https://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf) [https://perma.cc/VR78-BKUA] (discussing the implementation of economic and social rights post-conflict).

106. ICESCR, *supra* note 99, art. 6.

107. *Id.* art. 10(3).

108. *Id.* art. 11.

109. *Id.* art. 12.

110. *Id.* art. 13.

111. See Mark Lattimer, *Introduction*, in *THE GREY ZONE: CIVILIAN PROTECTION BETWEEN HUMAN RIGHTS AND THE LAWS OF WAR* 1, 3–4 (Mark Lattimer & Philippe Sands eds., 2018).

112. See *id.* at 4.

sources.<sup>113</sup> Second, the myriad of political, economic, and social factors and tensions at play following armed conflict necessitates a highly contextual response and may render measures based on generic IHRL obligations insufficient.<sup>114</sup> In particular, the communal experience of armed conflict demands a tailored response with a collective dimension<sup>115</sup> which individualized human rights measures might not provide. Third, IHRL largely assumes normal socio-economic conditions with an array of mechanisms, including judicial and political processes, to enable individuals to assert their rights.<sup>116</sup> In the aftermath of conflict, government is frequently weakened and not functioning effectively, making access to rights elusive.<sup>117</sup> Competing claims on a state's resources following armed conflict may also preclude the realization of rights.<sup>118</sup> Accordingly, there are significant limitations in the implementation and enforcement of IHRL,<sup>119</sup> particularly in post-conflict situations involving mass casualties.<sup>120</sup> These limitations necessitate a more tailored response to victims of war that involves support from the wider international community.

## 2. *Secondary Obligations to Repair Harm From Violations*

This Section considers the secondary obligations of states to repair harm caused by violations of the applicable law. After providing background on the international law obligation to make reparations, it proceeds to consider the right of individuals to claim reparations for violations of the law applicable in armed conflict.

War reparations have long been negotiated and paid between conflicting states, frequently on the terms of the victor.<sup>121</sup> Today, international law

113. As noted above, even if IHL provisions apply to such conflicts, they are directed primarily towards short-term survival and do not address the broader or longer-term needs of victims. *See supra* Section II.C.1.a.

114. *See infra* Section IV.B.2.

115. *Cf.* JOHN RAWLS, *THE LAW OF PEOPLES: WITH "THE IDEA OF PUBLIC REASON REVISITED"* 108–09 (2001) (and need parenthetical citation since Rawls isn't talking about armed conflict specifically).

116. *See* RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 116 (2002).

117. *See* Int'l Lab. Org., *Employment and Decent Work in the Humanitarian-Development-Peace Nexus* 8–9, 29–50 (2021), [https://www.ilo.org/wcmsp5/groups/public/—ed\\_emp/documents/instructionalmaterial/wcms\\_141275.pdf](https://www.ilo.org/wcmsp5/groups/public/—ed_emp/documents/instructionalmaterial/wcms_141275.pdf) [<https://perma.cc/5UXW-ZVT4>]; Gates et al., *supra* note 12, at 1713 (describing the effect of armed conflict on social, political and economic institutions as well as on development goals).

118. *See* GIACCA, *supra* note 89, at 43–44.

119. *See* DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 1–4 (2005).

120. *See* EVANS, *supra* note 5, at 127 (“[Human rights] mechanisms were not designed to address large numbers of victims in conflict situations.”).

121. *See, e.g.*, Pietro Sullo & Julian Wyatt, *War Reparations*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* ¶¶ 5–8 (2015); *see also* Silja Vöneky, *Implementation and Enforcement of International Humanitarian Law*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 647, 683 (Dieter Fleck ed., 3d ed. 2013); INT'L COMM. OF THE RED CROSS, *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949*, art. 91, ¶ 3647 (Yves Sandoz et al. eds., 1987) [hereinafter *COMMENTARY TO ADDITIONAL PROTOCOL I*] (noting the “tendency for the victors to demand compensation from the vanquished, without reciprocity and with-

obligates states to make reparations for injuries caused by violations of the applicable law,<sup>122</sup> including the law regulating the resort to force, IHL, and IHRL. States' responsibility to make reparation for violations—in the form of restitution, compensation, or satisfaction—is a rule of customary international law.<sup>123</sup> Article 3 of the 1907 Hague Convention (IV)<sup>124</sup> and Article 91 of 1977 Additional Protocol I<sup>125</sup> establish the obligation to compensate for violations of IHL occurring in international armed conflicts; the ICRC also recognized this obligation in its study on customary IHL.<sup>126</sup>

While states are the traditional beneficiaries of reparations,<sup>127</sup> rights may accrue directly to non-state actors under international law.<sup>128</sup> Whether the non-state actor can invoke such rights without the intermediation of the state depends on the primary rule in question<sup>129</sup>—in short, whether a treaty confers such rights.<sup>130</sup> This is particularly significant in the context of non-international armed conflict, which involves hostilities between governmental armed forces and non-state armed groups or between such groups only.<sup>131</sup> Treaty rules regulating non-international armed conflict are less extensive than those governing international armed conflict,<sup>132</sup> and contain no corresponding reparations obligation.<sup>133</sup> However, in its study on custom-

out making any distinction between the damages and losses resulting from lawful or unlawful acts of war”).

122. G.A. Res. 56/83, Annex, art. 31 (Jan. 28, 2002) [hereinafter ARSIWA].

123. See, e.g., *Factory at Chorzów* (Ger. V Pol.), Judgment, 1928 P.C.I.J. (1928) (ser. A) No. 17 at 21; ARSIWA, *supra* note 122, arts. 1, 31, 34.

124. Convention (IV) Respecting the Laws and Customs of War on Land, art. 3, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention (IV) 1907].

125. Additional Protocol I, *supra* note 10, art. 91 reproduces art. 3 of the Hague Convention (IV) 1907, *supra* note 124, almost verbatim, providing: “A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”

126. CUSTOMARY IHL STUDY, *supra* note 14, rule 150. See also Sullo & Wyatt, *supra* note 121, ¶ 35 (noting that in recent years, states have referred compensation claims to the International Court of Justice, often unsuccessfully); see also COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 121, art. 91, ¶ 3645. On the elusiveness of attributing responsibility, see DAVID KENNEDY, *OF WAR AND LAW* 141–64 (Princeton University Press, 2006).

127. ARSIWA, *supra* note 122, art. 33; cf. COMMENTARY TO ADDITIONAL PROTOCOL I, *supra* note 121, art. 91, ¶ 3657.

128. ARSIWA, *supra* note 122, art. 33(2); see also Report of the Commission to the General Assembly on the Work of Its Fifty-Third Session, at 95, commentary to art. 33, U.N. Doc. A/CN.4/Ser.A/2001/Add.1 (Part 2) (2001) (noting that under human rights treaties, “the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights”).

129. *Id.* at 95.

130. See ROLAND PORTMANN, *LEGAL PERSONALITY IN INTERNATIONAL LAW* 277–81 (2010) (noting that the existence of individual rights might be a matter for treaty interpretation, and that a treaty will have a direct effect on individuals whenever the provision so indicates).

131. See, e.g., First Geneva Convention, *supra* note 74, art. 3; Second Geneva Convention, *supra* note 74, art. 3; Third Geneva Convention, *supra* note 74, art. 3; Fourth Geneva Convention, *supra* note 74, art. 3; cf. Additional Protocol II, *supra* note 13, art. 1(1).

132. This is evident in the respective lengths of Additional Protocol I, *supra* note 10 (applicable in international armed conflict: 102 provisions), and Additional Protocol II, *supra* note 13 (applicable in non-international armed conflict: 28 provisions).

133. Tomuschat, *supra* note 8, at 815–16.



ary IHL, the ICRC considered that state practice supported a state obligation to make full reparation for the loss or injury caused by violations of IHL in non-international, as well as international, armed conflict.<sup>134</sup> This suggestion is not without ambiguity or controversy.<sup>135</sup> As noted in the study itself, the procedural mechanisms available for enforcement of interstate reparations in international conflicts are not available in non-international armed conflicts.<sup>136</sup> Rather, victims who suffer violations in their own state will generally need to access domestic courts to claim reparation in accordance with domestic law.<sup>137</sup> Moreover, it is generally accepted (including by the ICRC Study) that although IHL is binding on non-state armed groups which are parties to an armed conflict, there is insufficient practice to conclude that armed opposition groups are liable for reparations for violations of IHL.<sup>138</sup> Tomuschat uses this dearth of practice to conclude “that a violation of the rules governing non-international armed conflict does not entail reparation claims in the relationship between the parties to hostilities.”<sup>139</sup> The next Section deals further with the right of individuals to claim reparations or remedies from national governments arising out of either international or non-international conflict.

*a. Individual Rights to Reparations or Remedies*

In order for victims to claim reparations for violations directly from the violating state, international law must confer on individuals secondary rights to reparations, as well as the procedural capacity to enforce them.<sup>140</sup> While some conventions (such as certain human rights treaties) clearly confer remedies that are directly actionable by individuals, in other areas of international law, including IHL, the situation is less clear.<sup>141</sup>

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134. CUSTOMARY IHL STUDY, *supra* note 14, rule 150.

135. Carla Ferstman, *The Right of Reparation for Victims of Armed Conflict*, in *THE GREY ZONE: CIVILIAN PROTECTION BETWEEN HUMAN RIGHTS AND THE LAWS OF WAR* 219 (Mark Lattimer & Philippe Sands eds. 2018). For a critique of the methodology used in the ICRC’s Customary IHL Study more generally, see John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study: Customary International Humanitarian Law*, 89 INT’L REV. RED CROSS 443, 444–48 (2007).

136. CUSTOMARY IHL STUDY, *supra* note 14, rule 150.

137. *Id.*; Tomuschat, *supra* note 8, at 816; *see also infra* Section II.C.2.a., II.C.2.c.

138. CUSTOMARY IHL STUDY, *supra* note 14, rule 150; Tomuschat, *supra* note 8, at 816; Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT’L REV. RED CROSS 175, 196 (2005).

139. Tomuschat, *supra* note 8, at 816.

140. *See e.g.*, Christian Marxsen, *Introduction: The Emergence of an Individual Right to Reparation for Victims of Armed Conflict*, in *REPARATION FOR VICTIMS OF ARMED CONFLICT* 4–5 (Cristián Correa et al. eds., 2020); PROVOST, *supra* note 116, at 16; Schwager, *supra* note 8, at 629 (noting that “a right under international law exists independently of the procedural capacity of the holder of the right to enforce it pursuant to international law”); Andrew Clapham, *The Role of the Individual in International Law*, 21 EUR. J. INT’L L. 25, 27 (2010) (noting that “individuals currently have obligations and rights but no remedies under general international law”).

141. *See* PORTMANN, *supra* note 130, at 277–81.

IHL treaties do not explicitly give individuals the right to reparations for violations of the law.<sup>142</sup> However, international soft law documents, such as the United Nations (UN) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles), assert the right to prompt, effective, and adequate reparations for victims of gross violations of IHRL and serious violations of IHL.<sup>143</sup> They provide:

In accordance with its domestic laws and international legal obligations, a state shall provide reparation to victims for acts or omissions which can be attributed to the state and constitute gross violations of [IHRL] or serious violations of [IHL].<sup>144</sup>

Such reparation is intended to promote justice, and may include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>145</sup> The UN Basic Principles, along with other developments,<sup>146</sup> have led some scholars to argue that a right to individual reparations for violations is grounded in IHL.<sup>147</sup> However, even if this is the case (which is controversial), individuals lack the necessary procedural mechanisms for claiming and enforcing any reparative rights.<sup>148</sup> Most cases before national courts involving individual applications for violations of IHL have ulti-

142. See e.g., Sandoz et al., *supra* note 121, commentary to art. 91.

143. UN Basic Principles, *supra* note 41, Principle 11(b).

144. *Id.* Principle 15.

145. *Id.* Principles 15–23; see also Felix E. Torres, *Reparations: To What End? Developing the State's Positive Duties to Address Socio-Economic Harms in Post-Conflict Settings Through the European Court of Human Rights*, 32 EUR. J. INT'L L. 807 (2021) (discussing the corrective justice, relational justice, and deterrence benefits of judicial remedies).

146. Some point to treaties such as the Rome Statute, *supra* note 29, art. 75, which provides victims of certain violations of international law access to specified mechanisms for claiming reparations and to hybrid *ad hoc* claims commissions, such as the United Nations Compensation Commission and the Eritrea-Ethiopia Claims Commission. The 2005 Report of the International Commission of Inquiry on Darfur also recommended the establishment of avenues for claims by individuals following armed conflict. Gaeta, *supra* note 8, at 320–22; see also Schwager, *The Right to Compensation*, *supra* note 22, at 425–27. For further examples of state practice, see CUSTOMARY IHL STUDY, *supra* note 14, rule 150.

147. See e.g., Fritz Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces*, 40 INT'L COMPAR. L. Q. 827, 835–37 (1991); Fritz Kalshoven, *Article 3 of the Convention (IV) Respecting the Laws and Customs of War on Land, Signed at the Hague, 18 October 1907: Expert Opinion, in WAR AND THE RIGHTS OF INDIVIDUALS: RENAISSANCE OF INDIVIDUAL COMPENSATION* 31–48 (Hisakazu Fujita, Isomi Suzuki, Kantaro Nagano eds., Nippon Hyoron-sha Co. Ltd. 1999); Christopher Greenwood, *Expert Opinion, in WAR AND THE RIGHTS OF INDIVIDUALS: RENAISSANCE OF INDIVIDUAL COMPENSATION* 59–71 (Fujita et al. eds., Nippon Hyoron-sha Co. Ltd. 1999). This argument has been explored in detail elsewhere. See, e.g., Emanuela-Chiara Gillard, *Reparations for Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 529 (2003); Ferstman, *The Right of Reparation for Victims of Armed Conflict*, *supra* note 135; Tomuschat, *supra* note 8; Schwager, *supra* note 8.

148. Tomuschat, *supra* note 8, at 812; PROVOST, *supra* note 116, at 45–49; Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 497, 507 (2003); INTERNATIONAL LAW ASSOCIATION, REPARATION FOR VICTIMS OF ARMED CONFLICT (PROCEDURAL ISSUES), Sofia Conference (2012).

mately been unsuccessful.<sup>149</sup> The *Jurisdictional Immunities* case before the International Court of Justice entrenched this position, holding that reparations claims alleging serious violations of IHL do not deprive a state of its jurisdictional immunity under customary international law.<sup>150</sup> Accordingly, in the context of international armed conflict, individuals are often dependent on states to exercise international rights on their behalf, and may be precluded from claiming, or have their claims offset, by the state.<sup>151</sup> By the same token, victims of violations of IHL in non-international armed conflict are dependent on national laws permitting claims against the government.<sup>152</sup> Therefore, it cannot be said that individuals have a directly enforceable right to individual compensation for violations of IHL under international law.<sup>153</sup> While the ICRC Study on Customary International Humanitarian Law made note of “an increasing trend in favour of enabling individual victims of violations of [IHL] to seek reparation directly from the responsible state,”<sup>154</sup> it did not go so far as to find that a customary right existed, or even was emerging.<sup>155</sup>

The limitations of individual reparations go beyond questions of procedure and enforcement. As explored in detail elsewhere, individual reparations are conceptually limited as a response to victims of armed conflict.<sup>156</sup> As IHL tolerates a significant amount of violence, many suffer in war either directly or indirectly as a result of lawful conduct.<sup>157</sup> However, reparations

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149. See e.g., *X v. Japan* [Tokyo Dist. Ct.] Feb. 25, 2015, 61 Shomu Geppo (9) 1737 (Jap.), translated in Public International Law Judicial Decisions, 59 JAP. Y.B. INT'L L. 463, 473–74 (2016) (finding that as neither Hague Convention Art. 3 nor customary international law entitles individual victims to claim compensation the plaintiffs were not entitled to claim compensation directly from the state); the decision of the Supreme Court of Japan in the “Second Chinese ‘Comfort Women’” case (27 April 2007) discussed in Masahiko Asada & Trevor Ryan, *Post-War Reparations Between Japan and China and the Waiver of Individual Claims: Japan’s Supreme Court Judgments in the Nishimatsu Construction Case and the Second Chinese “Comfort Women” Case*, 19 IT. Y.B. INT'L L. 205, 215 (2009)); see also the decision of the German Supreme Court in Distomo [Sup. Ct.] 2003 42 ILM 1027 (Ger.) discussed in CUSTOMARY IHL STUDY, *supra* note 14, rule 150. For additional cases, see Lucas Bastin, *International Law and the International Court of Justice’s Decision*, in JURISDICTIONAL IMMUNITIES OF THE STATE, 13 MELB. J. INT'L L. 774, 779–80 (2012) (noting that “courts in the UK, Canada, France, Poland, New Zealand and Slovenia [have] ruled that the immunity to which a state is entitled is not withdrawn simply because the allegations concern . . . a serious violation of human rights law or the laws of war”).

150. Jurisdictional Immunities of the State (Ger. v. It.) (*Jurisdictional Immunities case*), Judgment, 2012 I.C.J. Rep. \_\_\_, ¶ 91 (Feb. 3).

151. See Asada & Ryan, *supra* note 149, at 214–16 (discussing the waiver of claims provision under the 1973 Japan-China Joint Communiqué, which precluded a number of individual claims from succeeding). See also SHELTON, *supra* note 119, at 431–32; *Nemariam v. Fed. Dem. Rep. of Eth.*, 491 F.3d 470, 473 (D.C. Cir. 2007) (noting that states may offset the claims of individuals as part of reparations negotiations).

152. See CUSTOMARY IHL STUDY, *supra* note 14, rule 150.

153. E.g., Tomuschat, *supra* note 8, at 812.

154. CUSTOMARY IHL STUDY, *supra* note 14, rule 150.

155. Ferstman, *The Right of Reparation for Victims of Armed Conflict*, *supra* note 135, at 213.

156. See Camins, *Needs or Rights*, *supra* note 18, at 139–41.

157. See *supra* notes 13–17.

under IHL are centered around violations of the law<sup>158</sup> and do not seek to compensate the many victims who suffer as a result of lawful conduct.<sup>159</sup> This leads to a two-tiered system of victimhood in armed conflict, with those injured through unlawful conduct having greater entitlements than those injured through lawful conduct. Such selective awarding of reparations among victims of war gives rise to perceptions of injustice and a significant risk of inflaming social tensions.<sup>160</sup>

In contrast with the lack of procedural mechanisms under IHL, several IHRL treaties explicitly confer rights on individuals seeking remedies for violations.<sup>161</sup> These secondary rights provide avenues for some victims of armed conflict to claim remedies for unlawful conduct within the more individualistic IHRL paradigm.<sup>162</sup> These rights may be invoked before national courts (national law permitting) or international fora, such as the European or Inter-American Court of Human Rights (if jurisdiction and admissibility requirements are met).<sup>163</sup> However, remedies under IHRL will not be available to many victims of armed conflict, due either to the lack of an available forum, limitations in the scope of application,<sup>164</sup> or

158. See, e.g., Additional Protocol I, *supra* note 10, Art. 91; *Lubanga Reparations Decision (Appeals Chamber)*, Case No. ICC-01/04-01/06-3129, ¶¶ 65–69 (Mar. 3, 2015).

159. See, e.g., Ronen, *supra* note 12, at 186.

160. See, e.g., *RSTFV Filing on Reparations (Lubanga)*, ICC-01/04-01/06-3177-Red, Filing on Reparations and Draft Implementation Plan, ¶ 16 (3 November 2015); see also Carla Ferstman, *Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING, 451, n. 25 (Carla Ferstman and Mariana Goetz eds., Brill, 2d. ed., 2019).

161. See, e.g., Convention for the Protection of Human Rights and Fundamental Freedoms art. 34, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights]; Universal Declaration of Human Rights, art. 8, GA Res. 217A (III), UN Doc. A/810 (1948); ICCPR, *supra* note 97, art. 2(3); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter *Convention Against Torture*]; see also Evans, *supra* note 5, at 33–35. Indeed, the United Nations Human Rights Committee has stated that the right to an effective remedy in the case of violations under the ICCPR cannot be subject to lawful derogation. See General Comment No. 29, *supra* note 97.

162. For an overview of relevant cases before the EctHR, see *Armed Conflicts: Cases Concerning the Katyń Massacre during World War II*, EUROPEAN COURT OF HUMAN RIGHTS PRESS UNIT, [https://www.echr.coe.int/Documents/FS\\_Armed\\_conflicts\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Armed_conflicts_ENG.pdf) [<https://perma.cc/9RAS-TSAR>]. Human rights obligations have also been used to form the basis for several national administrative reparations programs, especially in relation to non-international armed conflicts. See *CUSTOMARY IHL STUDY*, *supra* note 14, rule 150.

163. See, e.g., Evans, *supra* note 5, at 57–82. Civil and political rights, such as the right to life, e.g., ICCPR, *supra* note 97, art. 6; European Convention on Human Rights, *supra* note 161, art. 2; the right to be free from arbitrary detention, e.g., ICCPR, *supra* note 97, art. 9; European Convention on Human Rights, *supra* note 161, art. 5; and the right to be free from torture or cruel, inhuman, or degrading treatment; e.g., ICCPR, *supra* note 97, art. 7; Convention against Torture, *supra* note 161, art 2(2); tend to be the most readily applicable rights invoked in respect of harm suffered during armed conflict. For case examples, see generally Evans, *supra* note 5, at 44–85.

164. For example, IHRL has traditionally had limited application in relation to non-state armed groups, though this position may be evolving. See Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 INT'L REV. RED CROSS 491, 502–03 (2006). There are also limitations in relation to extra-territorial application of IHRL. See discussion *supra* note 20.

practical and procedural difficulties in making claims.<sup>165</sup> Enforcement mechanisms under IHRL, while more extensive than under IHL, remain limited, and, in many cases, there is a lack of effective monitoring and follow-up compliance at a national level.<sup>166</sup> Moreover, as Dinah Shelton observes, there are qualitative and quantitative differences between gross and systematic violations and individual cases.<sup>167</sup> In the former situation (often contiguous with non-international armed conflict), “the sheer number of victims and perpetrators may overwhelm the best efforts to provide redress.”<sup>168</sup> Additionally, the available money is usually needed to rebuild national institutions and, due to the overall social context following gross and systematic violations, remedies may have to be adjusted to achieve other goals such as cessation of conflict.<sup>169</sup>

Finally, it is worth noting that some international criminal law regimes facilitate reparations for victims.<sup>170</sup> For example, Article 75(2) of the Rome Statute provides that the International Criminal Court (ICC) may make an order “directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”<sup>171</sup> While the ICC has indeed ordered reparations with respect to victims, for various reasons it has not met the hopes and expectations of many victims and advocates.<sup>172</sup> The reparations regime is limited to victims of crimes for which an accused has been convicted (notwithstanding victim involvement during trials which result in acquittals).<sup>173</sup> The limitations of the legal concept of “victimhood” also result in some seemingly arbitrary distinctions between who is and is not entitled to reparations.<sup>174</sup>

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165. See, e.g., de Greiff, *supra* note 4, ¶ 71; Rubio-Marín & de Greiff, *supra* note 24; see also Luke Moffett et al., *The Limits of the Law: Putting Reparations into Practice*, EJIL TALK! (Jul. 2, 2019), [ejiltalk.org/the-limits-of-the-law-putting-reparations-into-practice/](https://perma.cc/J5M7-VUC8) [https://perma.cc/J5M7-VUC8].

166. Evans, *supra* note 5, at 57 (discussing monitoring); *id.* at 127 (discussing implementation mechanisms).

167. Shelton, *supra* note 119, at 389.

168. *Id.* at 389.

169. *Id.* at 389–90.

170. See, e.g., the Extraordinary Chambers in the Courts of Cambodia Internal Rules (rev.7) as revised on 23 February 2011, rule 23(1) (allowing for only moral and collective reparation against a convicted accused).

171. Rome Statute, *supra* note 29, art. 75(2).

172. See Ferstman, *Reparations at the ICC*, *supra* note 160, at 447–49.

173. See, e.g., Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Final Decision on the Reparations Proceedings, ¶ 11 (Aug. 3, 2018) (noting that even though the accused’s conviction was overturned on appeal and the reparations claims dismissed, the Court supported the RSTFV implementing assistance (as opposed to reparations) in the Central African Republic).

174. For example, in legal proceedings, victims are often divided into those who have suffered harm directly as a result of the unlawful conduct (direct victims), and the immediate family and dependents of direct victims, as well as persons who have suffered harm intervening to assist direct victims (indirect victims). See, e.g., *Lubanga Reparations Decision (Appeals Chamber)*, Case No. ICC-01/04-01/06-3129, ¶ 191 (Mar. 3, 2015); U.N. Basic Principles, *supra* note 41, art. 8. Victimhood often does not include persons harmed further along the line of causation or those who cannot satisfy the criteria for other reasons. See Luke Moffett & Clara Sandoval, *Tilting at Windmills: Reparations and the International Criminal Court*, LEIDEN J. INT’L L. 749, 755–57 (2021) (noting that some victims did not understand why certain people were included and others excluded from reparations).

In addition, delays have been unacceptably lengthy, administrative processes have proven problematic and many victims have been left without reparations altogether.<sup>175</sup> As Carla Ferstman wryly observes of the ICC, “[t]here are many busy and committed people rushing around doing a lot of work on reparations, but not much actual reparation has been achieved, for anyone.”<sup>176</sup> Scholars and judges are also recognizing the broader limitations of international criminal law as a mechanism for reparations, particularly its potential to restore social justice and heal wounds of societies affected by aggression, genocide, war crimes, and crimes against humanity.<sup>177</sup> Indeed, the lack of capacity to adequately deliver reparations has led to calls for the international community to urgently “look beyond the ICC and consider reparations in holistic terms, by strengthening domestic and international developments on redress and reparation mechanisms.”<sup>178</sup>

In sum, most victims of gross violations of IHRL and IHL do not receive any reparation, with the gap between normative progress and implementation being of “scandalous proportions.”<sup>179</sup> This may reflect the practical and economic problems associated with responding to the immense suffering wrought by armed conflict through individualized measures.<sup>180</sup> In any event, the magnitude of the implementation gap should not obscure the conceptual limitations of individual reparations, in particular their incapacity to address victims of the lawful conduct of war.<sup>181</sup> This disparity is one of several limitations associated with a violation-based approach to victims of armed conflict, which has significant value as a potential means of securing legal justice but represents a blunt way of dealing with tense and volatile situations.<sup>182</sup>

### b. Collective Reparations

Recently, there has been a trend towards awarding collective reparations in situations involving large numbers of victims.<sup>183</sup> While there is no conclusive definition,<sup>184</sup> collective reparations refer herein to “the benefits conferred on collectives in order to undo the collective harm that has been

175. See Ferstman, *Reparations at the ICC*, *supra* note 160, at 449.

176. See *id.*

177. See, e.g., Prosecutor v. Bemba Gombo, ICC-01/05-01/08-3636-Anx2, Separate opinion of Judges Van den Wyngaert and Morrison, ¶ 75 (June 8, 2018); Zegveld, *Victims as a Third Party*, *supra* note 38, at 341–42; Moffett & Sandoval, *supra* note 174, at 764–67.

178. Moffett & Sandoval, *supra* note 174, at 766. See ICRC 2011 Report, *supra* note 25, at 16.

179. de Greiff, *supra* note 4, ¶ 81.

180. See, e.g., *Jurisdictional Immunities case*, Judgment, 2012 I.C.J. Rep. \_\_\_\_, ¶ 18 (Feb. 3) (separate opinion by Keith, J.).

181. See *supra* notes 156–160. On the moral concerns raised by the absence of an obligation to provide redress to victims of incidental losses, see Ronen, *supra* note 12, at 186; Paul, *supra* note 12, at 106–15.

182. See, e.g., Moffett & Sandoval, *supra* note 174, at 752; Torres, *supra* note 145, at 825, 834.

183. See DIANA ODIER-CONTRERAS GARDUNO, COLLECTIVE REPARATIONS: TENSIONS AND DILEMMAS BETWEEN COLLECTIVE REPARATIONS AND THE INDIVIDUAL RIGHT TO RECEIVE REPARATIONS 4 (2018).

184. See, e.g., *id.* at 23.

caused as a consequence of a violation of international law.”<sup>185</sup> Collective reparations may arise either as part of national administrative reparations programs following mass violence, or as part of a juridical response to violations of international law, particularly in the ICC context.<sup>186</sup> Collective reparations are necessarily contextual. Examples include the construction of schools or hospitals; the establishment of memorials; the renaming of streets;<sup>187</sup> and support for housing, income-generating activities, education aid, and psychological assistance.<sup>188</sup> As Friedrich Rosenfeld notes, collective reparations are “not limited to undoing the immediate effects of the harm suffered. Rather, [they] also [contribute] to the long-term goal of building up peaceful post-conflict societies.”<sup>189</sup>

Despite recent awards in the ICC,<sup>190</sup> and limited practice in other tribunals such as the Inter-American Court of Human Rights (IACtHR),<sup>191</sup> collective reparations have little grounding in treaty law and cannot be said to represent an enforceable right under customary international law.<sup>192</sup> In any case, collective reparations in the judicial context remain inextricably tied to violations of the law applicable during armed conflict.<sup>193</sup> Not only does this limit the personal scope of collective reparations, it also requires the potentially lengthy and costly process of establishing that a violation occurred in order to trigger their application. This often creates an insurmountable hurdle for people seeking reparations.<sup>194</sup>

185. Rosenfeld, *supra* note 8, at 732. For a comprehensive definition, see GARDUNO, *supra* note 183, at 17, 24.

186. See, e.g., GARDUNO, *supra* note 183, at 30. The ICC may award reparations on a collective basis where the number of victims and the scope, forms and modalities of reparations make it more appropriate to do so. ICC Rules of Procedure and Evidence, *supra* note 41, rule 97(1) and 98(3); Lubanga Reparations Decision (Appeals Chamber), Case No. ICC-01/04-01/06-3129, Judgment on Appeals, ¶¶ 147–51 (Mar. 3, 2015).

187. Rosenfeld, *supra* note 8, at 733.

188. Prosecutor v. Germain Katanga, ICC-01/04-01/07, Order for Reparations Pursuant to Art. 75 of the Statute, ¶ 304 (Mar. 24, 2017), *aff'd*, *Katanga Reparations Order (Trial Chamber II)*, ICC-01/04-01/07, Judgment on Appeal Against Order of the Trial Chamber II, (Mar. 8, 2018).

189. Rosenfeld, *supra* note 8, at 745; see, e.g., Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 THOMAS JEFFERSON L. REV. 189, 212 (2007).

190. See, e.g., *Katanga Reparations Order (Trial Chamber II)*, ICC-01/04-01/07, ¶ 118–20.

191. See, e.g., *Pueblo Bello Massacre v. Colombia*, Inter-Am. Ct. H.R., Ser. C, No. 140, ¶¶ 265–79 (January 31, 2006) (ordering Colombia to guarantee the security of inhabitants returning to Pueblo Bello and to erect a monument recalling the facts of the massacre. Additional measures, including an obligation to provide collective psychological care if appropriate, were ordered in respect of the next of kin of the victims of the massacre); *Aloeboetoe v. Suriname*, Inter-Am. Comm'n H.R., Ser. C, No. 15, Judgment (Reparations), ¶ 96 (Sep. 10, 1993) (finding that as part of the compensation due, Suriname was required to reopen a school and medical dispensary at Gujaba to provide for education and basic medical needs of the local children).

192. See GARDUNO, *supra* note 183 at 13; Rosenfeld, *supra* note 8, at 738, 742.

193. Such orders “are intrinsically linked to the individual whose criminal liability is established in a conviction . . .” *Lubanga Reparations Decision (Appeals Chamber)*, Case No. ICC-01/04-01/06-3129, ¶ 151; see also *id.* ¶ 212 (noting there must also be a “sufficient causal link between the harm suffered by members of that community and the crimes of which [the accused] was found guilty”, and the Court must specify the scope of the convicted person’s liability for reparations in respect of a community); GARDUNO, *supra* note 183, at 24; Rosenfeld, *supra* note 8, at 734.

194. See de Greiff, *supra* note 4, ¶ 71.

*c. Administrative Reparations Programs*

Reparation measures, whether individual or collective, may arise as part of administrative reparations programs established under national law.<sup>195</sup> In the context of mass violence, administrative reparations programs at their best offer “faster results, lower costs, relaxed standards of evidence, non-adversarial procedures and a higher likelihood of receiving benefits” than judicial procedures.<sup>196</sup> There is, moreover, some flexibility around the form of administrative reparations programs, including the opportunity to include assistance measures that are not reliant on violations of the applicable law.<sup>197</sup>

Despite their potential advantages, however, administrative reparations programs face many challenges. Governments are very reluctant to establish such programs,<sup>198</sup> which are often “framed as a political negotiation in relation to scarce resources, rather than something that should comply with overarching legal standards.”<sup>199</sup> Where they are established, program quality varies considerably.<sup>200</sup> In some cases, *ad hoc* commissions have recommended reparations for victims of legal violations, but implementation of recommendations has fallen short or been unacceptably delayed.<sup>201</sup> Moreover, despite their potential flexibility, administrative reparations programs tend to remain tied to violations of the law,<sup>202</sup> excluding victims of lawful conduct. As discussed below, the creation of a VA obligation might avoid some of these limitations by shifting the focus from violations to needs,

195. See, e.g., de Greiff, *Justice and Reparations*, *supra* note 44, at 453.

196. de Greiff, *supra* note 4, ¶ 4.

197. See, e.g., U.N. Basic Principles, *supra* note 41, ¶ 16 (providing that “States should endeavour to establish national programmes for reparation *and other assistance* to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations” (emphasis added)); see also Theo van Boven, *Preface to OUT OF THE ASHES: REPARATIONS FOR GROSS VIOLATIONS OF HUMAN RIGHTS* (Koen de Feyter, R.S. Parmentier, M. Bossuyt and P. Lemmens eds., Intersentia 2006), vii (noting that the judicial and non-judicial approaches should “interact in a complementary fashion for the reparation and other assistance of victims”).

198. de Greiff, *supra* note 4, ¶ 48.

199. REDRESS, *supra* note 38, at 7 (noting the need for guidance in the application of minimum standards); see de Greiff, *supra* note 4, ¶ 13 (noting that inaction is often attributed to a lack of resources, but lack of political will might be a stronger factor).

200. See, e.g., REDRESS, *supra* note 38, at 7; de Greiff, *supra* note 4, ¶ 87 (expressing alarm at the failure of several programs to provide adequate, effective and prompt reparation).

201. See, e.g., Evans, *supra* note 5, at 152–63 (in relation to Guatemala), 166–84 (in relation to Sierra Leone), 202 (in relation to East Timor).

202. OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., *supra* note 45, at 19; see also Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission (Vol 2)*, 234 (2004) (“A person is a ‘victim’ where as a result of acts or omissions that constitute a violation of international human rights and humanitarian law norms, that person, individually or collectively, suffered harm . . . .”); cf. S.C. Res. 687, ¶ 16 (Apr. 3, 1991) (addressing harm resulting from the unlawful nature of the Iraqi invasion of Kuwait).



sharing the responsibility more widely, and creating an implementation and oversight framework.<sup>203</sup>

### 3. *Ex Gratia Amends*

More recently, the emerging state practice of making amends to victims of conflict in foreign states has been a focus of scholarly attention and international advocacy.<sup>204</sup> Amends involve voluntary payments or other measures offered by an injuring state under national legislation to express sympathy to civilians injured or killed in armed conflict, with no need to demonstrate unlawful conduct.<sup>205</sup> This is potentially a valuable contribution to victims harmed in the course of armed conflict; amends programs recognize human dignity, acknowledge the role of the military in causing harm, and may help foreign militaries win the hearts and minds of local populations.<sup>206</sup> However, amends are not obligatory and states have resisted efforts to make such payments required under international law.<sup>207</sup> They also have limited application in internal armed conflicts that do not involve foreign governments.<sup>208</sup> Moreover, in order to be successful, amends demand a level of sensitivity to victims' needs and personalization that foreign military forces might find difficult to implement.<sup>209</sup> Finally, amends remain an individualized modality to an issue that also necessitates a broader community, national, and international response.<sup>210</sup>

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203. Victim assistance measures could also apply alongside reparations in administrative programs. See UN Basic Principles, *supra* note 41, principle 16; van Boven, *supra* note 198, vii. See generally *infra* Part IV.

204. For examples of scholarship addressing the making of amends, see Wexler & Robbenolt, *supra* note 73; Bruce Oswald & Bethany Wellington, *Reparations for Violations in Armed Conflict and the Emerging Practice of Making Amends*, in ROUTLEDGE HANDBOOK OF THE LAW OF ARMED CONFLICT 520–37 (Rain Liivoja & Timothy L. H. McCormack eds., Routledge, 2016); CHARLI CARPENTER, LOST CAUSES: AGENDA VETTING IN GLOBAL ISSUE NETWORKS AND THE SHAPING OF HUMAN SECURITY, ch. 4 (Cornell University Press, 2014) (on the work of the Centre for Civilians in Armed Conflict (CIVIC)); Paul, *supra* note 12; W. Michael Reisman, *The Lessons of Qana*, 22 YALE J. INT'L L. 381, 397–98 (1997); Alexandra Lian Fowler, *State-Based Compensation for Victims of Armed Conflict: Recent Developments in Practice, 192–94* (2018) (Doctor of Juridical Studies thesis, University of Sydney) (on file with University of Sydney).

205. See Wexler & Robbenolt, *supra* note 73, at 129, 149. The Australian Defence Act 1903, for example, empowers the Defence Minister to authorize tactical payments to a foreign citizen who has suffered loss or injury because of an incident that occurs outside Australia in the course of Defence Force activities, even though the payments would not otherwise be authorized or required by law. Defence Act 1903, § 123H, 123J (Austl.). Similar provisions have been adopted in several states worldwide. See, e.g., Wexler & Robbenolt, *supra* note 73; Oswald & Wellington, *supra* note 205, at 535.

206. See, e.g., Wexler & Robbenolt, *supra* note 73, at 149–67.

207. CARPENTER, *supra* note 205, ch. 4; Wexler & Robbenolt, *supra* note 73, at 169.

208. For a discussion on the types of conflicts that tend to attract *ex gratia* payments, see Ronen, *supra* note 12, at 215–16; cf. Oswald & Wellington, *supra* note 205, at 536 (noting examples of states paying amends to their own citizens).

209. On the need for sensitivity and personalization, see Wexler & Robbenolt, *supra* note 73, at 159, 170.

210. On the need for community-based measures, also see *infra* note 255.

#### 4. *Victim Assistance Regimes*

Various disarmament treaties, including the Ottawa Convention, Protocol V on Explosive Remnants of War, the CCM, and the TPNW, include a provision requiring varying degrees of assistance to victims of the regulated weapons.<sup>211</sup> These provisions (which form the basis for the proposal in Part IV) require states parties to provide assistance for the care and rehabilitation, and social and economic inclusion, of victims within their jurisdiction or control.<sup>212</sup> They also require states parties to contribute to the implementation of the assistance obligation in other states, and indicate potential avenues for the provision of such support, including through the UN system or the ICRC.<sup>213</sup> These VA regimes represent a promising trajectory in disarmament law towards a victim-centric response.<sup>214</sup> They remain limited, however, to victims of banned weapons and affected communities.<sup>215</sup> The proposal in Part IV suggests expanding the VA obligation to victims of armed conflict more broadly.

#### 5. *Trust Funds and Other Assistance Mandates*

Some international trust funds, including the UN Voluntary Trust Fund on Contemporary Forms of Slavery,<sup>216</sup> the UN Trust Fund to End Violence

211. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, preamble, ¶ 3, art. 6(3), Sep. 18, 1997, ATS 3 [hereinafter Ottawa Convention]; Protocol on Explosive Remnants of War art. 8(2), Nov. 28, 2003, 2399 U.N.T.S. 100 [hereinafter Protocol V on Explosive Remnants of War]. The VA provision in the CCM draws heavily on the Convention on the Rights of Persons with Disabilities (CRPD), and the CRPD reinforces many provisions of the CCM. See ALEXANDER BREITEGGER, CLUSTER MUNITIONS AND INTERNATIONAL LAW: DISARMAMENT WITH A HUMAN FACE? 108–15 (Taylor and Francis, 2011); Convention on the Rights of Persons with Disabilities arts. 3, 4(1), Mar. 30, 2007, 2515 U.N.T.S. 3 [hereinafter CRPD] (obliging states to promote the full realization of human rights through legislative and other measures, including awareness-raising and fostering respect for the rights of persons with disabilities); see also Optional Protocol to the Convention on the Rights of Persons with Disabilities, May 3, 2008, 2518 U.N.T.S. 283 (establishing an individual complaints procedure); see generally Bonnie Docherty & Alicia Sanders-Zakre, *The Origins and Influence of Victim Assistance: Contributions of the Mine Ban Treaty, Convention on the Rights of Persons with Disabilities and Convention on Cluster Munitions*, 105 INT'L REV. OF THE RED CROSS 252 (2023) (discussing the role of civil society, and particularly survivors' groups, on the adoption of the titular treaties).

212. E.g., CCM, *supra* note 30, art. 5(1).

213. Ottawa Convention, *supra* note 212, art. 6(3); Protocol V on Explosive Remnants of War, *supra* note 212, art. 8(2), 8(3), 8(6), 8(7).

214. See, e.g., Emily Camins, *Addressing Victim Suffering under Disarmament Law: Rights, Reparations and Humanising Trends in International Law*, in DISARMAMENT LAW 128–29 (Treaa Dunworth & Anna Hood eds., Routledge, 2020).

215. See, e.g., CCM, *supra* note 30, arts. 2(1), 5(2)(e) (prohibiting discrimination between cluster munition victims and those who have suffered injuries or disabilities from other causes).

216. Established by the General Assembly, *United Nations Voluntary Trust Fund on Contemporary Forms of Slavery*, GA Res. 46/122, UN Doc. A/RES/46/122 (Dec. 17, 1991); see also Office of the UN High Commissioner for Human Rights, *The United Nations Voluntary Trust Fund on Contemporary Forms of Slavery*, 4–11 (2005), <https://www.ohchr.org/Documents/Publications/UNVFSpublicationsen.pdf> [<https://perma.cc/WCG9-SAPM>].

against Women,<sup>217</sup> the Fund for the Protection of Cultural Property in the Event of Armed Conflict,<sup>218</sup> NATO's Protection of Civilians Handbook,<sup>219</sup> and the Trust Fund for Victims established under the Rome Statute (RSTFV),<sup>220</sup> among others,<sup>221</sup> mandate assistance to victims within their scope. Private funds, such as the Global Survivors Fund for survivors of conflict-related sexual violence, also aim to ensure access to reparations or redress for victims.<sup>222</sup> While there is some variation in how these funds operate, most work in partnership with local or international intermediary organizations to provide, or improve access to, assistance services to victims.<sup>223</sup> While victims under these trust funds may also be survivors of

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217. Established by the General Assembly, *The Role of the United Nations Development Fund for Women in Eliminating Violence Against Women*, GA Res. 50/166, UN Doc. A/RES/50/166 (Feb. 16, 1996); see also UN Women, *UN Trust Fund to End Violence against Women*, <http://www.unwomen.org/en/trust-funds/un-trust-fund-to-end-violence-against-women>, [https://perma.cc/7Q7R-HG5V].

218. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 29, 26 March 1999.

219. *Protection of Civilians ACO Handbook*, NATO 28–29 (2019), <https://shape.nato.int/resources/3/website/ACO-Protection-of-Civilians-Handbook.pdf> [https://perma.cc/TR7V-FPP8].

220. Rome Statute, *supra* note 29, art. 79. The RSTFV is mandated to provide physical and psychological rehabilitation and material support in situations before the ICC, without the need for a reparations order against a convicted person. See, e.g., ICC Rules of Procedure and Evidence, *supra* note 41, rule 98(5) (which permits the use of resources for the benefit of victims); Regulations of the Trust Fund for Victims, *supra* note 35, regs 48, 50(1); see also Trust Fund for Victims, *Programme Progress Report 2015: Assistance & Reparations—Achievements, Lessons Learned, and Transitioning*, 10, <https://www.legal-tools.org/doc/370265/pdf>, [https://perma.cc/PWF8-AM73] (noting this mandate complements the accountability-based reparations mandate and, because it is able to reach a much wider population in a timelier manner, is considered crucial for helping to repair the harm that victims have suffered). For an excellent overview of how the RSTFV's assistance mandate is operationalized, and its strengths and limitations, see Anne Dutton & Fionnuala Ní Aoláin, *Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate*, 19(2) CHICAGO J INT'L L. 490 (2019); Ferstman, *Reparations at the ICC*, *supra* note 160, at 464–67. Neither the TPNW nor the CCM establishes a specific trust fund for victims, rather encouraging states parties to contribute to such organizations as the UN and the ICRC, or to relevant trust funds, in order to facilitate the provision of VA. CCM, *supra* note 30, art. 6(7), 6(9); TPNW *supra* note 34, art. 7(5).

221. See, e.g., The U.N. Voluntary Fund for Victims of Torture; U.N. Trust Fund for Human Security; the Voluntary Trust Fund for Victims of Chemical Weapons; and the ILO's technical assistance program (which has been implemented in relation to children soldiers, for example in relation to Yemen). See International Labour Committee, *Individual Case Discussion: 2014*, Conclusions, 103rd ILC session, Worst Forms of Child Labour Convention, 1999, No. 182–Yemen (2014).

222. The Mukwege Foundation and Nadia's Initiative, *Global Survivors Fund: Concept Paper*, 4–8 (Oct. 2019) <https://www.globalsurvivorsfund.org> [https://perma.cc/F87N-B9VJ]. Another example is the Japan-China Future Peace Fund for victims of chemical weapons. See *New Fund to Help Chinese Victims of Biochemical Weapons Left Behind by Japan*, BBC MONITORING ASIA-PACIFIC (London), Aug. 14, 2015.

223. See, e.g., Trust Fund for Victims, *Programme Progress Report 2015*, *supra* note 221, at 11 (noting that the RSTFV works in partnership with victims, their communities and local and international intermediary organizations to provide assistance services); Office of the UN High Commissioner for Human Rights, *The United Nations Voluntary Trust Fund on Contemporary Forms of Slavery*, *supra* note 217, at 5 (noting that the UN Voluntary Trust Fund on Contemporary Forms of Slavery works with and funds NGOs, often operating at the grass-roots, to assist large numbers of victims directly); see also UN Women, *UN Trust Fund to End Violence against Women*, *supra* note 218 (noting the UN Trust Fund to End Violence against Women works with civil society organizations to “improve access to services, such as legal assistance, psychosocial counselling, and health care, by increasing the capacity of service providers to respond effectively to the needs of women and girls affected by violence”).

war, the regimes are limited in personal or geographical<sup>224</sup> scope (or both), generally not mandated under international law, and for the most part not specially adapted to victims of armed conflict.

The ICRC also provides assistance, with the aim “to preserve life and/or restore the dignity of individuals or communities adversely affected by armed conflict or other situations of violence.”<sup>225</sup> Article 5(2)(d) of the Statutes of the International Red Cross and Red Crescent Movement provides that the role of the ICRC includes “to endeavour . . . to ensure the protection of and assistance to military and civilian victims of [international and other armed conflicts or internal strife] and of their direct results.”<sup>226</sup> In such situations, the ICRC provides a wide-ranging set of “core” activities, including supply of drinking water, waste management, energy supply for key installations, distribution of food rations, revival of small trades and handicrafts, support for victims of sexual violence, and physical rehabilitation programs.<sup>227</sup> In accordance with the ICRC’s humanitarian relief mandate under IHL,<sup>228</sup> this role applies primarily in crisis situations, though the ICRC “shoulders its residual responsibilities” in post-crisis situations.<sup>229</sup> Accordingly, while such measures are of critical importance, they are directed first and foremost towards active conflict situations and do not oblige states to undertake or accept assistance measures post-conflict.<sup>230</sup> The VA model proposed in Part IV would provide a legal framework to support many such measures, and expand the obligations of states to meet key needs of victims following armed conflict.

224. The RSTFV is currently providing assistance activities in the following ICC situation countries: Democratic Republic of the Congo; Uganda; and Central African Republic. Trust Fund for Victims, *Assistance Programmes*, <https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes> [<https://perma.cc/2GUY-5GEH>].

225. ICRC, *The ICRC: Its Mission and Work*, 15 (Mar. 2009) [https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0963.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0963.pdf) [<https://perma.cc/6JRT-PGG7>].

226. Statutes of the International Red Cross and Red Crescent Movement, art. 5(2)(d), 5th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006. The term “direct results of a conflict” applies to “situations in which general restoration of peace has been achieved . . . but victims remain in need of relief during the post-conflict period, especially within the context of reconstruction and rehabilitation programmes.” Seville Agreement on the Organization of the International Activities of the Components of the International Red Cross and Red Crescent Movement, 5.1(A)(c) (adopted by consensus in Res. 6 of the Council of Delegates in Seville, Spain, Nov. 26, 1997), <https://casebook.icrc.org/case-study/seville-agreement> [<https://perma.cc/H8LR-U9XV>].

227. ICRC, *Assistance Policy*, 86 INT’L REV. RED CROSS 677, 687 (2004); see also *supra* note 226.

228. See, e.g., Fourth Geneva Convention, *supra* note 74, arts. 59–63; Additional Protocol I, *supra* note 10, arts. 68–71; Additional Protocol II, *supra* note 13, art. 18.

229. ICRC, *Assistance Policy*, *supra* note 228, at 689. Some have cautioned the ICRC against “mission creep” by further diversifying its activities beyond its role in conflict and violence. See, e.g., Matthias Schmale, *Reflections on the ICRC’s Present and Future Role in Addressing Humanitarian Crises*, 94 INT’L REV. RED CROSS 1263, 1266–67 (2012).

230. On the related issue of humanitarian relief during armed conflict, see Additional Protocol I, *supra* note 10, arts. 17, 70; Additional Protocol II, *supra* note 13, art. 18; see also ICRC, *Report on International humanitarian law and the challenges of contemporary armed conflicts, prepared for the 32nd International Conference of the Red Cross and Red Crescent*, 26, No. 32IC/15/11 (Geneva, Switzerland, Dec. 8–10, 2015) (noting that ensuring humanitarian access remains a significant challenge).

*D. Summary: Shortcomings of Current Approaches*

At present, most international legal approaches to victims of armed conflict reflect an understanding of responsibility grounded in violations of the applicable law.<sup>231</sup> This has two major consequences. First, legal responses are mostly retrospective, and largely limited to responding to the conduct of the war. For example, reparations—whether interstate, individual, or collective—are inextricably linked to violations of the law. This results in the exclusion of those harmed through lawful conduct altogether and can create insurmountable evidentiary and procedural burdens for those entitled to reparations for violations. Not only is this selectiveness morally problematic, it can also lead to tensions and conflict among survivors. Focusing on legal violations also means that potentially advantageous humanitarian responses that are not based on breaches of the law, such as VA and trust fund regimes, may be overlooked as prospective legal responses. Reluctance to acknowledge violations of the law for political reasons may also preclude some states from establishing reparations programs. In short, the law's focus on violations results in a backward-looking approach that does not address the harm to most victims of armed conflict.

A second consequence of grounding legal responses in violations of the law is that responsibility to redress harm falls almost exclusively to the injuring state. In post-conflict situations, this can place an insurmountable burden on already-fragile states, or at least justify claims of scarce resources to preclude action such as administrative reparations programs. Ultimately, victims are the ones who will suffer if the injuring state is unable to meet its obligations following armed conflict. Limiting states' obligation to responsibility for violations constrains the capacity of international law to respond more comprehensively to the harm to victims of armed conflict.

## II. IDENTIFYING AND BRIDGING FAULT LINES

The question that arises in light of these deficiencies is whether, and if so, how, international law ought to be developed to address the needs of victims of war. Answering this question requires considering the values and motivation behind international law, not only as it is, but also as it should be. As a preface to the proposal in Part IV, this Part sets out reasons to expand beyond a legal response based primarily on responsibility for past violations towards a more comprehensive and future-focused approach. There are two conceptual shifts which could help bridge the fault lines between these responses: the importance both of connecting war with peace, and of separating obligation from legal violations.

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231. See, e.g., *ARSIWA*, *supra* note 122, art. 1.

### A. Connecting War With Peace

The present international legal response, with its focus on legal violations, fails to adequately account for the importance of effective post-conflict measures for the short-, medium-, and long-term peace of afflicted societies. While IHRL provides a framework for longer-term development and peacebuilding, and IHL protects basic humanitarian needs during conflict, there remains a gap in measures to assist victims in the transitional space between war and peace. As the maintenance (and reestablishment) of peace represents a key purpose of international law,<sup>232</sup> international law should address this deficiency.

Armed conflict gives rise to a complex and distinct set of needs, which arise when the structures and institutions that protect people and address these needs during peacetime are likely to be substantially weakened and functioning poorly.<sup>233</sup> This failure to meet victims' needs risks further perpetuating and spreading conflict.<sup>234</sup> In order to maintain and reestablish peace, post-conflict legal measures should have an eye on the future.<sup>235</sup> This involves expanding the focus of the law beyond responsibility for past violations to include the needs of communities, in order to enable them to transition towards a just and lasting peace.<sup>236</sup> Larry May, contemporary scholar of philosophy, law, and conflict, argues that in order to achieve a just and lasting peace, transitional justice must pursue an alternative to the current model of compensation.<sup>237</sup> He argues that "collateral" casualties of war ought to receive compensation for their suffering, "especially in cases where such compensation also advances the goal of reconciliation."<sup>238</sup> The high numbers of civilians harmed during modern conflict<sup>239</sup> renders addressing victims' harms of particular importance in transitioning towards peace. For

232. See, e.g., U.N. Charter, *supra* note 37, art. 1(1); see also Bailliet, *supra* note 37.

233. On the weakness of institutions post-conflict, see Int'l Lab. Org., *Employment and Decent Work in the Humanitarian-Development-Peace Nexus*, *supra* note 117, at 8–9.

234. See Obamamoye, *supra* note 6; see also Sirianne Dahlum et al., *The Conflict–Inequality Trap: How Internal Armed Conflict Affects Horizontal Inequality: Background Paper No 2-2019*, UNDP, at 23 (2019), <https://hdr.undp.org/system/files/documents/hdr19bpconflictinequalitytrapfinalpdf.pdf> [<https://perma.cc/9R7W-ZGW4>] (noting that war exacerbates horizontal inequality, which is a driver of conflict and mobilization for war).

235. See Ruti Teitel, *Rethinking Jus Post Bellum in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May*, 24 EUR. J. INT'L L. 335 at 335–36 (2013). On the historical importance of restoring peace following conflict, see A.C. Boyd, *Wheaton's Elements of International Law*, 706, § 544 (Stevens, 1889) (arguing that the effect of the treaty of peace is to "bury in oblivion" contested issues between the warring parties); see also EMER DE Vattel, *THE LAW OF NATIONS* (1758), tr Esq. Joseph Chitty (Vol II), Book IV, ch. II, §18–21, 437–38 (T and J W Johnson, 1852).

236. This may be distinguished from the mere absence of armed conflict or physical violence. For an overview of the complexities of defining peace, see ENCYCLOPEDIA OF VIOLENCE, PEACE, AND CONFLICT xxi (Lester R. Kurtz ed., 2d ed. 2008). On the often-protracted nature of contemporary conflict, see *infra* notes 379–380.

237. May, *supra* note 37, at 45.

238. *Id.* at 48.

239. See generally United Nations Secretary-General, *Report to the Security Council on Protection of Civilians in Armed Conflict*, U.N. Doc. S/2022/381 (May 10, 2022).

May and others, redressing all victims of war is important to achieve a just and lasting peace.<sup>240</sup>

A victim-oriented response to post-conflict redress would focus not only on violations of the law, but also on victims' needs.<sup>241</sup> IHL is guided by overarching notions of humanity, which temper the demands of military necessity.<sup>242</sup> As explored elsewhere, the humanitarian principles which drive the development of IHL would likewise impel an impartial response based not on technical violations of the law, but rather on ameliorating human suffering and higher notions of equitable justice.<sup>243</sup> Humanitarianism encompasses a broader approach than strict notions of legal justice—as embodied in responses founded on violations of the law—would demand.<sup>244</sup> This broader response to the pain of victims is important because IHL's considerations of military necessity tolerates a significant degree of suffering.<sup>245</sup> As judicial reparations are based on violations of the law, they are unable to respond to the majority of those harmed in conflict,<sup>246</sup> resulting in a two-tiered system for categorizing and prioritizing victims. By contrast, a sensitive, victim-oriented response, which includes victims of lawful as well as unlawful conduct, would limit division.<sup>247</sup> As the ICC in *Lubanga* found, the meaningfulness of a reparations program may depend on the inclusion not only of victims of unlawful conduct, but also of other members of affected communities.<sup>248</sup>

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240. May, *supra* note 37 at 48; see CÉCILE FABRE, *COSMOPOLITAN PEACE* (2016) (suggesting the need for an expansion beyond justice as the primary goal, not disputing the continued importance of justice to the establishment of peace).

241. See, e.g., Camins, *supra* note 18; see also May, *supra* note 37, at 48 (discussing the limits of a narrow conception of justice).

242. See, e.g., Jacques Meurant, *Inter Arma Caritas: Evolution and Nature of International Humanitarian Law*, 24 J. PEACE RSCH. 237 (1987); Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. OF INT'L L. 795, 798 (2010).

243. See Jean Pictet, *The Principles of International Humanitarian Law*, 6(66) INT'L REV. OF THE RED CROSS 455, 468 (1966) (describing humanitarianism as involving a higher form of equitable justice, which would give to each “what he [or she] is lacking,” and involve “repairing the aberrations of fate”); see also Camins, *supra* note 18, at 133–35.

244. See Pictet, *supra* note 243. See also May, *supra* note 37, at 48.

245. See Jochnick & Normand, *supra* note 9; cf. Durham, *supra* note 85.

246. Paul, *supra* note 12; Camins, *supra* note 18.

247. See *Lubanga Reparations Decision (Appeals Chamber)*, Case No. ICC-01/04-01/06-3129, Judgment on Appeals, ¶ 215 (Mar. 3, 2015) (noting, *inter alia*, the RSTFV's submission that “[p]rinciples of non-discrimination, doing no/less harm and aiming at reconciliation . . . necessarily and genuinely need to include broader communities,” and therefore directing the Board of Directors of the RSTFV “to consider . . . the possibility of including members of the affected communities in the assistance programmes operating in the situation area in the DRC, where such persons do not meet the . . . criteria [of eligibility for reparations]”); Rubio-Marín & de Greiff, *supra* note 24, at 333.

248. While awards of reparations, both individual and collective, were limited to victims of Lubanga's crimes, the Court “[took] note of” the submission of the Trust Fund that “[p]rinciples of non-discrimination, doing no/less harm and aiming at reconciliation, measures that include education on the root and underlying causes of the conflict, background of crimes and conflict, as well as measures that aim at guaranteeing non-repetition of the crimes, necessarily and genuinely need to include broader communities.” *Lubanga Reparations Decision (Appeals Chamber)*, Case No. ICC-01/04-01/06-3129, ¶ 215. The Court found it may be appropriate for the Trust Fund to provide assistance programs to community members who do not meet the technical definition of victims. In its submission to the ICC

Providing a safety net for victims who are not entitled or able to access violation-based forms of redress following armed conflict is an important step to address social tensions and move towards peace. To this end, experts in post-conflict redress have identified several key measures to alleviate the harm suffered by victims of armed conflict.<sup>249</sup> The International Conference of the Red Cross and Red Crescent has formally acknowledged some of these factors as areas requiring development.<sup>250</sup> These measures may be broadly summarized as: (i) physical rehabilitation for those who have suffered sexual or gender-based violence or other types of physical injury;<sup>251</sup> (ii) psychological rehabilitation to address the “psychological consequences and trauma arising from war, conflict, sexual violence, and other crimes”;<sup>252</sup> and (iii) material support to “improve the economic status of victim survivors through education, economic development, rebuilding of community infrastructure, and creation of employment opportunities.”<sup>253</sup> Such measures should be sensitively designed<sup>254</sup> and incorporate a community or collective dimension “to reduce stigmatization of victim survivors and promote a greater sense of trust, shared responsibility, and peaceful coexistence among community members.”<sup>255</sup> A legal model that promotes the sensitive provision of medical and psychological care, as well as social and economic inclusion, for victims of armed conflict would help communities transition from war to peace.

### B. *Disconnecting the Obligation to Address Harm from Legal Violations*

As discussed above, the present reparative responses leave many victims with their needs unmet. One reason for this is that impugned states are

on implementation in the *Lubanga* case, the RSTFV argued: “[r]eparations should not contribute to the creation of further harm, neither for the victims themselves, nor for the society in which they live. . . . Moreover . . . reparations should not be divisive and should not trigger additional stigma, discrimination, conflict and violence.” See *RSTFV Filing on Reparations (Lubanga)*, ICC-01/04-01/06-3177-Red, Filing on Reparations and Draft Implementation Plan, ¶ 16 (3 November 2015).

249. See Trust Fund for Victims, *Programme Progress Report 2015*, *supra* note 220, at 11; Rubio-Marín & de Greiff, *supra* note 24, at 331–33; de Greiff, *supra* note 4, ¶ 35; CHICAGO PRINCIPLES, *supra* note 40, at 47 (providing that states should provide victims of violations such rehabilitative support as medical and psychological care, social services, education, job training, and legal assistance).

250. See, e.g., Resolution Addressing Mental Health and Psychosocial Needs, *supra* note 17.

251. Trust Fund for Victims, *Programme Progress Report 2015*, *supra* note 220, at 11; see also de Greiff, *supra* note 4, ¶ 35 (discussing the importance and efficacy of medical and psychiatric care).

252. Trust Fund for Victims, *Programme Progress Report 2015*, *supra* note 220, at 11.

253. See *id.*; see also *RSTFV Filing on Reparations (Lubanga)*, ICC-01/04-01/06-3177-Red, ¶ 68–70 (noting four categories of remedies required to alleviate the harms suffered: (i) measures aimed at restoring the physical and psychological health of victims; (ii) their schooling, both through formal and informal education; (iii) measures aimed at socio-economic development and fostering employment, including vocational training; and (iv) measures aimed at community reconciliation); Rubio-Marín & de Greiff, *supra* note 24, at 331–33 (noting that material support in the form of rehabilitation and reintegration, along with economic empowerment measures, are particularly important for women post-conflict).

254. See CHICAGO PRINCIPLES, *supra* note 40, at 24, 44 (principle 3).

255. Trust Fund for Victims, *Programme Progress Report 2015*, *supra* note 220, at 11; see also Dutton & Ní Aoláin, *supra* note 220, at 508–09 (on the importance of communal responses).



unwilling to accept responsibility for unlawful conduct, and/or are unwilling or unable to fund such reparations.<sup>256</sup> As a preface to proposing the expanded use of VA models, this Section argues that responsibility should not be confined to the actors who directly caused the harm, and the international community has a moral obligation to assist affected people to transition effectively out of conflict. This is grounded on two duties that are discussed below: first, the moral obligation to assist those in need; and second, broader obligations to ensure international peace and security. Each of these notions detaches the obligation to assist victims from responsibility for violation of law.

The idea that states have a moral duty to aid other states, at least insofar as circumstances allow, has a long pedigree.<sup>257</sup> Emer de Vattel stated:

[O]ne state owes to another state whatever it owes to itself, so far as that other stands in real need of its assistance, and the former can grant it without neglecting the duties it owes to itself. *Such is the eternal and immutable law of nature.*<sup>258</sup>

Vattel argued that the nature of the calamity should determine the assistance provided:

[I]f a nation is afflicted with famine, all those who have provisions to spare ought to relieve her distress, without, however, exposing themselves to want . . . . Whatever be the calamity with which a nation is afflicted, the like assistance is due to it.<sup>259</sup>

Contemporary scholars have developed the thinking around such obligations between states. Some prominent political philosophers argue that affluent societies are duty-bound to help other societies overcome the burdens they face, and that in some circumstances, these duties might extend to international financial assistance.<sup>260</sup> An analogous duty to aid others underpins the Responsibility to Protect doctrine.<sup>261</sup>

There is a strong moral argument that the obligation to assist extends to repairing harm suffered by victims of armed conflict, at least insofar as such

256. *Supra* notes 198–199.

257. See, e.g., LARRY MAY, AFTER WAR ENDS: A PHILOSOPHICAL PERSPECTIVE 147–48 (2012); Lawrence O. Gostin & Robert Archer, *The Duty of States to Assist Other States in Need: Ethics, Human Rights, and International Law*, 35 J. L. MED. ETHICS, 526, 527 (2007).

258. VATTEL, *supra* note 236, at 135 (emphasis in original).

259. *Id.* at 136.

260. JOHN RAWLS, THE LAW OF PEOPLES: WITH “THE IDEA OF PUBLIC REASON REVISITED” 108–09 (2001); see also Charles R. Beitz, *Cosmopolitanism and Global Justice*, 9 J. ETHICS 20 (2005); MAY, *supra* note 257, at 150 (contending that states can take on and embody the distributive responsibilities of their members, despite being “ontologically infirm”).

261. See generally David Whetham & Bradley J. Strawser, *The Moral Responsibility to Aid Others, in RESPONSIBILITIES TO PROTECT: PERSPECTIVES IN THEORY AND PRACTICE* 1, 1 (David Whetham & Bradley J. Strawser, eds., 2015).

efforts do not in themselves cause undue hardship or suffering.<sup>262</sup> Contemporary laws of war are built on a tacit acceptance that states will engage in the dangerous conduct of war.<sup>263</sup> In some cases, wars will be fought contrary to the *jus ad bellum* and/or *jus in bello*, and at other times they will not. In all cases, however, people caught up in conflict—chiefly civilians—will be harmed, and by and large be left without recourse to any forms of support. The majority of these people cannot be considered responsible for the harm they have suffered in any real or proportionate sense.<sup>264</sup> On the other hand, many private and public entities, such as arms producers, private military or security contractors, and states seeking political or economic advantage in foreign states, profit from conflict.<sup>265</sup> If the international community tolerates the destructive and risky conduct of war—and may even be complicit in or benefit from it—there is an ongoing moral obligation to address the suffering of victims more comprehensively.<sup>266</sup>

Political philosopher Cécile Fabre contends that “all agents who have been harmed by war are owed help with the reconstruction of their community.”<sup>267</sup> She argues that when wrongdoing states are unwilling or unable to meet their reparative duties, bystanders to the conflict are under distributive duties to assist.<sup>268</sup> Fabre advocates for a combination of reparative and reconstructive duties following conflict, with reparation duties owed by rights violators (among others), and assistance duties owed by bystanders as well as participants in the conflict.<sup>269</sup>

While much of the harm suffered in conflict results from violations of IHL, considerable damage is also inflicted through lawful conduct. In light of this, some scholars have suggested legal frameworks for compensating victims for incidental injury resulting from lawful conduct.<sup>270</sup> Yaël Ronen,

262. See, e.g., Richard Shapcott, *From the Good International Citizen to the Cosmopolitan Political Community: A Constitutional Path*, 50 INT'L POL. 138 (2013); see also FABRE, *supra* note 241, at 2; Lonneke Peperkamp, *On the Duty to Reconstruct After War: Who is Responsible for Jus Post Bellum?*, 29 CAN. J. L. & JURIS. 403, 406 (2016) (discussing the “universal rebuild thesis”).

263. On the moral (and legal) equivalence of the causes of war, see VATTEL, *supra* note 235, Book III, Ch. XII, §§ 190–91, at 382; see also GEOFFREY BEST, *HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICT* 45 (1980).

264. See MAY, *supra* note 37, at 47.

265. See generally P. LE BILLON, *WARS OF PLUNDER: CONFLICTS, PROFITS AND THE POLITICS OF RESOURCES* (2014); see also *infra* Section IV.C.2.

266. See, e.g., FABRE, *supra* note 241, at 159 (discussing the moral responsibility of states that fail to prevent war, particularly violations); MAY, *supra* note 257, at 194–95; MAY, *supra* note 37, at 46. The moral obligation of third states is addressed further below in Section IV.B.7.

267. FABRE, *supra* note 241, at 163 (arguing “members of communities destroyed by war in general are owed help with their reconstruction,” whether in the form of reparation or assistance).

268. *Id.* at 171.

269. *Id.* at 143, 166–70 (describing reparations as “the disbursement of material resources to make up, as far as possible, for the wrong one has committed”). On collective responsibility, see MAY, *supra* note 258, Ch. 8.

270. E.g., Ronen, *supra* note 12; Dieter Fleck, *Individual and State Responsibility for Violations of the Jus in Bello*, in INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES: SYMPOSIUM IN HONOUR OF KNUT IPSSEN 180 (Wolff Heintschel von Heinegg & Volker Epping eds., 2007) (favoring a definition of victim that would allow victims of permissible collateral damage to claim reparations);

for example, proposes a “quasi-strict liability” to compensate victims of incidental injury, independent of fault on the part of the injuring party.<sup>271</sup> Such an approach warrants consideration insofar as it seeks to address the needs of victims of war injured through lawful conduct, and separates obligation from fault. However, as Ronen herself notes, it applies to international armed conflict and has little application in non-international armed conflict.<sup>272</sup> Moreover, it relies entirely on the compliance of the injuring party to address the needs of the victims; this will not always be forthcoming. This Article suggests that in order to address the needs of victims more comprehensively, responsibility to assist ought to extend to non-international armed conflicts, and beyond the sole province of the injuring state.

Insurance-type schemes to redress victims of armed conflict provide an alternative approach. Fabre argues that bystanders should be held under reconstruction duties akin to a “prudentially justified insurance scheme.”<sup>273</sup> May likewise proposes “a controversial plan—a world-wide no-fault insurance scheme for paying the restitution and reparation costs to victims of war and mass atrocity.”<sup>274</sup> After noting the limitations of traditional models of restitution and reparations for victims of war, he advocates for a fund into which every state would pay money for the purpose of providing restitution and reparations following conflict.<sup>275</sup> Such a scheme would, May argues, disconnect the payment of costs from questions of fault, and would be more likely to result in victims receiving compensation than the current system, which treats reparations or restitution as the sole responsibility of the wrongdoer.<sup>276</sup> It would operate akin to domestic no-fault accident compensation schemes,<sup>277</sup> as well as no-fault auto insurance schemes.<sup>278</sup> The model proposed below builds on such notions of collective responsibility, setting out a scheme intended to complement, not displace, existing reparations obligations.<sup>279</sup> The fact that the proposal herein is separate from (and in addition to) the responsibility to repair for unlawful damage may help

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Reisman, *supra* note 205, at 398 (arguing that “without regard to the question of violation of the law of war, belligerents must compensate injured noncombatants or their survivors promptly, in proportion to the degree to which each caused the injuries suffered”).

271. Ronen, *supra* note 12.

272. *Id.* at 188.

273. FABRE, *supra* note 241, at 168 (drawing an analogy with the welfare state: in paying taxes citizens protect themselves against the risk that they may one day have a claim against someone who is unable to pay, or may themselves be under reparative obligations they are unable to fulfil).

274. May, *supra* note 37, at 46.

275. *Id.*

276. *Id.*

277. I am grateful to Treasa Dunworth for drawing this analogy. See generally Accident Compensation Act 2001 (N.Z.). No-fault compensation schemes for medical injury also exist in Sweden, Finland, Norway, Denmark and France. See generally Michelle M. Mello et al., *Administrative Compensation for Medical Injuries: Lessons from Three Foreign Systems*, 14 ISSUE BRIEF (COMMONWEALTH FUND) 1 (2011).

278. See May, *supra* note 37, at 46–47.

279. In this respect the proposed model more closely reflects Fabre’s proposal. See FABRE, *supra* note 241, at 169.

obviate concerns that the existence of a victim compensation fund would disincentivize belligerent parties from taking precautions in attack.<sup>280</sup>

Expanding the obligation to assist victims of war is in the interests of the international community more broadly, if it will, as May asserts, facilitate peace in states emerging from conflict.<sup>281</sup> Indeed, the risk that unmet needs could cause further conflict renders the legal response to victims of war an issue of universal importance, a notion which resonates with the *erga omnes* nature of obligations under IHL.<sup>282</sup> Such a duty would, moreover, reflect and complement existing state obligations to assist, or cooperate with, other states for humanitarian or peaceful purposes under such instruments as the UN Charter,<sup>283</sup> the Universal Declaration of Human Rights,<sup>284</sup> the ICESCR,<sup>285</sup> and the Convention on the Rights of the Child,<sup>286</sup> as well as under the Responsibility to Protect doctrine.<sup>287</sup>

The VA model proposed below seeks to bridge the fault lines by connecting war with peace and detaching obligation from violations, outlining a legal framework for addressing the needs of victims of armed conflict. It goes beyond strict notions of responsibility for legal violations, proposing a set of obligations specially adapted to address several of the most fundamental needs of victims in post-conflict settings. The proposed model builds on central elements of the philosophical scholarship discussed above, particularizing a key set of duties in a manner consistent with existing obligations under international law.<sup>288</sup> It seeks to develop the moral obligation to assist into a practicable legal framework specially adapted to victims of armed conflict. If successfully implemented, such a model may not only help to alleviate the suffering of victims of armed conflict, but also facilitate the transition of communities and states out of conflict.

280. See Ronen, *supra* note 12, at 219 (discussing in the context of an international fund for a strict liability compensation regime for victims of armed conflict); see also *infra* Section IV.B.7.

281. May, *supra* note 37, at 48.

282. On the *erga omnes* nature of the obligation, see Geneva Conventions, *supra* note 74, common art. 1; Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgement, ¶ 23 (Int'l Crim Trib. for the Former Yugoslavia Jan. 14, 2000); see also CUSTOMARY IHL STUDY, *supra* note 14, rule 144; Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INT'L REV. RED CROSS 707 (2014).

283. U.N. Charter, *supra* note 37, art. 1(3).

284. Universal Declaration of Human Rights, *supra* note 161, art. 22.

285. ICESCR, *supra* note 99, art. 2(1).

286. CROC, *supra* note 88, art. 4.

287. Pillar two of the Responsibility to Protect requires the international community to assist states to capacity-build in order to prevent atrocities within their populations. G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 139 (Sept. 16, 2005); see also MAY, *supra* note 258, Ch. 8.

288. Cf. *infra* Section IV.B.2.c.

### III. VICTIM ASSISTANCE AS A SAFETY NET FOR ADDRESSING VICTIM SUFFERING

This Part proposes a VA model inspired by existing obligations under disarmament law to provide a safety net which would complement existing legal responses and help clarify states' obligations under administrative reparations programs.<sup>289</sup> It sets out the key elements of the proposed model, which is intended as a basic conceptual framework for further development *de lege ferenda*. It then contextualizes the proposed model within international law, and provides commentary of critical elements, before considering form and funding.

#### A. *The Proposed Model*

The proposed model, which might initially take the form of an international resolution,<sup>290</sup> adapts VA provisions within the CCM<sup>291</sup> and the TPNW<sup>292</sup> to apply in response to the suffering caused by armed conflict. The key paragraphs of the proposed model read as follows:

1. Each state party shall, with respect to persons<sup>293</sup> under its jurisdiction or control who have suffered harm as a result of armed conflict, in accordance with applicable international humanitarian and human rights law, adequately provide age- and gender-sensitive assistance, without discrimination, including medical care, rehabilitation, and psychological support, as well as provide for their social and economic inclusion.<sup>294</sup>
2. In fulfilling its obligations under paragraph 1 of this Article, each state party shall:
  - (a) Assess the needs of victims of armed conflict;
  - (b) Develop, implement, and enforce any necessary national laws and policies;
  - (c) Develop a national plan and budget, including timeframes to carry out these activities, with a view to incorporating them within the existing national disability, development, and human rights frameworks and mechanisms, while respecting the specific role and contribution of relevant actors;

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289. On the need for such clarification, see, for example, REDRESS, *supra* note 38; Ferstman, *Reparations at the ICC*, *supra* note 160, at 466 (noting the seemingly “limitless” discretion of the RSTFV).

290. See *infra* Section IV.C.1.

291. CCM, *supra* note 30, arts. 5 & 6.

292. TPNW, *supra* note 34, arts. 6 & 7.

293. Unless otherwise indicated by context, “persons” means natural persons only.

294. This paragraph is based on CCM, *supra* note 30, art. 5, and TPNW, *supra* note 34, art. 6(1).

- (d) Take steps to mobilize national and international resources;
  - (e) Not discriminate against or among victims of armed conflict, or between victims of unlawful conduct and those who have suffered injuries or disabilities from lawful conduct; differences in treatment should be based only on medical, rehabilitative, psychological, or socio-economic needs;
  - (f) Closely consult with and actively involve victims of armed conflict and their representative organizations;
  - (g) Designate a focal point within the government for coordination of matters relating to the implementation of this Article; and
  - (h) Strive to incorporate relevant guidelines and good practices including in the areas of medical care, rehabilitation, and psychological support, as well as social and economic inclusion.<sup>295</sup>
3. States must take steps to fulfill the obligations under paragraph 1 as soon as possible following the end of armed conflict.
  4. The obligations under this Protocol/Declaration shall be without prejudice to the duties and obligations of any other states under international law or bilateral agreements.<sup>296</sup>
  5. Each state party in a position to do so shall provide assistance for the implementation of the obligations referred to in Article 1.<sup>297</sup>
  6. Without prejudice to any other duty or obligation that it may have under international law, a state party that has engaged in armed conflict shall have a responsibility to provide adequate assistance to affected states parties, for the purpose of implementing victim assistance obligations.<sup>298</sup>

### B. Discussion of Proposed Model

In order to fill the conceptual shortcomings outlined above, while also striving for an efficient use of resources, the proposed model takes a collective, state-based approach to victim suffering. VA would exist in the space between secondary rights to reparations for violations of IHL or IHRL (whether individual, collective, or interstate) and primary human rights obligations under existing IHRL treaties. By placing the response within a

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295. This paragraph is based on CCM, *supra* note 30, art. 5(2).

296. This paragraph is based on TPNW, *supra* note 34, art. 6(3).

297. This is a truncated version of CCM, *supra* note 30, art. 6(7).

298. This paragraph is based on TPNW, *supra* note 34, art. 7(6).

broader civil context, VA would enable a holistic approach as a safety net to individualized modalities such as judicial reparations and amends payments.

### 1. *Situating the Proposed Model in International Law*

Precisely where post-conflict responses should be located within the broader taxonomy of international law is unsettled,<sup>299</sup> and is likely to involve some overlap with existing obligations.<sup>300</sup> The proposed model straddles both IHL and IHRL. Several considerations bring VA within the purview of IHL. Like reparations for violations of IHL, VA is in a broad sense remedial for victims of armed conflict. If reparations for violations of IHL, whether individual, collective, or state-based, are to be meaningful and productive, VA measures are an important complement.<sup>301</sup> Conceptually, the need for VA is a direct corollary of how war is conducted.<sup>302</sup> Moreover, as a primary obligation, VA sits comfortably with other remedial obligations under IHL—including interstate and individual compensation—and is consistent with ideas of humanitarianism inherent in IHL.<sup>303</sup> The existence of IHL interstate reparations provisions for violations implicitly acknowledges some degree of state responsibility for conflict-related damage. Therefore, such obligations should extend to include post-conflict care. As IHL to some extent displaces IHRL during armed conflict, it should impose responsibilities post-conflict to complement both the regulation of armed conflict and the operation of IHRL.

Equally, the proposed model operates within, and is conceptually consistent with, the IHRL framework. Although the proposed model does not seek, in the first instance, to confer directly enforceable individual rights on victims of armed conflict, it is consistent with existing IHRL obligations.<sup>304</sup> In particular, it develops the obligation of states to take positive action to facilitate the enjoyment of basic human rights (sometimes referred to as the obligation to fulfill),<sup>305</sup> providing a detailed application of the obligation in the context of victims of armed conflict. The proposed model particularizes key obligations owed to victims of armed conflict and pro-

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299. See, e.g., Jennifer S. Easterday et al., *Exploring the Normative Foundations of Jus Post Bellum: An Introduction*, in *JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS*, 1 (Carsten Stahn et al. eds., 2014); CARPENTER, *supra* note 205, at 70 (on the difficulty locating the issue of amends in international law).

300. See Easterday et al., *supra* note 299, at 2.

301. Lubanga Reparations Decision (Appeals Chamber), *supra* note 41.

302. See, e.g., Easterday et al., *supra* note 300, at 1 (describing the *jus post bellum* as a “natural corollary” of the *jus in bello*).

303. See *supra* Section III.A.

304. See, for example, remedies under the ICCPR, *supra* note 97, art. 2(3), and primary obligations under the ICESCR, *supra* note 99. See *infra* Section IV.B.2.C.

305. See, e.g., *What are human rights?*, OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS (last visited Mar. 21, 2023), <https://www.ohchr.org/en/what-are-human-rights> [https://perma.cc/3ALY-HGE9].

vides a safety net to address those circumstances where existing obligations do not adequately address victims' needs.

Overlap between the scope of application of the proposed model with existing IHRL obligations may create confusion or a lack of clarity. This is not a novel issue facing international law; the coterminous application of IHL with some IHRL obligations during armed conflict is an obvious case in point.<sup>306</sup> However, the overlap between VA and IHRL will be relatively limited and not overly problematic. Ultimately, each facilitates human security and dignity,<sup>307</sup> resulting in potential synergies rather than conflict. Such treaties as the TPNW and the CCM provide a precedent for how VA regimes can operate in a complementary manner with IHRL; indeed, one can be seen to reinforce the other.<sup>308</sup> As Françoise Hampson and Ibrahim Salama put it, “[t]wo mutually supportive sets of norms can only enhance the protection of human rights in all circumstances.”<sup>309</sup> The potential synergies are discussed further below.<sup>310</sup>

The proposed model would be complementary to measures such as reparations that address violations of IHL. With IHL under threat from the changing nature of warfare and the politico-legal climate,<sup>311</sup> a model without the need to establish violations would be appropriate and useful for responding to the needs of victims of armed conflict. As a matter of practice, the proposed model may help address the disconnect between relief and development,<sup>312</sup> and “break down the silos . . . between humanitarian and development actors.”<sup>313</sup>

306. See generally *THE GREY ZONE: CIVILIAN PROTECTION BETWEEN HUMAN RIGHTS AND THE LAWS OF WAR* (Mark Lattimer & Philippe Sands eds., 2018).

307. CARPENTER, *supra* note 204, at 77 (discussing the concept of human dignity as a notion which traverses both IHL and IHRL); see DANIEL RIETIKER, *HUMANIZATION OF ARMS CONTROL: PAVING THE WAY FOR A WORLD FREE OF NUCLEAR WEAPONS* 13 (2017) (discussing human security).

308. For an example of how IHRL obligations (such as those under the CRPD) can reinforce victim assistance provisions under IHL treaties (such as the CCM), see BREITEGGER, *supra* note 212, ch. 5.7.

309. Françoise Hampson & Ibrahim Salama (Economic and Social Council Commission on Human Rights), *Administration of Justice, Rule of Law and Democracy*, ¶ 31. U.N. Doc. E/CN.4/Sub.2/2005/14 (June 21, 2005).

310. See *infra* Section IV.B.3.

311. See, e.g., Antonio Cassese, *Current Challenges to International Humanitarian Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT* (Andrew Clapham & Paola Gaeta eds., 2014); Lorna McGregor, *The Thickening of the International Rule of Law in ‘Turbulent’ Times*, *EJIL: TALK!* (Mar. 8, 2018), <https://www.ejiltalk.org/the-thickening-of-the-international-rule-of-law-in-turbulent-times/> [<https://perma.cc/8FLX-U23K>].

312. See, e.g., U.N. Secretary-General, *Secretary-General’s Remarks at the High-Level Event on the New Way of Working* [as delivered] (Jan. 28, 2018), <https://www.un.org/sg/en/content/sg/statement/2018-01-28/secretary-generals-remarks-high-level-event-new-way-working> [<https://perma.cc/LAS3-N882>]; Elizabeth Ferris, *Challenges in the Humanitarian Field: The Big Picture*, *BROOKINGS ON THE RECORD* (Apr. 29, 2008), <https://www.brookings.edu/on-the-record/challenges-in-the-humanitarian-field-the-big-picture/> [<https://perma.cc/82V5-PEVV>] (discussing the “relief-development gap”).

313. See U.N. Secretary-General, *supra* note 313.



## 2. Comments on Paragraph 1: Primary Assistance Obligation

a. “Each state party shall, with respect to persons under its jurisdiction or control . . .”

In contrast with secondary obligations such as reparations, the proposed model imposes a primary responsibility on states to assist victims of armed conflict under their jurisdiction or control (for the most part, the territorial state). The state is an appropriate holder of this primary obligation for several reasons. First, such an arrangement reflects the essentially statist framework of international law.<sup>314</sup> In recognition of the deficiencies of the legal *status quo* for victims of armed conflict, this proposal intends to bolster and supplement, not supplant, the existing legal framework. Given its responsibility to ensure public safety and its correlative interest in providing human security, the territorial state is an appropriate holder of primary obligations for victims of armed conflict.<sup>315</sup> Such an obligation resonates with the implicit expectation under IHL that each party to an armed conflict should meet the basic needs of the population under its control.<sup>316</sup> Under IHRL, states parties have an obligation to respect, protect, and fulfill human rights.<sup>317</sup> Insofar as it holds states responsible, such an approach is also consistent with applicable soft law documents.<sup>318</sup>

Second, in the current politico-legal system, which places states front and center, the state is best placed to meet the needs of vulnerable populations. Given the extent of destruction following most modern armed conflicts, a macro response is needed to address the suffering of both individuals and communities.<sup>319</sup> The proposed obligations build on soft law obligations of states to provide victims with such remedial support as “medical and psychological care, social services, education, job training, and legal assis-

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314. See, e.g., G.A. Res. 46/182, annex, Resolution on Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, ¶ 4 (Dec. 19, 1991) (affirming that “Each State has the responsibility first and foremost to take care of the victims of natural disasters and other emergencies occurring on its territory”, including through the provision of humanitarian assistance); Felix Schwendimann, *The Legal Framework of Humanitarian Access in Armed Conflict*, 93 INT’L REV. RED CROSS 994 (2011).

315. See generally RIETIKER, *supra* note 308, at 12–15.

316. See ICRC, *supra* note 230, at 27; see also *supra* Section II.C.1.

317. See, e.g., U.N. Development Programme, Human Rights in UNDP Practice Note, 8 (discussing the obligation to fulfil).

318. E.g., U.N. Basic Principles, *supra* note 41, Part IX; see also ILA Declaration (Substantive Issues), *supra* note 41, art. 5; *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*, 13 J. CONFLICT & SEC. L. 451 (2008) (setting out the contiguous obligations of states and private military and security companies); U.N. GAOR, 63d sess., Agenda Item 76, U.N. SCOR, U.N. Docs. A/63/467 & S/2008/636 (Oct. 6, 2008).

319. This is recognized in, for example, ICC Rules of Procedure and Evidence, *supra* note 41, rule 97, as well as the RSTFV’s assistance mandate. On the resource constraints prohibiting full compensation to war victims, see *Jurisdictional Immunities case*, Judgment, 2012 I.C.J. Rep. \_\_\_, ¶ 18 (Feb. 3) (separate opinion by Keith, J.); Oswald & Wellington, *supra* note 205, at 537.

tance.”<sup>320</sup> Most of these measures and services have long been considered to fall within the functions and obligations of the state.<sup>321</sup> While foreign states, NGOs, and other organizations would assist in funding and providing assistance, it is appropriate that the ultimate obligation rest with the territorial state.

By imposing a primary, rather than secondary, obligation, VA to some extent avoids knotty political and juridical questions as to why a state should compensate for the lawful conduct of war. Establishing VA as a primary obligation, rather than one tied to violations of the law, could also reduce the risk of legal conflict and fragmentation, avoiding questions about which branch of international law applies post-conflict.<sup>322</sup> More pragmatically, the current politico-legal climate suggests states are reluctant to cede their monopoly on justice in the form of an ongoing enforceable right to individual reparations.<sup>323</sup> The adoption of a VA provision in the CCM<sup>324</sup> and the TPNW,<sup>325</sup> on the other hand, indicates a preparedness to agree to state-based obligations.

It is worth noting that the jurisdictional state would not bear sole responsibility; the proposed model would not displace reparations obligations under Article 91 of Additional Protocol I or customary international law,<sup>326</sup> and would also require international funding and support from supporting bodies to assist states to meet their obligations post-conflict.<sup>327</sup> In so doing, the proposed model could bolster existing measures, and provide structure and clarification to the distribution of assistance to victims post-conflict. It may, moreover, indirectly encourage territorial states to engage in less armed conflict, or at least provide a disincentive to harm, by foreshadowing an obligation to deal with all victims following conflict.

b. “. . . persons who have suffered harm as a result of armed conflict”

The proposed model confers a special status on persons who have suffered harm as a result of armed conflict. The need for especially vulnerable groups

320. See CHICAGO PRINCIPLES, *supra* note 40, at 47; U.N. Basic Principles, *supra* note 41, principles 20–21; see also de Greiff, *supra* note 4, ¶ 35 (discussing the importance and efficacy of medical and psychiatric care).

321. On such measures as obligations of the state, see, for example, Universal Declaration of Human Rights, *supra* note 161, arts. 23, 25, 26, 28; see further *General Comment No. 3*, *supra* note 98.

322. See CARPENTER, *supra* note 204, at 70.

323. On states' desire to keep the monopoly on justice, see Catia Lopes & Noëlle Quéniwet, *Individuals as Subjects of International Humanitarian Law and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW: TOWARDS A NEW MERGER IN INTERNATIONAL LAW, 199, 214 (Noëlle Quéniwet & Roberta Arnold eds., 2008).

324. The CCM currently has 110 states parties and 13 signatories, including Australia, Austria, Belgium, Canada, Denmark, France, Germany, Italy, Japan, Mexico, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, and the United Kingdom. China, Israel, Russia and the United States have not signed or acceded to the CCM.

325. The TPNW, arguably a more controversial convention, currently has 91 signatories and 68 states parties.

326. On the customary status of the reparations obligations, see *supra* note 123.

327. See *infra* Sections IV.B.6, IV.B.7, IV.C.

to receive focused attention under IHRL is well recognized, as evidenced by the many groups who are the subject of particular human rights instruments.<sup>328</sup> As a result of their experiences and harm suffered during war, as well as the degradation of social structures and services, many victims of armed conflict are less likely to be in a position to assert and exercise their human rights than others who have not experienced such conflict.<sup>329</sup> Assistance is required to enable victims to rebuild their lives, both individually and collectively, to go beyond the “survival mindset” which often follows exposure to violence, and to repair the ruptured social fabric.<sup>330</sup> As such, victims of armed conflict should be recognized as a particularly vulnerable group holding a special status.<sup>331</sup> This differentiation in favor of victims of armed conflict enables a meaningful and beneficial response.<sup>332</sup>

In accordance with the ordinary rules of treaty interpretation,<sup>333</sup> this provision would apply to persons affected by all situations of armed conflict, whether international or non-international in nature. It would also be within the scope of the proposed model to extend assistance to collectives or communities, as well as individuals, who have suffered harm as a result of armed conflict.<sup>334</sup> The proposed model would therefore comfortably traverse the different categories of, and actors in, armed conflict, providing assistance to all victims regardless of how suffering was caused. With armed conflict being increasingly fluid and difficult to define,<sup>335</sup> any response would ideally avoid the need for excessive categorization and distinction. Consistent with the rules of IHL urging the granting of amnesty for partici-

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328. See, e.g., G.A. Res. 54/263, annex I, Optional Protocol on the Rights of the Child on the Involvement of Children in Armed Conflict (May 25, 2000); International Meeting on Women’s and Girls’ Right to a Remedy and Reparation, *Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation* (Mar. 21, 2007) [hereinafter *Nairobi Declaration*]; CRPD, *supra* note 212; G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sep. 13, 2007); see also CCM, *supra* note 30, art. 5; TPNW, *supra* note 34, art. 6.

329. See *supra* note 69.

330. See, e.g., Office of Public Counsel for Victims, *supra* note 3, ¶¶ 6, 8 (noting the importance of flexibility in allowing victims’ to choose solutions to meet their needs); see also Evans, *supra* note 5, at 225 (noting the importance of measures aimed at rehabilitation, restoring dignity, reducing dependency and bringing victims on an equal footing with other members of society, as well as the “urgency, yet scarcity, of rehabilitation and general psychosocial assistance measures for victims”).

331. This approach has resonance in the CHICAGO PRINCIPLES, principle 3, requiring that “States shall acknowledge the special status of victims, ensure access to justice, and develop remedies and reparations.” CHICAGO PRINCIPLES, *supra* note 40, at 44. The commentary to the relevant principle notes that “States and others shall ensure that victims are treated with compassion and respect, and that policies and programmes are designed with special sensitivity to their needs.” *Id.*

332. See *id.*

333. See Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331 (requiring ordinary meaning be given to words in their context); see also, e.g., Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (discussing the meaning of armed conflict).

334. For discussion of situations in which collective responses may be more appropriate, see *supra* Section II.C.2.

335. See *infra* notes 379–380.

pation in non-international armed conflict,<sup>336</sup> VA would also address suffering of victims of non-state armed groups, as well as former members of such groups. However, in accordance with rules requiring investigation and prosecution of war crimes, exceptions should be made for those suspected of, accused of, or sentenced for war crimes.<sup>337</sup>

c. “. . . in accordance with applicable international humanitarian and human rights law”

The proposed model aims for legal and practical consistency with the secondary obligations of general and specific interstate war reparations for violations of IHL.<sup>338</sup> Ideally, it would strengthen and operate alongside that responsibility by imposing basic requirements on how interstate compensation is utilized, ensuring it is applied in the interests of victims. Moreover, it would require states to work for the rehabilitation and inclusion of war victims without imposing overly burdensome individual compensation requirements on states recovering from conflict.<sup>339</sup> The proposed model would also accord with and complement key obligations set out in the IHRL treaties,<sup>340</sup> as well as VA measures for various groups and individuals.<sup>341</sup>

The proposed model could also complement individual reparations measures. Individual reparations measures tend to narrowly address victims of established violations. VA under this model would cast a broader net, focusing more comprehensively on affected communities.<sup>342</sup> Since it would largely involve different actors, sources of obligation and funding, problems

336. See Additional Protocol II, *supra* note 13, art. 6(5); CUSTOMARY IHL STUDY, *supra* note 14, rule 159.

337. See First Geneva Convention, *supra* note 74, art. 49; see also Second Geneva Convention, *supra* note 74, art. 50; see also Third Geneva Convention, *supra* note 74, art. 129; see also Fourth Geneva Convention, *supra* note 74, art. 146; see also Additional Protocol II, *supra* note 13, art. 6; CUSTOMARY IHL STUDY, *supra* note 14, rule 158 (finding the obligation applies in respect of both international and non-international conflicts).

338. See Additional Protocol I, *supra* note 10, art. 91.

339. See *infra* Section IV.C.2. (discussing sharing the financial burden); cf. *Jurisdictional Immunities case*, Judgment, 2012 I.C.J. Rep. \_\_\_, ¶ 18 (Feb. 3) (separate opinion by Keith, J.) (discussing the “impracticable” prospect of individual reparations post-conflict).

340. See, e.g., ICESCR, *supra* note 99, arts. 2, 6, 11, 12, 13.

341. E.g., Optional Protocol on the Rights of the Child on the Involvement of Children in Armed Conflict, *supra* note 329, art. 6(3) (requiring states parties to accord demobilized child soldiers within their jurisdiction “all appropriate assistance for their physical and psychological recovery and their social reintegration”). Other states parties are also required to cooperate in the rehabilitation and social reintegration of child soldiers, including through technical cooperation and financial assistance. *Id.* art. 7(1). Art. 7(2) provides that “States Parties in a position to do so shall provide such assistance through existing multilateral, bilateral or other programmes or, inter alia, through a voluntary fund established in accordance with the rules of the General Assembly.” *Id.* art. 7(2).

342. By responding to the needs of victims of lawful conduct or others who cannot obtain reparations, the response would be more comprehensive. There is also scope for significant flexibility and greater community involvement under VA regimes. See Emily Camins, *Castig a Legal Safety Net: A Human Security Approach to Assisting Families Following Armed Conflict*, 55(3) ISR. L. REV. 215, 239–240 (2022).

arising in the context of the ICC and RSTFV<sup>343</sup> would be largely avoided. Given the fact that VA would be funded largely by international contributions and implemented with the assistance of supporting bodies (discussed below), the potential for conflict between judicial reparations and VA is limited.

There may be more nebulous concerns that VA would detract from efforts to secure reparations for victims of violations of the law. It is conceivable that, despite the non-regression clause in paragraph 4 of the proposed model, states could use the existence of victim assistance obligations as an excuse to avoid reparations. There could also be reluctance to revisit the (recently declined)<sup>344</sup> issue of strengthening the law relating to reparations. These concerns involve politico-legal questions, the outcomes of which are difficult to predict. Suffice it to note that VA would not directly affect efforts of victims seeking reparations for unlawful conduct; rather, it would act as a safety net for those left without. Given the pressing need for, and potentially significant benefits of, a comprehensive response for victims of armed conflict, this hypothetical risk should not deter action.

*d. “. . . age and gender-sensitive assistance, . . . social and economic inclusion”*

The proposed model seeks to facilitate a sensitive and inclusive response to the needs of many victims of armed conflict. The definition of “victim” in paragraph 1 does not distinguish between, or discriminate against, victims based on how the harm arose, other than it resulting from armed conflict.<sup>345</sup> This inclusive definition reflects not only the fact that “the overwhelming majority of individuals caught in war experience enormous suffering and deprivation,”<sup>346</sup> but also epistemic limitations to knowing how a person’s harm was caused.<sup>347</sup> As Fabre puts it, “at the bar of fundamental equality, and other things equal, there is no reason to hold that any given war victim has a stronger claim than other war victims.”<sup>348</sup>

Paragraph 1 of the proposed model requires states to provide victims with age- and gender-sensitive assistance, including medical care, rehabilitation, and psychological support, as well as provide for their social and economic inclusion. These measures correspond with key needs of victims of armed conflict.<sup>349</sup> By basing the response on socially sensitive, primarily forward-looking measures, the proposed model provides the flexibility and

343. On the interaction of the ICC’s reparations mandate and RSTFV’s assistance mandate, see Ferstman, *Reparations at the ICC*, *supra* note 160 at 464, 466 (noting that the assistance mandate “has been an important way to get a modicum of assistance to victims”, but also noting the reluctance of the RSTFV to undertake “activity that addresses the needs of victims affected by ongoing Court proceedings”); *see also* Moffett & Sandoval, *supra* note 175.

344. *See supra* note 25.

345. Proposed model, above Section IV.A, ¶ 2(e). *See also* discussion *infra* Section IV.B.3.b.

346. FABRE, *supra* note 241, at 163.

347. *Id.* at 163; *see also* GARDUNO, *supra* note 184, at 6–7.

348. FABRE, *supra* note 241, at 163–64.

349. *See supra* note 249–253 (discussing key needs of victims in situations of armed conflict).

inclusion required to respond to victims' needs in unstable contexts. It seeks to provide an important safety net for rights-based models (such as individual reparations), which are inherently discriminatory and risk social harm if not carried out with sensitivity.<sup>350</sup> In this respect, it would mirror the assistance mandate of the RSTFV under the Rome Statute, which aims to facilitate timely assistance without the need for the complex and often intractable legal processes which accompany reparations.<sup>351</sup> Moreover, because the responses tend to be collective and non-pecuniary in nature, there is a reduced evidentiary and administrative burden on both victims and legal systems. Further inspiration could be drawn from other combined needs-/rights-based models.<sup>352</sup>

A more inclusive, horizontal legal system is likely to particularly favor women and girls.<sup>353</sup> For various reasons—including caring responsibilities, legal limitations, and cultural norms—women often lack the capacity to pursue reparations.<sup>354</sup> In recognition of the challenges in reaching and assisting women, Ruth Rubio-Marín and Pablo de Greiff argue in favor of a complex approach which combines rehabilitation and reintegration with modalities that enhance women's economic agency.<sup>355</sup> The model proposed here allows not only for the provision of much-needed services, but also for measures promoting economic inclusion.<sup>356</sup> As the International Labour Organization has recognized, “improving the material conditions of the conflict-affected people through employment promotion is a *sine qua non* for long-term peace building.”<sup>357</sup> Experience suggests that grassroots responses, such as those to assist (predominantly female) victims of modern slavery, can be implemented with agility and impact, making efficient use of limited funds.<sup>358</sup> This inspires confidence that the proposed model,

350. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-3177-AnxA, Draft Implementation Plan for Collective Reparations to Victims, Submitted to the Amended Reparations Order of 3 March 2015, ¶¶ 81–87 (Nov. 3, 2015) (discussing the risk of stigmatization).

351. See Ferstman, *Reparations at the ICC*, *supra* note 160, at 464; see also Dutton & Ní Aoláin, *supra* note 221, at 521–22.

352. See, e.g., Economic and Social Council, *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, annex, principle 3 (11 February 1998); see also CHICAGO PRINCIPLES, *supra* note 40.

353. See, e.g., UN Committee on the Elimination of Discrimination against Women General Recommendation No. 30 on Women in Conflict Prevention, Conflict and Post-Conflict Situations, CEDAW/C/GC/30, ¶¶ 42–52 (Oct. 18, 2013) [hereinafter CEDAW General Recommendation No. 30].

354. See, e.g., Trust Fund for Victims, *Observations on Reparations in Response to the Scheduling Order of 14 March 2012 in the case of Prosecutor v Lubanga*, ICC-01/04-01/06, ¶ 32 (Apr. 25 2012); see also Rubio-Marín & de Greiff, *supra* note 24, at 322.

355. See Rubio-Marín & de Greiff, *supra* note 24 at 332–33; see also Evans, *supra* note 5, at 225.

356. See Date-Bah et al., *supra* note <CITE\_REF121243718>, at 1 (discussing the importance of promoting economic and social equality for women and other vulnerable groups in post-conflict interventions).

357. *Id.* at 2 (citations omitted).

358. OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, THE UNITED NATIONS VOLUNTARY TRUST FUND ON CONTEMPORARY FORMS OF SLAVERY, *supra* note 217, at 5 (noting that the fund “provides a rare opportunity for NGOs . . . to assist a large number of victims directly, with relatively small amounts of funds”, and serves as a catalyst for securing additional funding).

which requires inclusion and gender-sensitive assistance, could effectively support women,<sup>359</sup> particularly if implemented with their involvement under paragraph 2(f) of the proposed model.<sup>360</sup> This is especially important given the endemic violence against women and girls during armed conflict,<sup>361</sup> and the historic lack of reparations to such victims.<sup>362</sup>

### 3. *Comments on Paragraph 2: Fulfilment of Obligations Under Paragraph 1*

Paragraph 2, drawn from a corresponding provision in the CCM, particularizes measures to give effect to the primary VA obligation, requiring states to, *inter alia*: assess the needs of victims; develop, implement, and enforce any necessary laws and policies; mobilize resources; consult with victims; designate a government focal point; and incorporate guidelines and good practices.<sup>363</sup> Two subparagraphs warrant further discussion in the present context.

a. “. . . develop a national plan and budget . . . with a view to incorporating within existing . . . national frameworks”

Paragraph 2(c) is noteworthy for its potential to complement existing national disability, development and human rights frameworks. Drawing on the CCM and TPNW, it requires states to develop a national plan and budget for VA “with a view to incorporating them within the existing national disability, development and human rights frameworks and mechanisms.”<sup>364</sup> The Dubrovnik and Lausanne Action Plans, developed under the CCM framework, provide further precedent for how the proposed model could be implemented.<sup>365</sup>

The proposed model could complement and further delineate existing state obligations. VA involves the fulfilment of certain long-recognized human rights such as the rights to education, work, and highest attainable

359. See RSTFV *Filing on Reparations (Lubanga)*, ICC-01/04-01/06-3177-Red, Filing on Reparations and Draft Implementation Plan, ¶ 68 (3 November 2015) (discussing the remedies suggested to alleviate the harm of former child soldiers).

360. See Rubio-Marín & de Greiff, *supra* note 24 at 324; see also Nairobi Declaration, *supra* note 329, ¶¶ 2A, 2B; see also Camins, *supra* note 343, at 235–36.

361. E.g., CEDAW General Recommendation No. 30, *supra* note 354, ¶¶ 34–36, 42–47 (explaining the heightened risk of gender-based violence during and after conflict and the importance of women participating in the post-conflict period and recovery processes).

362. See generally Rubio-Marín & de Greiff, *supra* note 24 at 322; see also Evans, *supra* note 5 at 225; cf. Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06-2659, Reparations Order (Mar. 8, 2021), ¶ 195, 238 (finding that “[c]ollective reparations with individualised components . . . appear the most appropriate type of reparations to address the harm caused by rape and sexual slavery”; and noting the lack of reparations actually paid to victims of such harm by the Congolese government).

363. CCM, *supra* note 30, art. 5(2); see also discussion *supra* Section IV.A, ¶ 2(a), 2(b), and 2(d).

364. CCM, *supra* note 30, art. 5(2)(c).

365. First Review Conference of the Convention on Cluster Munitions, *Dubrovnik Action Plan*, CCM/CONF/2015/WP.3 (Sept. 2015); Second Review Conference of the Convention on Cluster Munitions (Second Part), *Lausanne Action Plan*, UN Doc. CCM/CONF/2021/6, annex II (Sept. 2021).

standards of physical and mental health.<sup>366</sup> Although some existing human rights obligations cover similar ground as VA, they are generally not remedial in nature, and lack the particularization and focus offered by the proposed model.<sup>367</sup> In this way, VA has the potential to act as a conceptual link between armed conflict and development. By feeding into existing law, systems, and infrastructure, the proposed model could generate synergy with these systems while maintaining the flexibility necessary to respond to victims of armed conflict in a sensitive and inclusive manner. Given their experience with victims of armed conflict and humanitarian mandates, there would also be scope for UN bodies, the ICRC, Red Cross and Red Crescent National Societies (as auxiliaries to government), and other institutions to play a significant role in the implementation of the proposed model.<sup>368</sup>

b. “. . . not discriminate against or among victims of armed conflict”

Drawing on the CCM, the proposed model explicitly prohibits discrimination against or between victims of armed conflict,<sup>369</sup> thereby ensuring that victims of lawful conduct (among others) are included within the scope of VA. The fact that a person suffers harm as a result of the lawful conduct of war should not of itself deprive them of assistance measures (or victim status) under international law.<sup>370</sup> Although international law generally seeks to remedy harm resulting from violation, there is increasing recognition of the harm suffered by victims of lawful conduct under IHL, and a growing sense that this harm warrants attention in some form.<sup>371</sup> An inclu-

366. E.g., ICESCR, *supra* note 99, arts. 13, 6, 12. See also Amrei Müller, *States' Obligations to Mitigate the Direct and Indirect Health Consequences of Non-International Armed Conflicts: Complementarity of IHL and the Right to Health*, 95 INT'L REV. RED CROSS 129, 161–62 (2013) (discussing the parallel application of the right to health alongside IHL during armed conflict).

367. Cf. CROC, *supra* note 88, art. 39 (requiring states to take “appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of . . . armed conflicts”).

368. This is expressly contemplated in CCM, *supra* note 30, art. 6(7); *infra* pt. IV. B. 6. See also, Resolution Addressing Mental Health and Psychosocial Needs, *supra* note 17, ¶ 2 (encouraging states and national societies to invest in “local and community-based action, embedded in local and national services, on a longer-term basis to . . . respond to mental health and psychosocial needs, including by strengthening . . . the capacities of volunteers”).

369. CCM, *supra* note 30, art. 5(2)(e).

370. This is subject to the victims themselves acting in accordance with IHL. See Camins, *supra* note 337, at 237–38.

371. See Wexler & Robbennolt, *supra* note 73; Reisman, *supra* note 204, at 397–98 (discussing moral arguments in favor of a duty to make amends); Paul, *supra* note 12, at 117 (discussing civil society support for addressing losses of victims of lawful conduct); Ronen, *supra* note 12, at 186; Oswald and Wellington, *supra* note 204; Andrew Childers & Anna Lamut, *Legal Foundations for “Making Amends” to Civilians Harmed by Armed Conflict*, Harvard Law School International Human Rights Clinic (Feb. 2012), <https://hrp.law.harvard.edu/pub/legal-foundations-for-making-amends-to-civilians-harmed-by-armed-conflict/> [<https://perma.cc/TTW8-YMDH>]. The CHICAGO PRINCIPLES, *supra* note 40, Principle 3, define victims broadly as “those who have suffered harm, individually or collectively, including physical injury, mental injury, emotional suffering, economic loss, or the significant impairment of basic legal rights.” The definition includes “those who have directly experienced violations of human rights and humanitarian law, as well as their immediate families.” *Id.* at 44, commentary on



sive approach to victims is appropriate given the limitations of the law in effectively restricting the conduct of armed conflict.<sup>372</sup>

This clause does not demand formal equality in the treatment of all victims of armed conflict. Rather, as is the case in the medical treatment of the sick and wounded under IHL,<sup>373</sup> vulnerability and need should be the driving determinants of assistance. As set out above, an exception should be made for those being investigated, prosecuted or punished for war crimes.<sup>374</sup>

The proposed VA regime would consider humanity by addressing harm caused by both lawful and unlawful conduct. As VA would be a primary obligation arising after war, it would not bump up against notions of military necessity. By separating the obligation to assist victims from violations of IHL, such a model prioritizes humanity without compromising the law's theoretical integrity.

#### 4. *Comments on Paragraph 3: End of Armed Conflict*

In order to ensure a VA regime is effective, it is important that it is implemented in a timely manner and without undue delay.<sup>375</sup> Under paragraph 3 of the proposed model (for which there is no direct precedent in the TPNW or CCM),<sup>376</sup> states must take steps to fulfill the obligations under the preceding paragraphs at the end of an armed conflict. The intention of paragraph 3 is to bring into existence the obligations under paragraph 1 as soon as possible after armed conflict ends. For various reasons, including conceptual and practical tension with military necessity under IHL, and the severe pressure humanitarian organizations already face in delivering relief during armed conflict,<sup>377</sup> it does not propose that the VA obligation should come into effect while armed conflict is ongoing. Rather, it seeks to help bridge the gap between relief and development,<sup>378</sup> in law as well as in practice.

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Principle 3. However, only victims of violations are entitled to reparations in the strict sense. *Id.* at 45, commentary on Principle 3.

372. On the limits of the law, see KENNEDY, *supra* note 126; Jochnick and Normand, *supra* note 9, at 54–56.

373. *E.g.*, First Geneva Convention, *supra* note 74, art. 12(2), 12(3); Second Geneva Convention, *supra* note 74, art. 12(2), 12(3); Additional Protocol I, *supra* note 10, art. 10(2); Additional Protocol II, *supra* note 13, art. 7(2).

374. *See supra* note 337.

375. *See, e.g.*, UN Basic Principles, *supra* note 41, principle 2(c).

376. *Cf.* CCM, *supra* note 30, art. 6(10) (requiring the timely and effective implementation of international assistance).

377. Peter Maurer, Statement of ICRC president to UN Security Council: Space for Impartial Humanitarian Action Under Threat, International Committee of the Red Cross, (Apr. 1, 2019) <https://www.icrc.org/en/document/icrc-president-un-security-council-space-impartial-humanitarian-action-under-threat> [<https://perma.cc/85SY-PD58>]

378. *See supra* note 313.

Defining the end of armed conflict is a difficult task,<sup>379</sup> as contemporary conflicts rarely end with a formal armistice agreement or conclusion of a peace treaty, but tend to continue at a lower intensity, or are interrupted by foreign armed intervention.<sup>380</sup> Accordingly, it is necessary to consider whether, as a question of fact, an armed conflict—whether international or non-international—is still in existence. The term “armed conflict” is used, but not comprehensively defined, in IHL treaties.<sup>381</sup> It is, however, defined in case law,<sup>382</sup> and will meet the definition where the violence reaches a sufficient level of intensity and the armed groups involved are sufficiently organized.<sup>383</sup> Accordingly, where such requirements are no longer met, armed conflict no longer exists<sup>384</sup> and, under paragraph 3, the obligations under the proposed model would arise.

There may be a period in which the obligations under the proposed model overlap with those under IHL, particularly in circumstances of occupation. Some provisions of IHL, such as those set out above, apply after the end of hostilities and, potentially, the end of armed conflict. The ICTY in *Tadić* held that IHL will apply from the initiation of such conflict and extend beyond the cessation of hostilities until a general conclusion of peace or (in the case of non-international armed conflict) a peaceful settlement is achieved.<sup>385</sup> Given the protective nature of the IHL provisions which continue to apply, this is unlikely to generate a legal conflict. However, to the extent that any overlap with pre-existing obligations generates confusion, the non-regression clause in paragraph 4 will ensure the continued application of other obligations.

Where victims are located in states not involved in armed conflict, the obligations should arise as soon as possible after their arrival in the state in question.

379. See, e.g., MARCO SASSÒLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? CASES, DOCUMENTS AND TEACHING MATERIALS ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 116 (2nd ed. 2006).

380. *Id.* at 116. On the end of conflict, see also CHRISTINE CHINKIN AND MARY KALDOR, INTERNATIONAL LAW AND NEW WARS, 343–44 (2017); Dale Stephens, *Counterinsurgency and Stability Operations: A New Approach to Legal Interpretation*, 86 INT’L L. STUD. SERIES U.S. NAVAL WAR COLL. 290–91 (2010) (describing postmodern warfare as an “environment . . . of mixed peace and war”); Christine Bell, *Post-Conflict Accountability and the Reshaping of Human Rights and Humanitarian Law*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 328, 330 (Orna Ben-Naftali ed., 2011) (describing a “no-war, no-peace” situation that often prevails in the short to medium term post-conflict).

381. See, e.g., Geneva Conventions, *supra* note 74, common arts. 2, 3; Additional Protocol II, *supra* note 13, art. 1(1).

382. Prosecutor v. *Tadić*, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

383. For further discussion see, for example, ANNYSSA BELLAL, THE WAR REPORT: ARMED CONFLICTS IN 2016 18–27 (Geneva Academy of International Humanitarian Law and Human Rights, 2017).

384. *Id.* at 24–25.

385. *Tadić*, Case No. IT-94-1-A, ¶ 70

### 5. *Comments on Paragraph 4: Non-Regression Clause*

In accordance with the non-regression clause, the proposed model would be supplementary and without prejudice to any obligations or rights to reparations that states, individuals, or collectives might hold under IHL or other areas of international law. Belligerents would therefore still need to act lawfully to avoid an obligation to repair.<sup>386</sup>

### 6. *Comments on Paragraph 5: Obligations of Other States*

The proposed model includes a brief paragraph setting out the obligations of other states to support the implementation of VA, thereby creating a “framework of shared responsibility.”<sup>387</sup> This provision, like Article 6(7) of the CCM, supports the delivery of assistance to victims and aims to ensure that states will be able to meet their primary VA obligations.<sup>388</sup> It is intended to encompass both in-kind and financial support,<sup>389</sup> and could be provided through existing bodies, including the UN system, the ICRC or other institutions.<sup>390</sup> There could also be scope for financial contributions—either earmarked or un-earmarked<sup>391</sup>—to be made through relevant existing trust funds or, potentially, a new trust fund responsible for victims of armed conflict.<sup>392</sup>

An international obligation to assist jurisdictional states to meet their own obligation is important to facilitate cooperation and to overcome the strong inclination of governments to claim that post-conflict measures to assist victims are unaffordable.<sup>393</sup> This approach underpins the VA models

386. *C.f.* Ronen, *supra* note 12, at 219 (discussing within the context of an international fund for a strict liability compensation regime for victims of armed conflict).

387. *See* Docherty & Sanders-Zakre, *supra* note 211, at 263 (discussing within the context of the CCM).

388. *See generally* Bonnie Docherty & Richard Moyes, *Article 6. International Cooperation and Assistance*, in *THE CONVENTION ON CLUSTER MUNITIONS: A COMMENTARY* 409 (Gro Nystuen & Stuart Casey-Maslen eds., 2010) (noting states affected by cluster munitions might thus be more willing to join the CCM).

389. In relation to the corresponding provision of the CCM, *see id.*

390. CCM *supra* note 30, art. 6(7) states that “assistance may be provided, *inter alia*, through the United Nations system, international, regional or national organisations or institutions, the International Committee of the Red Cross, national Red Cross and Red Crescent Societies and their International Federation, non-governmental organisations or on a bilateral basis.”

391. On the relevance of earmarking contributions, *see* Docherty & Moyes, *supra* note 389, at 413.

392. *See* CCM, *supra* note 30, art. 6(9) (providing that states “may contribute to relevant trust funds in order to facilitate the provision of assistance”); *see also* Docherty & Moyes, *supra* note 389, at 413 (noting that “[a] trust fund serves as a mechanism through which States Parties can provide financial assistance with only limited engagement in the prioritization or practical planning of the use of that assistance and with limited bureaucratic commitment”). For examples of existing international trust funds, *see* discussion in Section II.C.5. Although there is some overlap with the objects of these funds and those of the proposed model, none of the existing trust funds would comprehensively cover victims of armed conflict as defined in the proposed model. On the modalities of establishing new trust funds *see*, for example, UN ECONOMIC COMMISSION FOR EUROPE, *MODALITIES OF TRUST FUND ESTABLISHMENT AND ADMINISTRATION IN THE UN* (August 2015), [https://www.unecp.org/fileadmin/DAM/road\\_Safety/Modalities\\_of\\_trust\\_fund\\_establishment\\_in\\_the\\_UN.pdf](https://www.unecp.org/fileadmin/DAM/road_Safety/Modalities_of_trust_fund_establishment_in_the_UN.pdf) [<https://perma.cc/T9YE-DEP9>].

393. de Greiff, *supra* note 4, ¶ 13; *see also* Docherty & Moyes, *supra* note 389, at 409.

in the CCM,<sup>394</sup> TPNW,<sup>395</sup> and the RSTFV.<sup>396</sup> It also resonates with the moral obligation for bystander states to assist victims of war.<sup>397</sup>

Some may question the willingness of states to commit to such a regime.<sup>398</sup> However, there are grounds for believing states in a position to do so might be prepared to contribute towards a relatively modest and, hopefully, cost-effective means of addressing pressing social issues with transnational impact. States have, for example, expressed by international resolution a willingness to address the mental health and psychosocial needs of victims of armed conflict,<sup>399</sup> and have committed to similar obligations in other contexts.<sup>400</sup> This proposal also suggests additional sources of funding that could, if adopted, further distribute the responsibility to assist.<sup>401</sup>

### 7. *Comments on Paragraph 6: Obligations of a State That Has Engaged in Armed Conflict*

A critical question for consideration is whether the proposed model should include a provision requiring a state engaging in armed conflict in (or with harmful effects in) another state to contribute to implementing victim assistance obligations, such as those set out in paragraph 6. States negotiating the TPNW considered it important that user states be held responsible, thus (in the view of many) rectifying a shortcoming of the CCM.<sup>402</sup> The TPNW places primary responsibility to care for victims on territorial states, but also expressly requires user states to provide adequate assistance to victims and environmental rehabilitation,<sup>403</sup> marking a middle ground between traditional models of interstate reparations and duty of care/human rights models whereby responsibility rests with the territorial state.

Whether such an approach should be adopted in the context of armed conflict is not straightforward. On the one hand, in contrast with the

394. CCM, *supra* note 30, art. 6(7).

395. TPNW, *supra* note 34, art. 7(5).

396. Resolution Establishing RSTFV, Res, ICC-ASP/1/Res.6, 3rd plen. mtg., by consensus ¶ 2 (Sep. 9, 2002); Regulations of the Trust Fund for Victims, *supra* note 35, ch. 2.

397. See *supra* Section III.B. This approach further resonates with, and builds on, the legal requirement for states parties to ensure respect for and uphold the provisions of the Geneva Conventions *erga omnes*. See *supra* note 283. Like the proposed VA duty, these obligations are ultimately premised in a recognition of the need for a collective response to minimize suffering of those caught up in conflict.

398. See, e.g., Ronen, *supra* note 12 at 219 (querying the willingness of states to commit to ‘an international victim compensation fund based on compulsory state contributions’).

399. Resolution Addressing Mental Health and Psychosocial Needs, *supra* note 17.

400. See *supra* Section II.C.4.; also CCM *supra* note 30, art. 6(7), (8).

401. See *infra* Section IV.C.2.

402. See Bonnie Docherty, The Legal Content and Impact of the Treaty on the Prohibition of Nuclear Weapons, *Nobel Peace Prize Legal Seminar*, 5 (Dec. 11, 2017) <http://hrp.law.harvard.edu/wp-content/uploads/2017/12/Impact-of-TPNW-Nobel-presentation-Dec-2017.pdf> [https://perma.cc/7NLS-3CGA]. On the contentious negotiations regarding user state responsibility under the draft CCM, see BREITGGER, *supra* note 212, at 200; Camins, *Addressing Victim Suffering under Disarmament Law*, *supra* note 215, at 120.

403. TPNW, *supra* note 34, arts. 6(1), 7(6).

TPNW, IHL already specifically provides for compensation in the event of unlawful conduct, in the form of Article 91. In addition, whereas any use of nuclear weapons is unlawful under the TPNW, IHL does not outlaw armed conflict altogether. Rather, it tolerates a degree of harm to civilians and others caught up in conflict. Some might argue it is problematic to require additional payment given both the license granted to warring parties and the compensation obligations under Article 91 of Additional Protocol I.

On the other hand, there are cogent philosophical, legal, and practical arguments for imposing an assistance obligation on warring states, over and above reparative duties the states may owe on the basis of violations of IHL (or IHRL, if applicable). There are grounds for arguing states have a moral imperative to repair their destructive conduct.<sup>404</sup> In addition, failing explicitly to extend the assistance obligation to belligerent states arguably places too high a burden on the state with jurisdiction or control over the victims, and absolves belligerent or invading states of responsibility. Moreover, given the patchy record of interstate reparations payments following armed conflict,<sup>405</sup> it is problematic to assume an effective system of interstate compensation post-conflict. In any event, Article 91 of Additional Protocol I only imposes secondary responsibility for violations of the law, without recognizing the damage that occurs as part of the lawful conduct of war.<sup>406</sup> As VA would represent a primary obligation on all states, it is not necessarily inconsistent with IHL to impose such a responsibility. Finally, imposing an obligation to provide VA as an added cost of war would arguably disincentivize its use. These arguments weigh in favor of imposing an obligation to contribute to implementing VA on warring states, such as that set out in paragraph 6.

### C. Proposed Form and Funding

#### 1. Form and Oversight

Given the apparent reluctance of the international community to adopt new law,<sup>407</sup> a non-legal or soft law framework may be the preferred starting point. For example, the proposed model may initially take the form of a

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404. FABRE, *supra* note 240, at 171; *see also* May, *Reparations, Restitution and Transitional Justice*, *supra* note 37; Peperkamp, *supra* note 262, at 406; *cf.* Michael Walzer, *The Aftermath of War: Reflections on Jus Post Bellum*, in *ETHICS BEYOND WAR'S END* 35-46 (Eric Patterson ed., Georgetown University Press, 2012). The norms regulating peace in the just war tradition, for example, held that, in addition to reparation for war-time wrongdoings for victims, "assistance should be given to the defeated enemy and its civilian population towards the reconstruction of their country." Cécile Fabre, *Moral Responsibilities When Waging War*, OUPBLOG (Sept. 17, 2016), <https://blog.oup.com/2016/09/moral-responsibilities-waging-war> [https://perma.cc/5FW8-G7SE].

405. *See also* Sullo & Wyatt, *supra* note 121.

406. Additional Protocol I, *supra* note 10, art. 91.

407. *See supra* note 25; *see also* CARPENTER, *supra* note 204, at 64 (discussing the preferred approach of CIVIC to developing the law relating to amends); *id.* at 78 (discussing the preference of the ICRC to frame amends as "protecting civilians affected by armed conflict" rather than "filling gaps" in IHL (citations omitted)).

resolution from an appropriate body, such as the International Conference of the Red Cross and Red Crescent, or the UN General Assembly. While the ultimate goal might be a freestanding treaty or an additional protocol (for example to the 1949 Geneva Conventions), a soft law approach would strengthen and particularize existing obligations of states, without the initial burden of creating “hard law.”<sup>408</sup>

As the proposed model is obligation-, not individual rights-based, its efficacy would rest on strong oversight. To this end, the CCM’s transparency mechanisms may be instructive. Under the CCM, states must report annually to the UN Secretary-General on: (a) the status and progress of implementation of its VA obligations;<sup>409</sup> (b) details of the institutions mandated to carry out VA measures;<sup>410</sup> (c) the “amount of national resources, including financial, material or in-kind, allocated to the implementation” of VA obligations;<sup>411</sup> and (d) the “amounts, types and destinations of international cooperation and assistance provided.”<sup>412</sup> The UN Secretary-General must then distribute the reports among states parties to the treaty.<sup>413</sup> While there remains scope for development, there is evidence the CCM’s VA program has indeed benefitted victims, suggesting the implementation and oversight mechanisms have been effective.<sup>414</sup> The CCM’s approach to transparency provides a useful precedent for the proposed model.

## 2. *Additional Sources of Funding*

Recent VA models under disarmament law rely on international contributions to support states parties in meeting their primary assistance obligations.<sup>415</sup> While state contributions would likely (and appropriately) represent a significant source of funding (as discussed above),<sup>416</sup> it is worth considering additional sources, such as a tax on the manufacture or sale of weapons.<sup>417</sup> In 2020, the global arms trade was valued at over \$112 billion

408. See, e.g., JEFFREY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* 83 (Aspen, 5th ed., 2020) (describing soft law as “a vehicle to convey cost-effective yet credible signals to each other about their expectations as to what counts as compliant behavior”).

409. CCM, *supra* note 30, art. 7(1)(k).

410. *Id.*, art. 7(1)(l).

411. *Id.*, art. 7(1)(m).

412. *Id.*, 7(1)(n).

413. *Id.*, 7(3).

414. See, e.g., Review Conference of States Parties to the CCM, *Lausanne Declaration*, ¶ 4, UN Doc CCM/CONF/2020/WP.1 (23–27 November 2020) (noting that the VA provisions are making a positive difference to the care and rights of cluster munition victims); see also, Docherty & Sanders-Zakre, *supra* note 211 at 268–70; Camins, *Casting a Legal Safety Net*, *supra* note 343 at 239–40.

415. CCM, *supra* note 30, art. 6; TPNW, *supra* note 34, art. 7; Docherty & Moyes, *supra* note 389 at 409, ¶ 6.71.

416. See discussion *infra* Section IV.A, ¶ 5; see also *supra* Part IV.B.6.

417. My thanks to Philipp Kastner for this suggestion. Potential models include the proposed Tobin tax (on foreign exchange transactions) and the proposed Robin Hood tax (on financial transactions). See Jonathan Law, *Tobin tax*, *A DICTIONARY OF FINANCE AND BANKING* (Jonathan Law ed., 6th ed. 2018); see also Emmanuelle Jouanet, *How to Depart from the Existing Dire Condition of Development, in*

USD,<sup>418</sup> while world military expenditure in 2021 reached \$2.1 trillion.<sup>419</sup> One might reasonably argue that states and businesses profiting from armaments have a moral obligation to contribute to measures to remedy the harm caused by the weapons.

A tax or tariff on the transfer or brokerage of such weapons could potentially tie in with and expand upon obligations under the Arms Trade Treaty, such as those relating to the authorization of exports and measures to regulate brokering.<sup>420</sup> There would be scope for states to legislate for and collect the tax on a national level, and transmit the funds alongside their assistance contributions under paragraph 5 of the proposed model. Operationalizing such a measure on the international plane presents additional challenges. In addition to potential political hurdles and commercial opposition, there would be a significant practical obstacle: at present, a single coordinating body for international tax cooperation does not exist,<sup>421</sup> rendering enforcement difficult. However, there is currently considerable movement on the issue of international taxation, with the UN General Assembly recently resolving to explore the possibility of “developing an international tax cooperation framework or instrument.”<sup>422</sup> In time, this could provide a mechanism for the international administration of a tax on the transfer of armaments.<sup>423</sup>

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REALISING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 392, 410-12 (Antonio Cassese ed., 2012) (discussing fair globalization and the issue of international taxation).

418. *Financial Value of the Global Arms Trade*, STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, <https://www.sipri.org/databases/financial-value-global-arms-trade> [https://perma.cc/8U5K-PAUZ] (noting the true value is likely to be higher).

419. Press Release, Stockholm International Peace Research Institute, World Military Expenditure Passes \$2 Trillion for First Time (Apr. 25, 2022), <https://www.sipri.org/media/press-release/2022/world-military-expenditure-passes-2-trillion-first-time> [https://perma.cc/L4JE-L4WU].

420. Arms Trade Treaty, art. 8, Dec. 24, 2014, 52 I.L.M. 988 (authorizing arms exports); *id.*, art. 10 (requiring states to take measures to regulate brokering of conventional arms within their jurisdiction). An analogy might here be drawn with a Pigouvian tax, which “is a tax on a market transaction that creates a negative externality or an additional cost.” Ulrik Boesen, *Excise Tax Application and Trends*, TAX FOUNDATION FISCAL FACT NO. 753 4 (Mar. 2021). Examples include taxes on tobacco, sugar, and carbon. *Id.* My thanks to Ian Murray for drawing this comparison.

421. UN Secretary General, *Report on Further Strengthening the Work of the Committee of Experts on International Cooperation in Tax Matters*, Economic and Social Council, ¶ 20, UN Doc E/2015/51 (April 22, 2015).

422. UN General Assembly, *Promotion of Inclusive and Effective International Tax Cooperation at the United Nations*, ¶ 2, A/C.2/77/L.11/Rev.1 (November 23, 2022). Note also measures to address tax avoidance, improve the coherence of international tax rules and protect the taxation rights of developing countries under the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting. See OECD/G20 Base Erosion and Profit Shifting Project, *Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy*, at 3–5 (Oct. 2021), <https://www.oecd.org/tax/beps/brochure-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2021.pdf> [https://perma.cc/244D-H8T9].

423. An alternative to the taxation model might be found in the operation of the International Oil Pollution Compensation Supplementary Fund, which is financed by oil receivers and supplements the strict liability regime for oil pollution damage. See Alexandre Kiss & Dinah L. Shelton, *Strict Liability in International Environmental Law*, in LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES: *Liber Amicorum* Judge Thomas A. Mensah 1145–46 (Tafsir Malick Ndiaye & Rüdiger Wolfrum

## CONCLUSION

Armed conflict causes extensive suffering to its victims. Even if lawfully fought, war has a devastating effect on individuals and communities, destroying lives and rupturing the social fabric. The ramifications of conflict are felt on several levels, including physical, mental and emotional, economic, and cultural.<sup>424</sup> Meanwhile, the existing legal framework does not adequately address the human effects of armed conflict, leaving most victims without any form of reparation or redress. This combination of factors risks intensifying individual and social harm, perpetuating vulnerability, inequality, and conflict.<sup>425</sup>

This article has identified two key fault lines that may hinder the capacity of existing international legal measures to facilitate a satisfactory and peaceful outcome for victims of armed conflict. It has argued that existing approaches, while of value in securing legal justice, are retrospective and inherently limited by their grounding in violations of the law. Expanding the focus of the international legal response to connect war with peace and separate obligation from legal violations would enable a more holistic and forward-looking response to post-conflict victim suffering.

This article has invited consideration of a VA model to bridge the gap between the key needs of victims and the inadequacy of existing state obligations under international law. It has proposed an approach to victim suffering that focuses on mental and physical health and economic and social inclusion. The proposed model would oblige states to provide victims with age- and gender-sensitive assistance, including medical care, rehabilitation and psychological support, and measures for social and economic inclusion. While the primary duty would rest on the territorial state, other states—and potentially non-state actors such as armament companies or brokers—would also be required to contribute to implementing assistance measures, creating a shared responsibility framework.<sup>426</sup> The proposal also suggests transparency measures such as reporting obligations to facilitate compliance. Such a response, which finds precedent in related areas of international law, would be consistent with the philosophico-legal framework in which it would operate, giving rise to practical synergies and efficient use of limited resources. It would provide an important safety net to supplement individual and collective reparations and complement both the obligation of interstate compensation and the practice of making amends. Moreover,

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eds., 2007). This approach would likely necessitate the creation of a new trust fund for victims of armed conflict, as contemplated above. See *supra* note 393.

424. Prosecutor v. Germain Katanga, ICC-01/04-01/07-3762-tENG, Office of Public Counsel for Victims: Observations on the Trust Fund for Victims' Draft Implementation Plan Relevant to the Order for Reparations, ¶ 6 (Sep. 11, 2017).

425. Dahlum et al., *supra* note 235, at 31.

426. See Docherty & Sanders-Zakre, *supra* note 211, at 263.



the proposed model would provide a conceptual bridge between obligations arising in conflict and those applicable during peace.

Addressing the needs of victims of war is rightly a task for international law, and it is timely to consider expanding the modes for doing so. As May writes, “[i]t may be utopian to hope for an end to all wars, but it should not be seen as utopian to try to ameliorate the worst effects of war—the harms that occur to individuals who are simply often caught in the cross fire.”<sup>427</sup> The proposed model invites a widening of focus from the traditional violation-based model exemplified by reparations. While reparations for violations represent a valuable part of the post-conflict puzzle, they should be supported by prompt, sensitive and inclusive assistance measures if they are to help heal the divisions of armed conflict. By facilitating individual and community healing and empowerment, VA could provide a safety net to complement the selective nature of reparations. By prompting states to take initiative in an inclusive manner, a genuinely humanitarian response might arise.

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427. May, *Reparations, Restitution and Transitional Justice*, *supra* note 37, at 48.

