RIDEA Research Institute of Development and European Affairs

THE ISSUE OF ***REPARATIONS FOR WAR CRIMES*** COMMITTED IN ***KOSOVO*** IN THE CONTEXT OF AN EVENTUAL **'GRAND FINALE'** BETWEEN **KOSOVO** AND **SERBIA**

November **2019**

Supported by: Norwegian Embassy

Mother Teresa Square, Entrance I · 59 A · No. 10
Prishtinë, 10000
Republic of Kosovo
T/F: +383 38 746 206
E-mail: ridea.institute@gmail.com
Website: ridea-ks.org

BACKGROUND NOTE/ STUDY

ON

THE ISSUE OF REPARATIONS FOR WAR CRIMES COMMITTED IN KOSOVO IN THE CONTEXT OF AN EVENTUAL 'GRAND FINALE' BETWEEN KOSOVO AND SERBIA

November 2019

BACKGROUND NOTE/STUDY

ON

THE ISSUE OF REPARATIONS FOR WAR CRIMES COMMITTED IN KOSOVO IN THE CONTEXT OF AN EVENTUAL 'GRAND FINALE' BETWEEN KOSOVO AND SERBIA

This study is supported by:

Norwegian Embassy

Author: Research Institute of Development and European Affairs (RIDEA)

November 2019

Contents

Abbreviations

CEELI	Central and East European Law Initiative
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CPPED	International Convention for the Protection of All Persons from Enforced Disappearance
FRY	Federal Republic of Yugoslavia
IACtHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IDP	Internally Displaced Persons
ILC	International Law Commission
KLA	Kosovo Liberation Army
MIA	Ministry of Internal Affairs
NATO	North Atlantic Treaty Organization
NGO	Non-governmental Organization
PCIJ	Permanent Court of International Justice
SFRY	Socialist Federal Republic of Yugoslavia
TFV	Trust Fund for Victims
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo

Summary:

This Background note explores the magnitude of damage and destruction caused by the authorities of the Republic of Serbia and, as applicable, former Federal Republic of Yugoslavia, in the territory of Kosovo ensuing from the war crimes and other related atrocities committed by the said authorities. The methodology is largely based on authoritative data, qualitative and quantitative, produced and published by neutral mediums or institutionalized forums, judicial (e.g., ICTY) and otherwise (e.g., Human Rights Watch) that have exhibited a specifically high degree of objectivity in establishing and presenting the pertinent facts. The Paper begins with an overview of the relevant developments that have defined the special circumstances in and around Kosovo, culminating with the commission of mass atrocities in 1999. The subsequent Part II discusses the concept of reparation in international law; it does so from the perspectives of various sub-disciplines such as international humanitarian law, international human rights law, and international criminal law. The ultimate aim is to ascertain the role and status of reparations in international law, with a dominant focus on the State's duty to compensate for violations of, or damages caused to, individual human beings, contemporaneously conceived as an indubitable subject of international law. Part III then moves to a discussion about specific human (physical and mental) and material damages caused as a result of atrocities committed by the authorities of the state of Serbia in the territory of Kosovo. Part IV presents concluding remarks, identifying the potential ways for reparation.

I. Background

Events Preceding the Violent Break-Up of the Socialist Federal Republic of Yugoslavia

1. Yugoslavia changed its name and its constitutional framework several times since the end of the Second World War. In 1946, Democratic Federal Yugoslavia changed its name to the Federal People's Republic of Yugoslavia. According to the 1946 Constitution, Kosovo was part of the People's Republic of Serbia and was given the status of the autonomous region.[1] In 1963, the country's name was changed to the Socialist Federal Republic of Yugoslavia (hereinafter "the SFRY"). According to the 1963 Constitution, Kosovo's status was transformed from that of an autonomous region to that of an autonomous province.[2]

2. In 1974, the Constitution of the Socialist Federal Republic of Yugoslavia was enacted to replace the 1963 Constitution. The SFRY was defined by the 1974 Constitution as a state community of voluntarily united nations and their socialist republics, as well as the autonomous provinces of Kosovo and Vojvodina, which had representation in both federal level and in the level of the Socialist Republic of Serbia.[3]

[1] Article 2 of the 1946 Constitution, in M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, p. 52.
[2] See Articles 111 and 112 of the 1963 Constitution in M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, p. 53.
[3] Article 1 of Constitution of the Socialist Federal Republic of Yugoslavia, in H. Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation 1974-1999: An Analytical Documentation 1974-1999* (Cambridge International Documents Series), Cambridge University Press, 2001, p. 2 (hereinafter Krieger) and in M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, p. 54. This Article reads: "The Socialist Federal Republic of Yugoslavia is a federal state having the form of a state community of voluntary united nations and their Socialist Republics and of the Socialist Autonomous Provinces of Vojvodina and Kosovo, which are constituent parts of the Republic of Serbia, based on the power of self-management by the working class and all working people; it is at the same time a socialist self-management democratic community of working people and citizens and of nations and nationalities having equal rights."

According to the 1974 Constitution, Kosovo had its own Constitution, the Constitutional and Supreme Courts, its own Parliament, and Executive Committee.[4] It had its own representatives in both the SFRY Chamber of Republics and Provinces and the Federal Chamber and was also represented in the Federal Presidency.

3. As stated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in its judgment of 26 February 2009 in the *Milutinović et al.* case:

> *Under the Constitution of the Socialist Federal Republic of Yugoslavia ('SFRY'), promulgated on February 1974, the SFRY comprised six republics and two autonomous provinces. Both of these provinces – Kosovo and Vojvodina – formed part of the Socialist Republic of Serbia. This Constitution gave the provinces a significant degree of autonomy, which included the power to draft their own constitutions, to have their own constitutional courts, to have a representative in the SFRY Presidency in Belgrade, and the right to initiate proceedings before the Constitutional Courts of Yugoslavia and Serbia. In addition, they were represented, along with the republics, in the SFRY Chamber of Republics and Provinces and the Federal Chamber, which was the legislative body with the power to amend the SFRY Constitution.*[5]

4. According to Article 245 of the 1974 Constitution, the nations and nationalities of the Socialist Federal Republic of Yugoslavia had equal rights.[6] Further, it is noteworthy that under Article 5, the territory of a Republic could not be altered without the consent of that Republic, and the territory of an Autonomous Province –

---

[4] Article 4 of the 1974 Constitution reads: "The Socialist Autonomous Province are autonomous socialist self-managing democratic socio-political communities based on the power of self-management by the working class and all working people, in which the working people, nations and nationalities realize their sovereign rights, and when so specified by the Constitution of the Socialist Republic of Serbia in the common interest of the working people, nations and nationalities of that Republic as a whole, they do so also within the Republic." In Krieger, p. 3.

[5] *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebrojša Pavković, Vladimir Lazarević, Sreten Lukić* (IT-05-87-T), *Judgment*, 26 February 2009. Available at: http://www.icty.org/case/milutinovic/4#tjug.

[6] See Krieger, p. 3.

without the consent of that Autonomous Province.[7] That was reinforced in the last paragraph of that Article which reads: "Boundaries between the Republics may only be altered on the basis of mutual agreement, and if the boundary of an Autonomous Province is involved – also on the basis of the latter's agreement."[8] That means that among other rights the Autonomous Provinces enjoyed sovereignty over their territory at the same level as the Republics constituting the federal state.

Post-1989 Developments in Kosovo

5. In 1989, the Serbian authorities revoked Kosovo's autonomy against the will and the consent of the people of Kosovo.[9] The anti-constitutional acts of the Serbian government to forcibly integrate Kosovo into Serbia marked the starting point of the dissolution of the SFRY.

6. On June 3, 1990, Serbia approved the law on the action of Republic bodies in special circumstances in Kosovo.[10] Almost 300 Albanian directors were discharged by compulsory imposing measures. On July 5, 1990, Serbia passed the law on invalidation of the activity of the Assembly of Kosovo and its government.[11]

7. On July 26, 1990, Serbia passed the law on labour relations in special circumstances.[12] By that law, 135,000 Albanian workers were expelled from their jobs. Further, the whole activities in the Albanian language were banned, starting

[7] See Krieger, p. 3.
[8] Constitution of the Socialist Federal Republic of Yugoslavia, *Official Gazette of SFRY* Nr. 9/1974, Art. 5
[9] See Krieger, p. 8.
[10] *Law on the Actions of Republic Agencies under Special Circumstances*, 26 June 1990, Official Gazzete of SSRS, 33/90, in M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, pp. 60-61.
[11] *Law Terminating Work of the SAP of Kosovo Assembly and the Executive Council*, 5 July 1990, in M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, pp. 61-62. See also *Serb Assembly Regulation on Implementing Law Terminating Work of SAP Kosovo Assembly and Executive Council*, 13 July 1990, in M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, p. 62.
[12] *Law on Labour Relations under Special Circumstances*, Official Gazette of the Republic of Serbia, No. 22/91, in M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, pp. 62-63.

from education, culture, science, and media, while the Albanian personnel working in sectors such as schools, university, health institutions, media, police, and other relevant sectors was fired *en masse*. During this same year, more than 7,000 Albanian school children were poisoned.

8. Reacting to the actions taken by the Serbian leadership, members of the Assembly of Kosovo approved the Declaration of the Independence of Kosovo on July 2, 1990. This declaration preceded the Constitution of the Republic of Kosovo, adopted on September 7, 1990. An independence referendum was also organized in Kosovo from September 26 to September 30, 1990, following the abolition of Kosovo's autonomous status by Serbia in 1989. Of 87 percent of the population that took part in the referendum, 99.87 percent voted for the independence of Kosovo.[13]

9. Two laws adopted in 1992 made Serbian the language of instruction in Kosovo for both elementary and secondary schools.[14] Serbia stopped financing education in the Albanian language. By March 1991, 21,000 teachers had been sacked from their jobs.[15] Similarly, 1,885 doctors and other medical staff also lost their jobs.

10. The systematic repression and violation of basic human rights and fundamental freedoms was a daily occurrence in Kosovo. It is reported that between 1990 and 1995 over three hundred thousand Kosovar Albanians had left Kosovo for fear of persecution or economic reasons.[16]

---

[13] See D. Bethlehem and M. Weller (*eds.*), *The 'Yugoslav' Crisis in International Law: General Issues Part I*, Cambridge International Documents Series Volume 5, Cambridge University Press, 1997, p. xxx.

[14] See *Elementary School Law*, Official Gazette of the Republic of Serbia, No. 50/92 and *Secondary School Law*, Official Gazette of the Republic of Serbia, No. 50/92, in M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, p. 63. It is important to note also the *High School Law*, *ibidem*.

[15] See *inter alia* D. Kostovicova, *Parallel Worlds: Response of Kosovo Albanians to Loss of Autonomy in Serbia, 1989-1996*, Keele University Press, pp. 33-35.

[16] See *inter alia* International Crisis Group, *Kosovo Spring* Report, 20 March 1998, p. 5. Available at: http://www.crisisgroup.org/library/documents/report_archive/A400178_20031998.pdf; Minorities At Risk Project (University of Maryland's Center for International Development and Conflict Management) *Chronology for Kosovo Albanians in Yugoslavia*. Available at: http://www.cidcm.umd.edu/mar/chronology.asp?groupId=34501. The relevant paragraph reads: "Ethnic Albanians continued to be forced out of jobs controlled by State owned enterprises in the month of March. Serbian militia, led by Zeljko Raznjatovic, increased harassment of Kosovo Albanians in what was termed by Kosovar leaders to be 'ethnic cleansing in the quiet'. The results were alleged Albanian emigration from Kosovo reported to be up to 500,000."

11. From 1992 to 1998 the General Assembly has passed numerous resolutions, acknowledging and condemning persistent human rights violations that were going on in Kosovo.[17] In its Resolution 48/153 of 20 December 1993, while expressing grave concern regarding the human rights situation in Kosovo, the General Assembly strongly condemned: "[i]n particular the measures and practices of discrimination and the violations of the human rights of the ethnic Albanians of Kosovo, as well as the large-scale repression committed by the Serbian authorities, including: (a) Police brutality against ethnic Albanians, arbitrary searches, seizures and arrests, torture and ill-treatment during detention and discrimination in the administration of justice, which leads to a climate of lawlessness in which criminal acts, particularly against ethnic Albanians, take place with impunity; (b) The discriminatory removal of ethnic Albanian officials, especially from the police and judiciary, the mass dismissal of ethnic Albanians from professional, administrative and other skilled positions in State-owned enterprises and public institutions, including teachers from the Serb-run school system, and the closure of Albanian high schools and universities; (c) Arbitrary imprisonment of ethnic Albanian journalists, the closure of Albanian-language mass media and the discriminatory removal of ethnic Albanian staff from local radio and television stations; (d) Repression by the Serbian police and military."

12. In that same resolution, the General Assembly also urged the authorities in the Federal Republic of Yugoslavia "(a) To take all necessary measures to bring to an immediate end the human rights violations inflicted on the ethnic Albanians in Kosovo, including, in particular, discriminatory measures and practices, arbitrary detention and the use of torture and other cruel, inhuman or degrading treatment and the occurrence of summary executions; (b) To revoke all discriminatory legislation, in particular that which has entered into force since 1989; (c) To re-establish the democratic institutions of Kosovo, including the Parliament and the

[17] See *inter alia* Krieger, pp. 15-25, M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999.

judiciary; (d) To resume dialogue with the ethnic Albanians in Kosovo, including under the auspices of the International Conference on the Former Yugoslavia."

13. In its resolution 49/204 of 23 December 1994, the General Assembly noted the police brutality against ethnic Albanians, the killing of ethnic Albanians resulting from such violence, arbitrary searches, seizures, and arrests, forced evictions, torture and ill-treatment of detainees and discrimination in the administration of justice; discriminatory and arbitrary dismissals of ethnic Albanian civil servants, notably from the ranks of the police and the judiciary, mass dismissals of ethnic Albanians, confiscation and expropriation of their properties, discrimination against Albanian pupils and teachers, the closing of Albanian-language secondary schools and university, as well as the closing of all Albanian cultural and scientific institutions; the harassment and persecution of political parties and associations of ethnic Albanians and their leaders and activities, maltreating and imprisoning them; the intimidation and imprisonment of ethnic Albanian journalists and the systematic harassment and disruption of the news media in the Albanian language; the dismissals from clinics and hospitals of doctors and members of other categories of the medical profession of Albanian origin; the elimination in practice of the Albanian language, particularly in public administration and services; the serious and massive occurrence of discriminatory and repressive practices aimed at Albanians in Kosovo, as a whole, resulting in widespread involuntary migration; and noting also that the Sub-commission on Prevention of Discrimination and Protection of Minorities, in its resolution 1993/9 of 20 August 1993, considered that these measures and practices constituted a form of ethnic cleansing.

14. On December 22, 1995, the General Assembly adopted Resolution 50/190, noting various discriminatory measures taken in the legislative, administrative and judicial areas, acts of violence and arbitrary arrests perpetrated against ethnic Albanians in Kosovo and the continuing deterioration of the human rights situation in Kosovo, including: Police brutality against ethnic Albanians, the killing of ethnic Albanians resulting from such violence, arbitrary searches, seizures and arrests, forced

evictions, torture and ill-treatment of detainees and discrimination in the administration of justice, including the recent trials of ethnic Albanian former policemen; discriminatory and arbitrary dismissals of ethnic Albanian civil servants, notably from the ranks of the police and the judiciary, mass dismissals of ethnic Albanians, confiscation and expropriation of their properties, discrimination against ethnic Albanian pupils and teachers, the closing of Albanian-language secondary schools and the university, as well as the closing of all Albanian cultural and scientific institutions; the harassment and persecution of political parties and associations of ethnic Albanians and their leaders and activities, their maltreatment and imprisonment; the intimidation and imprisonment of ethnic Albanian journalists and the systematic harassment and disruption of the news media in the Albanian language; the dismissals from clinics and hospitals of doctors and members of other categories of the medical profession of Albanian origin; the elimination in practice of the Albanian language, particularly in public administration and services; the serious and massive occurrence of discriminatory and repressive practices aimed at ethnic Albanians in Kosovo, as a whole, resulting in widespread involuntary migration.

15. On December 12, 1996, the General Assembly adopted Resolution 51/111, by which it: "1. Condemns all violations of human rights in Kosovo, in particular, repression of the ethnic Albanian population and discrimination against them, as well as all acts of violence in Kosovo; 2. Demands that the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro): (a) Take all necessary measures to bring to an immediate end all human rights violations against ethnic Albanians in Kosovo, in particular the discriminatory measures and practices, arbitrary searches and detention, the violation of the right to a fair trial and the practice of torture and other cruel, inhuman or degrading treatment, and to revoke all discriminatory legislation, in particular that which has entered into force since 1989; (b) Release all political prisoners and cease the persecution of political leaders and members of local human rights organizations; (c) Allow the establishment of genuine democratic institutions in Kosovo, including the parliament and the judiciary, and respect the

will of its inhabitants as the best means of preventing the escalation of the conflict there; (d) Allow the reopening of educational, cultural and scientific institutions of the ethnic Albanians; (e) Pursue constructive dialogue with the representatives of ethnic Albanians of Kosovo […]") .

16. In its Resolution 52/139 of 12 December 1997, the General Assembly expressed its concern about all violations of human rights and fundamental freedoms in Kosovo, in particular, the repression of the ethnic Albanian population and discrimination against it, as well as acts of violence in Kosovo. It called upon the FRY authorities: to take all necessary measures to bring to an immediate end all human rights violations against ethnic Albanians in Kosovo, including, in particular, discriminatory measures and practices, arbitrary searches and detention, the violation of the right to a fair trial and the practice of torture and other cruel, inhuman or degrading treatment, and to revoke all discriminatory legislation, in particular that which has entered into force since 1989; to release all political prisoners and to cease the persecution of political leaders and members of local human rights organizations; to allow the return in safety and dignity of Albanian refugees from Kosovo to their homes; to allow the establishment of genuine democratic institutions in Kosovo, including the parliament and the judiciary, and to respect the will of its inhabitants as the best means of preventing the escalation of the conflict there; to allow the reopening of the educational, cultural and scientific institutions of the ethnic Albanians.

17. In October 1997, the UN Special Rapporteur on Human Rights in the former Yugoslavia, Elizabeth Rehn, visited Kosovo to investigate charges that Albanians were being abused.

At the end of her visit, Rehn said she had found evidence that Serbian police were guilty of "[b]rutality, with frequent use of torture" while treating the arrested Albanians.[18]

18. In December 1997, as a result of the frustration among the civilian population from their systematic persecution and repression by the authorities and as a result of inaction by the international community, the Kosovo Liberation Army (KLA) made its first public appearance and started its armed resistance against Serbian forces in Kosovo. The major offensives of Serbian police and Yugoslav army forces followed these developments. The first major attack was in the Drenica region in February/March 1997. Another offensive was launched in the border area with Albania.

19. On February 27, 1998, Serbian forces, including armoured units and air support, attacked several villages in the Drenica region. A Human Rights Watch report concluded that a large number of civilians, including dozens of women and children, died in the attack.[19] Other reports by UN organs and agencies provide information about the scale and effect of the police and military operations carried out by Serb police, military and para-military forces in Kosovo. They provide a detailed account of the serious human rights and humanitarian law violations against the civilian population.[20]

20. The UN High Commissioner for Refugees (hereinafter UNHCR) reported in early June 1998 that the operation forced more than 40,000 ethnic Albanians to leave

[18] Report of the High Commissioner for Human Rights on the Situation of Human Rights in Kosovo, Federal Republic of Yugoslavia, UN Doc. A/52/490, in M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, pp. 177-180. Based on that report the Commission on Human Rights in its Resolution 1998/79 called upon the authorities of the FRY to put an end to torture and ill-treatment of persons in detention as described in the reports of the Special Rapporteur, and to bring those responsible to justice.

[19] *Humanitarian Law Violations in Kosovo*, Human Rights Watch Report, October 1998.

[20] For Reports of the UN Commission on Human Rights, the UN High Commissioner on Human Rights and the Special Rapporteur for the Former Yugoslavia see *inter alia* M. Weller, *The Crisis in Kosovo 1989-1999*, Documents and Analysis Publishing Ltd, September 1999, pp. 158-185; Krieger, pp. 25-45 and 46-65; for NGO Reports see Krieger, pp. 90-118

their homes and flee for their lives.[21] The US President's special envoy for the former Yugoslavia, Robert Gelbard told a Senate committee that what Serbian forces were doing "[s]ounds an awful lot like ethnic cleansing, as they've been trying to drive people out of Kosovo and into Albania."

The 1999 Rambouillet Accords

19. While the situation in the ground was critical and human rights violations were ongoing; an internationally-sponsored conference was convened in Rambouillet, France, in February 1999. The conference aimed to provide a political solution to the conflict, or as the document itself suggests an interim agreement for peace and self-government in Kosovo.[22] The mechanism for final settlement contained in this document provided that three years after entry into force of the Accords, an international meeting would be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each party's efforts regarding the implementation of the Accords, and the Helsinki Final Act.[23] On 18 March 1999, the Agreement was signed by the Albanian representatives, but not by their Serb counterparts. It bears mentioning that this Agreement was concluded under the auspices of the members of the Contact Group and the European Union and undertaking with respect to these members and the European Union to abide by this Agreement.

20. As the fact sheet released on March 1, 1999, by the Bureau of European Affairs, U.S. Department of State, Washington, DC suggests, the Rambouillet Accords provided for a 3-year interim agreement that would provide democratic self-government,

---

[21] UNHCR, *Kosovo Crisis Update, The Exodus*, 7 April 1999. Available at: *http://www.unhcr.org/neës/NEWS/3ae6b80eb.html*.

[22] The full text of the Rambouillet Agreement is available online at: https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/kosovo_ramb.pdf.

[23] Article I: Amendment and Comprehensive Assessment, Rambouillet Agreement: Amendment, Comprehensive Assessment, and Final Clauses.

peace, and security for everyone living in Kosovo.[24] The agreement provides that the final settlement of the status of Kosovo would be determined based on the will of the people of Kosovo. Even though this agreement was not signed by Serbia, Resolution 1244 of the Security Council refers to it. The relevant part of Annex 1 to the resolution, listing a number of general principles for the political solution of the Kosovo crisis adopted at the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999, reads:

> *A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA.*[25]

NATO's Military Intervention in Kosovo – Operation 'Allied Force' 24 March – 10 June 1999

21. As a means of last resort, intervention by NATO Alliance took place in March 1999 after prolonged international diplomatic efforts, including the Rambouillet conference, had failed. Yugoslav forces had already driven more than 400,000 people from their homes, many of which they destroyed by shelling and arson. The UN Security Council had passed a resolution (1199), invoking Chapter VII of its Charter, demanding a withdrawal of the forces "used for civilian repression," and deciding, "should the concrete measures demanded in this resolution and resolution 1160 (1998) not be taken, to consider further action and additional measures to

[24] Understanding the Rambouillet Accords, Fact sheet released by the Bureau of European Affairs, U.S. Department of State, Washington, DC, March 1, 1999. Available at: https://1997-2001.state.gov/regions/eur/fs_990301_rambouillet.html.

[25] Annex 1 to Resolution 1244 of the Security Council of 10 June 1999 (Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999).

maintain or restore peace and stability in the region." In Resolution 1160 (1998), the Security Council already emphasized that "[f]ailure to make constructive progress towards the peaceful resolution of the situation in Kosovo will lead to the consideration of additional measures."

22. The brutal campaign of the Serbian authorities continued through all the period of the NATO actions. The Serbian military would specifically target young men. Sexual crimes against women of all ages were as well part of the campaign. Over 800,000 people were forcibly expelled or left their homes out of fear from Serbian police, military, and paramilitary forces. As an author describes it, "[y]oung girls were raped and boys killed since they might grow up to be guerrilla fighters. "Under Orders: War Crimes in Kosovo," a Human Rights Watch Report states, "[d]eliberate and unlawful killings of civilians – extrajudicial executions – were a key part of the 'cleansing' campaign. Throughout the province, civilians who were clearly non-combatants, including women and some children, were murdered by Serbian police, Yugoslav army soldiers, and associated paramilitary forces in execution-style killings."

23. According to a UN Commission of Experts, these methods constituted the policy known as "ethnic cleansing."[26] Through a widespread *and* systematic campaign of terror and violence, the Kosovo Albanian population was to be forcibly displaced both within and without Kosovo.[27] The common purpose was to displace a number of them sufficient to tip the demographic balance more toward ethnic equality and in order to cow the Kosovo Albanians into submission.[28] The intention to reduce the Albanian population in Kosovo to about 600,000 by killing members of the group or forcefully expelling them, were known to foreign officials, and have been publicly

[26] *Kosovo Report: Conflict: International Response, Lessons Learned*, Independent International Commission on Kosovo, Oxford University Press, 2000. Available at: *https://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF88119644CFC1256989005CD392-thekosovoreport.pdf*.
[27] ICTY, *Prosecutor v. Milutinovic et al*, Case No. IT-05-87, Judgment of 26 February 2009, Vol. 3, par. 95, p. 41.
[28] Ibid.

uttered by the Serbian officials.[29] The highest-ranking Serb officials, namely Slobodan Milosević, Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić were responsible not only for the adoption and the implementation of repressive policies against Kosovar Albanians but also for the crimes that took place in Kosovo in 1998-1999.

24. The International Court of Justice itself in the *Legality of Use of Force* cases had expressed deep concern over the human tragedy:

> *[…] the Court is deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo which form the background of the present dispute, and with the continuing loss of life and human suffering in all parts of Yugoslavia.*[30]

Resolution 1244 and the Establishment of the United Nations Interim Mission in Kosovo

25. On June 10, 1999, the Serbian Government agreed to withdraw Serb forces from Kosovo, opening the way to the adoption of Security Council Resolution 1244 (1999). Resolution 1244 authorized the establishment of a United Nations interim administrative mission in Kosovo (UNMIK), and the deployment of a NATO-led security force (KFOR). Kosovo was thus placed under a transitional United Nations administration, pending a political solution to its future political status.

26. Following the Security Council's consideration of the Secretary-General's report on the United Nations Interim Administration Mission in Kosovo (UNMIK), of 23 May 2005, the Secretary-General appointed Mr. Kai Eide (Norway) as his Special Envoy

[29] See, e.g., Steven Erlanger, 'Serbs Want Some Albanians in Kosovo, Officials Say', *New York Times*, 25 April 1999, p. 14. Available at: https://archive.nytimes.com/www.nytimes.com/library/world/europe/042599kosovo-belgrade.html.

[30] *Case concerning Legality of Use of Force (Yugoslavia v. Belgium), Request for the Indication of Interim Measures*, ICJ Rep. 1999, p. 131, para. 16. See also other nine *Legality of Use of Force* cases.

to undertake a comprehensive review of the situation in Kosovo.[31] Mr. Eide has concluded that the time has come to move to the next phase of the political process. Based on the assessment provided in the report and further consultations, the Secretary-General accepted Mr. Eide's conclusion. He, therefore, expressed his intent to initiate preparations for the appointment of a special envoy to lead the future status process.

27. In a statement of 24 October 2005 made by the President of the Security Council on behalf of the Council, the Security Council agreed with Ambassador Eide's assessment and welcomed the Secretary-General's readiness to appoint a Special Envoy to lead the status process.[32]

The Internationally Supervised Final Status Negotiation Process

28. The Secretary-General appointed Mr. Martti Ahtisaari as his Special Envoy in November 2005 to undertake the future status process envisioned in the UN Security Council Resolution 1244 (1999). His mandate was to be carried out in accordance with the ten guiding principles adopted by the Contact Group.[33] In a statement by the Contact Group Ministers of 31 January 2006, it was stated that they looked to Belgrade to bear in mind that the settlement needs, inter alia, to be acceptable to the people of Kosovo and that the disastrous policies of the past lied at the heart of the current problems.[34]

29. After fifteen-months of UN-sponsored negotiations, Mr. Ahtisaari prepared a Comprehensive Proposal for the Kosovo Status Settlement, in which he

[31] UN Doc. S/2005/335 and Corr.1
[32] Statement by the President of the Security Council, S/PRST/2005/51, 24 October 2005.
[33] Guiding principles of the Contact Group for a settlement of the status of Kosovo of November 2005. The three main points were no return of Kosovo to the pre-1999 situation, no partition of Kosovo, and no union of Kosovo with any or part of another country. The Contact Group is composed of France, Germany, Italy, Russia, the United Kingdom and the United States.
[34] Kosovo Contact Group Statement, London, 31 January 2006. Available at: *https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/declarations/88236.pdf*.

recommended that Kosovo's status should be 'supervised' independence. The Special Envoy reported to the Secretary-General in 2007 (in the "Ahtisaari Report") that, although he and his team had "held intensive negotiations with the leadership of Serbia and Kosovo over the course of the past year" to achieve "a political settlement that determines the future status of Kosovo," it had "become clear … that the parties are not able to reach an agreement on Kosovo's future status."[35] The Special Envoy reported that "[B]oth parties have reaffirmed their categorical, diametrically opposed positions," further stating that, "[I]t is my firm view that the negotiations' potential to produce any mutually agreeable outcome on Kosovo's status is exhausted. No amount of additional talks, whatever the format, will overcome this impasse."[36] Noting that, "Kosovo's state of limbo cannot continue," since "uncertainty over its future status has become a major obstacle to Kosovo's democratic development, accountability, economic recovery, and inter-ethnic reconciliation," the Special Envoy concluded that, "the time has come to resolve Kosovo's status."[37]

30. Accordingly, he concluded: "Upon careful consideration of Kosovo's recent history, the realities of Kosovo today and taking into account the negotiations with the parties, I have come to the conclusion that the only viable option for Kosovo is independence, to be supervised for an initial period by the international community. My Comprehensive Proposal for the Kosovo Status Settlement, which sets forth these international supervisory structures, provides the foundations for a future independent Kosovo that is viable, sustainable and stable, and in which all communities and their members can live a peaceful and dignified existence."[38]

31. The UN Secretary-General, in transmitting his Special Envoy's report to the Security Council, stated that "I fully support both the recommendation made by my Special

[35] S/2007/168, para. 1.
[36] Ibid., para. 3.
[37] Ibid., para. 5.
[38] Ibid., para. 5.

Envoy in his report on Kosovo's future status and the Comprehensive Proposal for the Kosovo Status Settlement."

32. After a period of discussions in the Security Council, the Contact Group (France, Germany, Italy, Russia, the United Kingdom and the United States) proposed that a "Troika" of representatives from the EU, the United States and Russia undertake yet another period of negotiations between Belgrade and Pristina on the future status of Kosovo, "the last major issue related to Yugoslavia's collapse." On August 1, 2007, the Secretary-Generally welcomed this initiative, restating his belief that the status quo was unsustainable and requested that a report be submitted by the Contact Group on these efforts by December 10, 2007. Albeit "the most sustained and intense high-level direct dialogue since hostilities ended in Kosovo in 1999," the Troika representatives reported that "[t]he parties were unable to reach an agreement on Kosovo's status."

Declaration of Independence by Kosovo on 17 February 2008

33. In its ninth year under a UN-led transitional administration and after a series of unsuccessful internationally-mediated talks, convened in an extraordinary meeting on February 17, 2008, the democratically-elected representatives of the people of Kosovo declared Kosovo to be an independent and sovereign state, noting that this act "reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement."[39]

34. An Advisory Opinion has been requested of the International Court of Justice by the UN General Assembly on the question of the legality of Kosovo's Declaration of

[39] See Declaration of Independence of Kosovo. Available at: http://www.assembly-kosova.org/common/docs/Dek_Pav_e.pdf. The full paragraph reads: "We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement."

Independence.[40] The Court rendered its Advisory Opinion n July 22, 2010. In its Advisory Opinion of 22 July, the International Court of Justice has concluded that the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework.[41] Consequently, the adoption of that declaration did not violate any applicable rule of international law.[42]

II. The Concept of Reparations in International Law

Substantive Principles on Reparations under International Law

35. The principle in international law affirming the obligation to provide reparation dates back many years. Already in 1927 and 1928, the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ, had stated in the *Factory at Chorzow Case* that:

> *It 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 in an adequate form ... reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.*[43]

> *Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution would bear ... such are the principles which should*

[40] International Court of Justice, *Accordance with International of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion of 22 July 2010.
[41] Ibid., para. 122.
[42] Ibid.
[43], 1927, PCIJ, Ser. A, No. 9, p. 21.

serve to determine the amount of compensation due for an act contrary to international law.[44]

36. The dictum established in the sentence of the PCIJ in the *Factory at Chorzow Case* has been widely cited and reaffirmed in a number of judgments of the ICJ, including the *Gabcikovo-Nagymaros Project Case*,[45] the more recent *Case Concerning Armed Activities on the Territory of the Congo*[46] and in numerous international and regional human rights case law.[47]

37. As it could be noted above, the *Factory at Chorzow Case* deals only with two forms of reparations: namely, restitution and compensation. These components historically constituted the basic foundations for the concept of reparations, which has in turn been furthered due to interpretations in human rights jurisprudence in particular. In cases of serious violations of human rights, it is clearly impossible to achieve *restitutio in integrum*, that is, re-establish the situation that existed before the wrongful acts. For instance, as noted by Christian Tomuschat, "the dead could not be brought back to life."[48]

38. Historically, general international law viewed reparations as an inter-state measure. However, the convergence of a number of developments in international law over the past decades has produced important shifts that have come to be recognized in general international law. A number of these include the affirmation of state responsibility in relation to certain fundamental human rights through the advancement of multiple treaty provisions in humanitarian as well as human rights law. Several of these have acquired recognition as customary law, and, in some cases, even as peremptory norms of international law that the world community has

[44] *Factory at Chorzow Case* (Germany v. Poland), Merits, 1928, PCIJ, Ser. A, No. 17, p. 47.
[45] *Gabcikovo-Nagymaros Project Case* (Hungary v. Slovakia), ICJ Report 1997, p. 7, paras 149–52.
[46] *Armed Activities on the Territory of the Congo Case* (Democratic Republic of the Congo v. Uganda), ICJ Report 2005, p. 82, para. 259.
[47] Examples include *Papamichalopoulos v. Greece* (Article 50), ECtHR, Ser. A, No. 330-B, 1995, para. 36; *Velasquez Rodriguez*, IACtHR, Ser. C, No. 4, 1989, pp. 26–7, 30–1.
[48] Christian Tomuschat, Reparation in Cases of Genocide, *Journal of International Criminal Justice*, 5(4) 2007, pp. 905-912.

a common interest in protecting. The ILC Articles on State Responsibility adopted in 2001 support this affirmation. The Articles define reparation as consisting of the following components: **guarantees of non-repetition** (Article 30); **restitution** (Article 34); **compensation** (Article 36); and **satisfaction** (Article 37). Although human rights are not specifically referred to in the ILC Articles, the official Commentaries to Article 33 assert that:

> *When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.*[49]

39. Additional affirmation of the acceptance of the right of individuals to reparations in general international law can be found in the ICJ Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 2004*,[50] which affirmed the duty of Israel to provide restitution and compensate individuals and "all-natural and legal persons having suffered any form of material damage as a result of the wall's construction."

40. As thus indicated, the core principle on reparation under international law was formulated by the Permanent Court of International Justice (PCIJ) in the case concerning the *Factory at Chorzow*: "reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed."[51] This statement refers to the principle of reparation as *restitutio in integrum*. This concept has been

[49] ILC, Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 33, para. 3 [hereinafter "Commentaries"].
[50] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Report, paras 145, 152–3.
[51] *Case concerning the Factory at Chorzow (Merits)*, PCIJ, Series A, No. 17, 1928, p. 47.

interpreted in different ways by international tribunals and other bodies, which determine the forms and quantity of reparations that can be awarded. Under traditional State responsibility, a retributive view of reparations tends to prevail, with an emphasis on measures such as restitution and compensation to provide redress.

41. Under the principle of proportionality, reparation should be proportional to the injury caused by the wrongful act,[52] the term "injury" incorporating both material and moral damages. In this regard, it should be highlighted that whereas the damage will be relevant to the form and quantum of reparation, the existence of material damage is not a requirement for seeking reparation.[53]

42. An important consequence of the principle of proportionality is that reparations are not punitive in nature. This is so regardless of the gravity of the breach.[54] Reparations should exclusively be aimed at remedying the damage committed through the wrongful act, and not conceived as an exemplary measure.

43. Closely related to the principle of proportionality and regarding the nature of the link between the illegal act and the harm suffered, the principle of causality states that reparations should redress only direct damages produced by the illegal act, leaving out those damages which are too indirect or remote. However, the former Special Rapporteur of the International Law Commission on State Responsibility, James Crawford, established that other elements of the breach, such as the willful misconduct of the State organs, should be taken into account, because "…the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation…."[55]

[52] Draft Articles, art. 31.
[53] Commentaries, art. 31, paras. 5 and 7.
[54] Ibid., chapter III, para. 5.
[55] Ibid., art. 31, para. 10.

44. There is a subordinate rule to the principle of causality, which is relevant in cases where the harm is due to concurrent causes, and it is not possible to attribute all the harm to a single responsible cause or subject. For example, in the case of the *Corfu Channel* (United Kingdom of Great Britain and Northern Ireland v. Albania),[56] in which Albania did not warn the British ships about the existence of mines in its seas placed by other States, Albania was nevertheless ordered to comply with all the reparation measures awarded to the United Kingdom. Thus, international law has established that unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible subject, the latter is held responsible for all the not too remote consequences of the wrongful conduct.[57]

45. International law has also established several forms of reparation which, on their own or combined, aim to provide full reparation for the harm caused. Following the principle of *restitutio in integrum* as stated by the PCIJ, the first of these forms is **restitution**. It aims to put things as they were before the wrongful act took place. Restitution is the preferred form of reparation under international law, but in many situations, it is not possible given the nature of the violation or because it is insufficient in providing adequate reparation for the harm suffered.

46. In the case concerning the *Factory at Chorzow*, the PCIJ stated that when restitution is not possible, there should be a payment of a sum corresponding to the value which restitution in kind would bear.[58] This form of reparation is usually known as **compensation,** and it is ordered when there are damages that cannot be redressed by restitution alone. As mentioned by Crawford, "…awards of compensation encompass material losses (loss of earnings, pensions, medical expenses, etc.) and non-material damage (pain and suffering, mental anguish, humiliation, loss of

[56] *Corfu Channel case*, Judgment of April 9: ICJ Reports 1949, p. 4.
[57] Commentaries, art. 31, paras. 12-13.
[58] Ibid.

enjoyment of life and loss of companionship or consortium), the latter usually quantified on the basis of an equitable assessment…".[59]

47. Finally, **satisfaction** is another form of reparation recognized by international law. In inter-State adjudication, it has a rather exceptional character since it only emerges when restitution and compensation do not achieve full reparation [60] and refers to injuries which are not financially assessable, which amount to an affront to the State.[61] Moreover, although satisfaction measures under general international law usually take the form of declaratory statements in relation to the wrongfulness of the conduct,[62] stronger measures such as formal apologies or construction of memorials, cannot be discarded. Indeed, the Draft Articles refer to "serious breaches of obligations under peremptory norms of general international law,"[63] and they presume that such violations cause severe non-material damages that require other forms of reparation such as formal apologies.

Principles of Reparation under International Humanitarian Law

48. References to reparations in international humanitarian law can be traced to Article 3 of the 1907 IV Hague Convention, wording which is repeated in Article 91 of the Additional Protocol I to the 1949 Geneva Conventions.[64] It states that:

> *A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.*

[59] Ibid, art. 36, para. 19.
[60] Ibid, art. 37, para. 1.
[61] Ibid, art. 37, para. 3.
[62] Ibid, art. 37 para. 6.
[63] Draft Articles, art. 41.3; and Commentaries, art. 41, paras. 13-14.
[64] E-C. Gillard, Reparation for Violations of International Humanitarian Law, *International Review of the Red Cross*, 85(851) (2003), 529–53

49. The official ICRC Commentary[65] gives some further guidance on the interpretation of the provisions. In line with general international law, the Article is construed on the presumption that it be exercised through an intra-state mechanism. The ICRC Commentary, however, gives little guidance as to how states should ensure that non-state parties to a conflict fulfill the obligation of paying compensation. Given the current extent of internal armed conflicts involving non-state entities, this illustrates a major lacuna in international humanitarian law.

50. It is important to observe that the Commentary affirms that state responsibility may also be incurred by omission when due diligence to prevent violations from taking place has not been demonstrated and, once they have occurred, repression of the acts has not been ensured.[66] Furthermore, Article 91 makes specific reference to coverage of all provisions of the Geneva Conventions. The Commentary explains that the term compensation, generally perceived to be a reference to monetary redress, in this context comprises the obligation to ensure restitution to the extent possible in addition to financial compensation.

51. While a conservative interpretation of Article 91 fails to recognize it as a source of rights in favor of individuals,[67] several scholars, including Kalshoven and Greenwood, have made important contributions to broaden the interpretation of Article 91.

They have based their arguments on the *travaux preparatoires* of the 1907 Hague Convention IV, which indicate that the provision was not intended to be confined to claims between states, but was to be conceived as creating a direct right to

[65] 1977 Protocol Additional I to the Geneva Conventions, ICRC Commentary to Article 91, paras 3645–61.
[66] 1977 Protocol Additional I to the Geneva Conventions, ICRC Commentary to Article 91, para. 3660.
[67] Provost, International Human Rights and Humanitarian Law, pp. 47–56. Provost nevertheless makes the point that while expressing reservations regarding the right to reparation in humanitarian law, certain such violations are 'coextensive with violations of nonderogable human rights, for which there is undoubtedly a right to a remedy and that the complementarity of human rights and humanitarian law ensures that the victims will not be left without a right to reparation for their injuries', p. 49. See also C. Tomuschat, 'Reparation for Victims of Grave Human Rights Violations', Tulane Journal of International and Comparative Law, 10 (2002), pp. 178–9.

compensation for individuals.[68] The debate on the reinterpretation of Article 91 stems in part from the redress movement against the Japanese government in the 1990s, during which both scholars submitted legal advice on the right to reparation.[69] Furthermore, it has been noted that the establishment of the United Nations Compensation Commission (UNCC) by the UN Security Council in 1991 following the Iraq war demonstrated state responsibility in relation to reparations for violations of humanitarian law.[70]

52. Of considerable importance is that the ICRC has specifically affirmed, in its 2005 in-depth study of customary international humanitarian law, that state responsibility for reparations has become established as a customary norm both in international and non-international armed conflicts.[71]

Principles of Reparation under International Human Rights Law

53. In contrast to humanitarian law, provisions on remedies and reparations are key features in all human rights instruments, which establish a multitude of legally binding and quasi-judicial enforcement mechanisms. Human rights jurisprudence has played an important role in defining different forms of reparations and has provided considerable guidance on the development of non-monetary forms of remedies.

---

[68] Greenwood, 'International Humanitarian Law', p. 250; F. Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces', International and Comparative Law Quarterly, 40 (1991), 827, 830. This argument is also supported by L. Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', pp. 497–526; Gillard, 'Reparation for Violations of International Humanitarian Law', pp. 529–53 and R. Pisillo Mazzeschi, 'Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview', Journal of International Criminal Justice, 1 (2003), 339–47.

[69] S. Hae Bong, 'Compensation for Victims of Wartime Atrocities, Recent Developments in Japan's Case Law', Journal of International Criminal Justice, 3(2005), 189.

[70] A. Gattini, 'The UN Compensation Commission: Old Rules New Procedures on War Reparations', European Journal of International Law, 13(1) (2002), 161–81.

[71] Henckaerts and Doswald-Beck, Customary International Humanitarian Law, Rule 150: 'A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.'

54. The origins of reparations in human rights law stem from the adoption of the Universal Declaration on Human Rights (UDHR) in 1948, as Article 8 states that:

> *Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*

55. The International Covenant on Civil and Political Rights (ICCPR) echoes the provision above as a legally binding norm in Article 2(3a): "any person whose rights or freedoms as herein recognized are violated shall have an effective remedy." Besides, Articles 9(5) and 14(6) provide a right to compensation for unlawful arrest, detention, and conviction. The Human Rights Committee has given a considerable interpretation of the content of the concept "effective remedy" in its decisions in cases of individual petitions, general comments on the interpretation of treaty provisions and also in its concluding observations of state party reports.

56. In 2004, the Human Rights Committee adopted its General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, largely inspired by the adoption of the ILC Draft Articles on State Responsibility in 2001 and the then draft Basic Principles on the Right to Reparation for Victims. The General Comment links the terms "remedy" and "reparation" explicit by stating that:

> *Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and*

changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.[72]

57. Other human rights treaty provisions, such as Article 14 of the Convention against Torture (CAT),[73] Article 6 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 39 of the Convention of the Rights of the Child (CRC) and Article 24(4) of the International Convention for the Protection of All Persons from Enforced Disappearance (CPPED),[74] affirm the right to reparation in different forms. The CPPED provides a particularly important contribution as its entry into force in 2010 provided a comprehensive definition of reparations in a legally binding instrument. Article 24(4), (5) established the following:

Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair, and adequate compensation. The right to obtain reparation ... covers material and moral damages and, where appropriate, other forms of reparation, such as: (a) restitution, (b) rehabilitation, (c) satisfaction, including restoration of dignity and reputation; (d) guarantees of non-repetition.

58. The above notwithstanding, many international human rights instruments are silent about the principles that should apply to reparations. This has allowed different human rights bodies to develop their own principles. Of all possible experiences, the one crafted by the Inter-American Court of Human Rights (hereinafter "IACtHR")

[72] CCPR General Comment No. 31, The Nature of General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 2004, para. 16.
[73] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 14: 'Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.'
[74] International Convention for the Protection of All Persons from Enforced Disappearance, Article 24(4): 'Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.'

deserves careful attention. This Court has the most far-reaching jurisprudence on reparations under international law.

59. International human rights law has also based the award of reparations on the same principle of *restitutio in integrum* as already introduced and as stated in the case concerning the *Factory at Chorzow*. However, human rights bodies like the IACtHR have reinterpreted the international law formula so as to include "the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm."[75]

60. The principle of proportionality has also been applied in international human rights law, even when dealing with gross human rights violations.[76] In this regard, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter "UN Basic Principles") state that reparation should be proportional to the gravity of the violations and the harm suffered.[77] A consequence of the proportionality principle in the realm of international human rights is that reparation measures should neither enrich nor impoverish the victim of a human rights violation, as they are intended to eliminate the effects of the violations that were committed.[78]

61. International human rights law has also adopted the principle of causality, stating that reparation entails the existence of a causal link between the violation found, the harm produced and the reparations sought.[79] Thus, by giving full effect to the principle of causality, the IACtHR has developed concepts such as the "life plan",

[75] IACtHR, *Velásquez Rodríguez v. Honduras, Merits*, Judgment of July 29, 1988, Series C No. 4, para. 26.
[76] Ibid., para. 38.
[77] UN Basic Principles, principle 15.
[78] IACtHR *"Street Children" (Villagrán-Morales et al.) v. Guatemala, Reparations and costs*, Judgment of May 26, 2001, Series C No. 77, para. 63.
[79] IACtHR, *Ticona Estrada and others v. Bolivia*, *Merits, reparations and costs*, Judgment of November 27, 2008, Series C No. 191, para. 110.

which "...is (…) akin to the concept of personal fulfillment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself (…). Those options, in themselves, have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard."[80]

62. The principle of due recognition of victimhood plays a very important role in reparations granted by international human rights law. It is worth recalling that in international law, the notion of harm has not only material but also moral dimensions.[81] In international human rights law, this has translated into the recognition that violations are capable of causing mental damage and emotional suffering,[82] which has allowed international human rights bodies to consider the next of kin of direct victims of human rights violations, their dependants and persons who have suffered harm in intervening to assist them or to prevent victimization, like victims in their own right.[83]

63. Related to the above principle and regarding the procedural principles of reparation, it is possible to infer from the practice of human rights bodies that there is an implicit principle that applies a flexible approach to the standard and burden of proof in reparations claims. As the Human Rights Committee says, "… [the] burden cannot rest alone on the author of the communication, especially considering that the author and the State party do not always have equal access to the evidence and that frequently the State party alone has access to relevant information…".[84] So, to balance this situation in accordance with the victim's capacity to prove the damage suffered, international adjudicatory bodies have relied on presumptions and

[80] IACtHR *Loayza-Tamayo v. Peru, Reparations and costs*, Judgment of November 27, 1998, Series C No. 42, paras. 147-148.
[81] Commentaries, art. 31, para. 5.
[82] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations General Assembly Resolution 40/34, November 1985, principle 1.
[83] Ibid., principle 2.
[84] *Elena Beatriz Vasilskis v. Uruguay*, Communication No. 80/1980, U.N. Doc. CCPR/C/OP/2 at 105 (1990), 18th session, para. 10.4.

circumstantial evidence "when they lead to consistent conclusions as regards the facts of the case."[85]

64. Subordinate to the due recognition of victimhood is the procedural principle of effective victim participation. Principle 6a) of the Declaration of Justice for Victims establishes that victims should be informed of their role and the scope, timing, and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information. For example, it should be noted that the first time victims were provided with *locus standi* before the IACtHR was at the reparations stage, given the importance of their role in such part of the judicial proceedings.[86]

65. Also linked to the principles of due recognition of victimhood and effective participation, is the principle of taking due account of the victims' situation in any given case. In this regard, principle 10 of the UN Basic Principles states that victims should be treated with humanity and respect for their dignity and human rights, and calls for the adoption of appropriate measures to ensure their safety, physical and psychological well-being and privacy, as well as those of their families.

66. The principle of non-discrimination in international human rights law is based on a right which is recognized in almost every human rights instrument, and it is related to all acts of the State which affect the people under its jurisdiction. Accordingly, when providing redress for human rights violations, States must implement reparation measures without discrimination on any of the grounds recognized by international law.

---

[85] IACtHR, *Gangaram Panday v. Suriname*, Merits, reparations and costs, Judgment of January 21, 1994, Series C No. 16, para. 49.

[86] See Clara Sandoval, "The Concepts of 'Injured Party' and 'Victim' of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on their Implications for Reparations" in C. Ferstman, A Stephens, and M. Goetz (eds.), *Reparations for Victims of Genocide, Crimes against Humanity and War Crimes: Systems in Place and Systems in the Making* (The Netherlands, Brill, 2009), pp. 243-282.

67. Regarding the forms of reparation required for achieving full restitution, international human rights law has awarded a range of measures, that combined, seek to provide full redress for the harm caused. International human rights bodies follow what international law has established in this regard, although they have crafted new forms of reparation. This comprehensive approach has also led to the acknowledgment that reparations can be both individual and collective.[87]

68. For example, concerning compensation, international human rights law has applied a principle of equity to calculate both material and non-material damages, when such damages are not fully proven. Thus, when a calculation for the loss of earnings cannot be made because there are no bases to determine the income that the victim would have had if the violation had not taken place, the IACtHR has referred to the minimum wage applicable in the State where the violation occurred, to calculate such loss.[88]

69. On the other hand, satisfaction measures under international human rights law play a central role in the award of reparations, unlike their exceptional character in inter-State adjudication. Under international human rights law, satisfaction refers to a whole range of measures that the State must comply with in order to redress the harm and to restore the dignity of the person that was affected by the violations;[89] in this sense, the IACtHR has mentioned that they must have public repercussion.[90] Accordingly, measures such as the public disclosure of the truth, besides being relevant for restoring the dignity of those directly affected by the violation, can be essential for the healing process of whole communities.

---

[87] See UN Basic Principles, ninth paragraph of the preamble. Regarding the IACtHR's jurisprudence on the subject, see *Aloeboetoe v. Suriname*, *Reparations and costs*, September 10, 1993, Series C No. 15, para. 83; *Plan de Sánchez Massacre v. Guatemala, Reparations and costs,* Judgment of November 19, 2004, Series C No. 116, paras. 86, 94-111; *Saramaka People v. Suriname*, *Preliminary objections, merits, reparations and costs*, November 28, 2007, Series C No. 172, paras. 188, 190-202.

[88] IACtHR *case of the Juvenile Reeducation Institute v. Paraguay*, *Preliminary Objections, merits, reparations and costs*, Judgment of September 2, 2004, Series C No. 112, para. 288.

[89] UN Basic Principles, principle 22.

[90] IACtHR, *Case of Plan de Sánchez Massacre*, supra note 86, para. 93.

70. Although non-existent as a form of reparation under general international law, rehabilitation under international human rights law is most of the time necessary for redressing the harms caused by gross human rights violations.[91] It is under this form of reparation that the idea of "full restitution" can be materialized[92] if rehabilitation is interpreted as a holistic measure which comprises not only physical and psychological care but also social and financial services which may involve the community where the victim belongs.

71. Finally, another measure that international human rights law has adopted to award comprehensive reparations is the guarantee of non-repetition. Under international law, it has been disputed if guarantees of non-repetition are a reparation measure or another consequence of State responsibility.[93] Nevertheless, under international human rights law, they play an important role in bringing some relief to victims. Guarantees of non-repetition, together with rehabilitation measures, are without a doubt the most far-reaching forms of reparation that can be awarded to redress a human rights violation, with measures such as institutional reform, vetting, training of police personnel, and development programs. It is also by using this form of reparation measure that some international bodies have aimed at materializing transformative reparations. The latter are measures which seek to address the root and structural causes of the violations.[94]

Principles of Reparation under International Criminal Law

72. Any criminal procedure considered respectful of human rights standards, besides identifying and punishing those responsible for the crimes committed, must aim to repair the consequences of the crimes. The Rome Statute and the ICC's Rules of

[91] See UN Basic Principles, principle 21; and the Declaration of Justice for Victims, principle 14.
[92] See REDRESS *Rehabilitation as a form of reparation under international law*, research by Clara Sandoval, December 2009.
[93] Commentaries, art. 30, para. 9.
[94] Rama Mani, "Reparation as a component of transitional justice: pursuing 'reparative justice' in the aftermath of violent conflict", in De Feyter, K., S. Parmentier, et al. (eds.), *Out of ashes: reparation for victims of gross and systematic human rights violations*, Intersentia, Antwerpen-Oxford, 2005, pp. 78-79.

Procedure and Evidence provide an adequate legal framework to accomplish this purpose. It would certainly be important to explore the regulatory choices made under the Rome Statute and practice of the ICC.

73. The principle of proportionality is not explicit in the ICC's regulations, but article 75.1 of the Rome Statute says that the Court may determine the scope and extent of any damage, loss, and injury in reparation procedures. Also, article 97 of the Rules of Procedure and Evidence states that the ICC may appoint experts to determine the scope and extent of damage, loss, and injury, regarding the assessment of reparations.

74. The principle of causality should be correctly applied by the ICC, taking due account of the extent of the damage caused to victims and communities, and its relationship (direct or not) with the crimes and the conduct carried out by the alleged perpetrator. Here the involvement of experts might also be vital to establish a causality link that goes beyond material damages and also looks carefully at non-material damages such as the level of trauma or emotional harm.

75. As for the achievement of full reparation or *restitutio in integrum*, the ICC will always deal with hard cases from a reparations perspective: on the one hand, because of the number of victims and amount of harm that they have potentially suffered; on the other hand, because the offender is not a State but an individual, with limited or nonexistent resources to repair the atrocities for which he or she is responsible. In addition, an individual lacks the capabilities of the State to implement the reparations ordered by the Court, and he/she will most likely be in prison.

76. Other practical problems include getting states to cooperate and assist the Court with, for example, the forfeiture of proceeds, property, and assets of the offender. For these reasons, the role of the Trust Fund for Victims (TFV) is crucial for the ICC to try and provide adequate and effective reparations.

77. The limitations that the ICC has regarding its capacity to award full restitution do not affect the right of the victims to claim reparations before other bodies for the human rights violations they might have also suffered. According to article 75.6 of the Rome Statute, the rights which emanate from this instrument are without prejudice of other rights that the victims may have under other treaties.

78. Regarding the forms of reparation, article 75.1 of the Rome Statute mentions restitution, compensation, and rehabilitation as measures that the ICC can implement. However, the statement is not exhaustive, so other forms of reparation, such as satisfaction, can be ordered. Nevertheless, due to the difficulties described above regarding the capacity of the offender to comply with reparation measures, and because of the limited capacity of the TFV to fully repair all the harm caused, the ICC will have to choose carefully among different forms of reparation. Thus, for example, although compensation is the most common measure ordered by international bodies for redressing both material and non-material damages, the funds that can be obtained either from the offender or from the TFV will hardly be enough to bring relief to all the victims that can be affected by war crimes and/or crimes against humanity. Therefore, measures such as collective forms of reparation[95] might be far more adequate to deal with the harm suffered.

79. Rule 85 of the Rules of Procedure and Evidence defines victims as natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court, as well as organizations and institutions under specific circumstances. Although not explicitly mentioned in article 75 of the Rome Statute, the Working Group on Procedural Matters at the Rome Conference mentioned that the use of the expression "to, or in respect of victims" in article 75.1 was intended to relate to the next of kin of victims.[96] The ICC's principles on reparation should clarify this matter and establish under which criteria the next of kin should be awarded reparations.

[95] Rule 97.1 of the Rules of Procedure and Evidence.
[96] REDRESS, *Justice for victims*, p. 16.

80. Finally, with regard to victims' participation for the award of reparations, the ICC's regulations provide an important legal framework for the intervention of victims in the proceedings. Article 68 of the Rome Statute establishes the conditions under which this participation is possible, which has to be done through legal representation, while article 75.3 allows this participation in reparation proceedings. Furthermore, rules 89 to 93 of the Rules of Procedure and Evidence establish with detail the victims' intervention in the proceedings, with rule 91.4 clarifying that in hearings that are limited to reparation issues, the legal representatives of the victims, with the permission of the Chamber, can freely question witnesses, experts and the person concerned. Although under these rules, the victims' participation through legal representation is granted, the participation of the victims themselves in the hearings should be particularly encouraged. In this regard, procedures before international bodies (particularly the IACtHR) have demonstrated that the testimony from the victims is one of the best ways to prove the harm suffered, besides having the potential to provide some healing to the victims.

Concluding Remarks

81. This Section documented that reparations are a legally inseparable corollary to human rights violations, which by definition constitute violations whereby the state is responsible towards the individual. Human rights law contains specific references to reparation as a right. The basis for the individual right to reparation can also be found in humanitarian law and international criminal law.

82. The convergence of norms and legal sources that explore and define the nature of reparations in relation to individuals is demonstrated in jurisprudence from the ICJ, the Articles on State Responsibility of the ILC, humanitarian law and human rights

instruments, both legally binding and non-binding, as well as human rights jurisprudence and international criminal law.

83. In particular, one could find guidance in the case-law of the European Court of Human Rights. The Strasbourg Court has developed a jurisprudence which in many instances deems a declaration of a violation to constitute sufficient reparation.[97] But it deviates from this line whenever an applicant has suffered considerable emotional distress and anguish, in particular because of the loss of a close relative.[98] Another formulation to be encountered in the judgments of the Strasbourg Court focuses on "anguish and feelings of helplessness and frustration" experienced by the applicant as a consequence of a breach of its obligations by a state party.[99] Therefore, in the human rights field, judges take into account the degree of pain and suffering endured by the victims.

84. For instance, in the case of *Xenides-Arestis v. Turkey*, the Strasbourg Court held that there had been a continuing violation of the applicant's rights guaranteed by Articles 8 of the Convention and Article 1 of Protocol No. 1 by reason of the complete denial of the rights of the applicant with respect to her home and the peaceful enjoyment of her property in northern Cyprus. As a result, the Court ordered the State to pay the applicant EUR 800,000 (eight hundred thousand Euros) in respect of pecuniary damage, EUR 50,000 (fifty thousand Euros) in respect of non-pecuniary damage, and EUR 35,000 (thirty-five thousand Euros) in respect of costs and expenses. Likewise, in the case of *Baysayeva v. Russia* (concerning the forced disappearance of a person), the Court ordered the State to pay the applicant EUR 50,000 (fifty thousand Euros) in respect of non-pecuniary (moral) damage. These cases and the amounts allocated by the Strasbourg Court with respect to both material and moral damages could be instructive to the case at hand.

---

[97] See, e.g., C. Tomuschat, 'Just Satisfaction under Article 50 of the European Convention on Human Rights', in P. Mahoney et al. (eds), *Protecting Human Rights: The European Perspective. Studies in Memory of Rolv Ryssda* (Köln et al.: Carl Heymanns Verlag, 2000) 1409, at 1423.
[98] See the judgments in cases *Baysayeva v. Russia*, 5 April 2007, § 179; *Tysiac v. Poland*, 20 March 2007, § 152.
[99] *Xenides-Arestis v. Turkey*, 7 December 2006, § 47.

III. Types and Magnitude of Reparations to be made

85. There are at least a number of principal categories of crimes or serious humanitarian law violations that demand reparation of some form. In particular, these should include killings of the civilians, prisoners, destruction of property (private, as well as cultural), victims of sexual violence, and mass deportation.

Killings

86. According to Amnesty International, by the end of the war in Kosovo in June 1999, an estimated **12,000** Kosovo Albanians had been killed.[100]

87. Likewise, a study by researchers from the Center for Disease Control and Prevention in Atlanta, published in 2000 in the medical journal Lancet, estimated "**12,000 deaths in the total population**" as a result of "war-related trauma."[101]

88. Another study, entitled *Political Killings in Kosova/Kosovo*, published in October 2000 by the Central and East European Law Initiative (CEELI) of the American Bar Association and the American Association for the Advancement of Science (AAAS), concluded that approximately **10,500** Kosovar Albanians were killed **between March 20 and June 12, 1999**, with a 95 percent confidence interval from 7,449 to 13,627.46.[102] The report further analyzes the timing and location of the killings, showing that the killings correlated closely with the flow of refugees out of Kosovo. It ought to be noted that this figure does not include those who were killed before 20 March 1999.

---

[100] Amnesty International, 'Wounds that Burn Our Souls': Compensation for Kosovo's Wartime Rape Survivors, But Still no Justice, at 6. Available at: https://www.amnesty.org/download/Documents/EUR7075582017ENGLISH.PDF.

[101] Paul B. Spiegel & Peter Salama, 'War and mortality in Kosovo, 1998-99: an epidemiological testimony', *The Lancet*, 355(9222) (2000), 2204-2209.

[102] Central and East European Law Initiative of the American Bar Association and the American Association for the Advancement of Science, 'Political Killings in Kosova/Kosovo', Washington D.C., October 2000.

89. Ultimately, as put by the Human Rights Watch, "what matters is not whether the dead number 5,000 or 15,000, but that large numbers of civilians were targeted for execution by Serbian and Yugoslav security forces."[103]

90. There are certain relevant characteristics of the killings during the war in Kosovo, which demand close attention. One such crucial element is the phenomenon of grave tempering, aimed at hiding the evidence and making it more difficult, and at cases also impossible to identify and count the precise number of people killed. As stated by the former ICTY Chief Prosecutor Carla Del Ponte in her address to the UN Security Council, "it will never be possible to provide an accurate figure for the number of people killed, because of deliberate attempts to burn the bodies or to conceal them in other ways."[104] Human Rights Watch, the OSCE, and other organizations documenting violations of humanitarian law and human rights in Kosovo have also collected evidence of grave tampering and other efforts to conceal evidence of killings by Yugoslav and Serbian forces prior to June 12, 1999. These include the removal of bodies, the reinterring of bodies from mass graves into individual graves, the burning of corpses, and the removal or exchange of clothing and personal effects to complicate the process of identification.[105]

91. As to the structure of the targeted groups, Human Rights Watch reported in a 2001 comprehensive and facts based report that although the vast majority of the victims were males, females and children were not exempt.[106] In numerous cases, specifically mentioned in the Human Rights Watch report, young children were killed along with adults.[107]

---

[103] Human Rights Watch, 'Under Orders: War Crimes in Kosovo' (2001), p. 121. Available at: https://www.hrw.org/sites/default/files/reports/Under_Orders_En_Combined.pdf).
[104] Address to the Security Council by Carla Del Ponte, prosecutor, International Criminal Tribunals for the former Yugoslavia and Rwanda, November 21, 2000, New York.
[105] Human Rights Watch, 'Under Orders: War Crimes in Kosovo', p. 124.
[106] Human Rights Watch, 'Under Orders: War Crimes in Kosovo', p. 119. This report—of around 600 pages—documents torture, killings, rapes, forced expulsions, and other war crimes committed by Serbian and Yugoslav government forces against Kosovar Albanians between March 24 and June 12, 1999. It ultimately reveals a coordinated and systematic campaign to terrorize, kill, and expel the ethnic Albanians of Kosovo that was organized by the highest levels of the Serbian and Yugoslav governments in power at that time.
[107] Ibid.

Missing Persons

92. In June 2000, the International Committee of the Red Cross (ICRC) reported that 3,368 civilians (mostly Kosovar Albanians, but with several hundred Serbs, and Roma) were still missing, nearly one year after the conflict.[108] Over 2,000 of these were believed to have been abducted by Yugoslav security forces before or during 1999.[109]

93. In August 2017, the UN High Commissioner for Human Rights reported that between 1998 and 1999, "more than 6,000 people went missing" in Kosovo and that 1,658 remained missing, with neither the person nor the body having, at that time, been found.[110]

Prisoners

94. According to a 1999 Human Rights Watch report, the Yugoslav government itself has acknowledged that approximately 1,900 Kosovar Albanians are being held in thirteen different detention facilities in Serbia. All of them have been visited at least once by the ICRC. But some known detainees did not appear on the government's list.[111]

95. A 2002 report of Associated Press speaks of a more precise figure, noting that "When Milosevic's troops pulled out [of Kosovo], they brought with them **2,015 Kosovo Albanian prisoners** and placed them in Serbian jails."[112]

---

[108] BBC News, '3,000 missing in Kosovo'. Available at: http://news.bbc.co.uk/2/hi/europe/781310.stm.
[109] Ibid.
[110] UN High Commissioner for Human Rights, 'Missing persons receive renewed attention in Kosovo*'. Available at https://www.ohchr.org/EN/NewsEvents/Pages/MissingPersonsInKosovo.aspx.
[111] Human Rights Watch, 'Political Trial in Serbia'. Available at: https://www.hrw.org/news/1999/11/07/political-trial-serbia.
[112] Associated Press, 'Yugoslavia Transfers 145 Prisoners'. Available at: http://www.freerepublic.com/focus/f-news/653849/posts.

96. Most of the prisoners were kept in Serbia until March 2002, when they were eventually transferred following an earlier agreement between the United Nations and Yugoslav authorities that came after months of international pressure.[113] Later reports claim that many prisoners are believed to have paid at the time between 10,000 and 20,000 Deutschmarks for their release.[114]

Destruction of Property

97. As reported by Human Rights Watch, the destruction of civilian property by Yugoslav/Serbian government troops in 1999 was widespread.[115] Citing a November 1999 UNHCR survey, Human Rights Watch reports that almost 40 percent of all residential houses in Kosovo were heavily damaged or completely destroyed. Out of a total of 237,842 houses, 45,768 were heavily damaged, and 46,414 were destroyed. Municipalities with strong ties to the KLA were disproportionately affected, in part because attacks against them began in 1998. But other areas without a history of KLA activity were also affected, such as the city of Peja, where more than 80 percent of the city's houses were heavily damaged or destroyed.[116] All in all, thousands of Albanian villages in Kosovo had been either partly or completely destroyed by burning or shelling.[117]

98. Schools and mosques were similarly affected. According to a United Nations damage assessment of 649 schools in Kosovo, more than one-fifth of the schools surveyed were heavily damaged, and more than 60 percent were completely destroyed.[118] Throughout Kosovo, Serbian and Yugoslav forces also deliberately rendered water wells unusable by dumping chemicals, dead animals, or human remains into the

---

[113] Ibid.
[114] BalkanInsight, 'Kosovo War Ex-Prisoners Fear Arrest in Serbia'. Available at: http://www.balkaninsight.com/en/article/kosovo-war-ex-prisoners-fear-arrest-in-serbia-08-22-2016.
[115] Human Rights Watch, 'Under Orders: War Crimes in Kosovo', p. 8.
[116] Ibid.
[117] Ibid., p. 110.
[118] Ibid., p. 8.

water. Human Rights Watch documented cases in four villages in which murder victims had been dumped into the water supply.[119]

99. In addition to property destruction, the damage is also caused by other means. Endless witnesses and victims have told Human Rights Watch how government forces robbed them of valuables, including wedding rings and automobiles, either at their homes or along the road during their expulsion.[120] Police, soldiers, and especially members of paramilitary units threatened individuals with death if they did not hand over sums of money, usually demanding German marks. Such theft was mentioned repeatedly, even by members of the security forces who spoke with the international media after the war. For some of the men, it was the reason they went to Kosovo. Some volunteers said they were released from prison in Serbia if they agreed to serve with the army or police.[121]

100. The European Union—which was in charge of pillar IV (reconstruction and economic development) of the UN Mission in Kosovo after the war—had estimated a cost of **at least 4 billion US dollars** over a period of three years to rebuild Kosovo.[122]

Rape and Other Forms of Sexual Violence

101. Rape and other forms of sexual violence were used during the Kosovo conflict both as weapons of war and instruments of the systematic policy of ethnic cleansing. As reported by Human Rights Watch in 2001, "[r]apes were not rare and isolated acts committed by individual Serbian or Yugoslav forces, but rather were used deliberately as an instrument to terrorize the civilian population, extort money from families, and push people to flee their homes. Rape also furthered the goal of forcing

[119] Ibid., pp. 8-9.
[120] Ibid., p. 9.
[121] Ibid.
[122] BBC News, 'Kosovo: The conflict by numbers'. Available at: http://news.bbc.co.uk/2/hi/europe/366981.stm.

ethnic Albanians from Kosovo."[123] Human Rights Watch also documented cases of women who were raped and subsequently killed by Yugoslav soldiers, Serbian police, or paramilitaries.[124] These crimes amount to the war crime of torture and have been found to have been so systematic as to constitute crimes against humanity.

102. Silenced by the deeply entrenched social stigma, which still overshadows wartime rape, many survivors have never spoken to their closest family about what happened to them. Some, counseled by nongovernmental organizations (NGOs) are able to talk about their experience, but few have spoken publicly about what they endured.[125]

103. Human Rights Watch documented 96 cases of rape by Serbian and Yugoslav forces against Kosovar Albanian women immediately before and during the 1999 bombing campaign and believes that many more incidents of rape have gone unreported.[126] It is estimated that thousands of people were victims of sexual violence during the Kosovo conflict of 1998-1999. Although only 278 female and two male survivors spoke to members of Medica Gjakova (NGO in Kosovo that registers and supports survivors of wartime sexual violence) about what happened.[127] International humanitarian organizations and local NGOs have collected an estimated 20,000 accounts of systematic rape and torture perpetrated by FRY/Serbian forces.[128]

---

[123] Human Rights Watch, 'Under Orders: War Crimes in Kosovo', p. 130.
[124] Ibid.
[125] See Amnesty International, 'Wounds that Burn Our Souls', pp. 6-7.
[126] Human Rights Watch, 'Under Orders: War Crimes in Kosovo', p. 130.
[127] Deutsche Welle, 'Kosovo: Survivors of wartime sexual violence speak out'. Available at: https://www.dw.com/en/kosovo-survivors-of-wartime-sexual-violence-speak-out/a-46596927.
[128] See, e.g., Voice of America, 'Kosovo War Rape Survivors See Hope in Reparations, but Justice Remains Elusive'. Available at: https://www.voanews.com/a/kosovo-war-rape-survivors-see-hope-reparations/4202346.html.; NPR, 'In Kosovo, War Rape Survivors Can Now Receive Reparations. But Shame Endures For Many'. Available at https://www.npr.org/sections/parallels/2018/04/06/598832041/in-kosovo-war-rape-survivors-can-now-receive-reparations-but-shame-endures-for-m. (noting that there are "thousand of women — up to 20,000 by some estimates — who were raped by Serbian militias two decades ago, during the 1998-1999 war that resulted in Kosovo's split from Serbia after the breakup of Yugoslavia."); The Guardian, 'After two decades, the hidden victims of the Kosovo war are finally recognised'. Available at: https://www.theguardian.com/global-development/2018/aug/03/after-two-decades-the-hidden-victims-of-the-kosovo-war-are-finally-recognised.

104. Three senior FRY/Serbian officials have been specifically held responsible for sexual assaults during the war in Kosovo as a form of persecution. Former Yugoslav Deputy Prime Minister Nikola Šainović, former Yugoslav Army General Nebojša Pavković, and Police General Sreten Lukić were convicted of the deportation, forcible transfer, murder and persecution (including sexual assaults) of thousands of ethnic Albanians, and each sentenced to 22 years' imprisonment.[129] The Trial Chamber also found that both Nebojša Pavković and Sreten Lukić, in occupying positions of command responsibility, had reason to foresee, but had failed to prevent sexual assaults.[130] In 2014, former Assistant Minister of Interior Vlastimir Djordjević was also convicted, following an appeal, "of persecutions through sexual assaults, as a crime against humanity."[131] The international legal responsibility of the state of Serbia can certainly be invoked and thus clearly established by way of authoritative findings of the ICTY concerning the actions and ommissions of the senior Serbian political, military and police officials.

Deportation of Kosovo Albanians by Serb/Yugoslav Forces and Ensuing Mental and Physical Suffering

105. In its judgment of 26 February 2009 in the *Milutinović et al.* case, the ICTY references a series of reports sent by the MIA Staff to the MIA Headquarters in Belgrade, from 24 March to 1 May 1999, recording the numbers of Kosovo Albanians crossing the borders in that period. According to these reports, in the first week of the NATO bombing, over 300,000 Kosovo Albanians crossed into Albania or Macedonia. By 6 April that number doubled, and by 1 May it had reached

[129] Others convicted include: former Yugoslav Army Colonel General Vladimir Lazarević and General Chief of Staff Dragoljub Ojdanić; former President Milan Milutinović was acquitted. The case against Slobodan Milošević was discontinued after his death.

[130] Judgment summary, 26 February 2009, http://www.icty.org/x/cases/milutinovic/tjug/en/090226summary.pdf.

[131] Case No.: IT-05-87/1-A, http://www.icty.org/x/cases/djordjevic/acjug/en/140127-summary.pdf.; Appeals Chamber Judgement, paras. 914-929, http://www.icty.org/x/cases/djordjevic/acjug/en/140127.pdf.

715,158.[132] This number got increased until 9 June, one day before the adoption of mandatory UN Security Council 1244 authorizing the establishment of both an UN-led civilian administration and a NATO-led military force.

106. The UNHCR estimates that **862,979** refugees left Kosovo from 23 March to 9 June 1999. This figure virtually corresponds to that provided in an OSCE report, which speaks of **863,000** being expelled from Kosovo between March and June 1999.[133] Amnesty International refers to similar accounts, stating that "By the end of the war in Kosovo in June 1999 ... **more than half of Kosovo's civilian population** were living in refugee camps in Albania and Macedonia."[134] This category differs from that of internally displaced persons (IDPs), namely persons that were displaced from their homes, but still present in the territory of Kosovo. As of mid-May 1999, **590,000** were **internally displaced** within Kosovo.[135] BBC reported on June 11, 1999, that around **1.4 million** Kosovo Albanians are currently refugees – either internally displaced persons, in camps or abroad.[136]

107. As to the causes for leaving the territory of Kosovo, the ICTY's Trial Chamber is satisfied that there was a broad campaign of violence directed against the Kosovo Albanian civilian population during the course of the NATO air-strikes, conducted by forces under the control of the FRY and Serbian authorities. The witnesses who testified both about their own experiences and that of their families, friends, and neighbors, in the few weeks between 24 March and the beginning of June 1999, gave a broadly consistent account of the fear that reigned in towns and villages across Kosovo, not because of the NATO bombing, but rather because of the actions of the VJ and MIA forces that accompanied it. In all of the 13 municipalities, the Chamber has found that forces of the FRY and Serbia deliberately expelled Kosovo Albanians

---

[132] *Prosecutor v. Milan Milutinović, Nikola Šainović, Dragoljub Ojdanić, Nebrojša Pavković, Vladimir Lazarević, Sreten Lukić* (IT-05-87-T), *Judgment*, 26 February 2009, Volume 2, pp. 405-406.
[133] OSCE, 'Kosovo/Kosova: As Seen, As Told', Part III, Ch. 14.
[134] Amnesty International, 'Wounds that Burn Our Souls', *supra*, at 6.
[135] UNHCR rough estimation as of 13 May 1999, quoted in OSCE 'Kosovo/Kosova: As Seen, As Told', *supra*.
[136] BBC News, 'Kosovo: The conflict by numbers'. Available at: http://news.bbc.co.uk/2/hi/europe/366981.stm.

from their homes, either by ordering them to leave or by creating an atmosphere of terror in order to affect their departure. As these people left their homes and moved either within Kosovo or towards and across its borders, many of them continued to be threatened, robbed, mistreated, and otherwise abused. In many places men were separated from women and children, their vehicles were stolen or destroyed, their houses were deliberately set on fire, money was extorted from them, and they were forced to relinquish their personal identity documents.[137]

108. The ICTY substantiates its findings through a systematic account of witness testimonies and other objectively verified data, looking across a number of Kosovo municipalities. To shed specific light on the campaign of violence and atmosphere of terror created by the forces of the FRY and Serbia, some of the examples provided by the Tribunal will be reproduced below:

> *For example, at the end of March 1999, an extremely threatening and violent environment was created in Peć/Peja town by police and military forces, burning houses, firing weapons, and abusing the local Kosovo Albanian population. A significant number of the town's residents thus fled or were ordered out of their homes, some of them being directed to go to Montenegro and others being sent to the centre of the town where they were put on buses and driven to the Albanian border. As discussed above, Ndrec Konaj described the fear and panic created among the local residents, including himself and his family, as they did not know what was going to happen to them. When these Kosovo Albanians returned to Peć/Peja after the end of the conflict, they found that many of their houses had been burned, although the houses belonging to Serbs in the town were undamaged.*

[137] *Prosecutor v. Milan Milutinović et al.,* p. 406.

In Dečani/Deçan municipality, immediately to the south of Peć/Peja municipality, similar events transpired in the village of Beleg at the end of March 1999. There the Kosovo Albanian residents were rounded up by police and army personnel, including VJ reservists, in the course of which some men were killed. A large group of predominantly Kosovo Albanian women and children was detained and mistreated: some of the women were sexually assaulted; and some men were physically abused. The next day most of the people from the group were ordered to go to Albania, and those that remained have not been heard from since.[138]

South of Dečani/Deçan, in Đakovica/Gjakova town, a prevailing atmosphere of terror was created by police and VJ forces from the commencement of the NATO bombing campaign. These forces engaged in the selective looting and burning of buildings and MUP forces killed Kosovo Albanian residents of the town, including a group of 20 women and children in a basement in Miloš Gilić/Milosh Giliq Street at the beginning of April. As a consequence, a large number of Kosovo Albanians fled the town and travelled to and across the Albanian border. During their journey, their personal identity documents were taken from them by VJ and MUP forces. Kosovo Albanian residents of villages in Đakovica/Gjakova municipality were also expelled from their homes by army and police forces in April 1999, in particular during a joint operation in the region known as the Reka/Caragoj valley at the end of the month. In the course of that operation a number of Kosovo Albanians were killed by members of the police and VJ, and the bodies of 287 people who went missing from Meja and the surrounding area at that time were subsequently found in mass graves at Batajnica, close to Belgrade.[139]

[138] Ibid. pp. 408-409.
[139] Ibid. p. 409.

It is uncontested that a broad operation was conducted by the VJ and MUP at the end of March 1999 in an area covering parts of Prizren, Suva Reka/Suhareka, kand Orahovac/Rahovec municipalities. During the course of that operation, on 25 March 1999, Kosovo Albanian villagers from Pirane/Pirana (in Prizren municipality) fled their homes as a consequence of the shelling of the village and the torching of houses by VJ and MUP forces. The same day MUP and VJ forces attacked the village of Celina (Orahovac/Rahovec municipality), looting and setting the majority of houses on fire. Members of the police also deliberately destroyed the local mosque. These forces terrorized the inhabitants of the village, killing a number of people. The Trial Chamber notes that witnesses to the attack on Celina, as well as to attacks on several other towns and villages in Kosovo, described the use of a special weapon, like a flame-thrower, by the forces of the FRY and Serbia, for the purposes of torching buildings. In light of this consistent evidence, the Chamber does not accept that such weapons had been decommissioned by the VJ in the 1950s, as claimed by Božidar Delić. People from Celina who had fled their homes and taken shelter in nearby woods were later rounded up and robbed of their valuables and identity documents. Some of them were physically abused and they were sent towards the Albanian border.[140]

…

The consistent eye-witness accounts of the systematic terrorisation of Kosovo Albanian civilians by the forces of the FRY and Serbia, their removal from their homes, and the looting and deliberate destruction of their property, satisfies the Chamber that there was a campaign of violence directed against the Kosovo Albanian civilian population, during which there were incidents of killing, sexual assault, and the intentional destruction of mosques. It was the deliberate actions of these

[140] Ibid. pp. 409-410.

> *forces during this campaign that caused the departure of at least 700,000 Kosovo Albanians from Kosovo in the short period of time between the end of March and beginning of June 1999. Efforts by the MUP to conceal the killing of Kosovo Albanians, by transporting the bodies to other areas of Serbia, as discussed in greater detail below, also suggest that such incidents were criminal in nature.*[141]

109. In conclusion, the evidence collected and administered by the ICTY is compelling as to the reasons and methods used by the FRY and Serbian authorities to effectuate the policy of deliberately expelling Kosovo Albanians from their homes. Moreover, there is a consensus among international organizations about the people that were deported from Kosovo and displaced from their homes, as presented in the first two paragraphs of this sub-section. This figure speaks of around 1,4 million people being deported from Kosovo or displaced from their homes—as noted by the ICTY—"either by ordering them to leave, or by creating an atmosphere of terror in order to effect their departure," and as they left their homes and moved either within Kosovo or towards and across its borders, "many of them continued to be threatened, robbed, mistreated, and otherwise abused," and in many places "men were separated from women and children, their vehicles were stolen or destroyed, their houses were deliberately set on fire, money was extorted from them, and they were forced to relinquish their personal identity documents." Taking this context in its totality, it is therefore not only the mere process of the group collectively leaving the homes under an atmosphere of threats and terror, but also the subsequent trauma and human suffering resulting from this process that merits reparation.

[141] Ibid. p. 416.

IV. Conclusions

Kosovo's position:

Kosovo's position in the negotiating process should be framed around the four types of reparation well-recognized by international law, namely (1) guarantees of non-repetition, (2) restitution, (3) compensation, and (4) satisfaction. The ultimate position about the specific claims is somewhat deferential to the political stance taken, also in light of the broader negotiating considerations. However, it is entirely possible to advance the four claims simultaneously.

Guarantees of non-repetition

Given the historical accounts, in particular, the experience during the last decade of the past century, it is also natural that Kosovo insists on getting formal guarantees from the Republic of Kosovo for the non-repetition of the past wrongdoings of the types documented in this background note. It should serve as a contractual, treaty-based, safeguard against the repetition of past violations committed by state authorities of Serbia. Therefore, these guarantees should be stipulated in a distinct clause of the comprehensive legally-binding agreement between the Republic of Kosovo and Republic of Serbia.

Restitution (especially of property)

Kosovo can and must claim the restitution of damaged property, as shown in this background note. The damages caused should encompass both private and public property (schools, religious and cultural objects, as well as related property). As indicated in one instance, the European Union, for instance, had estimated a cost of at least 4 billion US dollars over a period of only three years to rebuild Kosovo.

Damages are also caused indirectly by way of the effects the actual physical destruction has on broader economic considerations and human welfare.

Compensation

Material compensation must be requested for a series of material and non-material or non-pecuniary damages caused by the state of Serbia or Federal Republic of Yugoslavia, of which Serbia is a continuator (as confirmed by the 2007 ICJ judgment in the *case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide*). As revealed by the discussion in this background note, compensation is claimed (and, as applicable, ordered) when there are damages that cannot be redressed by restitution alone, such as in the case of serious human rights violations. Compensation encompasses both material losses (loss of earnings, property and/or pensions, medical expenses, etc.) and non-material damage (pain and suffering, mental anguish, humiliation, loss of enjoyment of life and loss of companionship or consortium).

In the case of Kosovo, compensation could be validly claimed for all six categories identified and discussed in this background note, namely: (1) killings; (2) missing persons; (3) prisoners); (4) destruction of property; (5) rape and other forms of sexual violence; and (6) mass deportation. In the case of human loss, compensation could become the most complicated of things, as life—the most precious of things—is by definition priceless and no specific amount, no matter how large or significant, is morally appropriate. However, with all its human and intellectual brutality, requesting some form of material compensation for human loss might sometimes provide for no matter how relative a degree of partial satisfaction for the surviving family members. Indeed, it is not uncommon in the jurisprudence of regional or international courts for the parties to request and courts to order the defendant States to pay specific amounts in respect of non-pecuniary damage for the loss of close family relatives. Among many other cases, in the cited case of *Baysayeva v.*

Russia concerning the forced disappearance of a person, for instance, the European Court of Human Rights ordered the State to pay the applicant EUR 50,000 (fifty thousand Euros) in respect of non-pecuniary (moral) damage.

Also with respect to the other identified categories, such as the missing persons or prisoners, rape or other forms of sexual violence, or mass deportation, the ensuing mental and physical suffering might be and in many cases indeed it is beyond an adequate proportion of compensation. And even if a certain degree of compensation might be deemed adequate, the amount should be particularly high and measured against the most rigorous standards.

Satisfaction (apology)

Satisfaction is one of the potential forms of reparation recognized by international law. In inter-State practice, it basically emerges when restitution and compensation do not achieve full reparation or when injuries are not financially assessable and amount to an affront to the State. Thus, to the extent Kosovo considers that restitution and compensation do not achieve full reparation by the Republic of Serbia for its international wrongdoings in relation to itself, Kosovo should insist on a formal apology to be made by the Republic of Serbia through a clear and express statement of its head of state and/or recognition of the wrongfulness of its past conduct in Kosovo, to be included in the comprehensive legally-binding agreement.

www.ridea-ks.org