Volume 65, Number 2, Spring 2024

Human Remedies

Adi Gal*

Since its inception, the human rights movement has concentrated on rights, whereas remedies have remained peripheral. Human rights conventions, courts, and non-governmental organizations have theorized, analyzed, and sought to internationalize rights, but remedies have been treated as an afterthought. While the human rights movement has taken a key position in international law, the possibility of a "human remedies" movement was never considered. In recent years, however, remedies and reparations have become the focus of a growing political and scholarly debate. Harm caused to civilians during armed conflicts, increasing environmental damage inflicted on vulnerable communities, and the expansion of qualified immunity doctrines preventing judicial remediation are only a few examples demonstrating different facets of the wide gap between proclaimed rights and the remedies for their violation. This Article suggests that this remedial deficit is a result of conceptual and institutional designs we, as societies, have made.

Over the past two decades, remedies have begun to claim their place in both theory and practice in international human rights law. Nevertheless, the "rights prism" remains, limiting our thinking about remedial strategies that do not speak in the "language of rights." The right to a remedy, construed as the right to seek remedies, depends on proving wrongdoing, often through a judicial procedure. The notion that a responsibility to remediate can arise due to an injury caused by a lawful act under a no-fault regime, regardless of proving a violation of rights, remains largely unexplored in international human rights law. In stark contrast, the tort law of domestic legal systems has developed in the opposite direction by expanding states' obligations to remediate and relaxing the adjudication process for specific types of injuries through various reparation schemes.

Framing the remedial process as contingent on the adjudication of a rights claim and its alleged violation has contributed greatly to the internalization and

* J.S.D. Candidate, Yale Law School, E. David Fischman fellow. I am indebted to Professors Samuel Moyn, Harold Hongju Koh, and Daniel Markovits for their continuous guidance and support. I am also grateful for the critique and counsel given to me at various stages of writing by Rebecca Crootof, Avihay Dorfman, Doruk Erhan, Sarah Ganty, Alon Harel, Oona A. Hathaway, Pinny Huberman, Asaf Lubin, Noy Naaman, Haggai Porat, W. Michael Reisman, Guy Rubinstein, Yuval Shany, Omar Yousef Shehabi, Yonatan Shemesh, Fan Xiaolu, the participants of the Cornell Law School Inter-University Graduate Student Conference, and the participants of the Yale Law School J.S.D. Colloquium. I am enormously thankful to Ariq Hatibie and the editors of the Harvard International Law Journal for their excellent comments and suggestions.

internationalization of rights. But when harms continue, and right-bearers are forced to internalize their costs in the absence of an adequate remedial regime, cumulative damages are obscured, and a right becomes a rather vague and loose concept. This Article reassesses the "rights prism" remedial approach and explores how a no-fault regime can narrow the right-remedy gap by balancing the victim's right to a remedy with the state's responsibility to remediate.

Table of Contents

Introduction 389
I. Abundance of Rights, Scarcity of Remedies 396
 A. *International and Regional Human Rights Conventions* . . 396
  1. *International Human Rights Conventions* 396
  2. *Regional Human Rights Conventions* 399
 B. *U.N. Treaty Bodies and Regional Human Rights Courts* 402
  1. *U.N. Treaty Bodies* 402
  2. *Regional Human Rights Courts* 404
 C. *Nongovernmental Human Rights Organizations* 408
 D. *Why Remedies Matter* 410
II. Attempts to Solve the "Remedial Failure" Through the Lens of "Rights" 414
 A. *Remedy Contingent on Proof of a Violation* 415
  1. *The Conceptual Premise* 415
  2. *Reassessing the Conceptual Premise* 422
 B. *The Right to a Remedy and the Judicial Framework* 424
  1. *The Institutional Premise* 424
  2. *Reassessing the Judicial Premise* 429
 C. *Some Preliminary Conclusions*. 430
III. Balancing the Victim's Right to a Remedy with the State's Responsibility to Remediate 432
 A. *A Brief Comparative Review of No-Fault Compensation Schemes* 433
 B. *Primary Rationales Shared by the No-Fault Schemes* 437
IV. How Human Rights Law Can Use Domestic No-Fault Schemes to Enhance Remedies 439
 A. *Expanding Domains of State Responsibility to Remediate* . . . 439
  1. *Responsibility to Remediate Accidental Harm Caused by State Agents* 440
  2. *Responsibility to Remediate Accidental Harm Caused in the Course of an Armed Conflict* 442
 B. *Considering Trade-Offs and Benchmarks for Future Schemes* 445

1. *Quantum and Funding* 445
2. *Judicial Review* 446
3. *Decision-Making Process and Burden of Proof* 447
4. *Monetary Remedies* 448
5. *Non-Monetary Remedies* 449
C. *Internationalizing No-Fault Remedies* 450
1. *Proliferation of National Schemes Through International Treaties* 450
2. *Proliferation of National Schemes Through a Transnational Process* 451
3. *Toward an International No-Fault Scheme for Climate Harm* 453
Conclusion 455

Introduction

When the Universal Declaration of Human Rights ("UDHR") was intended to be an International Bill of Human Rights, the Drafting Committee of the Commission on Human Rights, subject to the Economic and Social Council ("ECOSOC"), divided its work into three main strands and respective working groups: a declaration, a convention, and the question of implementation.[1] The right to a remedy was to be included in the third strand,[2] yet the Committee barely discussed remedies per se. The temporary working group did not consider the scope, type, or nature of remedies attainable when the new "human rights" were infringed. Rather, it concentrated on the Bill's future normative legal status and the nature of the machinery that would supervise and enforce the new rights.[3]

After conducting its independent sessions, the working group presented the Commission with its conclusions. These conclusions included a plan to establish an international court of human rights, with proposed

1. William A. Schabas, *Introductory Essay: The Drafting and Significance of the Universal Declaration of Human Rights*, *in* The Universal Declaration of Human Rights: The Travaux Préparatoires lxxi, lxxi, xci (William A. Schabas ed., 2013). The working groups were established at the 29th meeting of the Commission on Human Rights. *See* Comm'n on Hum. Rts., Summary Rec. of Twentyninth Meeting on Its Second Session, U.N. Doc. E/CN.4/SR.29, at 12–13 (Dec. 8, 1947).

2. Schabas, *supra* note 1, at xci.

3. Comm'n on Hum. Rts., Draft Rep. of the Working Group on Implementation on its Second Session, U.N. Doc. E/CN.4/53, at 4–25 (Dec. 10, 1947).

jurisdiction over "(a) disputes covering human rights and fundamental freedoms referred to it by the Commission on Human Rights" and "(b) disputes arising out of Articles affecting human rights in any treaty or convention between States referred to it by parties to the treaty or convention . . . ."[4] Over time, however, as the Bill shaped up to be a non-binding declaration, the "question of implementation" was gradually taken off the agenda,[5] despite some states' objections.[6] On December 10, 1948, the UDHR was adopted with only a general reference to a right to a remedy.[7]

Following the adoption of the Declaration, human rights have become an effective, powerful tool.[8] Individuals and groups worldwide increasingly framed their struggles in the language of human rights to help legitimize and promote their concerns on the international plane, turning "human rights" into what has been referred to as "an ethical *lingua franca*."[9] The human rights movement has made immense progress by

---

4. *Id.* at 31.

5. After the Working Group submitted its report to the Commission, the latter informed the ECOSOC it "decided to take no decision on any specific principle or solution stated in the Report . . . ." *See* U.N. ESCOR, Rep. of the Comm'n on Hum. Rts. 2nd Sess., at 7, U.N. Doc. E/600 (Dec. 17, 1947). In its subsequent report, the Commission informed the ECOSOC that "it did not have the time to consider the question of implementation, or the Covenant, in detail." *See* U.N. ESCOR, Rep. of the Comm'n on Hum. Rts. 3rd Sess., at 5, U.N. Doc. E/800 (Jun. 28, 1948).

6. *E.g.*, U.N. ESCOR, 7th Sess., 218th mtg., at 695–96, U.N. Doc. E/SR.218 (Aug. 26, 1948) (Australia's representative, Herbert V. Evatt, explained that "under the English legal system the remedy was equal in importance to the right, for without the remedy there was no right," and reminded his colleagues that rights were already proclaimed in the 1919 Minority Treaties but became dead letters when individuals had nowhere to turn once those rights were infringed).

7. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 8 (Dec. 10, 1948) [hereinafter UDHR].

8. Louis Henkin, The Age of Rights 16 (1990) ("In the United Nations, human rights were on every agenda, and the dedicated efforts of individuals and of some governments resulted in important international political and legal instruments . . . ."). *But see* Samuel Moyn, The Last Utopia: Human Rights in History 1–2 (2010) (arguing that human rights began to receive wide recognition outside the political sphere of the United Nations only from the 1970s, when "the moral world of Westerners shifted, opening a space for the sort of utopianism that coalesced in an international human rights movement that had never existed before" and further noting that "[e]ven in 1968, which the UN declared 'International Human Rights Year,' such rights remained peripheral as an organizing concept and almost nonexistent as a movement").

9. John Tasioulas, *The Moral Reality of Human Rights*, *in* Freedom from Poverty as a Human Right: Who Owes What to the Very Poor? 75, 75 (Thomas Pogge ed., 2007).

advancing human rights not as aspirations or desires, nor a plea for charity or kindness, but as entitlements that stem from basic notions of morality, translated into a legal system.[10] So when society recognizes one's right, the rights-holder is entitled to society's acknowledgment, satisfaction, and protection of that right.[11]

At the same time, remedies for human rights violations, *i.e.*, the substance of relief given to individuals through judicial, administrative, or legislative measures,[12] remained a second if not third-order question: How to increase the internalization and internationalization of human rights? While there were some early attempts by the International Law Association to shift the "emphasis" from the definition of rights to remedies for their violation, rights seem to have remained at the fore.[13]

Louis Henkin, a founding father of the human rights movement,[14] stressed that in human rights law, "the formal edifice of rights, duties, and remedies is not wholly realistic."[15]

According to Henkin, while a state's treaty obligation to "ensure" a human right requires that victims receive an effective remedy for its

10. Henkin, *supra* note 8, at 3.

11. *Id.*

12. While the term "remedies" is traditionally associated with courts' powers and the term "reparations" indicates non-judicial consequences of responsibility, in international legal instruments and judgments this separation is often blurred. My concern in this Article is with different types of substantive relief granted to victims through judicial, administrative, or legislative measures, all of which I refer to as "remedies." The term "reparations" will be used if it appears in the primary or secondary sources discussed.

13. *See, e.g.*, Interim Rep. of the Sub-Comm. on the International Protection of Human Rights by General International Law, *in Human Rights*, 54 Int'l L. Ass'n Rep. Conf. 596, 633 (1970) (quoting Int'l L. Ass'n, Rep. of the Fifty-Second Conference 754 (1966)) (explaining that in 1965 the International Law Association established the Committee on Human Rights in order to examine "whether there should be a shift in emphasis from the Definition of Human rights to Remedies for infringement of Human Rights"). The Committee's Rapporteur responded in the following year that "the trend is now towards the establishment of international machinery and techniques for implementation, machinery and techniques, that is to say, which will provide for some kind of supervision and control of the conduct of States in the observance of the standards now established." *Id.*

14. Harold Hongju Koh, *The Future of Lou Henkin's Human Rights Movement*, 38 Colum. Hum. Rts. L. Rev. 487, 490 (2007) (noting that the international human rights movement was Henkin's "most famous offspring").

15. Henkin, *supra* note 8, at 40.

violation,[16] "institutional remedies are few and infrequent."[17] But if remedies are understood as "inducements to comply,"[18] there are other forces—domestic and international, formal and informal—that can be considered "remedies," as they too push the state to fulfill its primary obligation and ensure the right in the future.[19] In other words, remedies for human rights violations were not expected to bring much relief to the individual, but to "enhance the likelihood that rights will be enjoyed" in the future.[20]

Over time, U.N. instruments,[21] various judicial and non-judicial fora,[22] and international non-governmental human rights organizations,[23] continued to develop, vindicate, and advocate for human rights norms. Yet they remained more reluctant to coerce states to allocate remedies when compliance with those norms deteriorated.[24] So while the international community theorized and discussed human rights, remedies remained a secondary topic, often accompanied by a sense of intentional vagueness.[25]

---

16. *Id*. at 149.
17. *Id*. at 39.
18. *Id*.
19. *Id*. ("[P]olitical criticism [including sanctions] by other states and international bodies, criticism by nongovernmental organizations including various activist organizations, and world-press available to mobilize hostile opinion. Might these qualify as well, or in addition, as 'remedies' that support the quality of international legal right because they enhance the likelihood that the rights will be enjoyed in fact?").
20. *Id*. at 38.
21. *See infra* Part I.A.
22. *See infra* Part I.B.
23. *See infra* Part I.C.
24. *See* Dinah Shelton, Remedies in International Human Rights Law 1–2 (3d ed. 2015) (arguing that most human rights tribunals, except for the Inter-American Court, "appear to remain unsure about the scope of their power to design and award remedies" and that "many human rights tribunals tend to see their primary role as forward-looking, that is, as bringing the state into compliance with its obligations"); *cf.* Kent Roach, Remedies for Human Rights Violations: A Two-Track Approach to Supra-National and National Law 5–6 (2021) (noting that it is international law's approach to remedies that inspired him to think of remedies as a "two-track process," where domestic courts, like supranational courts, should provide both forward-looking and backward-looking remedies).
25. *See, e.g.*, Jeffrey K. Staton & Alexia Romero, *Rational Remedies: The Role of Opinion Clarity in the Inter-American Human Rights System*, 63 Int'l Stud. Q. 477, 477 (2019) ("[A]lthough common concepts of the rule of law value legal clarity, judges do not always clearly express how they expect states to remedy their violations."). Staton and Romero note that while "[v]agueness can be used to provide state officials with a

While the human rights movement has taken a key position in international law, the possibility of a "human remedies" movement was never considered.[26] But remedies matter. If designed correctly, they can deter states from future violations; they can satisfy the victim's deep-rooted need for retribution and retaliation; they symbolize vindication; and they are a fundamental feature of rehabilitation and healing for individuals and societies alike.[27] Remedies are also critical for rights. They define the scope and limits of rights, and efficiently delineate which rights are realized and which rights are still within the terrain of normative declaration. In the real world, there are often gaps between rights and remedies. This does not mean there are no rights per se.[28] Nevertheless, a continued lack of remediation in response to the breach of a right alters that right, at least in the realm of legal praxis if not in the realm of morality. If a right is repeatedly violated and remains unredressed, some measure of honesty is required, and we must ask ourselves: Is there a right?

---

measure of discretion," it can also "invite delays, resistance, and, sometimes, outright defiance," which means that "this ability to manage the means-ends problem through vagueness invites a tradeoff." *Id.*

26. My idea for the term *human remedies* was inspired by Samuel Moyn's writing on "rights vs. duties," where he cites philosopher Onora O'Neill's criticism of the lack of a Universal Declaration of Human Duties or an International Human Obligations Movement. To this, Moyn adds: "While there has been great interest in the history of rights, no one has attempted to write the history of human duties." *See* Samuel Moyn, *Rights vs. Duties*, BOSTON REV. (May 16, 2016), https://www.bostonreview.net/articles/samuel-moyn-rights-duties [https://perma.cc/UCP3-7MZ9]. Various scholars who rejected the "rights talk" and stressed the importance of duties, however, ruled out remediation as the latter's possible—even if partial—manifestation. *See* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 97–98 (1991) (considering a remedial tort model as an ineffective way to promote a broader "civic obligation," since torts put individual rights first); DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 24–25 (2004) ("Human rights remedies, even when successful, treat the symptoms rather than the illness, and this allows the illness not only to fester, but to seem like health itself.").

27. Yael Danieli, *Massive Trauma and the Healing Role of Reparative Justice*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 41, 59–60 (Carla Ferstman et al. eds., 2009).

28. Hanoch Dagan, *Remedies, Rights, and Properties*, 4 J. TORT L. 1, 7 (2011) ("[R]ight infringements may not always trigger a remedy that fully vindicates the right at stake . . . .").

Over the last couple of decades, various attempts have been made to solve what has been referred to as "remedial failure."[29] Scholars,[30] non-governmental organizations ("NGOs"),[31] and the United Nations[32] have all paid more attention to remedies and advanced remedial theory and practice, yet many of these attempts can be framed under what I call the *rights-prism remedial approach*, which still perceives remedies through the lens of rights and the question of rights violations. This approach shares two largely uncontested premises: that proof of a violation and wrongdoing is the ultimate way for a remedy to arise, and that judicial remedies should be preferred—leaving non-judicial, especially non-adversarial, mechanisms and their remedial potential underexplored.[33] Under these premises, the analysis and articulation of rights stand at the core of human rights remedial practice.

This Article seeks not to replace the rights-prism remedial approach but to reconsider these prevalent assumptions to provoke further analysis of *additional* remedial strategies, ones that take less interest in the violation of the right in question and instead focus on remediating harm caused. It does so by suggesting two shifts. First, on the institutional level, while the rights-prism remedial approach is primarily concentrated on courts or other quasi-judicial bodies to determine the breach of a right, this Article suggests that, in addition to courts, governments should promote more administrative mechanisms that would aim to balance the individual's right to a remedy with the state's responsibility to remediate. Second, on the conceptual level, this Article suggests that these remedial schemes should embrace no-fault liability that focuses on harms and the distribution of their costs, rather than wrongful conducts or violations. They would draw on existing domestic compensation schemes from various jurisdictions, designed to allow broader and more immediate access to remedial arrangements compared to courts, but at

29. I borrow this phrasing from ROACH, *supra* note 24, at 5–6 ("International law has grappled with the reality of remedial failure . . . .").

30. *See infra* Parts I.D, II.B.

31. *See infra* Part I.C.

32. *See infra* Part I.B.

33. *See infra* Parts II.A, II.B. An exception to IHRL's judicial or quasi-judicial remedial preference can be seen in the context of transitional justice. For further discussion *see infra* text accompanying notes 117–118, 171.

the same time would enrich courts' jurisprudence on additional standards of liability.[34]

The remainder of this Article is divided into four Parts. Part I sets out the underpinnings and foundations for the deficiency of remedies under international human rights law ("IHRL"). It illustrates the extensive use of rights and the relatively scarce attention paid to remedies in U.N. and regional human rights instruments, human rights courts and tribunals, and NGO advocacy. It then considers some of the implications of the right-remedy imbalance, and suggests that, while it is essential to instill rights as international norms, the scarcity of remedies can lead to dangerous social consequences.

Part II reassesses two dominant notions in IHRL that remain largely uncontested under the *rights-prism remedial approach*: first, that remedies should by default arise from proof of the violation of rights, and second, that judicial remedies should be preferred over administrative ones. I propose that, although courts, insofar as they are independent and free of political bias, are crucial for any remedial practice, they should not be expected to narrow the right-remedy gap by themselves. Insofar as they take rights seriously, governments should act more rigorously to fulfill their independent responsibility to remediate, in addition to existing judicial mechanisms.

Part III presents what a government's responsibility to remediate might entail. As I show, in stark contrast to international law, tort law has developed in the opposite direction by expanding states' responsibility to remediate under no-fault liability regimes and relaxing the adjudication process for specific types of harm. I suggest that this shift should be further explored under IHRL. Victims subjected to unequivocal harm

34. Michael Reisman suggested that in cases of collateral damage caused to non-combatants during armed conflicts, the party causing the injury should have a general obligation to compensate for the harm caused, regardless of whether it violated the rules of international humanitarian law ("IHL"). *See generally* W. Michael Reisman, *The Lessons of Qana*, 22 Yale J. Int'l L. 381 (1997). In a later article, Reisman repeated this thesis, adding that IHL had wrongfully deviated from domestic legal principles that facilitate a distinction between the question of violation and the question of remediation. *See generally* W. Michael Reisman, *Compensating Collateral Damage in Elective International Conflict*, 8 Intercultural Hum. Rts. L. Rev. 1 (2013). Reisman differentiates IHL and IHRL victims due to the latter's standing rights to seek remedies (standing which is not granted to IHL victims). *Id.* at 4. However, this Article seeks to illustrate the particular issues that arise from this reliance on courts and suggests that a similar distinction between violation and remedy should be adopted for IHRL.

should be remediated readily through administrative no-fault schemes without an excruciating legal battle. Moving away from the "rights prism" would facilitate such a shift.

Building on Part III, Part IV provides examples of types of harms that could benefit from a no-fault scheme; explores possible trade-offs and potential benchmarks for future institutionalization; and suggests that focusing more on domestic remedial systems could, through a "transnational legal process,"[35] contribute to international remedial practice to serve a broader remedies movement. While this Part discusses possible means of implementation, it refrains from establishing strict criteria for triggering no-fault schemes; its main purpose is to provoke further analysis.

I. Abundance of Rights, Scarcity of Remedies

A. *International and Regional Human Rights Conventions*

1. *International Human Rights Conventions*

Human rights conventions tend to say little about remedies. Since rights were meant to be a universal tool, their codification had to be broad enough to overlook the differences between cultural interpretations and states' varying capacities to realize them.[36] While this vagueness enabled wider acceptance, it also relieved states from committing to specific obligations when it came to remedies.[37]

The International Covenant on Civil and Political Rights ("ICCPR"), for example, enumerates more than twenty rights, yet only two prescribe specific remedies in the event of their violation.[38] All other rights are

---

35. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599, 2645–46 (1997) (suggesting that distinct players in the international plane interact with one another, interpret the global norms applicable to their situation, and internalize them into their domestic systems). This process, says Koh, "generates a legal rule which will guide future transnational interactions between the parties." *Id.*

36. Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 Yale J. Int'l L. 211, 251–52 (2005).

37. *Id.*

38. International Covenant on Civil and Political Rights art. 9, ¶ 5, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."); *id.* art. 14, ¶ 6 ("When a person has by a final decision been convicted of a criminal offense and when subsequently his conviction has been reversed . . . the person who has suffered punishment . . . shall be compensated according to law . . . .").

protected by an umbrella clause that establishes the state's dual duty: to ensure that remedial claims are determined by competent judicial, administrative, legislative, or any other authority provided for by the state's legal system; and to enforce the remedies if so ordered by the relevant authority.[39] The text does not clarify what type of remedy is required or what happens if such a remedy is not awarded.

Furthermore, Article 2, Paragraph 3(a) highlights that the right to a remedy applies only upon the determination of a rights violation and, even though the provision allows administrative or legislative authorities to decide upon claims, there is a preference for the judicial route.[40] This emerges from the language of the ICCPR itself, according to which Article 2, Paragraph 3(b) obliges the state "to develop the possibilities of judicial remedy."[41]

Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD") enumerates a long list of civil, political, economic, social, and cultural rights; yet the obligation for remedies remains ambiguous under Article 6.[42] ICERD does not specify

---

39. *Id.* art. 2, ¶ 3 ("Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.").

40. Paul M. Taylor, *Article 2: To 'Respect and to Ensure' Covenant Rights*, *in* A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights 58, 78–79 (2020) (arguing that the reason for this preference stems from the attempt to avoid, as much as possible, decisions made by political bodies); Valeska David, *Reparations at the Human Rights Committee: Legal Basis, Practice and Challenges*, 32 Neth. Q. Hum. Rts. 8, 15 (2014) (noting that the drafters agreed "that competent judicial, administrative and legislative authorities of the State could equally constitute an effective remedy, while simultaneously giving certain prevalence to judicial remedies, which States obligated themselves to develop").

41. Taylor, *supra* note 40, at 78.

42. International Convention on the Elimination of All Forms of Racial Discrimination art. 6, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD] ("States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.").

what forms of reparation or satisfaction will suffice, or who is liable for them, thus leaving much room for interpretation.[43] During the drafting of Article 6, states' representatives rejected the right *to obtain* reparation, insisting that what was assured was the right to have "national tribunals and other State institutions" assess claims of a violation.[44] States agreed that potential claimants had only the right *to seek* reparation,[45] and suggestions to include clauses on damages were rejected.[46]

Other U.N. and global treaties such as the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the International Labor Organization Discrimination (Employment and Occupation) Convention, and the Convention and Protocol Relating to the Status of Refugees, do not include a remedy clause in case the rights guaranteed by these conventions are violated.[47]

A noticeable shift with respect to the articulation of remedies occurred in 2005 when the U.N. General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (the "Basic Principles and Guidelines").[48] This fifteen-years-in-the-making document was the United Nations' first significant attempt to refer comprehensively to

---

43. *See* Shelton, *supra* note 24, at 64 (noting that when signing the ICERD, the United Kingdom declared that, in its interpretation, the obligation under Article 6 would be discharged if any form of redress were made available, and "satisfaction," according to its account, would be achieved if the discriminatory conduct were brought to an end); Patrick Thornberry, The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary 407 (2016) (noting that Italy interpreted remedies to allow any claims for damage to be brought against the responsible persons for the acts that caused the damage).

44. Thornberry, *supra* note 43, at 406.

45. *Id.*

46. *Id.* at 425–26.

47. *See generally* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Elimination of All Forms of Discrimination Against Women, Mar. 1, 1980, 1249 U.N.T.S. 13 [hereinafter CEDAW]; Discrimination (Employment and Occupation) Convention, June 25, 1958, 362 U.N.T.S. 31; Convention and Protocol Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 139.

48. *See generally* 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 (Dec. 16, 2005) [hereinafter Basic Principles and Guidelines].

remedies and reparations as an issue requiring particular attention. Yet despite its descriptive and normative importance, its significance in practice is questionable. The Basic Principles and Guidelines clarify that they do not add any new obligations but reaffirm existing ones, rendering them largely declaratory.[49] Further, as the title and Preamble illustrate, they are directed at gross and serious violations, leaving violations that fall short of this threshold outside their scope.[50]

2. *Regional Human Rights Conventions*

Like U.N. conventions, regional human rights treaties enumerate rights much more clearly and extensively than they do remedies. The most advanced treaty in terms of remedies is the American Convention on Human Rights ("ACHR"). In addition to including remedies in some of the rights provisions,[51] two other articles are meant to guarantee remediation. Article 25 guarantees the right to judicial protection, providing everyone the right to recourse to a competent court or tribunal for protection against acts that violate their fundamental rights.[52]

---

49. Theo van Boven, *Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines*, *in* Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity 19, 32 (Carla Ferstman et al. eds., 2009) ("[T]hey are meant to serve as a tool, a guiding instrument for States in devising and implementing victim-oriented policies and programmes . . . . [G]ood reason can be advanced to consider the text as declaratory of legal standards in the area of victims' rights, in particular the right to a remedy and reparation.").

50. *Id.* at 33–34 ("[I]n customary international law 'gross violations' [of IHRL] include the types of violations that affect in qualitative and quantitative terms the core rights of human beings, notably the right to life and the right to physical and moral integrity of the human person. . . . The term 'serious violations' [of International Humanitarian Law] stands for severe violations that constitute crimes under international law . . . ."). Article 26 therefore provides that "it is understood that the present Principles and Guidelines are without prejudice to the right to a remedy and reparation for victims of *all* violations of international human rights law and international humanitarian law." *Id.* at 34 (emphasis added).

51. American Convention on Human Rights arts. 7, 10, 21, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR] (Article 7 states the right to personal liberty and enumerates that deprivation of this right generates the right to recourse; Article 10 provides that every person has the right to be compensated in accordance with the law in the event a final judgment has sentenced them through a miscarriage of justice; Article 21 states the right to property and the remedy of compensation.).

52. Article 25 obliges state parties to ensure that persons claiming this remedy has their rights determined by the competent authority provided for by the legal system of the state; to develop the possibilities of judicial remedies; and to ensure that the competent authorities enforce such remedies when granted. The second half of Article 25

The second remedial provision, Article 63.1, provides that if the Inter-American Court of Human Rights ("IACtHR") finds a rights violation, it should rule that it must be reinsured. It may also—if it considers it appropriate—order fair compensation for the injured party.[53]

The European Convention on Human Rights ("ECHR") includes a remedial clause for violations of the right to liberty and security,[54] and two general remedial provisions: one that enumerates the obligations of states to provide national remedies, and another that enables the European Court of Human Rights ("ECtHR") to order just satisfaction. Article 13, which concerns the right to a national remedy, provides that everyone whose rights were violated shall have an effective remedy before a national authority, notwithstanding that the violation was committed by persons acting in an official capacity.[55]

However, while there are basic requirements for a remedy to be considered effective, the ECtHR made clear that the word "'remedy,' in the context of Article 13, does not mean a remedy bound to succeed, but simply an accessible remedy before an authority competent to examine the merits of a complaint."[56]

---

resembles Article 2, Paragraph 3 of the ICCPR, which requires states parties to respect their obligation to provide remedies, preferably judicial ones. *See supra* text accompanying notes 40–41.

53. Christine Gray, *Remedies*, *in* The Oxford Handbook of International Adjudication 871, 894 (Cesare P.R. Romano et al. eds., 2015) (arguing that the provision provides the Inter-American Court of Human Rights with greater powers than any other human rights court or tribunal).

54. Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] ("Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.").

55. Article 13 was the source of some confusion due to its circularity. *See* Shelton, *supra* note 24, at 68 (noting that Article 13 allows relief only for those whose right has been violated, but that, in order to prove that a right has been infringed, a claimant must be provided with the means to prove it). Therefore, the ECtHR determined that the provision should be interpreted such that if individuals claim that their convention rights have been violated, they shall be entitled to have a competent state body determine whether those allegations are entitled to redress. *Id.*

56. European Court of Human Rights, Guide on Article 13 of the European Convention on Human Rights: Right to an Effective Remedy 18 (Feb. 29, 2024) https://ks.echr.coe.int/documents/d/echr-ks/guide_art_13_eng\ [https://perma.cc/VSF7-PGSY] [hereinafter Guide on Article 13]. The ECHR resembles the ICERD in the sense that it guarantees victims the right to *seek* reparation. *See* Thornberry, *supra* note 43, at 406.

Aside from Article 13, Article 41 addresses the ECtHR's scope to determine remedies, allowing it to award just satisfaction if the following are established: (1) that a violation has been committed; (2) that internal law allows only partial reparation; and (3) that the reparation is necessary.[57] While the first two conditions are quite easily met, the third requirement leaves the ECtHR broad discretion, especially in cases involving non-pecuniary harm, where it often determines that damages are unnecessary and that mere recognition of a rights violation is sufficient.[58]

The African Charter on Human and Peoples' Rights ("ACHPR") does not include a general remedial clause. The closest might be Article 7, which establishes the right of every individual to have their "cause heard" by "competent national organs", yet it does not mention the right to a remedy in case a violation is found.[59] Aside from that, of all the rights specified in the ACHPR, one is supported by an explicit remedy: Article 21 affirms peoples' right to "freely dispose of their wealth and natural resources."[60] The clause has been interpreted in only a few communications to date, and the Court and Commission have rarely found an actual violation.[61]

A more elaborative clause can be found under Article 27 of the Protocol to the African Charter on Human and Peoples' Rights, which provides the African Court with broad discretion to make "appropriate orders to remedy the violation including the payment of fair compensation or reparation."[62] Unfortunately, the Court's authority and level of compliance have been relatively weak.[63]

---

57. Veronica Fikfak, *Non-Pecuniary Damages Before the European Court of Human Rights: Forget the Victim; It's All About the State*, 33 Leiden J. Int'l L. 335, 339 (2020).

58. *Id.*

59. African Charter on Human and Peoples' Rights art. 7, ¶ 1(a), June 27, 1981, 21 I.L.M. 58. [hereinafter ACHPR].

60. *Id.* art. 21, ¶ 2 ("In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.").

61. Rachel Murray, The African Charter on Human and Peoples' Rights: A Commentary 518 (2019).

62. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 27, June 10, 1998.

63. John Mukum Mbaku, *The Emerging Jurisprudence of the Africa Human Rights Court and the Protection of Human Rights in Africa*, 56 Vand. J. Transnat'l L. 367, 405 (2023) ("Of the states that have ratified the African Court Protocol, only ten have made an Article 34(6), effectively accepting the competence of the African Human Rights Court to directly receive cases from individual citizens and NGOs within these countries. However, four countries have since withdrawn their Article 34(6) declarations.");

B. U.N. Treaty Bodies and Regional Human Rights Courts

The scarcity of remedies in human rights regional courts and U.N. human rights treaty bodies takes two main forms. First, as seen in the conventions above, when addressed, remedies are typically encouraged to be judicial—nationally and internationally. Yet the victim's road to a judicial remedy is filled with procedural, financial, and substantive hurdles. These obstacles not only leave numerous victims without a remedy after a lengthy judicial or quasi-judicial battle, but a priori deter many potential applicants from bringing complaints. Remedies are therefore scarce because they are hard to get. The second type of deficit, which is related but distinct from the first, is jurisprudential. Remedies are scant in that they are often left unclear, under-discussed, and subsidiary to the main purpose of the judicial process—the vindication of rights. Indeed, in human rights judicial mechanisms, declaring that a responding state has violated a conventional right is often perceived as the core of the judgment.[64]

1. U.N. Treaty Bodies

The nine "core" U.N. human rights treaties establish monitoring bodies to supervise state parties' compliance with their treaty obligations.[65] Although the treaties do not provide them with clear enforcement

---

Lilian Chenwi, *Successes of African Human Rights Court Undermined by Resistance from States*, The Conversation (Aug. 31, 2021), https://theconversation.com/successes-of-african-human-rights-court-undermined-by-resistance-from-states-166454 [https://perma.cc/7QTN-4XJU] (pointing out that around 75% of the court's decisions are not complied with by the states). This Article will focus mainly on the European and American Courts.

64. Shelton, *supra* note 24, at 287 ("[A] declaration that the responding state has or has not violated a guaranteed right or rights of the victim forms the heart of a judgment in all international human rights complaint procedures."); *see also* Eva Brems, *Human Rights: Minimum and Maximum Perspectives*, 9 Hum. Rts. L. Rev. 349, 350 (2009) ("In human rights discourse, the concept of the 'human rights violation' is central. Determining whether any particular measure that restricts a human right constitutes a violation of that right is the main pre-occupation of the human rights lawyers."). Scholars have expressed a similar critique of the emphasis put on rights by constitutional courts. For further discussion *see infra* text accompanying notes 91–94.

65. *See generally* U.N. OHCHR, *Individual Complaint Procedures Under the United Nations Human Rights Treaties*, Fact Sheet No. 7 Rev. 2, 1 (2013), https://www.ohchr.org/sites/default/files/2021-08/FactSheet7Rev.2.pdf [https://perma.cc/K7TV-DUZC] (referring to the following as the "core human rights treaties": ICCPR, *supra* note 38; ICERD, *supra* note 42; CEDAW, *supra* note 47; ICESCR, *supra* note 47; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; The Convention on the Rights

powers, their authority is mandatory once a state becomes a member.[66] However, treaty bodies' jurisdiction over individual complaints is not automatic; it requires states to allow the committees to review individual complaints alleging rights violations by a state party through a quasi-judicial procedure.[67]

A complaint brought under an individual complaint mechanism must satisfy two requirements.[68] First, the applicant must show that the state is a part to the convention in question and that it accepted the individual complaint procedure. Second, the applicant must also show that the right has been violated and that they exhausted all available domestic remedies.[69] Yet, even if the complainant succeeds in meeting the burden of proof, the committees can provide a non-legally binding recommendation to the state regarding the required remedies, and monitor the implementation of their recommendations through follow-up procedures.[70] Generally speaking, as Shelton commented, "[t]he main work of the treaty bodies . . . lies in standard-setting."[71]

---

of Persons with Disabilities, Mar. 30, 2007, 2515 U.N.T.S. 3 [hereinafter CRPD]; The International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 23, 2010, 2716 U.N.T.S. 3 [hereinafter ICPPED]; The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Dec. 18, 1990, 2220 U.N.T.S. 3 [hereinafter CMW]; The Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

66. Dinah Shelton, *The Development of Human Rights Law and Challenges Faced by UN Treaty Bodies 1969-2022*, 25 Max Planck Y.B. U.N. L. Online 682, 686 (2022) ("States have been notably reluctant . . . to include measures that amount to enforcement or allow binding judgments to be taken or sanctions imposed for non-compliance.").

67. *See generally* U.N. OHCHR, *The United Nations Human Rights Treaty System*, Fact Sheet No. 30 Rev. 1 (2012), https://www.ohchr.org/sites/default/files/Documents/Publications/FactSheet30Rev1.pdf [https://perma.cc/ZP8P-5CV7].

68. *See generally Individual Communications: Human Rights Treaty Bodies*, U.N. OHCHR, https://www.ohchr.org/en/treaty-bodies/individual-communications [https://perma.cc/YR5T-6TJA].

69. *See* U.N. OHCHR, *Individual Complaint Procedures*, *supra* note 65, at 7–10.

70. *Id.* at 11. *But see* Christian Tomuschat, Human Rights: Between Idealism and Realism 233 (3d ed. 2014) (discussing treaty bodies' recommendations on state reports and emphasizing that "the lack of juridical bindingness does not necessarily affect the effectiveness of such observations. Countries that are eager to have a positive balance sheet in the field of human rights, because in general they are committed to the rule of law, will carefully evaluate any observations which have been addressed to them, seeking to remedy any deficiencies to the greatest extent possible.").

71. Shelton, *supra* note 66, at 688.

Over the years, critics have questioned treaty bodies' effectiveness with respect to individual complaints,[72] and their lack of guidance on how states should remediate the violation.[73] With time, treaty bodies have provided more specific views on how states should respond to the violation in terms of future compliance,[74] yet it is not uncommon for committees to find a rights violation with only a general recommendation on the type of remedy for the author of the communication.[75]

2. *Regional Human Rights Courts*

Due to their binding jurisdiction, human rights courts have been more elaborative than U.N. committees, but still tend to leave remedies ambiguous, in contrast to their in-depth analysis of rights. Regional courts adjudicate cases on their merits, deliberating whether a right has been violated or not. Remedies, in contrast, are not considered the main part of a judgment.

The ECtHR's official practice directions recently clarified that "it should be borne in mind that the public vindication of the wrong suffered by the applicant, in a judgment binding on the Contracting State, is

---

72. *See* Geir Ulfstein, *Individual Complaints*, *in* UN Human Rights Treaty Bodies: Law and Legitimacy 73, 115 (Hellen Keller & Geir Ulfstein eds., 2012) (arguing that many states choose not to implement treaty bodies findings and cases often take years to be decided, leading to a possible chilling effect on new complainants).

73. Shelton, *supra* note 24, at 201.

74. *See id.* at 197–203.

75. *See, e.g.*, Jallow v. Bulgaria, Comm. on the Elimination of Discrimination against Women, U.N. Doc. CEDAW/C/52/D/32/2011, ¶ 8.8 (Aug. 28, 2012) ("concerning the author of the communication and her daughter: To provide them with appropriate compensation commensurate with the gravity of the violations of their rights."); Gerasimov v. Kazakhstan, Comm. against Torture, U.N. Doc. CAT/C/48/D/433/2010, ¶ 14 (July 10, 2012) ("The Committee urges the State party to conduct a proper, impartial and independent investigation in order to bring to justice those responsible for the complainant's treatment, to provide the complainant with redress and fair and adequate reparation for the suffering inflicted, including compensation and full rehabilitation, and to prevent similar violations in the future."); Sotnik v. Russia, Hum. Rts. Comm., U.N. Doc. CCPR/C/129/D/2478/2014 (Oct. 14, 2020) ("[T]he State party is obliged to provide the author with an effective remedy, including adequate compensation for the violations suffered. The State party is also under an obligation to take all steps necessary to prevent similar violations from occurring in the future."); Zapescu v. Moldova, Comm. on the Elimination of Racial Discrimination., U.N. Doc. CERD/C/103/D/60/2016, ¶ 10 (May 31, 2021) ("The Committee recommends that the State party convey an apology to the petitioner and grant him adequate compensation for the damage caused by the above-mentioned violation of the Convention.").

a powerful form of redress in itself."[76] In other words, it is the vindication of the right that matters, and remedies can, but by no means have to, be considered, let alone awarded by the ECtHR.[77]

Furthermore, when the ECtHR awards remedies for non-pecuniary harm, these are often limited to damages whose calculation method is confidential. Damages are scaled by classified tables, leaving potential claimants with a limited idea of what to expect or how to assess if seeking damages is worthwhile.[78] Recent data analysis by Veronica Fikfak shows that, despite the court's claims that its main role is to provide justice for individual claimants, its non-pecuniary remediation system is focused on the state—what it can afford and with what it can comply.[79] This aligns with the ECtHR's recent statement, noting that just satisfaction is determined, among other criteria, by looking at "the local economic circumstances in the Respondent States."[80]

This rather fuzzy definition has not only affected ECtHR claimants. The Strasbourg court's reluctance to set guidelines on damages calculations affects all forty-six legal systems that are obliged to comply with its orders and the interpretation of the ECHR.[81] Indeed, the United King-

76. Eur. Ct. Hum. Rts., Practice Directions: Just Satisfaction Claims 66 (June 3, 2022), https://www.echr.coe.int/documents/pd_satisfaction_claims_eng.pdf [https://perma.cc/K86L-AC7D] [hereinafter ECtHR Practice Directions].

77. *See, e.g.*, H.F. v. France, App. Nos. 24384/19 & 44324/20, ¶ 288 (Sept. 14, 2022), https://hudoc.echr.coe.int/fre?i=001-219333 [https://perma.cc/FS97-LK5V]. The applicants, French citizens, requested five thousand Euros for each family as compensation for the non-pecuniary damage they claimed to have suffered due to France's repatriation of their daughters and grandchildren back to Syria as they were trying to flee the war. The court found that France had violated its obligation yet considered that "a finding of a violation is sufficient in itself to compensate for any non-pecuniary damage sustained by the applicants." *See also* Ástráðsson v. Iceland, App. No. 26374/18, ¶ 130 (Dec. 1, 2020), https://hudoc.echr.coe.int/fre?i=001-191701 [https://perma.cc/68G3-7P3R]; Ibrahim v. Norway, App. No. 15379/16, ¶9-10 (Serghides, J., partly dissenting) (Dec. 10, 2021), https://www.courthousenews.com/wp-content/uploads/2021/12/ibrahim-norway-echr.pdf; Grzeda v. Poland, App. No. 43572/18, ¶ 357-58 (Mar. 15, 2022), https://hudoc.echr.coe.int/fre?i=001-216400 [https://perma.cc/683S-ULCA]; Fedotova v. Russia, App. No. 40792/10, ¶ 235 (Jan. 17, 2023), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-222750%22]}.

78. Fikfak, *supra* note 57, at 361.

79. *Id.* at 360 ("[T]he victim is wholly neglected in the Court's consideration of damages. Her vulnerability, individual circumstances, and consequences she may have suffered are mostly ignored (including death). In group cases, the award is not individualized, and the victim depends on others in the group.").

80. ECtHR Practice Directions, *supra* note 76, at 67.

81. Fikfak, *supra* note 57, at 336–37.

dom Law Commission has stated that the ECtHR's jurisprudence on damages has failed to provide coherent legal principles.[82]

Unlike the ECtHR, the IACtHR has famously adopted a more progressive approach to remedies and even developed new ones, presenting a much more victim-oriented jurisprudence. Examples run from demanding the opening of a trust fund and a medical clinic in a case involving the unlawful killing of villagers, to finding and returning the remains of a disappeared person to his family, to releasing an unlawfully detained arrestee and ordering the state to provide him with a new job, benefits, and pension.[83]

Still, the IACtHR, albeit much less frequently, has held that recognizing a rights violation through a judgment constitutes sufficient remedy.[84] Furthermore, the number of cases that actually reach the IACtHR is significantly lower in comparison to those that reach the ECtHR, and they usually concern only the most serious rights violations, such as torture and enforced disappearance.[85] Over the past decade, the IACtHR has reviewed, on average, twenty-five cases per year out of some 2,000 yearly petitions, allowing it to reduce the overall expected remedial "costs."[86] Finally, despite the court's progressive approach, recent research has shown that the general degree of state parties' compliance with remedies is only 38.87%.[87]

Scholars have suggested different motives for why courts are reluctant to award more remedies and develop consistent remedial jurisprudence. Fear of legitimacy loss and noncompliance,[88] hesitance over interfering with states' resources,[89] and a perception of the court's role in maintaining compliance rather than in allocating individual remedies for past

---

82. *Id.* at 336.

83. Gray, *supra* note 53, at 895 nn.105–08.

84. Roach, *supra* note 24, at 251.

85. Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. Rev. 693, 733 (2008).

86. *IACHR Statistics*, Inter-Am. Comm'n Hum. Rts. (Dec. 2022), https://www.oas.org/en/iachr/multimedia/statistics/statistics.html [https://perma.cc/V69M-VSDW]; *see also* Starr, *supra* note 85, at 734.

87. Patricia Cruz Martin, *Compliance of the Judgments of the Inter-American Court of Human Rights* 25–26 (Jul. 9, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3647326 [https://perma.cc/VC9E-MSJA].

88. Starr, *supra* note 85, at 734–35.

89. *See* Malcolm Langford, *Judging Resource Availability*, *in* The Road to a Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights 89, 89 (John Squires et al. eds., 2005).

harms,[90] are just some of the explanations offered. Nevertheless, these explanations overlook the fact that the rights-prism has shaped remedies' development and distribution by positioning the rights analysis as the main purpose of adjudication.

Constitutional legal scholar Daryl Levinson suggests a somewhat similar explanation for the deficit of constitutional remedies. Courts, Levinson says, prefer to concentrate on rights because rights are allegedly less "sensitive to consequence" and are thus less concerned with political considerations.[91] As Levinson put it, there is an assumption that "rights can be talked about and . . . *best* understood . . . in complete isolation from (merely) remedial concerns."[92] However, explains Levinson, this "rights essentialism" portrays an oversimplified image of the right-remedy relationship. In reality, they are much more equal: Rights and remedies are intertwined, for rights are dependent on remedies not only for their realization "but for their scope, shape, and very existence."[93] Levinson's idea of rights essentialism illustrates how perceiving rights as the ultimate manifestation of the adjudication process leads to the marginalization of remedies, in a way that ultimately reforms the very shape and content of the right in question.[94]

---

90. Shelton, *supra* note 24, at 2.

91. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857, 872 (1999) (noting that the view that judges should focus on rights and not remedies is closely associated with Ronald Dworkin's theory that differentiated policy (remedies) from principles (rights)). Levinson explained: "Dworkin argues that elected officials should have primary responsibility for making policy decisions because they are best equipped to aggregate and compromise the competing interests of the political community." *Id.*

92. *Id.* at 858.

93. *Id.*

94. *Id.* at 939. Some writers imported Levinson's thesis to the human rights context to emphasize the strong interrelation between remedies and rights. *See, e.g.*, Margaux J. Hall & David C. Weiss, *Human Rights and Remedial Equilibration: Equilibrating Socio-Economic Rights*, 36 Brook. J. Int'l L. 454, 504–05 (2011) (applying Levinson's "rights essentialism" to human rights, particularly social and economic rights, and illustrating how courts' reluctance to issue remedies has affected those rights); Starr, *supra* note 85, at 715 (applying Levinson's theory to international criminal tribunals); Roach, *supra* note 24, at 34 (Roach argued that both Levinson and Starr are "correct in identifying remedial deterrence as an important and frequent process where courts 'shrink rights to avoid expansive remedies'"). I address some of Starr's and Roach's arguments in Part II.B.1.

C. Nongovernmental Human Rights Organizations

Apart from international conventions and tribunals, civil society discourse and advocacy, particularly from human rights NGOs, has also contributed to the emphasis of rights over remedies. NGOs are recognized as an important international actor in Article 71 of the U.N. Charter, which states that the Economic and Social Council may consult with NGOs that deal with issues under its competence.[95] Over the years, the provision has been interpreted broadly by the ECOSOC to allow organizations to be involved in the United Nations' human rights activities in many advisory capacities.[96] This consultative system, also adopted by European and African Union bodies, encouraged the establishment of other NGOs. Today, approximately ten million NGOs operate on national and international planes.[97]

While human rights NGOs are highly diverse in size, reach, and operational methods, they share a basic agenda: pushing for further implementation of human rights norms and promoting compliance with existing human rights treaties.[98] NGOs have substantially impacted governments, judicial systems, and international bodies over the past several decades—whether through lobbying, *amicus curiae* briefs, or representing individuals in communications submitted to treaty bodies.[99] Thus, examining NGO advocacy is especially important when looking at the right-remedy imbalance.

A substantive examination of the right-remedy relationship in the work of these organizations would require a separate study. However, a general

95. U.N. Charter art. 71.

96. Thomas Buergenthal et al., International Human Rights in a Nutshell 487 (5th ed. 2017). To work with the United Nations and its specialized agencies, NGOs must receive consultative status, which, if granted, provides a significant platform to influence those bodies' agendas. They attend meetings, present reports, and offer consultations to various committees. *Id*. at 498.

97. *Id*. at 488.

98. *Id*. at 488–89 (noting that some NGOs, especially the bigger ones, aim to address many objects within human rights law, while others are interested in a certain right, and others still concentrate on a single convention that includes several rights with the same variety applying to their operational methods). Some NGOs focus more on engaging with government officials, whereas others choose to concentrate on establishing domestic collaborations within civil society and providing relief to communities undergoing rights abuse. *Id*.

99. *See generally* Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change (1st ed. 2004).

survey of a few of the biggest NGOs' databases reveals a significant gap between the number of documents that mention "rights" compared to the number of documents that reference "remedies" (or similar terms).[100] For example, out of all documents published on Amnesty International's database, which extends back to 1981, approximately 43.3% mention the word "rights" while only about 4% include the word "remedies" (or comparable terms such as "redress," "reparations," and "compensation").[101] Similar results were found in other prominent NGO databases, such as Open Society Foundations (44% versus 4%)[102] and Anti-Slavery International (49.1% versus 14.2%).[103]

In recent years, human rights organizations have taken an active role in calling for remedies, especially around the crises in Yemen, Iraq, Syria, and Ukraine. For example, the Center for Civilians in Conflict, an NGO established in 2003, aims to mitigate and respond to harm inflicted on citizens in conflict zones like the Democratic Republic of

---

100. The calculations were made using the search engines of the relevant organizations to find documents that include the words "remedies," "reparations," "compensation," and "redress," versus "rights." The reported numbers refer to the number of documents, not the number of times the terms occur. The documents reviewed include news articles, daily briefs, newsletters, annual reports, articles, campaign materials, litigation submissions, open letters, press releases, and blogs.

101. *Search Results*, Amnesty Int'l, https://www.amnesty.org/en/search [https://perma.cc/95CS-MZPQ] (last visited Mar. 22, 2024) (Search in the search bar without placing any word, to get the total number of documents available on the database; then search in search bar for "rights" and compare the number of results for the term "remedies", "reparations," "compensation," and "redress.") [hereinafter Search Instructions]. It is important to acknowledge the possible overlap of documents that include the various remedial terms. Nevertheless, even with this overlap—which risks counting the same document several times—the number of records is still lower compared to the number of records that mention the term "rights." Out of 75,376 documents, 32,707 mentioned rights, and 3,090 mentioned remedies or attributable terms. More conservatively, the term "right to" appears 8,282 times (10.9% of the overall documents), still reflecting a gap.

102. *Search Results*, Open Soc'y Found., https://www.opensocietyfoundations.org/search?= [https://perma.cc/PE79-PJ4Q] (last visited Mar. 28, 2024) (search in search bar according to Search Instructions, *supra* note 101). Out of 7,472 documents, 3,290 mentioned rights, and 334 mentioned remedies or attributable terms. The term "right to" appeared 678 times (9% of the overall documents).

103. *Search Results*, Anti-Slavery Int'l, https://www.antislavery.org/?s [https://perma.cc/359W-YRNR] (last visited Mar. 28, 2024) (search in search bar according to Search Instructions, *supra* note 101). Out of 898 documents, 441 mentioned rights, and 128 mentioned remedies or attributable terms. The term "right to" appeared 86 times (9.57% of the overall documents).

the Congo, Ethiopia, and Ukraine.[104] Similarly, the Ceasefire Centre for Civilian Rights places remediation for Iraqi citizens as one of its primary agendas.[105] In June 2022, Mwatana for Human Rights, a Yemeni NGO, published a detailed report together with the Lowenstein International Human Rights Clinic of Yale Law School on the damage caused during the decade-long armed conflict in the country, which called on the warring parties in Yemen to provide effective remedies to civilians.[106]

Such remedies-oriented campaigns help increase the pressure on governments to be accountable for the damage they inflict. Nevertheless, much like the U.N. Basic Principles and Guidelines on the Right to a Remedy, these organizations focused on widespread and systematic abuse over years of continuous wars, whereas remedies for human rights harms, which do not reach this high threshold, received less attention.

D. Why Remedies Matter

Before delving into the possible ways in which IHRL remedial arrangements can be further enhanced, it is helpful to contemplate the implications of the right-remedy imbalance in the human rights system.

In *Love, Guilt and Reparation*, psychoanalyst Melanie Klein notes that a child's desire to make things right when he or she feels guilty is deeply bound with the emotion of love and sympathy, and constitutes a part of healthy psychological and societal development.[107] Drawing on Klein's analysis, some have suggested that it is not only that one has a natural impulse to make things right, but also that one is likely to reverse that need and come to "expect it from others."[108]

---

104. Ctr. for Civilians in Conflict, https://civiliansinconflict.org [https://perma.cc/6ZT2-3ZK2] (last visited Mar. 22, 2024).

105. *Civilian-Led Monitoring in Iraq*, Ceasefire Ctr. for Civilian Rts., https://www.ceasefire.org/civilian-led-monitoring-in-iraq [https://perma.cc/QAA8-5CMB] (last visited Mar. 22, 2024).

106. *See generally* Mwatana for Hum. Rts. & Lowenstein Int'l Hum. Rts. Clinic, "Returned to Zero": The Case for Reparations to Civilians in Yemen (June 29, 2022), https://reliefweb.int/report/yemen/returned-zero-case-reparations-civilians-yemen [https://perma.cc/43H4-RZDD].

107. Melanie Klein, Love, Guilt and Reparation: And Other Works 1921-1945 311–13 (Roger Money-Kyrle et al. eds., 1975).

108. Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition*, *in* The Handbook of Reparations 560, 563 (Pablo de Greiff ed., 2006).

Remedies symbolize vindication, an acknowledgment of the harm done, and are a fundamental feature of rehabilitation and healing for individuals and societies alike. According to psychologist Brandon Hamber, "financial reparations and other acts of reparations . . . have the potential to play an important role in any process of healing," and they "can symbolically acknowledge and recognize the individual's suffering."[109] From a psychological standpoint, victimologist Yael Danieli argues that compensation holds symbolic value: It may be "minor in amount but major in significance."[110] For the victim, it concretizes that someone is responsible for the harm caused: "[H]e is not guilty, and somebody cares about it."[111]

While this is true for remedies in any area of law, it holds unique significance in human rights law in light of the role that the state plays as the wrongdoer. As Shelton notes, when the state is the entity that causes the damage, an additional dimension of harm is created—a dimension that does not necessarily exist in "private wrongdoing."[112] Beyond the harm caused by the violation itself, there is also a violation of the trust placed in the very entity that was meant to protect the rights and interests it breached.[113] When these victims are left unredressed, the state's duty to respect the guarantees it took upon itself weakens, and a sense of impunity is created—one that affects society at large. Hence, the importance of remediation under IHRL stretches far beyond the individual level. This is why there has long been a recognition that remedies can play an important role in preventing future state violations, and courts have seen remedies like guarantees of non-repetition and injunctions as means to that end.[114]

But remediation has another important, even if less direct, societal purpose, which is not between the state and the victim but between the

109. *Id.* at 566.

110. Danieli, *supra* note 27, at 59.

111. *Id.* at 60.

112. Shelton, *supra* note 24, at 61.

113. *Id.* This point was also stressed, as Shelton points out, by the IACtHR in the case of *Loayza Tamayo v. Peru*, in which the court held that the violation was "a breach of the trust that the person had in government organs duty-bound to protect him and to provide him with the security needed to exercise his rights and to satisfy his legitimate interests." *See* Judgment (Reparations and Costs), Inter-Am. Ct. H.R. (ser. C) No. 42, ¶ 150 (Nov. 27, 1998).

114. Roach, *supra* note 24, at 88.

victim and society as a whole.[115] Remedies "constitute, in themselves, a form of recognition" that society owes to those who had to pay a price about which they were never asked, nor to which they ever agreed.[116] When violations of rights are left unadjudicated and thus unremedied, it is all too easy to obscure the links between these harms and the society in whose name they are committed. When harms continue but the rights-bearers are forced to internalize the costs, cumulative damages are obscured, and the notion of responsibility becomes a rather vague and relative concept.

In human rights theory, society's role in the process of remediation and recognition of the harm done on its behalf are usually associated with transitional justice theories, which are intended to assist societies' attempts to come to terms with *large-scale* past abuses, and to ensure justice and reconciliation.[117] However, society's recognition and awareness of its responsibility for violating rights are important not only in these extreme scenarios of mass harm and abuse for which transitional justice theories were designed.[118] Any democratic society, not just one undergoing

115. The relationship between society and the individual stands at the core of the idea of human rights, as human rights are not only what the state must refrain from doing to the individual, but also, stresses Henkin, what society is "required to do *for* the individual." *See* Henkin, *supra* note 8, at 2.

116. Pablo de Greiff, *Justice and Reparations*, *in* The Handbook of Reparations 451, 460–61 (Pablo de Greiff ed., 2006) ("[A] minimum condition for the attribution of moral standing, without which individuals cannot be recognized as such, is the acknowledgment that my actions impinge on them. The denial of this sort of standing, of this sort of consideration, reveals clearly that I have failed to recognize that I am dealing with individuals."); *see also* Henkin, *supra* note 8, at 3 ("The idea of human rights implies also that society must provide some system of remedies to which individuals may resort to obtain the benefits to which they are entitled or be compensated for their loss.").

117. Transitional justice theories recommend using "mechanisms" that include criminal adjudication, truth commissions, vetting, and reparations, which are commonly thought of as parts of a holistic strategy. *See* U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 26, U.N. Doc. S/2004/616 (Aug. 23, 2004); *see also* Pablo de Greiff, *Theorizing Transitional Justice, in* Transitional Justice 31, 31 (Melissa S. Williams et al. eds., 2012).

118. *See* Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 Harv. L. Rev. 762, 762–63 (2003) ("[T]heorists of transitional justice commonly err by treating regime transitions as a self-contained subject, thereby denying the relevance or utility of comparisons and analogies between regime transitions, on the one hand, and the wide variety of transitions that occur in consolidated democracies, on the other.").

transition, must be aware of the things done in its name. In Karl Jaspers' words:

> [A]ll the people pay for all the acts of their government . . . [but] that they know themselves liable is the first indication of their dawning political liberty. . . . The inner political unfreedom has the opposite feeling. It obeys on the one hand, and feels not guilty on the other.[119]

When distributed continuously and transparently, remedies inform society about its responsibility for its members or aliens who are harmed by the state.[120] Remedies can affect how society understands its role in the harm caused on its behalf and provoke future change. A democratic society must be able to listen to victims, recognize the harm,[121] and ultimately share the cost of the loss caused. In contrast, the refusal to remediate promotes the opposite outcome—the erosion of "political responsibility,"[122] which is crucial for any democratic society.

Finally, beyond strengthening political responsibility, remediation is crucial for maintaining trust in the IHRL system itself.[123] In 1952, Humphrey Waldock, who would later become President of the

---

119. KARL JASPERS, THE QUESTION OF GERMAN GUILT 71 (E.B. Ashton trans., 1965).

120. This does not imply that society as a whole is guilty of the harm inflicted. In her essay, *Organized Guilt and Universal Responsibility*, Hannah Arendt considers the difference when she argues that in Nazi Germany, "[t]he number of those who are responsible and guilty will be relatively small. There are many who share responsibility without any visible proof of guilt." Hannah Arendt, *Organized Guilt and Universal Responsibility*, *in* ESSAYS IN UNDERSTANDING, 1930-1954: FORMATION, EXILE, AND TOTALITARIANISM, 125 (Jerome Kohn ed., 1994). According to Young, Arendt held that political responsibility is established when one is responsible for something she herself has not done, and this responsibility stems from her being a member of a group, and which membership she cannot voluntarily dissolve, namely, a nation or political community. *See* Iris Marion Young, *Guilt Versus Responsibility: A Reading and Partial Critique of Hannah Arendt*, *in* RESPONSIBILITY FOR JUSTICE 75, 78 (Iris Marion Young & Martha Nussbaum eds., 2011).

121. Young, *supra* note 120, at 88 (suggesting that being politically responsible means watching the institutions acting in our name, monitoring their actions to guarantee that they are not overly harmful, and ensuring that citizens have the required institutions to speak up).

122. *Id.* at 75. Young uses this phrase and attributes it to Arendt. *See* Hannah Arendt, *Collective Responsibility*, *in* AMOR MUNDI: EXPLORATIONS IN THE FAITH AND THOUGHT OF HANNAH ARENDT 43, 45 (James W. Bernauer ed., 1987).

123. By "the IHRL system" I mean international human rights instruments, institutions, and procedures.

International Court of Justice ("ICJ"), cautioned that any law that "prohibits resort to force without providing a legitimate claimant with adequate alternative means of obtaining redress, contains the seeds of trouble."[124] The paucity of remedies risks eroding civil trust in the human rights mechanisms intended to guarantee them, legitimizing other forms of self-help.[125] Just as remediation can rebuild and heal societies, the reverse is also true: Ignoring the deep-rooted need for redress can perpetuate violence.

II. Attempts to Solve the "Remedial Failure" Through the Lens of "Rights"

Any attempt to enhance remediation must first acknowledge that the remedial deficit is not coincidental. As the famous tort scholar Patrick Atiyah noted when discussing U.S. torts remedial arrangements:

> [T]hese results of our present institutional arrangements are the consequences of various choices which our societies have made. The choice has sometimes been more consciously and openly made. . . . In other instances, the present position may be partly the result of less open and conscious choice. . . . But, open or not, conscious or not, we as societies are responsible for the choices we have made.[126]

Drawing on Atiyah, the following Part suggests that to enhance remediation results, one should look at two of the premises underpinning

124. Sir Claud H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, *in* 81 Recueil Des Cours 451, 490 (1952). This was also argued by Nozick, and Locke before him. Locke believed that private justice is dangerous. Nozick agreed but insisted that it should be prohibited only if there are alternative means to obtain compensation. *See* Onora O'Neill, Justice Across Boundaries: Whose Obligations? 49–50 (2016) (observing that "Nozick's position is a curious one for any rights theorist . . . since it appears to concede that rights can be weighed in terms of some more fundamental measure of value, and so that they are not after all ethically fundamental").

125. *Cf.* Daniel Markovits, *Democratic Disobedience*, 114 Yale L.J. 1897, 1902 (2005) (justifying "political disobedience from within democratic theory, emphasizing the support that political disobedience can provide for the broader political process by correcting democratic deficits in law and policy"). Drawing on Markovits, turning to self-help can still be seen from within the human rights framework as it corrects deficiencies in the system itself.

126. Patrick S. Atiyah, *No Fault Compensation: A Question That Will Not Go Away*, 54 Tul. L. Rev. 271, 289 (1980).

remedial arrangements in IHRL today and consider whether their reassessment can pave the way toward new, additional, remedial opportunities.

I focus on two interrelated and largely uncontested premises, one conceptual and the other institutional. Under the former, for remedies to arise, the claimant must first prove that their right was violated due to the state's wrongdoing. According to the latter—and partially related to the former in light of the precondition of establishing wrongdoing and the requirement for an objective body to determine whether a violation took place—courts should be preferred over administrative bodies.[127] Thus, attempts to solve the "remedial failure" have focused mostly on adjudication. While these conceptual and institutional premises pushed theorization and articulation of rights to the fore, I suggest that they limit the way IHRL thinks about remedies.

A. Remedy Contingent on Proof of a Violation

1. The Conceptual Premise

a. The Demand for Breach of an Obligation

Under international law, it is the breach of an obligation that gives rise to the duty to make reparations.[128] This link between wrongfulness and reparations appeared in Article 36, Paragraph 2 of the Statute of the Permanent Court of International Justice ("PCIJ"), eventually transcribed as Article 36, Paragraph 2 of the ICJ Statute.[129] In the 1928 *Chorzow Factory* case, when the PCIJ established the leading international principle of "no right without a remedy," it stated that "[i]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[130]

---

127. *See infra* Part II.B.

128. Shelton, *supra* note 24, at 13.

129. James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 191 (2002) [hereinafter Crawford, The Articles]. Article 36, Paragraph 2 provides that state parties to the Statute may "recognize as compulsory" the Court's jurisdiction, *inter alia*, "in all legal disputes concerning . . . the existence of any fact which, if established, would constitute a breach of an international obligation" and "the nature or extent of the reparation to be made for the breach of an international obligation." *See* Statute of the International Court of Justice art. 36, ¶ 2, June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute].

130. The Factory at Chorzów (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13).

Accordingly, under the law of state responsibility, Article 31 provides that "(1) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act"; and that "(2) Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State."[131] Hence, an injury must be caused by the internationally wrongful act, i.e., breach of a primary obligation, for the harming state's secondary obligation of reparations to arise.[132]

The possibility of obtaining remedies for harm caused by a lawful act, without a breach of an obligation, received attention from the International Law Commission ("ILC") in the context of transboundary harm caused by hazardous activities,[133] and is reflected in several international cases and treaties that establish responsibility for lawful yet hazardous activities.[134] Yet, the possibility of obtaining remedies for the harmful

---

131. G.A. Res. 56/83, art. 31 (Dec. 12, 2001) [hereinafter Articles on State Responsibility].

132. Crawford, The Articles, *supra* note 129, at 203. As Crawford explains in a later commentary, the requirement for breach of an obligation (i.e. wrongful act) is a necessary condition for the Articles to apply: "[T]he secondary legal consequences of state conduct that has injurious effects for other states without breaching the former state's obligations fall outside the scope of the state responsibility regime in ARSIWA. Rather, the consequences of lawful activity with injurious effects will be prescribed by the primary rules and obligations applicable in the circumstances." *See* James Crawford, State Responsibility: The General Part 239 (2013) [hereinafter Crawford, The General Part].

133. *See, e.g.*, Int'l Law Comm'n, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities, with Commentaries*, U.N. Doc. A/61/10, at 79, cmt. 14 (2006). The innovative idea of the draft principles was to institutionalize a primary obligation to compensate for any harm resulting from hazardous but lawful activities so that a failure to "take all necessary measures to ensure that prompt and adequate compensation" would lead to an internationally wrongful act as provided by the Articles on State Responsibility. *Id.* at 76. Here, there is no request for the illegality of the act, but only harmful result; it is its mere occurrence that must be compensated. *See* Pierre d'Argent, *Responsibility or Liability: Is It Really That Simple?*, *in* Theories of International Responsibility Law 209, 215–17 (Samantha Besson ed., 2022).

134. Rebecca Crootof, *International Cybertorts: Expanding State Accountability in Cyberspace*, 103 Cornell L. Rev. 565, 602 (2018) ("States have regularly concluded treaties creating or clarifying liability for specific acts or omissions. While drafted over many decades, these treaties generally focus on a few, specific kinds of harms [injuries associated with nuclear accidents, oil spills, and other kinds of hazardous materials] or harms which endanger the use of shared spaces [international watercourses, transboundary waters, and outer space]."); *see also* Trail Smelter Case (U.S./Can.), 3 R.I.A.A. 1905, 1965 (1941); United Nations General Assembly, Rio Declaration on Environment and

consequences of a state act that is not wrongful, i.e., not prohibited by international law, remains underexplored in IHRL's scholarship and practice.

Under IHRL, the right to a remedy is conditioned on the finding of a rights violation, either directly (by an act) or indirectly (by omission). The proof of a violation is the bedrock of any remedial clause in human rights instruments;[135] the first element considered by U.N. treaty bodies;[136] and regarded as a necessary component by courts to award remedies.[137] As Shelton clarifies: "The legal basis of responsibility for human rights violations derives from breach of a human rights treaty or norm of customary international law."[138] Hence, it is the breach of a state's human rights obligation that constitutes a violation and a right to a remedy.

Development, 21st plenary meeting, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26 (Vol. I), (Rio Declaration) (14 June 1992) Principle 16 ("National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.").

135. *E.g.*, UDHR, *supra* note 7, art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."); ICCPR*, supra* note 38, arts. 2, 3(a) ("Each State Party to the present Covenant undertakes: To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."); CMW, *supra* note 65, art. 83, ("Each State Party to the present Convention undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."); ECHR, *supra* note 54, art. 13 ("Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority."); ACHR, *supra* note 51, art. 25 ("Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.").

136. As explained on the U.N. OHCHR website: "Eight of the committees (CCPR, CERD, CAT, CEDAW, CRPD, CED, CESCR, and CRC) can receive petitions from individuals. Any individual who claims that their rights under the treaty have been violated by a State party to that treaty may bring a communication before the relevant committee, provided that the State has recognized the competence of the committee to receive such complaints and that domestic remedies have been exhausted." *What the Treaty Bodies Do*, U.N. OHCHR, https://www.ohchr.org/en/treaty-bodies/what-treaty-bodies-do [https://perma.cc/BB3H-24DU] (last visited Mar. 22, 2024).

137. *See supra* Part I.B.

138. Shelton, *supra* note 24, at 58.

b. The Implicit Requirement for Fault in the ECtHR and IACtHR Jurisprudence

As noted above, the breach of an obligation is necessary for a remedy to arise. Additionally, the finding of the violation itself is often conditioned, even if implicitly, on the finding of fault on the state's part.

The Articles on State Responsibility do not mention any requirement for the wrongful act to include elements of intent or fault. This, as Crawford explains, stems from the Articles' purpose to operate in varied areas of international law. Hence, any "role of fault in relation to any given primary rule . . . depends on the interpretation of that rule in the light of its object or purpose."[139] In other words, "there is no requirement of fault *beyond* that required by the relevant primary rule."[140]

At this stage, it might be useful to clarify what "fault" entails. In everyday language, fault and blame can be used to serve a similar meaning.[141] Yet, fault, in the legal sense, does not have to require any form of moral blame.[142] Rather, one can be at fault when they "fail to conduct themselves as a reasonable person would," and their misconduct causes harm to others.[143]

The relevance of fault under IHRL and the nexus between fault and proof of a rights violation have been the focus of some debate. While some scholars have acknowledged the existence of the fault element in the human rights law context,[144] others have come to the opposite

139. Crawford, The Articles, *supra* note 129, at 13; *see also* Crawford, The General Part, *supra* note 132, at 49 ("Article 1 seems to state the obvious. But there are several things it does not say, and its importance lies in these silences. First, it does not spell out any general preconditions for responsibility in international law, such as 'fault' on the part of the wrongdoing state.").

140. Crawford, The General Part, *supra* note 132, at 502.

141. *See* Gregory C. Keating, *Is There Really No Liability Without Fault?: A Critique of Goldberg & Zipursky*, 85 Fordham L. Rev. 24, 25 (2017).

142. *Id.* at 27 ("[T]he imposition of negligence liability does not turn on the blameworthiness of the defendant's conduct . . . ."); John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 Fordham L. Rev. 743, 786–87 (2016) ("[O]ne could be held liable for a blameless bit of negligence, an innocent trespass, a nuisance without fault, and a conversion committed under duress.").

143. Keating, *supra* note 141, at 24.

144. Shelton, *supra* note 24, at 19 ("Law and its institutions are the instruments through which fault is determined and its consequences are assessed in order to redress harm caused."); *id.* at 402 ("[R]emedies are generally based on fault, a prerequisite of liability. Decisions imposing liability and affording remedies thus represent moral

conclusion.[145] However, at least concerning indirect violations (also referred to as violations of positive obligations), which constitute a considerable chunk of the ECtHR and IACtHR jurisprudence, there is broader agreement that both courts tend to determine the existence of the obligation based on the state's conduct and its justifiability, which, inevitably, inserts the demand of fault.[146]

Indirect violations occur when a state has failed to *prevent* (or in other words, *protect* from) a breach of rights. For a positive obligation to arise, both the IACtHR and the ECtHR adopted a conduct-based analysis, according to which the following elements must be proven: (1) "the [state's] awareness of a situation of real and imminent danger"; (2) "for a specific individual or group of individuals"; and (3) "the reasonable possibility of preventing or avoiding that danger."[147]

---

judgment of wrongdoing, a condemnation of the act, and have a retributive as well as compensatory purpose.").

145. Jason N.E. Varuhas, Damages and Human Rights 83–84 (2016) ("[L]iability in human rights law is generally strict, not fault-based. . . . Thus, whether an authority acted reasonably, in good faith, without fault or blame, or with benevolence is not generally relevant to liability."). Donal Nolan, *Negligence and Human Rights Law: The Case for Separate Development*, 76 Modern L. Rev. 286, 305 (2013) ("Close comparison of what for the sake of convenience we can term the "fault" principles operative in negligence law and human rights law reveals a degree of disparity which also represents a significant obstacle in the path of convergence of the two sets of norms.").

146. *See* Vladislava Stoyanova, *Fault, Knowledge and Risk Within the Framework of Positive Obligations Under the European Convention on Human Rights*, 33 Leiden J. Int'l L. 601, 619 (2020) ("Fault is an important element in the assessment of state responsibility for breach of positive obligations under the ECHR. More specifically, the ECtHR has consistently referred to the standard of 'knew or ought to have known' in its analysis, reflecting actual or putative knowledge by the state about risk of harm."); Nolan, *supra* note 145, at 305 ("[A]lthough the 'fault' requirement applicable in positive obligation cases arising under articles 2 and 3 has not received much direct attention from the Strasbourg Court, it is fair to say that the standard of reasonableness which is employed appears broadly to mirror the approach taken in negligence."); Martin Tamayo Serrano, *State Omissions in the Inter-American Court: Causation, Positive Obligations and the Right to Life*, 8 Bristol L. Rev. 65, 71–72 (2022) ("The requirement of fault or intention in the violation's assessment was deemed irrelevant" by the IACtHR. Yet, it has been understating the place of subjectivity, as "[r]equirements for indirect responsibility, like establishing knowledge for due diligence, already imply a subjective element . . . .").

147. González v. Mexico, Judgment, Inter-Am. Ct. H.R. (ser. A) No. 205[9], ¶ 280 (Nov. 16, 2009). The doctrine was developed by the ECtHR in *Osman v. United Kingdom*, where the U.K. Government argued that "the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful [sic] disregard of the duty to protect

In the *Mastromatteo* case, concerning a positive obligation to protect the right to life, the ECtHR held as follows:

> A positive obligation will arise . . . where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[148]

As Stoyanova notes, it follows that state knowledge triggers the positive obligation. And once the obligation is triggered, the establishment of a violation is determined based on a reasonableness standard.[149]

Any first-year law student will easily recognize this terminology. In torts, the wrongdoer is "at fault" for failing to act as required.[150] The tortfeasor's liability is not a "reflex" for the interfered interest in question.[151] Instead, liability is established when the duty of care, breach,

---

life." Osman v. United Kingdom, App. No. 87/1997/871/1083, ¶ 116 (Oct. 28, 1998), https://hudoc.echr.coe.int/fre?i=001-58257 [https://perma.cc/4CWD-L9UK].

148. Mastromatteo v. Italy, App. No. 37703/97, ¶ 68 (Oct. 24, 2002), https://hudoc.echr.coe.int/fre?i=001-60707 [https://perma.cc/M24Z-VVJJ]. The case concerned the applicant's son who was murdered by prisoners who had been granted prison leave. Mr. Masteromatteo submitted that the Italian authorities not only violated their positive obligation to protect his son's right to life but also refused to compensate him for his loss. Italy argued that Masteromatteo could seek damages by suing the criminals or the judges responsible for releasing the prisoners in civil courts. The Court unanimously accepted Italy's submission that it has not violated its positive obligation to protect the right to life, and held sixteen votes to one that, in light of the lack of violation, the state was not required to compensate the applicant, who "could have sued the authorities for negligence." *Id.* at ¶ 95. The Court acknowledged that such remedies would depend on the proof of fault. However, it stressed that "Article 2 of the Convention does not impose on States an obligation to provide compensation on the basis of strict liability." *Id.* Judge Bonello partly dissented. While he joined the majority in finding no violation of the right to life, he held that the state is under a duty to "offset" the harm caused: "[It is] to be an indisputable axiom of law that in case of fault or negligence from which harm results, it is the lapser who pays. It seems however that the Court's case-law can be made to justify other, more nonconformist, solutions." *Id.* at ¶¶ 5, 21 (Bonello, J., partly dissenting).

149. Stoyanova, *supra* note 146, at 605.

150. Goldberg & Zipursky, *supra* note 142, at 745.

151. Varuhas, *supra* note 145, at 35 ("Rather than liability being a reflex of whether basic interests have been interfered with, liability in negligence depends upon an inquiry into whether the defendant 'ought to be held responsible for the harm'.").

causation, and remoteness have been proven.[152] In a tort negligence case, the court asks:

> (a) whether the defendant owed a duty of care to the claimant to prevent him sustaining the type of harm that was a foreseeable consequence of his careless acts or omissions; (b) whether there was an act or omission by the defendant which was in breach of that duty of care; and (c) for what loss, injury, and damage, if any, the defendant is liable.[153]

This conduct-based liability terminology can also be found in the common balancing test. Human rights instruments acknowledge various circumstances that courts should consider before deciding that a violation has occurred.[154] A violation is established after the interpreter (the judicial or quasi-judicial institution) has appropriately balanced the competing rights or interests (such as public health, national security, and public order) of the state on the one hand and the claimant on the other. This balance resembles the assessment of the standard of conduct,[155] which lies at the heart of the fault liability regime.

For example, in the *Broniowski* case, the ECtHR held that it "must make an overall examination of the various interests in issue," that its "assessment may involve . . . the conduct of the parties, including the means employed by the State and their implementation," and that "uncertainty

152. *Id.*

153. *Id.*

154. *See, e.g.*, ECHR, *supra* note 54, art. 10, ¶ 2 ("[T]he exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."). *See generally* Lucas Lixinski, *Balancing Test: Inter-American Court of Human Rights (IACtHR)*, *in* MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL PROCEDURAL LAW (Hélène Ruiz Fabri ed., 2019) (discussing the IACtHR's use of "balancing tests" in their proportionality jurisprudence); Alastair Mowbray, *A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights*, 10 HUM. RTS. L. REV. 289 (2010) (discussing the "fair balance" approach applied by the ECtHR).

155. Barbara C. Steininger & Nora Wallner-Friedl, *Wrongfulness and Fault*, *in* TORT LAW IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS 501, 519 (Attila Fenyves et al. eds., 2011) ("Such a weighing of interest, however, is the basis of any assessment of whether the required standard of conduct has been adhered to or not, in other words whether there has been a violation of a duty of care.").

. . . is a factor to be taken into account in assessing the State's conduct."[156] As Stefan Somers notes, it is hard to imagine how the Court can assess the state's conduct without referring to the hypothetical behavior of the *reasonable* state required in a fault-liability regime.[157]

2. *Reassessing the Conceptual Premise*

Recognizing the role "fault" plays in the finding of a rights violation in IHRL is important not only for the sake of doctrinal precision, but also because denying its dominance creates inconsistencies and confusion between different liability regimes and, as a result, obscures the potential remedies available under no-fault regimes.

A harm-based strict liability regime will not examine whether the state's act was defective, and not even if the rights in question were violated. As Gregory Keating points out:

> What needs to be shown to establish a strict liability claim is not that the defendant conducted himself improperly but that the defendant unjustifiably violated a right, *or inflicted harm whose infliction required reparation on the part of the party responsible for its infliction, even though that infliction was not itself wrongful*.[158]

Torts scholar Ernest Weinrib notes that, in strict liability, "*causa*, not *culpa*, is paramount: liability follows from the occurrence of the damage at the defendant's hands, regardless of whether the defendant's behavior was faulty."[159] Under a harm-based strict liability regime in IHRL, the obligation to remediate would arise as a result of harm regardless of the proof of a wrongful rights violation. The finding of a violation could be

---

156. Broniowski v. Poland, App. No. 31443/96, ¶ 151, (June 22, 2004), https://hudoc.echr.coe.int/fre?i=001-61828 [https://perma.cc/5TA2-2F5C].

157. Stefan Somers, The European Convention on Human Rights as an Instrument of Tort Law 183 (2019) (Somers uses the term *bonus pater familias*, which is analogous to that of *reasonable person* in common law); *see also* Varuhas, *supra* note 145, at 93 (arguing that ECtHR emphasizes that "its discretion turns on 'what is just, fair and reasonable in all the circumstances of the case'" and that "[t]his formulation is striking in that it is identical—linguistically and in its open-endedness, at least—to the fair, just and reasonable incantation applied to duty of care analysis in negligence").

158. Keating, *supra* note 141, at 29 (emphasis added); *cf.* Goldberg & Zipursky, *supra* note 142, at 745 (arguing that there is fault and wrongdoing in strict liability).

159. Ernest J. Weinrib, The Idea of Private Law 171 (1st ed., 1995).

irrespective of the state's responsibility to remediate as long as its action or omission *caused harm*.[160]

Currently, for an act to transcend mere *interference* with a right, and instead constitute a *violation* of that right, a court's analysis often concentrates on proportionality and balancing tests, thus rendering rights and the question of their violations the core of the judgment.[161] Indeed, the essential, often longest, part of a judgment is devoted to deliberating the scope and meaning of the rights in question and to determining the existence of a violation. Under this prism, it is hardly surprising that the finding of a violation can be considered a sufficient remedy.[162]

Reassessing the rights prism means concentrating, as a matter of policy, on ways that remediation can proliferate, even at the expense of relieving the demand for a breach of an obligation or the articulation of the right. This is, surely, not an easy task for at least two reasons. The first reason concerns the moral significance of ascribing wrongfulness to state action. For the victim, such recognition could be crucial for healing, and marks the difference between public "knowledge and acknowledgement."[163] Further, from a forward-looking perspective, shifting from questions of rights violations to questions of caused harm might undermine the power of condemnation and deterrence which are crucial for inducing the state to comply with its human rights obligations in the future.

A second difficulty is the high costs of shifting to a harm-based strict liability regime. A common objection made in the tort context is that strict liability creates high adjudication costs, so unless it "serves some good purpose," the "machinery of adjudication will not be set in motion." [164] Opening harm-based liability would encourage victims

---

160. For a discussion on the question of causation under positive obligations and the element of fault, see generally Laurens Lavrysen, *Causation and Positive Obligations under the European Convention on Human Rights: A Reply to Vladislava Stoyanova*, 18 Hum. Rts. L. Rev. 705 (2018); Serrano, *supra* note 146.

161. Shelton, *supra* note 24, at 287 ("Regional human rights courts judge the merits of a case by declaring that the applicant's rights have or have not been violated.").

162. *Id.*; *see also supra* text accompanying notes 76–77.

163. This distinction was made by Thomas Nagel, stressing that acknowledgment "can only happen to knowledge when it becomes officially sanctioned, when it is made part of the public cognitive scene." *See* Trudy Govier, *What Is Acknowledgment and Why Is It Important?*, *in* Dilemmas of Reconciliation: Cases And Concepts 65, 66 (Carol A.L. Prager & Trudy Govier eds., 2003).

164. Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 Harv. L. Rev. 401, 401 (1959).

to file a complaint whenever harm occurs. Even if such harm is limited to pecuniary harms, given the broad scope of interests that human rights instruments are meant to protect, a shift in the standard of liability seems unlikely. Tribunals are already cognizant of their "judicial meddling"[165] and have developed several avoidance doctrines to compromise their jurisdiction with issues of legitimacy and obedience.[166] Applying such a liability standard would require, borrowing Joseph Weiler's words, significant "'judicial capital,' measured in the coin of credibility and legitimacy, which is involved each time a court breaks with the past and makes a new development."[167]

As the following section suggests, however, despite the centrality of courts, they are not the sole institution that can provide substantive remedies.

B. The Right to a Remedy and the Judicial Framework

1. The Institutional Premise

The second prominent premise which seems to underpin human rights law today is that although the right to an effective remedy includes legislative, administrative, and judicial remedies, the last option should be preferred. This preference has been indicated by treaty bodies,[168]

---

165. Joseph H. H. Weiler, *Thou Shalt Not Oppress a Stranger: On the Judicial Protection of the Human Rights of Non-EC Nationals – A Critique*, 3 Eur. J. Int'l L. 65, 70 (1992).

166. Scholars have proposed various doctrinal avenues. *See* Octavian Ichim, Just Satisfaction Under the European Convention on Human Rights 135 (2015) (expanding declaratory relief); Miles Jackson, *Judicial Avoidance at the European Court of Human Rights: Institutional Authority, the Procedural Turn, and Docket Control*, 20 Int'l J. Const. L. 112, 120–22 (2022) (broadening the margin of appreciation); Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1948 (1997) (exploring the concept of "procedural avoidance" to obviate the "need to render constitutional rulings on the merits"). Starr later borrowed that term when describing international tribunals' strategy to avoid making remedial decisions. Starr, *supra* note 85, at 724.

167. Weiler, *supra* note 165, at 70.

168. The Human Rights Committee, for example, clarifies that "Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights." U.N. Hum. Rts. Comm., The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13, ¶ 15 (May 26, 2004). However, the remedial role is mostly reserved for the judiciary, and administrative mechanisms "are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies." *Id; see also* Shelton, *supra* note 24, at 100.

conventions,[169] and was narrowly challenged in the literature. Over the years, IHRL remedies scholars have contributed enormously to the law and theorization of remedies. Yet, they concentrate on courts while giving relatively limited attention to non-judicial alternatives.[170] Non-judicial avenues are often discussed within the context of widespread human rights violations, mostly associated with transitional justice mechanisms that address mass abuse and gross violations.[171] However, harm caused by "ordinary" violations tends to stay within the terrain of adjudication.

In 1985, Christine Gray expressed concern that courts gave negligible attention to remedies.[172] Nevertheless, she criticized the then-Special Rapporteur who headed the work of the ILC Draft Articles on State Responsibility for advising against turning to decisions of international

169. *See supra* text accompanying notes 38, 42, 47, 52.

170. *See* SHELTON, *supra* note 24, at 96 ("Access to justice means ensuring the possibility for an injured individual or group to bring a claim before an appropriate tribunal and have it adjudicated, increasingly this means by judicial proceedings.").

171. *See, e.g.*, Andrea Gualde & Natalia Luterstein, *The Argentinean Reparations Programme for Grave Violations of Human Rights Perpetrated During the Last Military Dictatorship (1976-1983)*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 527, 529–31 (Carla Ferstman et al. eds., 1st ed. 2009) (discussing the Argentinian Reparation Programme, which included laws intended to offer economic reparations to victims of the terror acts of the state). *See generally* Nelson Camilo Sánchez Léon & Clara Sandoval-Villalba, *Go Big or Go Home? Lessons Learned from the Colombia Victims' Reparation System*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 547 (Carla Ferstman et al. eds., 2d ed. 2020) (discussing the different judicial and non-judicial mechanisms Colombia developed to redress "more than eight million people [who] have been victims of violence" as a result of decades of internal armed conflict); Milica Kostić & Sandra Orlović, *Reparations for Victims of War Within the Western Balkans EU Accession Negotiations: Serbia Case Study*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 611–15 (Carla Ferstman et al. eds., 2d ed. 2020) (discussing the "avenues for obtaining compensation and other reparative measures for violations suffered (including) administrative proceedings . . . civil lawsuits . . . and a third mechanism, which is activated by filing a compensation claim within pending criminal proceedings"); Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, *in* THE HANDBOOK OF REPARATIONS 176 (Pablo de Greiff ed., 2006) (overviewing the South African experience on post-apartheid reparation and rehabilitation programs); Diana Cammack, *Reparations in Malawi*, *in* THE HANDBOOK OF REPARATIONS 215 (Pablo de Greiff ed., 2006) (overviewing Malawi's reparational schemes to help victims of abuse between 1992 and 2002).

172. Christine Gray, *Is There an International Law of Remedies?*, 56 BRIT. Y.B. INT'L L. 25, 25 (1985).

courts and tribunals for rules on the consequences of state responsibility.[173] According to the Special Rapporteur, since tribunals are constrained by the limits of their jurisdiction, respond long after the breach has occurred, and can be unclear with regard to the calculation of damages, they should not be considered an appropriate source for the future Articles.[174] That recommendation, warned Gray, sharply contrasted with the approach of "most writers who, in dealing with the consequences of responsibility, concentrate, often exclusively, on judicial remedies."[175]

Gray's observation regarding the almost exclusive focus on judicial remedies remains true to this day. In Dina Shelton's extensive study on remedies for international human rights violations, she acknowledges international tribunals' reluctance to design and award non-monetary remedies,[176] criticizes the "unpredictable valuations" of monetary remedies, and generally recognizes that human rights proceedings' purpose is often perceived more as compliance inducement and less as a mechanism to redress individual harm.[177] Yet she gives limited attention to the remedial potential of other institutions.[178] She aims to map a "coherent foundation" for remedies in the hope that it could serve as the basis for future remedial jurisprudence.[179]

Sonja Starr suggests a different approach to address the right-remedy gap. She illustrates how international courts and tribunals are torn between their inherent institutional limitations (such as maintaining compliance and legitimacy) and the *Chorzow Factory* principle of "effective remedy," according to which there must be a remedy for any violation.[180]

---

173. The Special Rapporteur (Mr. Willem Riphagen), *Second report on the content, forms and degrees of international responsibility (Part two of the draft articles)*, 2 Y.B. Int'l L. Comm'n 1, 83-84, 92-93, U.N. Doc A/CN.4/SER.A/1981/Add.1 (Part 1) (1981).

174. *Id*. The final version of the Articles on State Responsibility, however, clearly reflects judicial remedies. *See generally*, U.N. Commission to the General Assembly on the work of its fifty-third session, *Report of the International Law Commission on the work of its fifty-third session (23 April–1 June and 2 July–10 August 2001)*, 2 Y.B. Int'l L. Comm'n 1, 28, 91–94, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (2006).

175. Gray, *supra* note 172, at 28. According to Gray, this has led the "Special Rapporteur to play down the importance of the *Chorzów Factory* case and to reject the idea that [restitution] is the primary remedy in international law." *Id.*

176. *See* Shelton, *supra* note 24, at 400–01.

177. *Id.* at 9, 376.

178. Shelton's mention of administrative remedies throughout the book is brief, mostly in the context of transitional justice. *See, e.g.*, *id*. at 122–25.

179. *Id.* at 9.

180. Starr, *supra* note 85, at 699–705.

Yet she does not consider non-judicial routes. Her suggestion is to relieve courts of the forced attempts to provide an effective remedy and instead be honest in their judgments regarding the competing justifications preventing them from overcoming the right-remedy gap.[181] In that sense, Starr differs from scholars who have attempted to solve courts' difficulties in providing effective remedies by pushing for strong remedial rules. Nonetheless, by focusing solely on courts, she maintains the same institutional conviction: Adjudication is the ultimate way to achieve remediation.[182]

Like Starr, Kent Roach also recognizes that remedies pose institutional and jurisprudential difficulties for courts dealing with human rights violations, but suggests that courts can soften those difficulties by adopting a "two-track" approach, which considers both the individual applicant's need for justice and the deterrence of wrongful state action in the future.[183] To illustrate his idea, Roach delves into IHRL jurisprudence and suggests that constitutional courts should adopt supranational tribunals' analysis of remedies.[184] Distinctively, Roach emphasizes the importance of what he calls the "remedial dialogue" between courts and governments.[185] He points out that "there is much wisdom in a broader approach that includes a variety of national authorities, such as the executive and the legislature, while not excluding the judiciary in the remedial process."[186] Yet his focus remains on the judiciary.

The centrality of adjudication is illustrated in the right to a remedy itself, interpreted as having a dual meaning—procedural and substantive.[187] The first refers to the right to present the claim for a violation to a competent, independent body. The second refers to the outcome of the process and guarantees that, in case of a violation, the successful claimant

---

181. *Id.* at 740.

182. Starr's analysis focuses on criminal tribunals, but she applies her theory to the ECtHR and IACtHR. *Id.* at 732–36.

183. Roach, *supra* note 24, at 88–89.

184. *Id.* at 93.

185. Roach introduced the idea of "remedial dialogues" in an earlier article, arguing that this dialogue occurs "when courts issue remedies that have implications for the executive and legislative branches of government, but allow the elected branches of government a range of possible responses." Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 Tex. Int'l L.J. 537, 539, 546 (2005).

186. Roach, *supra* note 24, at 41.

187. Shelton, *supra* note 24, at 16.

will be entitled to relief.[188] The state, then, is obliged to provide access to a competent body, and under the second obligation—for reparations—if so ordered.

In other words, individuals who claim to have been wronged are equipped not with a state's responsibility to repair them, but with a right to prove that their right was violated and to request that a competent institution order remedies. This renders judicial or quasi-judicial institutions a necessary component in the remedial process.[189]

This interpretation of the right to a remedy as one linked to a judicial procedure is not unique to IHRL. In their recent book, tort scholars John Goldberg and Benjamin Zipursky argue that the procedural element in the "right to civil recourse" is, in itself, substantive, as what it provides is the "power to file a claim and, upon proof of claim, to obtain judicially ordered relief that corresponds to a liability in the person(s) against whom suit has been brought."[190]

According to Goldberg and Zipursky, the right to a remedy, which they consider a fundamental civil right, is embedded in the judicial process:

> The phrase "where there's a right, there's a remedy" means that a person is entitled to be provided with a remedy by a court for having suffered a certain kind of rights violation. More precisely, the maxim posits a linkage between the legal rights . . . and rights of action. *Ubi jus* thus can be restated as follows: Whenever a person has been wronged by another through a violation of a relational directive, that person is entitled to be provided with a right of action by the state.[191]

Understood as such, even if the right to a remedy is not translated thinly (whereby the right to civil recourse is solely the right to present a

---

188. *Id.*

189. *See* Henkin, *supra* note 8, at 38–39 ("[T]he principal remedy for violations [of constitutional rights] is judicial review, a limited remedy at best: it may prevent future violations but does not undo the past; for many violations there is not even compensation to the victim . . . Judicial review is accepted as an adequate remedy . . . [likewise,] except to the eye of some strict Austinians, the international legal system creates legal rights and duties . . . but the remedy for its violation often consists only of the right to make the claim, infrequently also to assert it in some judicial or arbitral forum.").

190. John C.P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs 98 (2020).

191. *Id.* at 99.

claim before a competent body), but, rather, as Goldberg and Zipursky argue, to obtain a remedy if a violation has been proven,[192] it conditions the remedy upon judicial or quasi-judicial mechanisms.

This judicial focus, shared by tort and human rights scholars, illustrates the deeply ingrained connection between rights and courts. As Cane and Goudkamp note: "The rights culture is built on a strong concept of individual entitlement. Courts and legal processes play a central role in vindicating such entitlements."[193]

2. *Reassessing the Judicial Premise*

In 2010, discussing international adjudication, Donald H. Regan poignantly observed that "[m]any writers move too easily from the premise that we need a lot more effective international law than we currently have . . . to the problematic conclusion that since no other institution is currently able to give it to us, judges should step in to supply our need."[194]

That courts should be the entities to determine whether a state has acted unlawfully and to decide upon the remedial consequences, as opposed to the state and its administrators, is a basic feature of the separation of powers. The state is more likely to be biased when deciding upon its alleged violations and might tend to protect its agents or organs.[195]

In democratic countries, courts enjoy varying degrees of independence, ensuring that judges' decisions are not dictated by other branches of government. However, while judges may be independent, they are not neutral. They are committed to providing an effective remedy, yet they must also be aware of the remedial "costs" at play. Particularly high awards

---

192. *See id.*

193. Peter Cane & James Goudkamp, Atiyah's Accidents, Compensation and the Law 202 (9th ed., 2018). For more on what Duncan Kennedy calls "a clear parallel between the role of judicial method and the role of rights," see also Duncan Kennedy, A Critique on Adjudication: Fin de Siècle 310 (1997).

194. Donald H. Regan, *International Adjudication: A Response to Paulus—Courts, Custom, Treaties, Regimes, and the WTO*, *in* The Philosophy of International Law 225, 241 (Samantha Besson & John Tasioulas eds., 2010).

195. Taylor suggests that the general preference to judicial remedies in the ICCPR is meant to "rule out decisions made solely by political and subordinate administrative organs, or those which are otherwise not independent and free of political constraint." Taylor, *supra* note 40, at 78–79.

could undermine judicial legitimacy and lead to disobedience, especially when they involve distribution policies, as is often required by remedies.[196]

Henkin stressed this in reference to the U.S. courts:

> Recourse to the theory of rights should also caution us against total and exclusive preoccupation with and reliance on the judicial remedy. As it has become, the judicial remedy against governmental violation of rights is strong and effective, but it is a limited remedy. . . . It is limited by the nature of the judicial process, by political-institutional considerations . . . it is limited because courts are not legislatures and cannot supply the kind of support for rights that requires legislation.[197]

On the international plane, these limitations are amplified. Compared to their domestic counterparts, international courts struggle more with questions of authority, obedience, respect, and compliance.[198]

As I suggested in Part I.B, this has led them to focus more on the right in question, which can lead to remedial vagueness, leaving the remedial decision to the state in the case of a violation, or limiting standing to serious violations in which interference with state policy would not risk a court's legitimacy.[199] Hence, alongside the rights emphasis resulting from the focus on finding a rights violation, rights analysis is also at the fore because of an inherent reluctance to translate them into concrete policies; that is, remedies.[200]

C. Some Preliminary Conclusions

The human rights movement introduced new opportunities for victims who were not able to seek recourse from their state or perpetrator by encouraging them to vindicate their rights through international judicial

196. *See* Starr, *supra* note 85, at 710 ("[R]emedial costs sometimes drive international courts to distort their jurisprudence . . . ."); Hall & Weiss, *supra* note 94, at 462 ("[C]ourts may engage in remedial deterrence when they avoid providing a tangible remedy to a rights deprivation because of the collateral costs—whether economic, social, political, or otherwise.").

197. Henkin, *supra* note 8, at 107.

198. *See generally* Başak Çali, The Authority of International Law: Obedience, Respect, and Rebuttal (2015).

199. *See supra* text accompanying notes 77–86.

200. *See* Levinson, *supra* note 91, at 871–72; *see also supra* text accompanying note 91.

forums.[201] While these changes were nothing short of ground-breaking,[202] there are both actual and normative costs in constructing the remedy as a right to be claimed. Generating the remedy from a right might carry rhetorical power as it reinforces the remedy in the same normative status as other rights, and it might even signal the continuation of the primary right that was abridged.[203] At the same time, framing a remedy as a right relieves the obligation bearer.

Courts are indispensable for developing essential human rights remedies, promoting rule-of-law ideals, and establishing rights precedents and doctrines. But governments should not take a backseat.[204] They should be constantly reminded by NGOs, scholars, and courts of their independent remedial responsibility. The right to a remedy should be balanced with the state's responsibility to remediate.

Any country committed to the rule of law, which claims to respect, protect, and promote human rights, cannot, at the same time, harm innocent citizens or aliens and expect them to continuously bear the costs of their injuries, even if the act itself was prima facie lawful. In 2007, the IACtHR held that "while the victims or their next of kin should have ample opportunity to seek just compensation under domestic law, the State's obligation cannot rest exclusively on their procedural initiative or on the submission of probative elements by private individuals."[205] Without the correlative duty of reparation, the state's commitment to rights are simply declaratory. This is not to say that every right has a remedy, but that the state has a moral responsibility that stems from its power to constantly reevaluate and reassess ways to realize the *right to a remedy*. As the IACtHR stated, this obligation cannot be reduced to the victim's

201. SHELTON, *supra* note 24, at 3–5.

202. I*d*.

203. *See* Ernest Weinrib, *Two Conceptions of Remedies*, *in* JUSTIFYING PRIVATE LAW REMEDIES 3, 12–13 (Charles E.F. Rickett ed., 2008).

204. *Cf.* AZIZ Z. HUQ, THE COLLAPSE OF CONSTITUTIONAL REMEDIES 132 (2021) (warning that federal courts' reluctance to provide remedies can be used by politicians as a useful policy instrument to avoid democratic accountability). In the human rights context, governments can declare they are committed to human rights and hide behind courts to undermine them, thereby damaging democratic accountability.

205. Rochela Massacre v. Colombia, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 163, ¶ 220 (May 11, 2007). In the following year, the Inter-American Commission on Human Rights referred to the court's holding in guidelines it prepared on reparations policy. Principal Guidelines for a Comprehensive Reparation Policy, Inter-Am. Comm'n H.R., OEA/Ser.L./V/II.131 (Feb. 19, 2008).

right to seek a remedy.[206] The state must ask what "ought to be done" for those harmed by its actions.[207]

III. Balancing the Victim's Right to a Remedy with the State's Responsibility to Remediate

While IHRL has concentrated primarily on judicial remedies for rights violations, different domestic systems have increasingly expanded administrative reparations for personal injuries of various kinds. They have done so without proof of a wrongful act, signaling the state's moral duty to repair instances in which harm was caused to the protected interests of citizens and aliens. This shift toward a victim-oriented, no-fault liability started in the early twentieth century with the English and American Workers' Acts, and gradually became a global phenomenon; yet it has gained scarce attention in human rights literature.[208]

This next Section briefly surveys the no-fault liability shift in various domestic systems, the main motivations behind their rise, and the challenges they sought to address. Since the different domestic schemes were developed separately and sporadically, there is limited scholarship regarding their mutual theoretical framework. Still, some scholars suggest that these schemes illustrate states' acknowledgement of their responsibility to remediate injured individuals without having them jump through

206. Rochela Massacre v. Colombia, *supra* note 205. *See also* Velasquez-Rodriguez v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 60–64, 73 (July 29, 1988).

207. O'Neill, *supra* note 124, at 53–54 ("When we ask about rights . . . our first concern is with entitlements . . . . When we ask about obligations we begin by asking what ought to be done.").

208. No-fault schemes have received some attention with respect to climate damage. *See infra*, Part IV.C.3. In addition to the climate context, there have also been suggestions to conceptualize the International Criminal Court's Trust Fund as a global no-fault compensation scheme. *See, e.g.*, Frédéric Mégret, *Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes*, 36 Brook. J. Int'l L. 123, 128 (2010) ("[I]f one lets go of the intuition that the answer is to be found in the context of mass criminality and transitional justice, the better analogy is that the [Victims Trust Fund] takes its cue from what is in fact an already remarkable history—the development of domestic victim compensation schemes designed to deal with ordinary, particularly violent crimes. These schemes have existed for about half a century and are now a permanent feature of many justice systems.").

multiple procedural and substantive hoops and, instead, provide them with non-adversarial alternatives.[209]

This acknowledgment and the rationales behind it illustrate new ways of thinking about remedial arrangements that are currently lacking under IHRL. Following Part III, Part IV will consider how no-fault schemes can be implemented within IHRL, not to replace existing arrangements, but rather to complement and expand its remedial approach, and how no-fault insights, which adhere to distributive rather than corrective justice, can help address bigger remedial challenges that stand ahead.

A. A Brief Comparative Review of No-Fault Compensation Schemes

Around the turn of the twentieth century, alongside the surge in industrialization and the increasing incidence of workers' injuries, challenges to the fault principle started to emerge. Litigation expenses and liability uncertainties caused the enactment of no-fault compensation acts, first in the United Kingdom (1897)[210] and then in the United States (1910–1921).[211] Both statutes took a sharp turn from the negligence standard. Negligence was no longer a condition for liability. Instead, the statutes provided that any "personal injury by accident arising out of and in the course of employment"[212] would be compensated, regardless of common law defenses that might arise.[213] In other words, "once the injury came within the statute, the employer was liable."[214]

Soon after, new jurisdictions sought to extend the no-fault approach beyond industrial injuries to automobile accidents, which had also presented new risks and injuries.[215] In 1946, a Canadian province was the first to enact a no-fault automobile plan that required all drivers to purchase first-party personal injury loss insurance that would compensate

---

209. *See* Sonia Macleod & Christopher Hodges, *Conclusions*, *in* Redress Schemes for Personal Injuries 615, 618 (Sonia Macleod & Christopher Hodges eds., 2017).

210. Workmen's Compensation Act 1897, 60 & 61 Vict. c. 37 (Eng.) [hereinafter U.K. Workmen's Act].

211. *See* James M. Anderson et al., The U.S. Experience with No-Fault Automobile Insurance: A Retrospective 21 (2010).

212. UK Workmen's Act, *supra* note 210, § 1, ¶ 1.

213. *See* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 Ga. L. Rev. 775, 797–98 (1981) (noting that the only exception was for when the injury was willful misconduct of the workman).

214. As Epstein notes, not all types of employment were protected; household and retail personnel were not subject to the statute. *Id.* at 798.

215. Anderson et al., *supra* note 211, at 23.

them regardless of fault.[216] Aside from the victim-centered approach, both workers' compensation and automobile insurance schemes were meant to enhance these activities by promoting confidence in them. As Howells noted, "the assurance of compensation if harm occurs . . . encourage[d] citizens to have the confidence to take part in an activity."[217]

In the following decades, no-fault schemes continued to spread. In 1974, New Zealand launched its famous Accident Compensation Scheme.[218] It was based on five key principles: society's responsibility to its members, comprehensive entitlement, full rehabilitation, compensation, and administrative efficiency.[219]

Around the same time, Nordic states, including Sweden, Denmark, Finland, and Norway, were developing their own no-fault model to cover injuries caused in the workplace, by automobiles, and due to medical and pharmaceutical intervention.[220] Like other schemes, they too allowed individuals to be compensated on the basis of injuries rather than rights,[221] thereby signaling the state's (and society's) responsibility to provide redress for harms caused, regardless of fault. This shift from fault and adversarial procedures in the Nordic states expanded to medical professionals who were strongly encouraged to cooperate with the schemes and help create a culture of honesty and shared information to improve the healthcare system.[222]

Meanwhile, in the United States, new no-fault schemes continued to emerge on both the federal and state levels. After the Worker's Compensation Act, schemes were created for clinical accidents (including birth

216. *Id*. at 30 (discussing the jurisdiction of Saskatchewan).

217. Geraint Howells, *Justifications for Preferential Adoption of No-Fault Accident Compensation Schemes*, 16 OTAGO L. REV. 127, 132 (2019).

218. *See* Christopher Hodges & Sonia Macleod, New Zealand: *The Accident Compensation Scheme, in* REDRESS SCHEMES FOR PERSONAL INJURIES 33, 33 (Sonia Macleod & Christopher Hodges eds., 2017).

219. *See id.*

220. *See* Sonia Macleod & Christopher Hodges, *Nordic Injury Compensation Schemes*, *in* REDRESS SCHEMES FOR PERSONAL INJURIES 161, 161 (Sonia Macleod & Christopher Hodges eds., 2017).

221. *See* Sonia Macleod & Christopher Hodges, *An Introduction to the Schemes, in* REDRESS SCHEMES FOR PERSONAL INJURIES 3, 6 (Sonia Macleod & Christopher Hodges eds., 2017).

222. *See* Macleod & Hodges, *supra* note 209, at 619.

injuries),[223] automobile insurance,[224] vaccine damages,[225] and schemes to redress specific events, such as the fund established for survivors of the September 11, 2001 terrorist attacks.[226] Despite the country's legal culture of private enforcement, the schemes illustrated a recognition of redress as a social good.[227] The vaccine compensation schemes, for example, evoked confidence in citizens who knew that they would not need to sue the manufacturer in case of injury. Such incentives resulted in more vaccinations, thereby improving public health.[228] The motivation to

---

223. *E.g.*, Virginia Birth-Related Neurological Injury Compensation Act, VA. CODE ANN. §§ 38.2-5000–5021 (1987). *See generally* Sonia Macleod & Christopher Hodges, *The Virginia Birth-Related Neurological Injury Compensation Program*, *in* REDRESS SCHEMES FOR PERSONAL INJURIES 316 (Sonia Macleod & Christopher Hodges eds., 2017); Sonia Macleod & Christopher Hodges, *The Florida Birth-Related Neurological Injury Compensation Association*, *in* REDRESS SCHEMES FOR PERSONAL INJURIES 330 (Sonia Macleod & Christopher Hodges eds., 2017).

224. *See generally* Sonia Macleod & Christopher Hodges, *Motor Vehicle Coverage in the USA*, *in* REDRESS SCHEMES FOR PERSONAL INJURIES 285 (Sonia Macleod & Christopher Hodges eds., 2017). It is worth noting, however, that the shift to no-fault invoked objections in the name of human rights. In his dissent report, New York Court of Appeals Judge Jacob D. Fuchsberg considered limitations on recovery if the sum does not reach the agreed-upon threshold—an elimination of personal or human rights: "[E]ndorsement of the so-called no-fault proposals currently being advanced in New York for compensating automobile victims would be a sad departure from the Association's high standard of courageous protection of personal and human rights. . . . [A] true no-fault system would not take away from the injured their right to full and fair compensation for all real damage. To the extent that the right to full compensation is destroyed, 'no-fault' becomes 'no-pay.'" *See* Jacob D. Fuchsberg, Judge, N.Y. Ct. App., Dissent to the Report of the Special Committee on Automobile Insurance Plan: The "No-Fault" Principle 245, 259–60, *in* REC. ASS'N BAR CITY N.Y. (1972) (emphasis removed).

225. *Vaccine Injury Compensation Program*, U.S. DEP'T OF JUST. CIV. DIV., https://www.justice.gov/civil/vicp [https://perma.cc/L5MH-8PTF] (last updated Jan. 25, 2023); *see also* Sonia Macleod, *Vaccine Injury Compensation Schemes*, *in* REDRESS SCHEMES FOR PERSONAL INJURIES 381, 384–94 (Sonia Macleod & Christopher Hodges eds., 2017).

226. *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 401, 115 Stat. 230, 237 (2001) (codified as amended at 49 U.S.C. § 40101 (2018)); Christopher J. Robinette, *Harmonizing Wrongs and Compensation*, 80 MD. L. REV. 343, 368–70 (2021).

227. *See also* Sonia Macleod & Christopher Hodges, *No-Fault Schemes in the USA*, *in* REDRESS SCHEMES FOR PERSONAL INJURIES 281, 282 (Sonia Macleod & Christopher Hodges eds., 2017).

228. Macleod & Hodges, *supra* note 209, at 620.

improve public health stood at the heart of many similar vaccine damage schemes worldwide.[229]

In France and Germany, no-fault schemes reflected a longer civil liability tradition of spreading societal costs across the community.[230] Starting in the second half of the twentieth century, the Conseil d'État[231] gradually developed the principle of liability without fault based on the principle of "equality before public burdens."[232] At the base of this equality principle stands the notion that, since the state is responsible for the interests of all its citizens, it must compensate individuals or groups when it induces a disproportionate burden on them—even if it has done so without fault or has acted otherwise lawfully.[233] The rule entails the basic premise that the community bears the inherent liability to compensate those harmed due to "burdens imposed for the common good."[234]

The types of burdens that might undermine the equality principle vary. One pattern of harm is that resulting from a "special risk" created by the state.[235] For example, in 1951, when discussing liability for damages in the context of a police operation, the Conseil d'État differentiated between victims who were unconnected to the object of the operation and victims who were its target, noting that the former must be compensated

229. Macleod & Hodges, *supra* note 225, at 381 n.1 (including Germany, France, Japan, Switzerland, Denmark, New Zealand, Sweden, the United Kingdom, Quebec, Taiwan, Italy, and Norway).

230. Claire Bright & Christopher Hodges, *France: The ONIAM Scheme*, *in* Redress Schemes for Personal Injuries 427, 428 (Sonia Macleod & Christopher Hodges eds., 2017).

231. The *Conseil d'État* is a French government body that operates both as a legal adviser to the government and as the highest administrative court.

232. Cees van Dam, European Tort Law 537 (2d ed. 2013) (translating and explaining the French phrase "responsabilité pour rupture de l'égalité devant les charges publiques" from Article 13 of the Declaration of the Rights of Man and of the Citizen).

233. *Id.*

234. John Bell, *France: Administrative Liability in French Law*, 2 Eur. Pub. L. 337, 338 (1996).

235. Reisman, *Compensating Collateral Damage, supra* note 34, at 5–7 (suggesting that in cases of elective armed conflict, international or non-international, when persons who are not combatants suffer death, injury, or property damage, the injuring party should be under a general obligation to provide compensation regardless of a violation. Reisman pointed out models of responsibility in domestic legal systems, particularly the French and German, to demonstrate that IHL should follow similar principles).

for any damage caused regardless of the act's lawfulness. The latter must be compensated only insofar as the act was wrongful.[236]

Similarly, in Germany, the state's liability can be based on *Sonderopfer* ("exceptional sacrifice"), a customary rule providing for compensation when the state subjects a person to an unequal burden compared to others.[237] Liability for lawful conduct does not take away from public bodies' margin of discretion, but insists that the state must not leave groups empty-handed when harmed by policies, measures, or risks imposed on them in pursuit of the public interest.[238] The liability does not focus on whether the public body was *wrong* but on whether citizens are treated equally and how their loss differs from the loss or gain of others.[239] If such inequality is created, it is the responsibility of the community as a whole to jointly compensate them by shifting the loss from the individual to the collective (i.e., taxpayers).[240]

Not all countries that operate a no-fault regime began from a tradition of strict liability like that of France or Germany. In the U.K. legal system, no-fault schemes have played an increasingly dominant role only since the 1990s. Yet, to date, it has enacted compensation schemes for a wide range of harms caused by criminal injuries, injured soldiers, harms resulting from vaccinations, infected blood support, medical negligence, diseases, and a wide range of industrial injuries.[241]

B. Primary Rationales Shared by the No-Fault Schemes

No-fault schemes have received limited theoretical attention from a global comparative perspective.[242] Yet they seem to share three

---

236. *Id.* at 5 (citing CE Sect. 27 juillet 1951, Dme Auberg6 et Dumont); *see also* van Dam, *supra* note 232, at 538–39 (describing other cases in which the state can be found responsible for undermining the equality principle).

237. van Dam, *supra* note 232, at 540.

238. *Id.* at 580–81.

239. *Id.* at 581.

240. *Id.*

241. Howells, *supra* note 217, at 147–50.

242. Kim Watts, A Comparative Law Analysis of No-Fault Comprehensive Compensation Funds: International Best Practice and Contemporary Applications 2 (2023) ("To date, there has not been a comparative law analysis of the most comprehensive and publicly-managed types of no-fault compensation funds with one another, along with an application of the relevant research conclusions from such an analysis to the wider landscape.").

rationales:[243] increasing the likelihood of injured individuals receiving compensation (a victim-centered rationale); enhancing trust in a socially-desirable activity (an activity/trust-enhancement rationale); and distributing loss across the community in whose name the harm was done (the social responsibility rationale). Let us consider these in turn.

The first and arguably most straightforward rationale is increasing the individual's chances of receiving compensation. Problems of proof (procedural or substantive) and lack of resources (financial, emotional, or others) can lead harmed individuals to "fall[] through the cracks" of the torts system.[244] According to Macleod and Hodges, "[b]y far the more powerful motivation has been the desire to switch away from tort as the trigger of liability to a system that has a wider and less onerous gateway and provides a less adversarial environment for the parties."[245]

The second rationale—enhancing confidence in what the legislature considers a desired societal activity—also underlies the various schemes. Take, for example, vaccinations. Despite their inherent risks, they promote a social good: public health. To encourage the public to get vaccinated, states ensure that, in case of harm, individuals need not absorb the financial damage themselves.[246]

Trust enhancement also seems to lie at the root of schemes aimed at remediating injuries endured by soldiers or victims of crime. In both cases, compensation is awarded for accepting risks inherent in a socially desirable activity. Soldiers risk their lives for the state, so as states seek to incentivize citizens to join their armed forces, they provide guarantees and benefits in case of harm.[247] Although somewhat less noticeable, the same rationale applies to criminal injury schemes. Living in society includes accepting

---

243. Howells suggested the first two rationales in his analysis of the U.K. schemes, yet his suggestion seems to remain true in other jurisdictions, too. Howells *supra* note 217, at 130–33.

244. *Id.* at 153.

245. Macleod & Hodges, *supra* note 209, at 618.

246. *See id.* at 619–20 (arguing that "the main point behind the Japanese drug ADR scheme was to maintain the confidence of the population in the safety of medicines and the regulatory system," and that a similar mixture of ideologies sparked the 9/11 fund). Leaving victims to sue their insurance companies would have left them with slim chances of compensation; the fund signaled broad social responsibility while, at the same time, helping save the airline industry. *See id.*

247. Howells, *supra* note 217, at 139. As he shows, this was articulated by the U.K. Secretary of Defence, who said there is "a responsibility to look after our Armed Forces. They must have confidence that when they are injured due to their Service, [] they and their family will be fully cared for . . . and they must have confidence that we will

the unavoidable threat of crime, against which the state is meant to protect. As part of the "social contract," citizens surrender their right to self-help in return for the state's protection and law enforcement. No-fault liability is a continuation of that same obligation. When a state compensates crime victims, it signals that it has confidence in its law enforcement and will not abandon those whom it was unable to protect.[248]

The third rationale behind compensation schemes is social responsibility, which aligns, even if not explicitly, with the German and French distributive approaches. The various schemes demonstrate that, when community members are harmed in the course of a desirable social activity meant to serve the collective, that harm or loss, as far as possible, should be distributed evenly among all community members.[249]

IV. How Human Rights Law Can Use Domestic No-Fault Schemes to Enhance Remedies

A. *Expanding Domains of State Responsibility to Remediate*

An expansion of responsibility could start by seeking cases (1) where the harm is attributable to state activities; (2) where, due to systemic, evidential, or procedural difficulties of establishing liability, those harmed individuals "fall between the cracks" of the judicial system and must absorb the damages themselves; (3) where compensating these individuals will align with the three rationales underlying current domestic no-fault schemes. Next, I provide two U.S. examples that could provoke further analysis: injuries caused to innocent people by a state's law

---

provide them with a fair and just compensation scheme as part of that support." *Id.* at 138–39.

248. *See id.* at 135–37 (Howells contemplates these rationales but suggests they cannot explain why crime victims are preferred over other types of injured groups who are not provided with a no-fault scheme).

249. *See id.* at 143 (noting that when the United Kingdom introduced the Vaccine Damage Payments Act 1979, the British Medical Journal published an article explaining that "[t]he moral justification for compensation . . . is based on the social contract, and that "[n]ational immunization programmes not only aim to protect the individual but also to protect society." The Journal continued: "If individuals are asked to accept a risk (even a very small one) partly for the benefit of society then it seems equitable that society should compensate the victims of occasional unlucky mishaps." *Id.*)

enforcement authority, and injuries caused to aliens in the course of an armed conflict.[250]

1. Responsibility to Remediate Accidental Harm Caused by State Agents

In the United States today, doctrines of sovereign and official immunities often (and increasingly, as some argue)[251] preclude constitutional remedies, especially those involving damages.[252] Since the early 1980s,[253] the Supreme Court has conveyed hostility toward damages claims against the government and its officials for alleged constitutional misconduct, despite opening that door a decade earlier in *Bivens*.[254]

In *Bivens,* the Court held that the petitioner was entitled to monetary damages for injuries resulting from the agents' Fourth Amendment violations.[255] Gradually, however, the Court started undermining *Bivens* claims[256] while expanding immunity doctrines.[257] According to Richard Fallon, "[i]n recent Terms, the Court has repeatedly granted *certiorari* and then reversed lower courts for failing to uphold immunity defenses, often by affirming that qualified immunity serves vital social purposes and protects all but plainly incompetent officials."[258]

---

250. My focus on the United States stems from it being a state that is not subjected to a human rights tribunal. A strategy for the proliferation of remedies should not limit itself to countries that are parties to a regional human rights court.

251. Richard H. Fallon Jr., *Bidding Farewell to Constitutional Torts*, 107 Cal. L. Rev. 933, 951 (2019). *See generally* Huq, *supra* note 204.

252. Fallon, *supra* note 251, at 951.

253. *See generally, e.g.,* Bush v. Lucas, 462 U.S. 367 (1983).

254. Fallon, *supra* note 251, at 951.

255. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

256. Fallon, *supra* note 251, at 951–54.

257. *Id.* at 954–57. In a nutshell, the immunities test is a question of reasonableness, according to which "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982). Besides expanding official immunities, the Court has narrowed other remedial alternatives for alleged constitutional violations by ruling that federal statutes have repealed the right to file a suit against state officials for constitutional violations expressly created by § 1983, or by creating other obstacles to obtaining damages from state governments. *See* Fallon, *supra* note 251, at 956–57.

258. Fallon, *supra* note 251, at 956–57.

Naturally, this legal reality created a chilling effect on litigation.[259] Empirical studies suggest that only a thin layer of claimants of potentially compensable policing harms reach jury trials.[260]

A no-fault scheme for harm caused by police actions would adhere to all three rationales that underlie other compensation schemes. It would allow individuals to be compensated without having to overcome qualified immunities by proving intention and fault;[261] enhance confidence in law enforcement, currently at a record low;[262] and demonstrate social responsibility. If crime prevention is a social good, there is no reason why innocent people should endure special losses or be exposed to unequal risk.

To a large extent, such an arrangement is already at play. Police departments nationwide reach private settlements but they do so away from the public eye, in an ad hoc manner, and with no clear rules for registering the settlements, making it very difficult to draw a comprehensive picture of their efficacy in deterring recidivism and of lessons learned, if any.[263]

---

259. In 2021, Brandon Hasbrouck, Professor of Law at Washington and Lee University, noted that "it's possible that the relationship between [some cities' police departments] and [their] residents [are] *so* bad that people simply don't see a point in trying to get compensation." Amelia Thomson-Devaux, Laura Bronner & Damini Sharma, *Police Misconduct Costs Cities Millions Every Year. But That's Where the Accountability Ends*, The Marshall Project (Feb. 22, 2021), https://www.themarshallproject.org/2021/02/22/police-misconduct-costs-cities-millions-every-year-but-that-s-where-the-accountability-ends [https://perma.cc/AS29-K529] (emphasis in original) ("In fact, wading into the legal system in search of restitution or accountability may actually result in more trouble for police misconduct victims in places where police departments are especially powerful or defensive. If you're not crystal-clear in your recollections of what happened, you could end up with a criminal complaint against *you* . . . . Black people have the perception in many places that police are pretty much untouchable. So is [a lawsuit] really worth your time?").

260. *See* Aurélie Ouss & John Rappaport, *Is Police Behavior Getting Worse? Data Selection and the Measurement of Policing Harms*, 49 J. Legal Stud. 153, 154 (2020) ("If the dispute-resolution process is a pyramid . . . with jury trials at the peak, the base is the set of all potentially compensable policing harms.").

261. *See generally* Aziz Z. Huq & Genevieve Lakier, *Apparent Fault*, 131 Harv. L. Rev. 1525, 1534 (2018); Huq, *supra* note 204 (discussing how the demand for fault has decreased remediation).

262. Emily Washburn, *America Less Confident in Police than Ever Before: A Look at the Numbers*, Forbes (Feb. 3, 2023), https://www.forbes.com/sites/emilywashburn/2023/02/03/america-less-confident-in-police-than-ever-before-a-look-at-the-numbers/ [https://perma.cc/HK7D-8E9U].

263. Miriam Aroni Krinsky, *Police Departments—Not Taxpayers—Should Pay the Bill for Misconduct Settlements*, MarketWatch (Mar. 30, 2021), https://www.marketwatch.

While a no-fault scheme would not explicitly recognize wrongdoing, it would guarantee cheaper and more equal access to compensation,[264] allow for consistent data collection to monitor the nature and scope of civilian harm,[265] and promote transparency and compliance. While such a scheme would not talk in the language of constitutional and human rights, it could certainly vindicate them in practice.

2. *Responsibility to Remediate Accidental Harm Caused in the Course of an Armed Conflict*

A no-fault scheme could also help remedy international human rights harms caused by *lawful* acts during armed conflict, which are often left unaddressed.

Armed conflicts unavoidably cause death and injury to non-combatants. International Humanitarian Law ("IHL") does not entitle these victims (or their dependents) to any remedy if the act that harmed them was lawful. Article 91 of Additional Protocol I of 1977 states: "A Party to the conflict which violate[d] the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation . . . ."[266] Hence, as Reisman emphasized, if the harm resulted from a *lawful* act, "there is, apparently, no obligation to remedy the injury."[267]

---

com/story/police-departments-not-taxpayers-should-pay-the-bill-for-misconduct-settlements-11617043529 [https://perma.cc/ZXA6-MASA].

264. In the current context, my concern is mostly with tangible harm, not any constitutional rights violation. Thus, searches and seizures that might be found "unreasonable" under the Fourth Amendment would not necessarily trigger the scheme, at least not initially. At the same time, if pecuniary damages were inflicted, questions of legality and the good faith of the police officer would be deemed irrelevant. *Cf.* Fallon, *supra* note 251, at 938 ("[T]he availability of damages remedies for all constitutional violations would likely result in a shrinking of constitutional rights . . . if damages were automatically available for every search and seizure that a court deemed 'unreasonable' under the Fourth Amendment . . . then we could expect a narrowing of operative standards of constitutional 'reasonableness.'").

265. *See* Rebecca Crootof, *Implementing War Torts*, 63 Va. J. Int'l L. 319, 342 (2023) (discussing the possible advantages of indemnification systems for civilian victims of war).

266. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 91, June 8, 1977, 1125 U.N.T.S. 3.

267. Reisman, *Compensating Collateral Damage*, *supra* note 34, at 3; *see also* Reisman, *The Lessons of Qana*, *supra* note 34, at 397–98 (1997). This issue of compensation for lawful activities joins the broader remedial failure under humanitarian law, which stems from the fact that individuals have limited standing to seek remedies. *See, e.g.*,

Rebecca Crootof suggests constructing a war tort regime to increase "the likelihood of victim compensation."[268] One of the models she offers is to create domestic war torts liability by "waiving territorial and foreign state immunities and procedural barriers."[269] Yet, as Crootof herself points out, "there is little evidence that states generally would be willing to water down their protection from suits . . . ."[270] A perhaps more feasible approach that Crootof mentions is creating domestic compensation schemes.[271] States already use systems meant to supplement traditional tort law; programs in a similar spirit can be established to address harm caused to civilians in the course of armed conflicts, as a matter of equality.[272]

Recently, the U.S. Department of Defense ("DoD") expressed interest in promoting a similar remedial arrangement. In 2022, the DoD published its new Civilian Harm Mitigation and Response Action Plan (the "DoD Plan" or "the Plan"), which includes a comprehensive strategy

---

Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 INT'L REV. RED CROSS 497, 507, 514 (2003) (pointing out that on the domestic level "[n]either humanitarian law as a whole nor any specific article imposes an obligation on States to give direct effect in their national legal systems to the provisions of IHL," that "[a]t the international level, too, victims of violations of IHL are hardly able to exercise their rights under the law," and that "[t]here is no general international mechanism allowing them to assert those rights").

268. Crootof, *supra* note 265, at 359. Crootof develops the idea of "war torts" where victims could be compensated for accidental harms. She considers various possible mechanisms for providing compensation, domestic, international and hybrid, without prioritizing one over the other. She does insist, however, on strict liability. *Id.* at 328; *see also* Rebecca Crootof, *War Torts*, 97 N.Y.U. L. REV. 1063, 1118 (2022).

269. Crootof, *supra* note 265, at 347; *cf.* Haim Abraham, *Tort Liability for Belligerent Wrongs*, 39 OXFORD J. LEGAL STUD. 808, 810 (2019) ("[T]he *in bello* rules demarcate the boundaries of liability, as only losses that are inflicted in breach of these rules will give rise to liability [and compensation].").

270. Crootof, *supra* note 265, at 348. Nevertheless, Crootof suggests that "states which have been invaded, served as battlegrounds for foreign engagements, or received large numbers of refugees might find it beneficial to take the lead in crafting domestic war torts liability, as doing so would provide a legal justification for restitution demands." *Id.*

271. Crootof considers national victims' funds or international indemnification systems. *Id.* at 339–341, 347.

272. *See* Reisman, *Compensating Collateral Damage*, *supra* note 34, at 12 ("[A]s a general human rights matter, a state may not discriminate, with regard to those subject to its jurisdiction and control, between its own nationals and foreign nationals. But states which have developed a legal distinction between so-called 'police actions' and 'belligerent actions' do this.").

for preventing, mitigating, and responding to civilian casualties.[273] The Plan clarifies that the DoD is now establishing "an overarching institutional framework for how the Department . . . will respond to civilians harmed by operations," including through a "legislative proposal for consideration . . . to support necessary authorities required by the actions in this objective."[274]

Although the DoD Plan states that it neither modifies nor creates any new legal responsibility, it seeks to expand the possible responses to harm. According to the published plan, the DoD will

> . . . ensure the availability of a diverse menu of response options to respond to individuals and communities affected by the U.S. military operations – including public and private acknowledgments of harm, condolence payments, medical care, repairs to damaged structures and infrastructure, ordnance removal, and locally-held commemorative events or symbols.[275]

Concrete achievements can only be assessed over time.[276] Still, the Plan signals an interesting development in states' no-fault responsibility for redressing harm imposed on aliens—regardless of the finding of a legal violation under IHL and IHRL.[277]

Such a scheme will also adhere to the three aforementioned rationales. First, individuals currently barred from receiving compensation when harmed by lawful acts, except for some vague *ex gratia* payments, can obtain compensation through a more systematic path. The second rationale, trust enhancement, will be promoted as it signals to affected communities that their potential losses are not unavoidable collateral damage that can pass by without any consequences.[278] Finally, compensating

---

273. U.S. Dep't of Def., Civilian Harm Mitigation and Response Action Plan (Aug. 25, 2022) [hereinafter DOD Plan].

274. *Id.* at 24.

275. *Id.* ("These options will allow commanders to craft tailored responses, based on consultations with affected individuals and communities . . . .").

276. *See* Luke Hartig, *A Big Step Forward or Running in Place?: The Pentagon's New Policy on Civilian Casualties*, Just Security (Feb. 8, 2022), https://www.justsecurity.org/80131/a-big-step-forward-or-running-in-place-the-pentagons-new-policy-on-civilian-casualties [https://perma.cc/2PNY-GRVH].

277. The DoD Plan does not mention "human rights" (or even "rights," for that matter) but nonetheless lists objectives that promote their protection. *See, e.g.*, DoD Plan, *supra* note 274, at 24–26.

278. To achieve the purpose of this rationale, compensation will not suffice. Trust can be enhanced only insofar as there are genuine attempts to prevent harm, as the

collateral damage caused by an internationally lawful act will demonstrate social responsibility. If this rationale holds within a state, it holds even more weight when the affected members are not part of the community and thus cannot enjoy the benefits the activity was meant to serve. As Michael Reisman pointed out, "[i]n comparison to a domestic victim, the foreign victim is doubly injured—by the act and by the absence of enjoyment of any indirect benefit from it as a member of the community on whose behalf the injurious act was done."[279]

B. Considering Trade-Offs and Benchmarks for Future Schemes

1. Quantum and Funding

The main counterargument against the idea of new IHRL schemes is likely a fear of a flood of claims for relief. This objection does not undermine the legitimacy of the schemes but rather emphasizes the importance of demarcating clear boundaries of entitlement to distinguish between more versus less deserving claimants. In other words, these concerns should incentivize more careful definitions of the triggering requirements, rather than justify the denial of these schemes.[280] The benefits of broader accountability and compensation should weigh against the cost of hostility and distrust resulting from continued untreated damages. Additionally, given that a state cannot fully estimate the financial dimension of future settlements, the proposed framework increases certainty for the individual claimants and the state.

Plan's mitigation objectives seem to acknowledge. An organized scheme that seeks to address both these goals will engage with both armed forces and civilians. Such a scheme should also be transparent, which in itself could enhance trust. *See* Ctr. for Civilians in Conflict, Amends and Reparations for Civilian Harm in Armed Conflict 11 (Dec. 2022), https://civiliansinconflict.org/wp-content/uploads/2023/01/CIVIC_Amends_Brief.pdf [https://perma.cc/D5XX-EMEV] ("Credible civilian harm recording can help clarify the truth surrounding incidents, including whether or not a violation occurred. Building trust in civilian harm documenting mechanisms can help to defuse false allegations, and therefore enhance the legitimacy of actors in armed conflict.").

279. Reisman, *Compensating Collateral Damage*, *supra* note 34, at 7.

280. Daphne Barak-Erez, *Avlot Chukatiot Beldan Chukei HaYesod* (*Constitutional Torts in the Era of Basic Laws)*, 9 Mishpat U'Mimshal 103, 109 (2005) (Isr.) (suggesting that Israeli authorities should be obliged to pay compensation for human rights violations and asserts that concerns regarding the "flood" of claims should not "undermine the legitimacy of the constitutional compensation claims, yet it is necessary to outline a clear framework for them and to recognize appropriate legal defenses for the authorities and their employees.").

When considering how funding should be made, it is important to note that different sources of remediation bear different meanings and send different messages.[281] Whether or not the remedy comes directly from government funding earmarked for the types of harm in question makes a difference to the claimants and society as a whole. The source of funding depends on the scheme's resources, the kinds of harm it seeks to address, its duration, scope, and so on, yet a collective payment approach would demonstrate civic solidarity and political responsibility (as opposed to guilt) for the harm done. To differentiate deserving from less deserving claimants, schemes should require a minimum threshold of harm and cap the damages paid.[282] This aligns with no-fault plans, many of which operate on a lump-sum or tariff basis, offering real and meaningful remediation but not seeking to return the victim to their original position.[283] It also resonates with transitional justice reparation schemes, which are intended not to make the victims or their survivors whole but, rather, to demonstrate a meaningful "contribution to the[ir] quality of life."[284]

2. Judicial Review

Another probable objection is the importance of explicit accountability and condemnation. According to the literature on transitional justice, remediation is a necessary yet insufficient component on the path toward justice. Accountability is essential for individuals and societies to heal, whereas distributing reparations without admitting fault can seem like an "easy way out." This observation is also true for human rights violations that do not reach the scope of transitional justice scenarios. The importance of the notion that those who abused human rights should be held accountable and publicly condemned cannot be underestimated. Indeed, judicial measures are the means to guarantee such condemnation.

Yet the question is not whether such judicial measures (and remedies) should be replaced with no-fault schemes. The answer is simple—no. The question is instead whether prioritizing the admission of wrongfulness at

---

281. Debra Satz, *Countering the Wrongs of the Past: The Role of Compensation*, *in* REPARATIONS: INTERDISCIPLINARY INQUIRIES 176, 181 (Jon Miller & Rahul Kumar eds., 2007).

282. *Cf.* Crootof, *supra* note 265, at 362–63 (making a similar suggestion for war torts).

283. Howells, *supra* note 217, at 153.

284. De Greiff, *supra* note 116, at 466.

the expense of remediation, as is currently the case, further undermines those whose rights were abused and whom IHRL was meant to protect.

From a procedural perspective, whether or not applicants to an administrative scheme can ask for a judicial remedy is a policy decision and can vary according to the type, severity, and complexity of harm. A state can decide that if the case falls within a scheme, processing under that scheme is mandatory yet subject to judicial review, or it can also allow complainants to receive a concrete offer before they make a decision.[285] In any case, and similar to torts, the schemes would not (and could not) replace courts.

3. *Decision-Making Process and Burden of Proof*

According to Macleod & Hodges, who suggested a model for personal injury compensation schemes based on a broad comparative analysis, a successful administrative scheme should embrace an investigative or inquisitorial-like process, not an adversarial one.[286] They further suggest that the default stages should include the following: a submissions process directly to the administrative body; an initial screening process that operates according to the scheme's entitlement criteria; and an allocation of relevant claims to a more thorough assessment conducted either by in-house or external experts.[287] Assessment may include, for example, a medical examination of the claimant, an expert opinion on causation, or any other technical input that might be necessary.[288] The

---

285. In France, medical patients can file complaints to the court and the scheme, as long as they notify both bodies. A claimant can also wait until a compensation offer is made by the latter and decide whether they prefer to reject it and turn to court. *See* Bright & Hodges, *supra* note 230, at 427–30 (citing Loi 2002-303 du 4 Mars 2002 Relative aux Droits des Malades et à la Qualité du Système de Santé [Law 2002-303 of March 4, 2002 on the Rights of Patients and on the Quality of the Health System], *in* Journal Officiel de la République Française [Official Journal of The French Republic], Mar. 5, 2002, ¶ 1 (allowing patients injured as a result of medical accidents (in private or public services), mandatory vaccinations, or specific diseases caused by blood products to be compensated regardless of the caregiver's fault).

286. Sonia Macleod et al., *Parameters and Outline of a Modern Compensation Scheme*, *in* Redress Schemes for Personal Injuries 647, 648 (Sonia Macleod & Christopher Hodges eds., 2017).

287. *Id.*; *see also* Macleod & Hodges, *supra* note 209, at 633 ("It is key that the scheme is able to provide oversight on the decision on quantum if there is discretion in the level of award available.").

288. Macleod & Hodges, *supra* note 209, at 633; Macleod et al., *supra* note 286, at 648.

state through the administrative scheme should bear the costs of the full assessment process. If a claim is valid, the scheme administrator should pay immediately.[289]

4. *Monetary Remedies*

Much has been written about the insufficiency or inappropriateness of monetary compensation as a restorative approach to human rights abuses. But the victims who seek compensation are well aware that money will not undo their trauma.[290] They are looking for a "second-best form of justice."[291] Even when facing the worst possible loss, some remedy can be preferable to no remedy.[292] Furthermore, the material act of compensation constitutes symbolic accountability and, arguably, conveys an apology.[293] Even if the acknowledgment of responsibility is obscured, it can be inferred from the payment itself. [294]

Certainly, the preference for compensation will not apply to all. Harmed individuals and groups might refuse to accept any payment that comes without an expressed apology or recognition.[295] However, this is

289. *See* Macleod & Hodges, *supra* note 286, at 649.

290. Satz, *supra* note 281, at 190.

291. *Id.*

292. Nancy Amoury Combs, *From Prosecutorial to Reparatory: A Valuable Post-Conflict Change of Focus*, 36 MICH. J. INT'L L. 219, 264 nn.217–18 (2015). In a survey conducted in eleven post-conflict zones, one thousand victims of war crimes were asked what punishment they thought was most appropriate. While 36% said "imprisonment," 34% said reparations to the victims were most appropriate. The same study found that victims considered monetary compensation to be the most important reparation, as it symbolizes, according to the interviewees, both accountability and a means to support their recovery. *Id.*; *see also* Sareta Ashraph, *Transitional Justice – Without the Transition? Considering a Path to Reparations for the Syrian People*, *in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 746, 746–47 (Carla Ferstman & Mariana Goetz eds., 2d ed., 2020) (discussing the importance of reparations in the Syrian context); AFGHAN INDEP. HUM. RTS. COMM'N, A CALL FOR JUSTICE: A NATIONAL CONSULTATION ON PAST HUMAN RIGHTS VIOLATIONS IN AFGHANISTAN 33 n.36 (Jan. 25, 2005), https://www.refworld.org/pdfid/47fdfad50.pdf [https://perma.cc/9NLU-DH5M] (describing a survey conducted in Afghanistan that found that 88% of the 4,151 respondents felt reparations should be made for past crimes, with one-fifth of the respondents preferring reparations to other justice mechanisms).

293. Michal Alberstein & Nadav Davidovitch, *Apologies in the Healthcare System: From Clinical Medicine to Public Health*, 74 LAW & CONTEMP. PROBS. 151, 173 (2011).

294. *Id.*

295. Hamber, *supra* note 108, at 577 (describing how the Argentinian human rights association, *Las Madres de la Plaza de Mayo*, has continuously rejected the government's

not a compelling justification for denying monetary remedies. Take, for example, mundane harms such as medical injuries. While some injured patients are willing to settle out of court, others prefer to have their "day in court" so that their physician is held publicly accountable.[296] Still, different countries allow these potential claimants to choose between a redress scheme for medical harm and the judicial route. The same should apply to human rights. It should be the state's responsibility to allow injured individuals to choose whether or not they wish to recover through compensation.

5. *Non-Monetary Remedies*

While domestic schemes currently provide mostly monetary compensation, they can also include non-financial redress. The DoD Plan intends to offer non-monetary remedies to "ensure the availability of a diverse menu of response options."[297] On the spectrum of no-fault schemes, this approach is a fuller model compared to mere compensation, largely aligning with the remedy of satisfaction, which is interpreted broadly in IHRL.[298]

Drawing from De Grieff's suggested non-judicial "forms of reparations" in the context of transitional justice, non-monetary remedies could include symbolic measures like personal letters of apology; public acts of atonement; service packages that consist of medical, educational, or housing assistance; and social investment.[299] An efficient scheme, however,

---

offer of compensation for the disappearance of their children during the Videla dictatorship in the 1970s, and how Brazilian families whose loved ones have been murdered or have disappeared during the Brazilian dictatorship saw the government's attempt to offer compensation as an effort to buy their silence). These notions have long stood at the base of transitional justice theory, according to which reparations schemes are considered a key component in the path to justice but cannot stand alone. *See supra* text accompanying notes 117–118.

296. *See* Robinette, *supra* note 226, at 346–47. In a study on medical malpractice, participants were asked whether they would prefer guaranteed compensation, but only for medical expenses and lost income, without the chance of recovering other damages such as pain and suffering (which requires the tort system). Over 30% of the respondents replied affirmatively. The same percentage was registered even in cases where the parties had a personal relationship with the defendant. *Id.*

297. *Supra* note 273.

298. *See* Roach, *supra* note 24, at 39 (citing the Basic Principles and Guidelines, *supra* note 48, art. 21). *See also* the Articles on State Responsibility, *supra* note 131, art. 37¶2.

299. De Greiff, *supra* note 116, at 468–70.

should avoid an open-ended list of remedies that could risk undermining its relative advantages over courts: simplicity, speed, and certainty. It will have to find the right balance between the need for assurance regarding the type of obtainable relief and the flexibility required in tailoring those remedies to ensure efficacy.

C. Internationalizing No-Fault Remedies

1. Proliferation of National Schemes Through International Treaties

One possible way in which national schemes can enhance international remediation is by promoting an international or regional treaty that establishes the parties' obligation to remediate certain human rights harms regardless of fault. A version of this international obligation appears in the framework of the 2004 European Council Directive relating to compensation for crime victims. According to the Directive, victims of intentional crimes committed in one member state could be compensated by the state in which the crime was committed if they cannot be compensated by the offender.[300] Although the Directive applies to cross-border crimes, it promotes the responsibility of states to provide compensation to victims on a no-fault basis in a non-judicial manner.[301]

Theoretically speaking, more like-minded directives can be created. If victims of violent crimes can be compensated by such schemes, why not victims of harm caused by state agents due to a mistake of fact? Or harm suffered during police activities? Or collateral damage arising out of an armed conflict?

300. Council Directive 2004/80, art. 12(2), 2004 O.J. (L 261) 15, 17 (EC) [hereinafter Council Directive] ("All Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims."). In 2019, the E.U. Commission Special Adviser for Compensation to Victims of Crime advised expanding compensation to other forms of reparation, such as recognition and restitution. *Report of the Special Adviser, J. Milquet, to the President of the European Commission Jean-Claude Juncker on Strengthening Victims' Rights: From Compensation to Reparation*, at 8 (Mar. 2019), https://commission.europa.eu/document/download/0184a9c1-09ae-4773-a42a-7107238ddbbd_en?filename=strengthening_victims_rights__from_compensation_to_reparation_rev.pdf.

301. Council Directive*, supra* note 300, art. 9.

2. Proliferation of National Schemes Through a Transnational Process

The question of how state practice becomes international law and vice versa is a complex question. Given the absence of a clear government and legislature in the international fora, "the problem of lawmaking," as Reisman put it, "has always been more urgent and, apparently, more complicated in international law."[302] This is why he suggests looking at lawmaking not only as "the processes in which certain policies that self-describe as law are made but with the aggregate of processes in a community by which political perspectives at varying levels of consciousness are shaped and changed."[303]

Adopting Reisman's realism when internationalizing no-fault regimes as part of IHRL's remedial corpus means identifying the desired authoritative decision-making processes—whether domestically or internationally. Simply put, it is not necessarily an international no-fault treaty that we should strive for, but, rather, it is the *engagement* of various players—institutions and individuals—with the potential of a human rights no-fault regime that broadens remedial opportunities.

As suggested in Part II, the likelihood that treaty bodies and regional tribunals would order a remedy regardless of the finding of a violation, is not particularly high.[304] What courts and treaty bodies can do, however, is to further engage with no-fault schemes whenever the parties reference them. Thus far, no-fault schemes have been deemed irrelevant (for not comprising part of existing state law),[305] insufficient (for failing to

---

302. W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 Am. Soc'y Int'l L. Proc. 101, 101 (1981).

303. *Id.* at 104.

304. *See, e.g.*, ECtHR's Practice Direction, *supra* note 76, at 66 ("The purpose of the Court's award under Article 41 of the Convention in respect to damage is to compensate the applicant for the actual harmful consequences of a violation. *No award can therefore be made for damage caused by events or situations that have not been found to constitute a violation of the Convention* . . . .") (emphasis added).

305. *See, e.g.*, Vasileva v. Bulgaria, App. No. 23796/10, ¶ 70 (Sep. 12, 2016), https://hudoc.echr.coe.int/fre?i=001-161413 [https://perma.cc/Y78E-L46H]. The applicant, who suffered harm as a result of a mastectomy, asked the court to declare that as part of its positive obligation, the state should allow for an alternative no-fault mechanism of compensation or, alternatively, reverse the burden of proof. *Id.* The court rejected this possibility altogether: "Some High Contracting Parties also operate no-fault compensation schemes. In view of the broad margin of appreciation enjoyed by the High Contracting Parties in laying down their health care policy, and in choosing how to comply with their positive obligations and organize their judicial systems, there is no basis on which to hold that the Convention requires a special mechanism which

provide adequate compensation),[306] or inappropriate (for providing only damages).[307] While these conclusions might be justified on a case-by-case basis, courts can nonetheless clarify the general circumstances under which such schemes could become relevant, sufficient, or appropriate.

If treaty bodies, regional courts, and special rapporteurs further engage with these remedial possibilities, they could encourage other actors to explore the potential of non-judicial, no-fault schemes. This process, described by Harold Koh as "vertical," concentrates on "the relationship between the international and the domestic legal systems."[308] According to Koh, "[m]any efforts at human rights norm-internalization are begun not by nation-states but by 'transnational norm entrepreneurs,' private transnational organizations or individuals who mobilize popular opinion and political support within their host country and abroad for the development of a universal human rights norm."[309] Such processes can work "upward" from the state to the international level, and "downward" to the state level.

This transnational process should also incentivize governments to explore no-fault remediation. Article 38(1)(c) of the ICJ Statute provides that, among the primary sources of international law are "the general

---

facilitates the bringing of medical malpractice claims or a reversal of the burden of proof in such cases, as suggested by the applicant." *Id.*

306. *See, e.g.*, Horvath v. Australia, Hum. Rts. Comm., U.N. Doc. CCPR/C/110/D/1885/2009, ¶ 8.7 (Jun. 5, 2014) ("The State party refers to compensation under the Victims of Crime Assistance Scheme, but the Committee is not convinced that, given the nature of the Scheme, including its no-fault attributes, the author could indeed obtain adequate redress through it for serious harm inflicted by State agents. The Committee notes in that respect that the State party has not provided information about cases in which persons with claims similar to those of the author obtained adequate redress through the Scheme.").

307. *See, e.g.*, Yaşa v. Turkey, App. No. 22495/93, ¶ 74 (Sep. 2, 1998), https://hudoc.echr.coe.int/?i=001-58238 [https://perma.cc/5PGT-CZN9] ("[T]he Court has already noted, an administrative-law action is a remedy based on the strict liability of the State, in particular for the illegal acts of its agents, whose identification is not, by definition, a prerequisite to bringing an action of this nature. However, the investigations which the Contracting States are obliged by Articles 2 and 13 of the Convention to conduct in cases of fatal assault must be able to lead to the identification and punishment of those responsible . . . . that obligation cannot be satisfied merely by awarding damages.").

308. Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 Ind. L.J. 1397, 1406 (1999).

309. *Id.* at 1409.

principles of law recognized by civilized nations."[310] Hence, the more often no-fault schemes appear in international adjudication, e.g., when examining the exhaustion of remedies, the more likely they will be interpreted as a norm binding upon the international community.[311] If the interest in international legal remedies continues to expand, as it has in recent years, states will be incentivized to design future remedial options that can become international law. Indeed, states have long been interested in framing international legal orders in their own image.[312]

3. Toward an International No-Fault Scheme for Climate Harm

Another important way in which no-fault schemes can help address the IHRL right-remedy gap would be within the climate context. What the various domestic schemes teach us is that remediation should not stem solely from an individualistic right to a remedy based upon corrective justice but also from a social responsibility to distribute risks and their costs regardless of fault. Understood as such, the no-fault framework can also help enhance distributive justice considerations in theory and practice under IHRL, which is crucial for addressing the biggest injustices of our time: slavery, colonialism, and the continuation of the two—the climate crisis.[313]

In *Reconsidering Reparations*, Olúfẹ́mi Táíwò notes that "it's not, in the straightforward sense, the *fault* of present-day descendants of settlers or whites that other people's descendants have a harder time of things. Nor was the world order founded centuries before their birth caused by their actions."[314] This is not to say that there is no damage to repair, only that

---

310. ICJ Statute, *supra* note 129, art. 38.

311. *See* Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2007 I.C.J. Rep. 601, ¶ 47 (May 24) (holding that administrative remedies will be included under the exhaustion of remedies rule if they are "aimed at vindicating a right and not at obtaining a favour, unless they constitute an essential prerequisite for the admissibility of subsequent contentious proceedings"). In that case, the state argued that the petitioner could have requested the competent administrative authority to reconsider his expulsion from the Democratic Republic of Congo, but the ICJ stressed that "grace cannot be deemed a local remedy to be exhausted." *Id.*

312. Eyal Benvenisti & George W. Downs, Between Fragmentation and Democracy: The Role of National and International Courts 83 (2017).

313. Olúfémi O. Táíwò, Reconsidering Reparations 147 (2022).

314. *Id.* at 122.

reparations cannot always stem from notions of corrective justice that seek to right the wrong.[315]

While adjudication remains an important remedial option in the context of climate harm, as acknowledged in the 2022 United Nations Climate Conference, the dire and growing climate crisis requires more extensive solutions.[316] The conference led to the establishment of the COP27 Loss and Damage Fund.[317] However, while the fund marks an important step in providing assistance to communities across the world, it is based on voluntary donations, which currently can barely cover the cost of adaptation in the coming years.[318]

In February 2024, Amnesty International and the Center for International Environmental Law submitted a report to the Human Rights Council calling for a shift from voluntary to obligatory finance while stressing the importance of implementing a human rights approach to reparations. The report offers what they consider "foundational guidance in relation to arrangements States could consider to deliver climate

---

315. To clarify his point, Táíwò turns to the famous strict liability case—*Vincent v. Lake Erie Transportation*—in which the defendant tied his ship to the plaintiff's dock during a storm and severely damaged it as a result. Vincent v. Lake Erie Transportation, 109 Minn. 456, 457–58 (1910). Although the shipowner had done no wrong, he caused damage and was ordered to bear its cost. *See* Táíwò, *supra* note 313, at 123; *cf.* Arthur Ripstein, Private Wrongs 128 (2016) (reading *Vincent* to be "entirely about the rights of the parties, and only incidentally about costs and benefits that are at issue").

316. *Statement by the Secretary-General at the Conclusion of COP27 in Sharm el-Sheikh*, U.N. Sec'y Gen. (Nov. 19, 2022), https://www.un.org/sg/en/content/sg/statement/2022-11-19/statement-the-secretary-general-the-conclusion-of-cop27%C2%A0-sharm-el-sheikh%C2%A0%C2%A0#:~:text=I%20welcome%20the%20decision%20to,climate%20crisis%20must%20be%20heard. [https://perma.cc/6G5Y-BY4M] ("Climate chaos is a crisis of biblical proportions . . . . From the beginning, this conference has been driven by two overriding themes: justice and ambition. Justice for those on the frontlines who did so little to cause the crisis – including the victims of the recent floods in Pakistan that inundated one-third of the country. Ambition to keep the 1.5-degree limit alive and pull humanity back from the climate cliff. This COP has taken an important step towards justice. I welcome the decision to establish a loss and damage fund and to operationalize it in the coming period.").

317. *See generally Fund for Responding to Loss and Damage*, U.N. Framework Convention on Climate Change (last visited Mar. 22, 2024), https://unfccc.int/loss-and-damage-fund-joint-interim-secretariat [https://perma.cc/R2LT-DBUT].

318. Amnesty Int'l, *Climate-Related Human Rights Harm and the Right to Effective Remedy*, AI Index IOR 40/7717/2024, at 9 n.37 (Feb. 13, 2024) ("The adaptation needs in developing countries are 10–18 times bigger than public finance flows, with a current adaptation gap that is estimated at $194–366 billion per year.").

reparations."[319] However, the examples provided do not distinguish between fault and no-fault schemes, nor do they consider the numerous national redress schemes currently in place.[320] Instead, they suggest looking at the practice of truth commissions.[321]

While this framework can serve as an important starting point, an in-depth study of no-fault mechanisms and their relevance for human rights law is required.[322] Since the current voluntary approach stems from states' reluctance to take direct responsibility for climate damage, studying the rationales, motivations, and theoretical justification of existing national and international no-fault compensation mechanisms could significantly advance IHRL's remedial agenda in protecting hundreds of millions of climate damage victims.

Conclusion

My intention in this Article was twofold: (1) to demonstrate the longstanding emphasis on rights and the relative marginalization of remedies, and (2) to suggest that taking remedies seriously demands reconsidering the weight given to rights in a remedial process. The wide right-remedy gap is the result of structural arrangements. Encouraging individuals to claim their right to a remedy primarily through judicial procedures, while conditioning a remedy on the proof of a rights violation has clear advantages in terms of rights theorization and internationalization. Yet they preserve the "rights prism," which prevents us from considering

---

319. *Id.* at 12.

320. *Id.* at 12–13. The report addresses the International Oil Pollution Compensation Funds based on strict liability and no-fault on the one hand, and the U.N. Compensation Commission, which is derived from Iraq's liability "under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations as a result of Iraq's *unlawful* invasion and occupation of Kuwait." *See* S.C. Res 687 ¶ 16 (April 3, 1991) (emphasis added).

321. Amnesty Int'l, *supra* note 318, at 13–16.

322. Scholars have been suggesting no-fault climate compensation schemes for over a decade, yet the idea seems to remain rather marginal in IHRL literature. *See generally, e.g.*, Melissa Farris, *Compensating Climate Change Victims: The Climate Compensation Fund as an Alternative to Tort Litigation*, 2 Sea Grant L. & Pol'y J. 49 (2010); Fanny Thornton, *Compensatory Justice for Climate Change Displacees Under International Law: Fault-Based and No-Fault Approaches*, 6 Irish Y.B. Int'l L. 25, 38–39 (2011); Kim Watts et. al., *Climate Change, Compensation and Unpredictable or Uninsurable Loss: A Possible Path Forward Using Compensation Funds*, 14 J. Eur. Tort. L 316 (2023).

remedial strategies that attach less importance to the analysis of rights and their violations.

Since the beginning of the previous century and, increasingly, since the 1960s, various no-fault programs have been designed to remedy personal injuries. They do so without necessarily articulating the right in question and without condemning the perpetrator, which might explain why human rights scholars have largely overlooked them. However, I argue that IHRL can draw from this approach to expand remedial opportunities. Questions of balancing fault with no-fault remedial arrangements have occupied tort scholarship for decades.[323] Yet they remain largely unexplored under IHRL. A remedial system based on a no-fault regime might not speak in the language of rights and wrongs, but if such mechanisms can accommodate new types of injuries and provide redress to more victims, it must be considered. After seventy-five years of leading with human rights, perhaps the time has come to shift to human remedies.

323. *See generally, e.g.*, Keeton, *supra* note 164; Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 Yale L.J. 1055 (1972); Allan C. Hutchinson, *Beyond No-Fault*, 73 Cal. L. Rev. 755 (1985); Richard A. Epstein, A Theory of Strict Liability: Toward a Reformulation of Tort Law (1980); Atiyah, *supra* note 126; John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 Tex. L. Rev. 917 (2010); Ernest J. Weinrib, The Idea of Private Law 171–204 (2016).