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War Reparations

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A. Concept and Definition

1 War reparations involve the transfer of legal rights, goods, property and, typically, money from one State to another in response to the injury caused by the use of armed force. While often considered a sub-category of reparations obligations existing under the classical theory of internationally wrongful acts and State responsibility law, the practice of claiming and paying war reparations in fact dates back to ancient times and presents several specific features.

2 Historically, war reparations can be the consequence of all acts of warfare, be they legal or illegal in terms of modern international law. Traditionally, victors imposed on vanquished peoples war indemnities aimed at covering the costs of warfare and punishing the defeated population. They therefore enjoyed special authority in shaping war reparations. International legal obligations concerning war reparations were, and still are, frequently contained in peace agreements and post-conflict settlements treaties that play a crucial role in the establishment of a balance between States within the international community. The legal foundation of clauses imposing payment of money often included in peace treaties remained unclear in Antiquity. These treaties often referred to different legal justifications including war expenses or an act of submission of the defeated party towards the winning one. In the 16th and 17th centuries, European legal scholarship made a crucial contribution to both the development of the concept of war reparations and the clarification of their legal foundation. Emer de Vattel wrote that '[q]uiconque fait une guerre juste, est en droit de faire contribuer le pays ennemi à l'entretien de son Armée, à tous les frais de la guerre' (*Droit des gens* Liv III Chapter IX § 145). Alberico Gentili justified the duty to pay war indemnities on the military predominance of the country winning the war (*De Jure Belli Libri Tres* Lib III Chapter IV). Samuel Pufendorf further elaborated on this concept, affirming that resorting to war instead of adopting a peaceful dispute-settlement mechanism implies the acceptance of a certain degree of chance. In his view, it followed that once the war is over, the defeated party must accept the verdict of the arms and the post-conflict order imposed by the winner (*De jure naturae ac gentium* Lib V Chapter IX § 3). Unlike Gentili and Pufendorf, Hugo Grotius considered the rationale on which war reparations were grounded to be the necessity of ensuring the future security of both the winning and the defeated party to a conflict (*De Jure Belli ac Pacis* Lib III Chapters XV, VI).

3 The recourse to war in international relations only became prohibited under international law relatively recently as a result of the Kellogg-Briand Pact (1928) through which parties renounced it in all circumstances rather than just certain circumstances as had been the case under the Covenant of the League of Nations. Today, the duty to provide war reparations under international law is rooted in: 1) a violation of the *ius ad bellum*, namely an unlawful use of force in international relations contrary to Art. 2 (4) United Nations Charter; and 2) a breach of international humanitarian law (violation of the *ius in bello*). These legal bases for war reparations, which are independent of each other, owe their existence to the significant development of the general notion of reparation under international law in recent decades.

4 The principle that States have to provide reparations to other States to redress wrongful acts they have committed is undisputed under international law and is confirmed by other instruments of international law and in particular by the 2001 International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts (Art. 31 and Arts 34–37). Moreover, Art. 3 Hague Convention concerning the Laws and Customs of War on Land (Hague Peace Conferences [1899 and 1907]) and Art. 91 Geneva Conventions Additional Protocol I (1977) establish an inter-State duty to pay compensation when a belligerent party violates the provisions of the Convention and the Protocol I (see below). The primary function of reparations in international law is the re-establishment of the situation that would have existed if an international wrongful act had not been committed and the forms that such reparation may take are various. In the specific case of war reparations, historical practice favours the use of restitution, monetary compensation, territorial guarantees, guarantees of non-repetition, and symbolic reparations. As regards who can claim reparations, a State's duty to provide inter-State reparations after the commission of an

internationally wrongful act is certain, but the crystallization of an individual right to reparation for victims of gross human rights violations remains a matter of considerable controversy.

B. Historical Evolution of State Practice

1. From Antiquity to the Treaty of Versailles

5 War, both as a means of protection of States' interests and as an extra-judicial means of dispute settlement, enjoyed legitimacy under international law until the 20th century. Until this time, war reparations were paid by the defeated party as a form of indemnity for the victors. They also constituted a punishment for the vanquished peoples. Peace treaties addressing the issue of reparations in Antiquity, such as the 241 BC treaty between Rome and Carthage, included provisions dealing with territorial transfers, the payment of money, and of ransoms for the liberation of war prisoners (Peace Treaties).

6 The French Revolution marked a shift in the practice regarding war reparations. Napoleon was the first to introduce very harsh provisions requiring indemnities into the peace treaties he concluded, a practice later followed by other European leaders. Particularly remarkable in this regard was the Treaty of Tolentino of 19 February 1797 signed with Pope Pius VI. The peace treaty provided for several territorial cessions including Avignon, Bologna, Ferrara, and the Romagna region, as well as for the payment of 36 million francs and the transfer of numerous valuable artworks and manuscripts to the French.

7 In the aftermath of the Vienna Congress (1815), the Treaty of Paris of 20 November 1815 consolidated the trend to seek substantial reparation, requiring France to pay 700 million francs to the powers that defeated it and to cede several of its colonies. Such a treaty inaugurated the trend to legally found and justify the request of war reparations based on war expenses or war indemnifications, which characterized the vast majority of the post-conflict agreements of the 19th century. France was required to pay 12.5 million francs to Portugal, Spain, Denmark, and Switzerland and 100 million respectively to the United Kingdom, Prussia, Austria, and Russia. Moreover, France was required to allow its territory to be occupied by an army of 150,000 men in order to ensure the safety of the neighbouring countries. The 1815 Treaty of Paris constitutes the first of many efforts to legally justify claims to war reparations under international law. The rationale was seen in the right of the winning party to claim compensation for war damage and expenses. This approach was confirmed by the peace treaties signed in Versailles in the aftermath of the Franco-Prussian War in 1871, in Vienna between the Kingdom of Prussia, the Kingdom of Denmark, and the Austrian Empire in 1864, and in Prague at the end of the Austro-Prussian War in 1866.

8 Through the Treaty signed in Versailles in February 1871 and the subsequent Frankfurt Peace Treaty (1871), the victors imposed on France the payment of 5 million francs as 'contributions' to war expenses. France was required to pay for the provisions of the army deployed in its territory to guarantee the payment of such a sum. Other treaties from this period demonstrate that, at the end of the 19th century, the institution of war reparations had been well-entrenched; it was no longer subject to the arbitrary discretion of the winning powers, but instead included as a central element in the establishment of new political arrangements following armed conflict. Within this framework the role of European powers as mediators during peace negotiations was also consolidated.

9 During the Hague Conference of 1907 the legal responsibility of States for all damage caused by their troops was codified as a part of a then nascent international law of war. Art. 3 Hague Convention IV of 18 October 1907 in fact reads as follows: '[a] belligerent Party which violates the provisions of the said Regulations 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'.

10 In the Versailles Peace Treaty (1919), concluded in the wake of World War I in June 1919, the

term 'war indemnity', which had been employed in many prior treaties, was replaced by 'war reparations'. The clause on which the claims for reparations by the Allies were based was Art. 231 Versailles Peace Treaty (Part VIII of the Treaty), later labelled the 'War Guilt Clause', which reads as follows:

The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.

11 Art. 232 established that the Allies would only seek reparations for certain categories of civilian damages caused by Germany. Such categories, specified in Annex I to Part VIII of the Treaty, included:

(1) Damage to injured persons and to surviving dependents by personal injury to or death of civilians caused by acts of war

(2) Damage caused by Germany or her allies to civilian victims of acts of cruelty, violence or maltreatment (including injuries to life or health as a consequence of imprisonment, deportation, internment or evacuation, of exposure at sea or of being forced to labour), wherever arising, and to the surviving dependents of such victims.

(3) Damage caused by Germany or her allies in their own territory or in occupied or invaded territory to civilian victims of all acts injurious to health or capacity to work, or to honour, as well as to the surviving dependents of such victims.

(4) Damage caused by any kind of maltreatment of prisoners of war.

(5) As damage caused to the peoples of the Allied and Associated Powers, all pensions and compensation in the nature of pensions to naval and military victims of war (including members of the air force), whether mutilated, wounded, sick or invalided, and to the dependents of such victims....

(6) The cost of assistance by the Government of the Allied and Associated Powers to prisoners of war and to their families and dependents.

(7) Allowances by the Governments of the Allied and Associated Powers to the families and dependents of mobilised persons or persons serving with the forces, the amount due to them for each calendar year in which hostilities occurred being calculated for each Government on the basis of the average scale for such payments in force in France during that year.

(8) Damage caused to civilians by being forced by Germany or her allies to labour without just remuneration.

(9) Damage in respect of all property wherever situated belonging to any of the Allied or Associated States or their nationals, with the exception of naval and military works or materials, which has been carried off, seized, injured or destroyed by the acts of Germany or her allies on land, on sea or from the air, or damage directly in consequence of hostilities or of any operations of war.

(10) Damage in the form of levies, fines and other similar exactions imposed by Germany or her allies upon the civilian population.

12 The overall amount of the reparations to be paid was not specified in the Versailles Peace Treaty, as this task was assigned to a Reparation Commission. The role of the latter was defined in Art. 12 of the Second Annex to Part VIII of the Treaty:

The Commission shall in general have wide latitude as to its control and handling of the whole reparation problem as dealt with in this Part of the present Treaty and shall have authority to interpret its provisions. Subject to the provisions of the present Treaty, the Commission is constituted by the several Allied and Associated Governments referred to in paragraphs 2 and 3 above as the exclusive agency of the said Governments respectively for receiving, selling, holding, and distributing the reparation payments to be made by Germany under this Part of the present Treaty.

13 The Reparations Commission fixed the amount of compensation to be paid by Germany at 132 billion gold marks. At the conference of Spa, the partition of the reparations to be made by Germany was decided: 52% was attributed to France, 22% to the UK, 10% to Italy, 8% to Belgium, 0.75% to Japan and Portugal and 6.5% to the other parties to the conflict.

14 Art. 18 of Annex II of the Versailles Peace Treaty gave the Allied and Associated Powers the right to take a wide-range of measures in case of voluntary default by Germany, measures which Germany agreed in advance not to regard as acts of war against it. These included economic and financial prohibitions, reprisals and other measures those powers deemed necessary. France and Belgium relied on the 'other measures' limb of Annex II, Art. 18 when, considering Germany to be in default of its reparation payments, they occupied the Ruhr region in January 1923. Germany ordered its populations to commence passive resistance against the foreign occupation.

15 As a result of the diplomatic crisis and hyperinflation, the economic situation of Germany significantly deteriorated. Germany, relying on Art. 234 Versailles Peace Treaty, which states that '[t]he Reparation Commission shall after May 1, 1921,... consider the resources and capacity of Germany, and,... shall have discretion to extend the date, and to modify the form of payments' appealed the Reparation Commission. British mediation undertaken in an effort to resolve the crisis resulted in the so-called Dawes Plan agreed at an international conference held in London from 16 July to 30 August 1924. The plan introduced a new approach towards German reparation payments, endeavouring to shape them according to the Germany's actual ability to pay. The Dawes Plan foresaw an annual increase of the debt rates to be paid by Germany pursuant to an index of prosperity from 1 billion to 2.5 billion marks. Germany was also granted a loan of 800 million marks to pay its debt. In 1929 the Dawes Plan was replaced by the Young Plan, which established an international bank to which Germany was required to pay the amounts due. Under the Young Plan, Germany was asked to pay 37 billion marks within 59 years. The Great Depression, however, profoundly reduced Germany's capacity to pay its debt. Germany requested a re-negotiation of its reparation payments on the basis of the *rebus sic stantibus* doctrine (Treaties, Fundamental Change of Circumstances). At the 1932 Lausanne Conference, it was decided that Germany should pay into the international bank 3 billion marks plus the loans it got through the Dawes and Young Plans. This amount represented the combination of the payments previously made by Germany and the renegotiation of the German debt. The outbreak of World War II meant the suspension of all payments by Germany.

16 The long-lasting issue of German reparations after World War I was solved only through the London Agreement on German External Debts (1953) between Germany and 33 other countries. Art. 5 established that '[c]onsideration of governmental claims against Germany arising out of the first World War shall be deferred until a final general settlement of this matter'. By affirming its continuity with the Reich, the Federal Republic of (West) Germany inherited its debt of 7.5 billion marks. By 1980, the Young debt had been paid. Pursuant to a provision included in the London Agreement concerning German reunification, since 1990 the Federal Republic of Germany has started to pay the remaining debt of 176 million marks owed by the former (East) German Democratic Republic. The exact amount of the reparations paid by Germany as a consequence of World War I is subject to debate. Studies sponsored by the US Government based on documents provided by the Reparation Commission found that Germany had paid 21.5 billion marks. German

studies find a higher amount reaching almost 68 billion marks. Gattini argues that the average amount suggested by experts in this matter is 40 billions of marks, which interestingly corresponds to what the economist John Maynard Keynes, who himself attended the Versailles conference, considered at the time to be the upper limit of Germany's capacity to pay.

2. From World War II to the Present Day

17 International practice on war reparations since 1945 can be divided into instances occurring in three distinct periods. Immediately following World War II there were a number of different regimes set up to repair the very significant damage caused by that conflict. Then, in respect of international conflicts occurring during the Cold War (1947–91), reparations were sometimes claimed, even enjoined by the Security Council, but, in keeping with the geopolitics of the time, rarely paid. As has been widely noted, the fall of the Berlin Wall ushered in a new era of internationalism and respect for the international rule of law. Claims to reparations for damage caused by conflicts that have taken place since 1990 have therefore taken on a multilateral dimension, allowing first the UN Security Council and then the International Court of Justice to play an enhanced role in the substantial recent development of the international law norms in this field.

3. World War II Reparations

18 The various post-World War II reparations regimes (Reparations after World War II) possess many key features distinguishing them from the systems of reparations introduced by the Versailles Peace Treaty following World War I. Such differences were not only attributable to the economic and ultimately political failings of the World War I reparations regime, but also to the particular nature and circumstances of World War II and the early Cold War period that directly followed it.

19 Most strikingly, reparations agreements concluded after World War II openly took into account the obligated party's capacity to pay reparations. Indeed, as noted above, the Versailles reparations regime had famously been criticized as too onerous even during its development and its catastrophic failure to achieve its primary objectives of restoring infrastructure, economic health, and peace across Europe meant that the Allied Powers were loath to overburden a vanquished power after World War II in the same way that they had earlier overburdened Germany—a major recipient of direct US aid for the importation of essential food and goods in the interwar period. In keeping with what had become known as the 'first charge principle' at the Potsdam Conference (1945), the prevailing objective was that Axis powers would only have to pay reparations with the funds left over after they had met their essential internal economic needs. This objective was pursued through adjustments to the amount, form, and manner of paying the reparations and sometimes even written into the treaty as an express condition on the obligation to pay.

20 In the case of Italy, for example, the specific reparations amounts the Peace Treaties (1947) required it to pay the Soviet Union and certain smaller victim States were subject to the express obligation that 'the quantities and types of goods and services to be delivered... be selected and... scheduled in such a way as to avoid interference with the economic reconstruction of Italy...' (Art. 74A (3), Art. 74B (3) Peace Treaty with Italy). The Peace Treaty with Japan (1951) commences its reparations section by noting Japan's obligation to pay reparations, but qualifying it by expressly 'recogniz[ing] that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations' (Art. 14 Peace Treaty with Japan).

21 In the more complex case of German reparations after World War II, the Potsdam Agreement explicitly required that the payment of reparations should leave enough resources to enable the German people to subsist without external assistance (Conclusions of Protocol of the Berlin Conference of the Three Heads of Government of the USSR, US, and UK, Protocol of Proceedings [1 August 1945] Section IIB para. 19). Indeed, soon after the war, the USSR renounced its claim to

German assets in Bulgaria, Finland, Hungary, and Romania and exacted its industrial reparations not through the dismantling of plants, but primarily through placing the production of formerly German factories in Soviet zones under Soviet control. The Western Allies' care not to overburden Germany financially as they had done through the Versailles Treaty after World War I is demonstrated, for example, by Art. 4 (C) (ii) (c) of the 1946 Agreement on Reparation from Germany which required the Inter-Allied Reparation Agency to consider the 'relation of the item or items [claimed] to the general pattern of the claimant country's pre-war economic life and to programs for its post-war economic adjustment or development' in its allocation of industrial and other capital equipment. The fact of occupation also allowed the Allies to more closely monitor German payment of reparations from the proceeds of internal production in accordance with not only the first charge principle, but also their changing political priorities regarding the role of Germany in post-war international society. In the ten years following the war, the Three Powers progressively scaled back their impositions on German industrial activity in the interest of rebuilding a West Germany capable of withstanding growing Soviet influence to the East. Similar geopolitical considerations regarding the post-war strength of Japan meant that the US ceased requiring the payment of war reparations from Japan in May 1949 and never ended up claiming from Japan the vast majority of the reparations to which it considered itself legally entitled.

22 A further aspect of World War II reparations regimes that constituted a development in the international law applicable to war reparations was their partial acceptance of the claims of individual victims of the atrocities of that war (Compensation for Personal Damages Suffered during World War II). In the Agreement on Reparation from Germany, for example, the Allies agreed to allocate a share of the reparations to which they were entitled to the 'rehabilitation and resettlement' of so-called 'non-repatriable victims of German action' defined as the 'true victims of Nazi persecution and to their immediate families and dependents' (Art. 8). The Luxembourg Agreement between the State of Israel and the Federal Republic of Germany, apart from requiring vast reparations payments directly to Israel, also required through its Protocol No 1 payments for the specific benefit of victims of the Nazi regime. The reparations entitlement of a class of individuals particularly affected by the war was also respected in Japan's agreement to 'indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan' by transferring assets to the International Committee of the Red Cross (ICRC) for the benefit of former prisoners of war (Art. 16 Peace Treaty with Japan).

4. Reparations Claims Arising from International Conflicts during the Cold War Period

23 In the post-war context, the various demands that reparations be paid in respect of damage caused by conflicts in the Cold War era attest to the fact that, by the 1960s, the majority of States recognized an international law rule requiring the payment of reparations for the wrongful use of force had been firmly established. However, the practice of this period also reveals the practical and political difficulties inherent in enforcing such a legal right, with reparations as such never actually paid in respect of any Cold War-era conflict.

24 Many States settling conflicts occurring during this period preferred to mutually renounce their reparations claims in peace treaties or simply to ignore the issue of reparations altogether. Such compromises were no doubt encouraged by the afore-mentioned political and practical difficulties of recovering reparations and the desire to avoid formal scrutiny of responsibility for the conflict and the nature of the damage caused; scrutiny which would have risked further souring relations. The particular political context of the various wars between Israel and Arab States throughout the Cold War period meant that the issue of reparations was never seriously addressed. Treaties signed in respect of the Suez Canal crisis (General Agreement between France and the United Arab Republic [1958]), Falkland Islands/Islas Malvinas war (Argentina–United Kingdom: Joint Statement on Relations and Formula on Sovereignty with regard to Falkland Islands, South Georgia, and South Sandwich [1989]), and the Honduras–El Salvador Football War (General Peace Treaty between El

Salvador and Honduras [1980]) all proceeded to a mutual renunciation of reparations claims despite the firm and stated convictions of States, such as Egypt in respect of the Suez Crisis and the United Kingdom in respect of the Falklands War, that they were entitled to reparations under international law. Representatives of the UK government, for example, declared to their Parliament after the Falklands War that the UK was 'wronged by the aggression of Argentina' and therefore 'entitled to claim compensation', only to renounce such claims on the basis of the 'insurmountable practical and political hurdles' that such a claim would have presented (see statements reproduced in d'Argent 302).

25 The resolution of the issue of reparations after the Vietnam war constitutes a further example of States considering themselves legally entitled to reparations, but politically and practically incapable of enforcing that entitlement. A centrepiece of President Nixon's 'peace with honor' approach to the resolution of the Vietnam War seems to have required a rejection of the North Vietnamese insistence, in a published negotiating position, that the US Government 'bear full responsibility for the losses... caused' and its corollary implication that the US had engaged in an illegal use of force. The result was a refusal to pay reparations as such, with the US preferring to provide aid and contribute to the reconstruction of the war-torn areas. The practical interest of receiving post-war economic assistance, whatever its name, seems to have led the Vietnamese representative to sign off on the Paris Peace Accords ending the war in Vietnam which make no explicit mention of reparations and merely state that 'the United States will contribute to healing the wounds of war and to post-war reconstruction of the Democratic Republic of Viet-Nam and throughout Indochina' (*Agreement on ending the war and restoring peace in Viet-Nam*, 27 January 1973, 935 UNTS 2, Art. 21).

26 UN Security Council practice throughout the Cold War period also points to a solidification of the right to war reparations on the basis of any internationally wrongful use of force. For example, the Security Council unanimously considered Lebanon entitled to redress for the destruction it suffered as a result of Israel's premeditated military action on the civil International Airport of Beirut in 1968 (Security Council Resolution 262 (31 December 1968), para. 4), while Angola's claims to full compensation were deemed by the Council to be just after the deployment of South African forces in Angola in 1975 (Security Council Resolution 387 (31 March 1976), para. 4). Then, in response to the Iran–Iraq War (1980–88), the Security Council called upon the Secretary-General to investigate both responsibility for the conflict and the damage it had caused (Security Council Resolution 598 (20 July 1987), paras 6 and 7). While compensation was sometimes paid to private actors, none of these resolutions ever resulted in the transfer of war reparations between the States concerned.

5. War Reparations since 1990

27 Many of the political obstacles that had plagued the enforcement of reparations obligations during the Cold War (1947–91) era were suddenly removed when the fall of the Berlin Wall ushered in a new era of international cooperation and substantially strengthened the hand of the UN Security Council (Germany, Unification of). However, while war reparations were organized through the Security Council for the first armed conflict of this period, the Iraq–Kuwait War (1990–91), States involved in subsequent international armed conflicts pursued any reparations claims primarily through another principal organ of the United Nations, the International Court of Justice.

28 The Security Council's response to Iraq's invasion of Kuwait in August 1990 and the subsequent defeat of Iraqi forces in Kuwait by a UN-authorized and US-led international coalition underscored the power of the Council in the immediate wake of the Cold War. The Security Council built upon its new-found power to establish the most comprehensive reparations regime since the end of World War II. The reparations regime established through Security Council Resolutions 674 (1990) (para 8), 686 (1991) (para 2 (b)), 687 (1991) (paras 16–19) and 692 (1991) (paras 3–9) further entrenched the legal basis for war reparations claims. It also built on features of war

reparations that had emerged in the aftermath of World War II and developed an ambitious institutional structure for the management of an incredibly wide range of claims that has itself proved to be a source of the further development of international law regarding war reparations.

29 The success of the Council's action in relation to Iraq–Kuwait war reparations lies in the use of sequestered Iraqi oil revenues to ensure payment of the reparations and the creation of a very sophisticated UN compensation commission to ensure the appropriate allocation of reparation payments to a wide range of victims of the war. Whereas previous Security Council resolutions had merely requested that a Member pay reparations, requests that had gone unheeded, resolutions 687 and 692 effectively organized the actual payment of reparations by requiring oil revenues, brought under UN control through the oil-for-food programme, to be paid into a separate UN compensation fund and providing for (further) trade sanctions in the case that they were not. Iraq's liability under international law for the damage caused was decided *ex ante* by the Security Council and its standing to contest claims made before the UN Compensation Commission (United Nations Compensation Commission[UNCC]) was severely limited. The Security Council had brought such weight to bear that Iraq had little choice in the matter and has since paid out in excess of US\$34 billion in reparations. In keeping with the first charge principle that had emerged in war reparations practice after World War II, the Council had been careful to adjust the amount of the Iraqi oil revenue to be directed to the fund to Iraq's ability to pay, seeking advice as to the correct percentage to sequester from the Secretary-General who factored in Iraq's civilian import needs and debt servicing obligations—beginning at no more than 30% and subsequently being reduced through 25%, to 5% since 2003.

30 However, the UN Compensation Fund and Compensation Commission system for reparations was not merely an innovation in terms of enforcing the payment of war reparations, but also in how they were assessed and managed. Whereas war reparations had traditionally dealt only with claims made by States, the UNCC not only accepted, but also appeared to prioritize, claims made by individuals. Then, where other war reparations commissions had been created by and for the victors of the relevant war (Mixed Claims Commissions), the UNCC was a truly international body for the benefit of all non-Iraqi victims, regardless of the role played by the particular victim's State in the conflict. With the issue of Iraqi responsibility under international law having already been decided, the Commission had a less judicial and more technical approach to its work than had been the case with earlier claims commissions including those such as the Iran–US Claims Tribunal (Iran–United States Claims Tribunal), decision making powers being shared between Panels of Commissioners examining specific cases and a Governing Council establishing general principles and possessing ultimate decision making authority. The enormous number of claims, estimated at close to 2.7 million at last count, also prompted procedural innovations, particularly as regards the categorization of claims according to their urgency, amount, on whose behalf they were brought, and in relation to what kind of damage—categories for which even different standards of proof were explicitly used. Finally, the various Security Council resolutions and abundant practice of the UNCC also influenced, as will be further discussed below, the development of international law applicable to war reparations in relation to specific issues such as attribution, causation, and remoteness.

31 The views of the five permanent members of the Security Council were somewhat less united in respect of conflicts that took on an international dimension after the Iraq–Kuwait war than they had been when they established the reparations regime for that conflict. Indeed, splits among the permanent five meant that the Council could not play as central a role in the conflicts in the Former Yugoslavia (Yugoslavia, Dissolution of), the Iraq war from 2003 (Iraq, Invasion of [2003]), or the Russia–Georgia crisis which broke out in 2008 as it had done in the wake of the Iraqi invasion of Kuwait in 1990.

32 If raised at all, war reparations claims were therefore addressed not by the Security Council, but merely bilaterally and, in relation to several conflicts, ultimately before the International Court of Justice. War reparations have been sought before the Court by the major protagonists in the Balkan

conflicts of the 1990s. Bosnia demanded financial compensation for wartime damage in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro), but the Court decided that 'financial compensation [was] not the appropriate form of reparation for the breach of the obligation to prevent genocide' because Bosnia had failed to prove 'a causal nexus between the Respondent's violation of its obligation of prevention and the damage resulting from the genocide at Srebrenica'. Croatia's similar claim against Serbia passed the preliminary objections phase, but is still undecided on the merits and now finds itself subject to a Serbian counter-suit seeking reparations for the damage caused by Croatian forces during World War II. Financial compensation was also sought by Georgia in its recent case regarding Russian military operations in South Ossetia and Abkhazia, but this claim failed when the Court found that it did not have jurisdiction to hear Georgia's case in April 2011.

C. Applicable Legal Framework

1. The Legal Foundations of the Obligation to Pay War Reparations

33 Pre-20th century war reparations were more closely linked to a victor's right to plunder the resources of the vanquished than to any notion of a remedy for an internationally wrongful act. As the 'spoils of war', the combatants' post-conflict wealth fell largely into the hands of the victor, not of the victim State which had been wronged. Over the last hundred years, however, wealth transfers occurring after war have increasingly come within the general framework of international law and, more specifically, the law of State responsibility.

34 Within this framework, the payment of reparations is traditionally linked to responsibility for the outbreak of war in general under Art. 2 (4) United Nations Charter and the customary international law prohibition on the use of force in the settlement of international disputes. Responsibility is assigned to the 'aggressor' and the payment of reparations required in respect of the entirety of the damage produced by the conflict that State is deemed to have caused. In the Iraq-Iran war, for example, the Security Council placed the issue of the international legal responsibility for the conflict in general at the centre of concurrent diplomatic negotiations, by requesting 'the Secretary-General to explore... the question of entrusting an impartial body with inquiring into responsibility for the conflict' (Security Council Resolution No 598 [1987] para. 6). The Council took a similar approach in affirming unequivocally that Iraq was subject to '*liability under international law* for any direct loss, damage... or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait', but has also indicated that a right to claim war reparations may find its source in any, even smaller and isolated, internationally wrongful uses of force (Security Council Resolution 687 [1991] para. 16).

35 Today, those seeking war reparations increasingly rely upon breaches of international law occasioned not by the waging of war itself, but the manner in which it is waged, so-called violations of the *jus in bello*. The claims for compensation in the genocide cases brought against Serbia in the International Court of Justice constitute examples of war reparations claims based on such violations even if a claim to monetary reparations sometimes appears less justifiable in relation to such violations. While such reliance on *jus in bello* violations often seems to have been required by the narrow jurisdictional bases being pleaded, such as the Genocide Convention and the Convention on the Elimination of all Forms of Racial Discrimination in the subsequent ICJ dispute between Georgia and Russia case, it may also reflect a shift toward a more broadly-based right to monetary war reparations in contemporary international law. Indeed, the 2012 judgment of the Court in the *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, by considering for unrelated reasons whether the obligation to pay war reparations in respect of violations of international humanitarian law was *ius cogens*, may be read as implying that there is a norm of international law requiring the payment of reparations in such instances, even if it is clearly

not a peremptory norm.

36 State practice accordingly shows that, under contemporary international law, war reparations will be available both to a State subject to another State's aggression or wrongful use of force and in situations where overall responsibility for the conflict is unclear but breaches of international law occurred in how the acts of war were carried out.

37 This conclusion is supported by the general law of State responsibility of which the obligation to pay war reparations is ultimately an application (State responsibility). Under the law of State responsibility, the obligation to make reparation arises as a corollary of an internationally wrongful act (Art. 31 ILC Articles on State Responsibility) and these may include both violations of the prohibition on the use of force and violations of international humanitarian law.

2. Individuals' Rights to Claim War Reparations

38 The general international law right to reparations and State practice specifically in relation to war reparations vests the power to claim reparations solely in the State. This complicates the possibility of individual claims to war reparations on the basis of human rights violations occurring during wartime. Under the general rules of diplomatic protection (see further the ICJ's 1970 judgment in the *Barcelona Traction Case*), the State is entitled to forgo its right to war reparations thereby depriving its citizens of any international legal right against the foreign State. Different instances of war reparations programmes, however, have recognized the right of certain categories of individuals to make claims in their own right, including the war reparations awarded by the UNCC or the Mixed Arbitration Tribunals established by the Treaty of Versailles.

39 It remains difficult to assess the impact of the emergence of international human rights law on the international legal situation regarding war reparations. Indeed the predominant view of the doctrine on this issue holds that the situation has not changed with respect to what McNair wrote concerning post-conflict settlements in 1948, namely that 'it appears that international law treats a State as being invested for international purposes with complete power to affect by treaty the private rights of its nationals, whether by disposing of their property, surrendering their claims, changing their nationality or otherwise'. State practice in the aftermath of WWII is consistent with this view, as the Italian renunciation of 'all claims of any description against the Allied and Associated Powers on behalf of the Italian Government or *Italian nationals*' (Art. 76 (3) Peace Treaty with Italy) has confirmed. It seems that general international law currently accepts such a principle, the scope of which is today somewhat narrower, because States' renunciations are not considered admissible with regard to damage deriving from a violation of a norm of *iuscogens*.

3. The Modalities of War Reparations

40 While the obligation to pay war reparations is a sub-species of the general obligation to make reparation under State responsibility law, the specific modalities of the payment of those reparations is a sub-species of the general international law that has developed in respect of reparations.

41 In many respects, the modalities for the award and payment of *war* reparations mirror those of the international law of reparations in general. This is particularly clear in relation to the *form* of war reparations. The International Court of Justice's 2007 decision on reparations claimed by Bosnia after the Balkan War, for example, only gave satisfaction in the form of a declaration in the judgment that Serbia failed to comply with the Convention obligation to prevent the crime of genocide. In keeping with the orthodoxy on the payment of reparations under general international law, this was considered the appropriate form of reparation on the basis that it had not been established that Serbia's breach had caused any material damage capable of raising any obligation to make restitution or pay compensation.

42 In other respects, the precise modalities of war reparations may, according to leading contemporary authors on the international law applicable to war reparations, diverge from that of general reparations and State responsibility law (see eg d'Argent; Gattini). The scope of the damage in respect of which a responsible State is required to pay reparations, the types of damage in respect of which a victim State can claim reparations, and the test for causation linking the internationally wrongful act to such damage are most often cited in this regard because State practice appears to have made allowances in these respects for the *sui generis* nature of war. The 'first charge' principle invoked throughout the 20th century to adjust reparations payments according to a State's capacity to pay and the strict 'direct loss' formula used by the Security Council when it established the UNCC constitute instances of such State practice.

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