ÅBO AKADEMI – FACULTY OF SOCIAL SCIENCES, BUSINESS AND ECONOMICS
Abstract for Master´s Thesis

Subject: Public International Law, Master´s Degree Programme in International Human Rights Law
Author: Sara Kärnä

Title of the Thesis: The right to reparation for conflict-related gender-based violations of international law – The individual's right to reparation in international humanitarian law and human rights law applicable in Africa

Supevisor: Catarina Krause

During armed conflicts, gender-based violence is commonly used as a method of warfare, and women and girls disproportionately make up a majority of the victims. International humanitarian law, regulating the two parties of a conflict, has for long remained a body of law that has not addressed individual rights. Though arguments towards a more victim-centric interpretations have emerged, an individual right to reparation for violations of international humanitarian law still remains to be enforced. Determining, to what extent the existing human rights mechanisms are able to contribute to the realisation of victims' rights during armed conflicts is therefore in place.

The thesis looks into the right to reparation in the International Covenant on Civil and Political Rights, and the African regional human instruments, most importantly the African Charter on Human and Peoples' Rights. The regional human rights instruments may best address the needs and charachteristics of a specific region, due to which a comparison will be drawn between regional bodies that have developed significant jurisprudence on reparations; the Inter-American Commission and the Court of Human Rights.

Though the case law of both the African Commission and the Court and the Human Rights Committee have confirmed the existence of the right to reparation and have utilized their respective treaty provisions in order to award individuals with reparations, a solid and accomplished jurisprudence on the actualisation of the right to reparation in armed conflicts cannot yet be detected. The Inter-American Court has taken significant steps in creating sustainable standards for state responsibility for violations of human rights, specifically on terms of gender-based violence. Similar obligations to prevent, investigate and provide reparations for violations of human rights can be identified in the jurisprudence of the African Commission, but to a lesser extent. The obligation to investigate is, however, essentially interlinked with the obligation to provide reparations, through which the obligation to repair can been seen as strengthened on the African continent. Instruments such as the Maputo Protocol are moulding the bigger picture towards a more seamless interplay between the two regimes. The acknowledgements about the existence of a right to reparation have very likely contributed to the number of initiatives and resolutions on the topic.

Key words: reparation, armed conflict, gender-based violence, international humanitarian law, international human rights law

Date: 16.1.2020

Number of pages: 81
Number of words (excl. bibliography and annexes: 27 525

The abstract is approved as a maturity test:

MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

Sara Kärnä

THE RIGHT TO REPARATION FOR CONFLICT-RELATED GENDER-BASED VIOLATIONS OF INTERNATIONAL LAW – THE INDIVIDUAL'S RIGHT TO REPARATION IN INTERNATIONAL HUMANITARIAN LAW AND HUMAN RIGHTS LAW APPLICABLE IN AFRICA

Master's Thesis in International law and Human Rights
Master's Programme in International Law and Human Rights
Supervisor: Catarina Krause
Åbo Akademi
2020

Table of contents

List of abbreviations

AP I-II	Additional Protocols I and II to the Geneva Conventions of 1949
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on Elimination of All Discrimination Against Women
GBV	Gender-based violence
IAC	International armed conflict
ICC	The International Criminal Court
ICCPR	The International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
IHRL	International human rights law
HRC	Human Rights Committee
NIAC	Non-international armed conflict
GC	Geneva Convention of 1949

1 INTRODUCTION

1.1 Background to the study

Societies emerging from eras of conflict and repression need to address past mass violence and human rights abuses in order to establish sustaining peace. Armed conflicts place populations in particularly vulnerable positions, the people most affected by the armed conflict typically being among the most vulnerable in society.[1] Although steps forward have been taken in the protection of the individual in situations of armed conflicts, in reality, individuals still continue to suffer at the hands of abusive governments and other actors, such as armed groups. The high prevalence of gender-based violence (GBV) has been documented in various conflict-related contexts.[2] The underlying acceptance of violence, particularly against women, existing within many societies, seems to become more outwardly acceptable when conflicts shatter the ordinary, every-day life of people.

Gender-based violence can be considered any harmful act directed against individuals or groups of individuals on the basis of their gender and it can be translated into a violation of human rights or a form of discrimination.[3] Although men and boys are also targets of GBV, it is women and girls that still disproportionately make up a majority of the victims of gender-based violence in conflicts.[4] During armed conflicts, e.g. sexual violence is commonly used as a method of warfare to instil fear, to humiliate, control, disperse and/or forcibly relocate civilian members of an ethnic group or a community.[5]

---

[1] Evans (2012) p. 137.

[2] Committee on the Elimination of Discrimination against Women, General Recommendation No. 30 (2013), para. 39.

[3] The Istanbul Convention, Article 3. Gender-based violence can translate into human rights violation as a breach of prohibitions of discrimination, found in several human rights instruments such as CEDAW. Another provisions found in human rights conventions, under which violations may fall, are e.g. the International Covenant on Civil and Political Rights articles 6 (right to life), 7 (right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment), 8 (right not to be subjected to slavery or forced labour), 9 (right to liberty and security of the person), 10 (right of all persons deprived of their liberty to be treated with dignity) and article 17 (right to private and family life), articles 2, 3 and 18(3) of the African Charter on Human and Peoples' rights and article 2 in the Protocol on the Rights of Women in Africa (the Maputo Protocol).

Gender-based violence may include sexual violence, domestic violence, trafficking, forced or early marriage and harmful traditional practices. See Inter-Agency Standing Committee (2005) 'The Guidelines for Gender-Based Violence Interventions in Humanitarian Settings', See also the Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992) and Articles 1 and 2 of the UN General Assembly Declaration on the Elimination of Violence against Women (1993).

[4] Report of the Office of the United Nations High Commissioner for Human Rights (2014). p. 3. Para. 5.

[5] UN-Women (2012), p. 2.

Addressing GBV as a human rights matter establishes legal obligations to states and therefore compels states to prevent such violence, to punish perpetrators and furthermore, to provide the individual with access to effective remedies and reparation through human rights mechanisms.[6]

Reparations are growingly brought up in dealing with the aftermath of conflicts as the attention has started to shift towards a more victim-centred approach in the realm of international law. While acts of gender-based violence may account to crimes under customary international law, in addition to crimes under the Rome Statute and breaches of i.e. the Geneva Conventions, the dichotomy of modern conflicts poses a challenge in the search for accountability. When it comes to violations perpetrated during non-international armed conflicts (furthermore, NIACs), holding perpetrators accountable and proving the violations committed by e.g. armed groups is difficult, let alone issuing binding decisions on providing victims with reparations. Understanding individuals' rights in the realm of conflicts is the first step in addressing the needs of a victim.

Reparation efforts have historically overlooked women's and girls' needs and concerns. However, in recent years there has been an increase in recognition of the need for, and potential of, reparations acknowledging the gendered nature of violence.[7] A study on the first decision the Trial Chamber of the International Criminal Court (furthermore, the ICC) issued on reparations, the *Lubanga* case, illustrating the operation of the reparations regime, shows that the ICC's reparations mandate will have little value for victims of sexual and gender-based violence unless gender injustices are recognised at each and every stage of the investigation and trial process, and pursued with adequate resources.[8] The ICC has also yet to come with an outcome pronouncing specifically on gender-based crimes and reparations for them.

Effort on the reinvigoration of the existing international humanitarian law (furhermore, IHL) mechanisms have been suggested in search for accountability,[9] as scholars are

[6] UN Secretary-general (2016) para. 39.
[7] Progress has been made on the conceptual level, demonstrated by e.g. the Nairobi Declaration Women's and Girls' Right to a Remedy and Reparation (2007) and by the Special Rapporteur on violence against women (VOW) advocating for gender-sensitive reparations for conflict-related sexual violence in e.g. the Report of the Office of the United Nations High Commissioner for Human Rights (2014).
Reparations have the potential to facilitate the rebuilding of women's lives: para. 3 of the declaration states that 'reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights predate the conflict situation'
[8] Chappell (2017) p. 1228, 1236.
[9] ICRC (2003) p. 60.

increasingly arguing that the traditional legal construct, considering IHL as a regime regulating merely the two parties of a conflict, is no longer perfectly accurate and that an individual right to reparations for violations of IHL is emerging.[10] Since human rights mechanisms were not especially designed to respond to the needs of armed conflict victims, it is evident that their ability to answer to their needs is not comprehensive. Keeping this in mind, determining, to what extent the existing human rights mechanisms are able to contribute to the realisation of victims' rights, as well as a study of the interpretation of IHL regarding individual rights is in place.

1.2 African conflicts and reparations

Numerous armed conflicts take place on the African continent, and an increasing proportion of the actors involved in peacekeeping operations on the continent are African. Yet scholarly writing on the regulation of these conflicts lags behind.[11] The ICC has largely, yet not without criticism, focused its attention on African conflicts, and while intervention on the continent may be justified, it has also been accused of taking on cases that were already being addressed by the national courts.[12] Bearing in mind the ICC's role as a court of last resort, the main focus in the efforts towards effective realisation of a victim's rights should therefore lie elsewhere. Therefore, it seems useful to examine what are the possibilities of victims of gender-based violations of human rights and humanitarian law to obtain reparations, based on the regional human rights instruments, as well as the International Covenant on Civil and Political Rights (furthermore, the ICCPR).

Addressing gender-based violence has historically not been easy in communities and traditional settings that however, from the point of view of an individual, hold significant cultural authority in Africa. Additionally, formal justice systems may in principle offer redress for women, but they will likely face many barriers in accessing them.[13] Studies have shown that formal and traditional justice seem to have little or no coordination or synergy in their functions, and that very few women actually even access the formal justice systems.[14] Though traditional justice systems run in communities are generally more accessible to women, they may be biased against them. No perfect sys-

[10] See, International Law Association (ILA) (2010). See also Schwager, 'in Kolb and Gaggioli (eds.) and Gaeta (2011) in Ben-Naftali (ed.) p. 318.
[11] Hailbronner (2016) p.339.
[12] See i.e. discussion on the ICC Forum from March 2013 to January 2014.
[13] See i.e. International Center for Research on Women – Gender-based Violence Prevention Network – South African Medical Research Council (2012).
[14] See i.e. Bafaki (2011).

tem seems to exist in terms of addressing gender-based violence. Furthermore, Evans has previously noted that the issue of reparations has for the time being not received sufficient attention in the jurisprudence of the African Commission on Human and People's Rights (furthermore, the African Commission) either. In some cases, dealing with serious violations of human rights, the issue of reparations has not even been addressed.[15] The Inter-American Court and Commission on Human Rights have on the contrary succeeded in creating a notably consistent jurisprudence on reparations.[16]

The existence of regional human rights instruments as well as quasi-judicial, or non-judicial mechanisms may resonate better in local conditions than global, universal ones. Regional systems may offer different degrees of flexibility and room for on the ground-mechanisms such as commissions and local forms of justice. It seems helpful to study whether there in fact is a difference of approach between the regional instruments and the ICCPR. As a universal instrument the ICCPR represents the recognition of basic rights and fundamental freedoms inherent to all human beings, regardless of geographical location or citizenship. By reviewing the protection awarded by the ICCPR and the African regional instruments, the thesis aims to discover the extent to which the individual in Africa can access reparations for gender-violence, in a conflict setting. To draw a comparison with a more developed reparations regime and between two regional systems, the African regional norms will therefore be compared to the Inter-American regional human rights system. Due to the well-developed jurisprudence in the area of reparations in the Inter-American system, a comparison between the available African regional instruments and the Inter-American Instruments is particularly interesting. As regional instruments the both two systems hold the potential to address issues of regional nature. As the Human Rights Committee's contributions to the realm of reparations largely arise from its concluding observations and do not have a regional focus, the comparative analysis focuses on the case law of the African and the Inter-American regional systems.

1.3 Research question

This thesis examines the individual's right to reparation in an armed conflict for gender-based violations of international humanitarian law and international human rights law in Africa. The main question the thesis seeks to clarify, whether there is a legal basis for a right to reparation for an individual victim of gender-based violations occurred during

[15] Evans (2012) p. 77.
[16] Evans (2012) p. 36.

an armed conflict. This question can be approached by breaking it down into two sub-questions; does international humanitarian law grant the individual a right to reparation for gender-based violations, e.g. grave breaches of the branch of law? Is international human rights law able to provide an individual victim of gender-based, conflict-related violence a right to reparation in the context of an armed conflict in Africa?

The study will first (Chapter 2) look at the individual's position in international humanitarian law, identifying the influence of international human rights law on the individual's position in the domain of international law in general. After this, the chapter will discuss the interaction between IHL and international human rights law (furthermore, IHRL), and their influence in interpreting the bodies of law. Chapter 3 establishes the different ways in which the African Commission and the Human Rights Committee have read IHL into human rights law provisions and seeks to clarify the impact on the individual. Chapter 4 discusses the positions the treaty bodies have taken on the right to reparation for gender-based violations of human rights. The chapter draws a comparison between the application of the African Charter and its Protocols and the Inter-American Convention in order to clarify how the regional instruments differ in their approach to reparations for gender-violence in armed conflicts.

1.4 Limitations

The thesis takes as a starting point the previously mentioned lack of significant developments in the ICC regime in awarding gender-sensitive reparations for victims on the African continent. Also, since the thesis focuses on the relationship between IHL and IHRL, and the applicability of IHRL in armed conflicts, it will therefore not take into consideration the contributions of other international criminal tribunals and quasi-judicial bodies. While using the other international human rights treaty bodies as a means to compare and contrast the findings of the research, the focus will be on the African human rights mechanism and the International Covenant on Civil and Political Rights.

The thesis will not in detail elaborate on the content of reparations, but will address them as a whole. Furthermore, the role of reparations and their ability to reach the intended goals they were meant to reach will not be discussed. The question of the 'transformative' nature of reparations, a highly topical conversation on the effects of reparations on the roots and causes in the society leading to gender-based violations, is therefore also out of the scope of this paper. The thesis will also not focus on the effects of whether it is a group or an individual that is lodging the complaint since The African

Charter and the Optional Protocol to the International Covenant on Civil and Political Rights as well as the American Convention on Human Rights allow for individual complaints regarding violations of the respective conventions. Differentiating between group and individual complaints is outside the scope of the thesis since the focus will be on the right to reparation, not the content of them.

1.5 Method and sources

The main legal sources in international humanitarian law utilized in the paper consist of the Hague Convention (IV) on the Laws and Customs of War on Land of 1907, the Geneva Conventions (GC I–IV) and their Additional Protocols I and II. Additional sources include the case law of the International Court of Justice and its predecessor and the International Committee of the Red Cross (furthermore the ICRC) customary international humanitarian law study. In international human rights law, since the United Nations is considered the main norm-creator for Africa, the role of the United Nations treaty bodies and their jurisprudence is compared with the jurisprudence of the African Commission and the Court applying the African Charter, most importantly the International Convention on Civil and Political Rights and the Human Rights Committee as its monitoring body.[17] Cases referring to or drawing from IHL will particularly be considered. The jurisprudence of the Inter-American Court and Commission regarding reparations for gender-based violence will be discussed as a comparison to understand the regional differences in the jurisprudence related to gender-based violence and the responsibility of the state for violations of gendered nature.

More specific to gender-based violence, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, better known as the Maputo protocol will be discussed as an instrument specifically addressing violence against women in armed conflicts. Relevant international case law outside of the African context will be referred to as examples of the pre-existing interpretation of the relevant rules of IHL and human rights law for this study, since the rules of IHL haven been invoked regionally under relevant human rights law provisions included in human rights treaties. The ILC articles on State Responsibility for Internationally Wrongful Acts[18] are taken into consideration as a source providing general guidance addressing basic issues of responsibility and remedy, irrespective of the primary or substantive rules they may be applied to. Their relevance for the purpose of this study is based on their efforts to

[17] Viljoen (2011) p. 191.
[18] International Law Commission 2001

track the current state of international law in order to encourage the progressive development of international law and its codification.[19]

Christine Evans's study on the right to reparation in international law for victims of armed conflict[20] provides a basis on which the question of reparations will be discussed. As a thorough examination of the right to reparations in armed conflicts, including different types of reparations, Evans's study allows this thesis to focus on narrower subject, reparations for gendered violence. Hampson[21], Todeschini[22] well as Droege[23] and Hailbronner[24] have contributed to the discussion on the relationship between international human rights law and IHL from the point of view of human rights instruments, while also covering the practical overlap between IHL and human rights law. While Todeschini effectively points out the questions evoked by the International Court of Justice (furthermore, the ICJ) statements on the relationship between IHL and human rights law, Hampson focuses on the treaty body perspective, providing insight on the question of the concurrent applicability of IHL and human rights law. Her analysis on the different possibilities in interpreting the relationship of the two bodies of law provides a frame in which the interpretations of the treaty bodies will be observed. Furthermore, Todeschini's fairly recent assessment of the normative and practical implications of the Human Rights Committee jurisprudence, pointing out both challenges and merits, is considered a prominent voice in the analysis. Droege, highlighting the complementarity on the two bodies of law, shows evidence of the influence of human rights law on IHL by pointing out the detailed, yet less protective provisions of IHL, in comparison with human rights law. Her arguments provide a more practical view on the right to reparation, though ending up creating expectations towards the reparations regime of the ICC. As African contributors, Hailbronner and Viljoen[25] mostly concentrate specifically on Africa. Viljoen characterizes the African regional approach to the relationship between IHL and human rights law as interpretative, providing a wide analysis of the affairs affected by the relationship and setting the stage for further research.[26] Following Viljoen, Hailbronner seeks to analyse the jurisprudence of the African regional bodies in a global context, providing a basis for the thesis to continue in terms of

[19] The UN Charter, Article 13 (1) (a)
[20] Evans, Christine (2012)
[21] ICRC, University of Essex, Department of Law and Human Rights
[22] Aarhus University, University of Trento
[23] The Red Cross, University of Jerusalem
[24] Humboldt Research Fellow, Institute for International and Comparative Law, University of Pretoria, South Africa
[25] Lecturer of Law, University of Pretoria, South Africa; MA LL.B (Pretoria), LL.M (Cantab), LL.D (Pretoria).
[26] Viljoen (2014) p.314.

reparations. Celorio's[27] both historical and matter-specific study on the Inter-American Court's approach on reparations and gender offers a point of reference for comparative analysis in the last chapter of the thesis.

[27] Human Rights Specialist, Special Rapporteurship on the Rights of Women, Inter-American Commission on Human Rights; Professional Lecturer in Law, George Washington University Law School. The views expressed are solely those of the author and do not necessarily reflect the views of the Inter-American Commission on Human Rights, the Secretary General of the Organization of American States, or the Organization of American States.

2 REPARATIONS IN IHL AND HUMAN RIGHTS LAW APPLICABLE IN AFRICA

2.1 IHL primary rights

In international law, the right to reparation is generally viewed as a secondary right connecting to a primary, substantive right that has been breached.[28] In order to find out to what extent individuals are granted a right to reparation under IHL it first needs to be established whether they actually have primary rights under IHL and secondly, upon the occurrence of a breach of a primary right, whether an individual has the right to claim reparation under the same branch of law.

As humanitarian rules were originally designed to apply in relationships between states in the form of prohibitions, the notion of 'rights' was not clearly defined. Whether individuals possess rights under the law of armed conflict and can be considered as possible victims depends on if they can be considered beneficiaries of IHL rules. According to Zegveld, the simple recognition of victims of violations of international humanitarian law itself already presupposes the existence of individual rights of victims in IHL.[29] Traditionally considered, individuals have indeed been the beneficiaries of the regulations, but not holders of claims, as they were afforded protection as objects, without being the subjects holding rights.[30] It has been argued that most of IHL provisions generally address states parties to the Convention, providing them with duties of protection without the reference to 'rights'.[31] It has also been argued that many of the treaty provisions relating to the conduct of hostilities are worded as 'prohibitions' concerning the belligerent parties, rather than actual rights granted to specific persons.[32] Based on these observations, it has been considered that the individual under these provisions is a mere indirect beneficiary of the obligations, which are addressed to the parties to the conflict, and which grant the analogous rights only to the belligerent parties.[33]

However, established the traditional interpretation of IHL has been, references to 'rights' can be found in IHL. The 1949 Geneva Conventions explicitly confer 'rights' to

[28] Zegveld (2003) p.503.
[29] Zegveld (2003) p.503.
[30] Peters (2016) p. 194.
[31] Bilkova (2007) p. 1, Peters (2016) p.194.
[32] Gaeta (2011) p. 318, in Orna Ben-Naftali (ed.), Peters (2016) p. 194. As an example, article 51, para 2, of AP I.
[33] Gaeta (2011) p. 319, in Orna Ben-Naftali (ed.).

protected persons[34] and a number of rules refer precisely to concepts such as 'rights', 'entitlements' or 'benefits', pointing towards an individual rights holder.[35] The multiple references to individual rights within the IHL framework date to a time after the 1907 Hague Convention, to which the origin concept of reparation in IHL has been traced.[36]

Kleffner argues that one can identify rules containing elements of individual benefits in IHL, even without concentrating on specific provisions as examples. As an example, the grave breaches provisions could be analysed as conferring individual humanitarian rights against acts such as wilfully causing great suffering or serious injury to body and health or torture or inhuman treatment.[37] Kleffner professes that the same holds true for norms applicable in non-international armed conflicts, such as humiliating and degrading treatment and the prohibition of violence to life, stipulated in Common Art. 3 and Art. 4 of Additional Protocol II.[38] Whether these elements could provide a foundation for an individual claim is, however, a different question altogether.

Referring to the development of contemporary international law, under which individuals are no longer considered as 'objects' of rights accruing only to states, Gaeta proposes an affirmed standing for individuals as holders of primary rights. Accordingly, it would be mindless to affirm that this position as a rights holder would dissolve in a situation when their need for protection against abuse 'reaches its peak' and they are the most vulnerable, namely during armed conflicts.[39] Furthermore, Gaeta refers to art. 7 of GC I, II and III and art. 8 of GC IV which articulate that the protected persons can 'in no circumstances renounce in part or entirety the rights secured to them in the Conventions.'[40] These have been referred to as 'non-disposal clauses' by Peters; indicators clarifying the intention of the Contracting Parties to indeed lay down individual rights directly by the Conventions themselves, not only after domestic enactments by the contracting parties.[41] Even though the power to renounce legal positions (rights) has been

[34] Articles such as Art. 7 and 8 common to the four Geneva Conventions of 12 August 1949 give protected persons explicit rights. Prior to that, in the 1929 Convention relative to the Treatment of Prisoners of War, the concept of "rights" appears in several provisions of the Convention, such as arts. 42 and 62.
[35] Zegveld (2003) p.503
[36] As an example, Article 6 of the second Geneva Convention addresses the wounded, sick and shipwrecked persons with the right not to be adversely affected by any special agreement between the High Contracting Parties, and not to have their rights conferred by the Convention restricted. Other articles providing individuals with rights are articles such as Article 7 of the GC I, Articles 7, 14, 84, 105 and 130 of the GC III, Articles 5, 7, 8, 27, 38, 80 and 146 of the GC IV, Articles 44(5), 45(3), 75 and 85(4) of 1977 AP I; and Article 6(2) of 1977 AP II.
[37] GC 1 Art. 50, GC 2 Art 51, GC 3 Art 130, GC 4 Art. 147, AP 1 Article 11, AP 1 Article 85.
[38] Kleffner (2002) p.244–245.
[39] Gaeta (2011) in Ben-Naftali (eds.) p. 319.
[40] Gaeta (2011) in Ben-Naftali (eds.) p. 319, Art. 7 of GC I, II and III and art. 8 of GC IV.
[41] Peters (2016) p. 196.

considered as evidence of these positions actually belonging to that person, this logic should be overlooked in this situation. The reason behind conferring protected persons rights accompanied by non-disposal clauses i.e. not allowing the protected person decide themselves when the provisions should be applied or not, was to limit a state's possibilities to interfere and exercise their sovereignty. Since the persons concerned are typically put under pressure to renounce their rights, the non-disposal clauses would be in place to take the incentive away from states from exercising coercion e.g. with prisoners of war.[42]

National courts have addressed the question on individual rights granted by IHL. In the *Bridge of Varvarin case* by a German civil court in Bonn the Court held that in contrast to conferring rights, IHL offers 'protection' to the individual.[43] The Court compared IHL to human rights law conventions, asserting that there are no similar provisions in IHL granting an individual a procedural right to obtain compensation for the consequences of an armed conflict. In the Netherlands, the Amsterdam District Court, while rejecting the applicant claim, recognized the possibility of tracing individual rights from the rules of IHL, although confining the right to personally invoke those rights.[44] In general, the difficulty before national courts has risen with the recognition of the right to present a claim towards a state responsible for violations of international humanitarian law.[45] Quénivet argues that the assertion of the civil court in Bonn ignores the existing, although few, legal opportunities to obtain redress on the national level, referring to e.g. to the growing number of individuals seeking redress of IHL violations nationally under human rights provisions.[46]

As developments towards a more victim-centric approach to reparations are yet to be properly detected and pronounced upon by the courts, the instruments providing guidance and presentiment of the direction the law is headed, are growingly recognising the individual.[47] As an example, Evans argues that instruments such as the Basic Principles

[42] Peters. (2016) p. 197.
[43] *Bridge of Varvarin case* – OLG at para.2863. On the decision see Quénivet (2004)
[44] Dedovic v. Kok et al., para. 5.3.22.
[45] See e.g. the Federal Constitutional Court of Germany in *the Case concerning jurisdictional immunities* para. 38a., and the formerly mentioned *Bridge of Varvarin case*, 2 November 2006, para 10a), where the Court states: 'to this day only the State of nationality is liable for claims of compensation based on unlawful acts of a foreign state against its citizens, in spite of the development of the level of protection of human rights which resulted in the recognition that individuals could partly be subjects of international law and to the establishment of individual claim cases based on treaties'.
[46] Quénivet (2004) p.183–184.
[47] E.g. The United Nations Commission on Human Rights has recognized the interests of victims of IHL violations. See also the 'The Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law', aspire to strengthen the provision of victims of violations of human rights and IHL with a right to a remedy.

and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law clearly aim to merge IHL and human rights law and stress the importance of and the obligation to implement domestic reparations for victims of armed conflicts.[48] Considering the growing voice according to which IHL must be interpreted in the light of the development of international law in the field of human rights[49], the question of the secondary right to reparation and its existence in IHL deserves an inspection.

2.2 IHL secondary right to reparations and claims under IHL

If it can be concluded that individuals enjoy primary rights under IHL, as a natural consequence of that, the violation of those rights entitles them to the secondary right to reparation under international law.[50] A party is responsibility to provide compensation for a breach of its obligations under IHL was explicitly laid down in the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land.[51] A similar requirement is articulated in Article 91 of Additional Protocol to the Geneva Conventions.[52] Each of the Conventions establishes that no High Contracting Party shall absolve itself or any other High Contracting Party in respect of grave breaches of the Conventions.[53] Given the PCIJ statement in the *Chorzow Factory case*[54]*,* Gillard notes that the obligation to make reparations automatically arises, without a need to be explicitly spelled in a convention. The rule, according to scholars, represents customary international law and the accepted principle of state responsibility, which is also recognised as customary international humanitarian law by the ICRC.[55] Although the Hague Convention and the Additional Protocol I use the word compensation, reparation for IHL violations may take different and multiple forms, envisaged in other IHL conventions.[56]

Who was originally meant to be the beneficiary entitled to compensation according to article 3 of the Hague Convention of 1907 has been widely discussed. In accordance

[48] Evans (2012) p. 5.
[49] Gaeta (2011) in Ben-Naftali (eds.) p. 319.
[50] Gaeta (2011) in Ben-Naftali (eds.) p. 320.
[51] Article 3 of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land.
[52] See Article 91 of the AP I.
[53] Arts. 51, 52, 131 and 148 of the Four Geneva Conventions I–IV.
[54] See Chorzow Factory case para 73.
[55] See Sandoz etl al. (eds.) (1987) para. 3645–3661and Henckaerts, J., et al. (2005).
[56] Gillard (2003) p. 532-533. References to other forms of reparations can be found e.g. in the Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (Article 3 mentions the return of unlawfully taken property as restitution.)

with a less prevalent view, Kalshoven has argued that the traveaux préparatoires of Article 3 of the Hague Convention IV prove that the provision had originally been intended to address a state's liability to compensate individual persons for their losses incurred as a direct consequence of detrimental contact with its armed forces.[57] He sees civilians as the sole benefactors of the article because it seems unlikely that the article would have been meant to cover *all* acts contradicting the provisions. Since it seems highly unlikely that article 3 was designed to cover combatants' complaints, say, of forbidden methods of warfare, it seems justifiable to assume the enemy and neutral civilians as the intended benefactors of the article.[58] According to Kalshoven, the text of the Convention goes even further when considering the annexed regulations and the intent behind them. Articles 52 and 53 of the Regulations[59] refer to the obligation of a hostile power to pay indemnities in respect of requisitions demanded from the civilian population for the necessities of the army occupation, at the conclusion of peace. He highlights that neither of these provisions refer to any unlawful conduct but in contrast seem to deal with situations where the requisitions were in place. This would point to an early attempt to restrain the enemy army's possibility to freely "live off the land" without compensation.[60] Even though the regulations are not considered as the letter of the law, the intent to address individuals can be detected from them, as they are a complementary part of the Convention.[61]

ICJ Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian territory of 2004 however affirmed the duty of a state to provide restitution and compensation for individuals having suffered as a result of the construction of the wall.[62] In the operative part of the Advisory Opinion, the Court held that Israel had an obligation to provide reparation for all damage caused by the construction of the wall, as a result of the violations of international law.[63] The Court identified the beneficiaries of the reparations as it held that Israel had the obligation to make reparation for the damage caused "to all the natural and legal persons concerned".[64] Gaeta points out that the Court had admittedly not specified that the obligation for reparations specifically stemmed from the violations of the rules of IHL, the construction of the

[57] Kalshoven (1991) p. 830 (1991). See also; Zegveld, (2003) p. 506-507.
[58] Kalshoven (1991) p. 833.
[59] Regulations Respecting the Laws And Customs of War On Land #Section III: Art. 52 & 53.
[60] Kalshoven (1991) p. 830-831.
[61] Kalshoven (1991) p. 833.
[62] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, (The Wall) paras 145, 152–3.
[63] *The Wall* para 163, 3, C. Para 152.
[64] *The Wall* para 152.

wall being unlawful under various rules of international law.[65] The failure of the Court to clarify the violations entailing the obligation would only mean that the Court found the matter irrelevant, since the obligation to repair follows naturally from the illegality of the Israeli conduct under the rules of international law, including specific rules of IHL.[66] No basis for treaty claim can, however, be derived from the ruling of the Court as has been demonstrated by case law. In 2007 the ICJ *Bosnia Genocide case* provided significantly less clarity on state obligations to provide reparations when not according monetary compensation, based on the lack of a causal nexus between the failure by Serbia to comply with its obligation to prevent genocide and the death of 7000 men in Srebrenica.[67] The International Court of Justice has also taken the position that states, rather than individuals, are the beneficiaries of the provision and the ones having standing to lodge claims.[68] This has been, according to Modirzahed, the approach also preferred by IHL lawyers[69] and some national courts.[70] The Court has been criticized for inconsistency in its jurisprudence and taking steps back due to the case.[71]

A great portion of scholars, prefer the traditional reading of the Hague Convention of 1907 and remain of the opinion that since the wording of the document does not address individuals, they in fact do not have direct claims against an enemy state. The relevant practice proving the contrary remains scarce.[72] Reference to the open phrasing of Article 3 of the Hague Convention IV and API article 91 has been made in order to justify interpreting the norm in light of recent developments in international law, especially the emergence of international human rights law and the growing recognition of the individual as a subject of international law.[73] The individualised reading of the provisions would according to this view, not represent an illegitimate development of the law crafted by judges, but would rather be considered a legitimate dynamic interpretation of the law.[74] Dynamism in the interpretation of international law is a relevant but often contentious factor in international case law. Distinguishing between the letter of the law

[65] Gaeta (2011) in Ben-Naftali (eds.) p.321. According to the writer, the construction of the wall was in breach of in particular the law of self-determination of peoples, the rules on military occupation and human rights.
[66] See d'Argent (2006) p.436–477.
[67] Application of the Genocide Convention Case para. 462–470.
[68] Case concerning Jurisdictional Immunities para.26, Camins (2016) p. 130.
[69] Modirzadeh (2014) p. 225–304.
[70] *Distomo case* para. 20, discussed by Rau (2005) p. 702.
[71] See for example Gaeta (ed.) pp. 364–73 and Tomuschat (2007) p.905–912.
[72] Tomuschat (2014) p. 412.
[73] Rau (2005) p. 709, Peters (2016) p.203, 207.
[74] Peters (2014) p. 210.

('lex lata') and the law that ought to be ('lex ferenda') is not simple since "there is always an international law in the process of formation."[75]

The humanitarian law treaties applicable in non-international armed conflicts are silent on reparation.[76] According to the International Committee of the Red Cross (ICRC), it lies in the nature of non-international armed conflicts that the approaches to reparations available in international armed conflicts are not automatically available in non-international contexts, and that particularly in non-international armed conflicts the victims suffering in their own states usually have access to justice and a possibility to claim reparations through their domestic courts.[77] The ICRC has however highlighted the growing amount of state practice showing that the rule to provide reparation for the loss or damage occurred would be considered a customary norm, therefore applying in both international and non-international armed conflicts.[78]

Many arguments speaking for an emerging individual right to reparation under IHL rely on the fact that, although human rights and humanitarian law stem from different historical and doctrinal roots, their common denominator is the principle of humanity that is inherent to every individual. One should raise the question why the same individual can enforce his rights embedded in human rights treaties but not in humanitarian law treaties. Though the arguments for the right of an individual to claim reparation exist and can be justified, the needed acknowledgements by relevant judicial authorities are still lacking in practice.

Some progressive questions about a merger between IHL and IHRL have already been presented, which may have overread the current state of law. However, some interplay certainly has already occurred, concerning both international and non-international armed conflicts.[79] Considering the nature of contemporary armed conflicts, the victims have sought alternative options in accessing reparations. Both Additional Protocols acknowledge the application of human rights in armed conflicts,[80] and while the ICRC did not follow this course in the early stages of the discussion,[81] it later accepted that

---

[75] *Case concerning Jurisdictional Immunities* (Dissenting opinion of Cancado Trindade), paras. 32, 39. referring to A. Alvarez (1962) p. 292.
[76] References to a right to reparation in the context of a non-international armed conflict can be found only in customary international law, see Henckaerts, J., et al. (2005) rule 150.
[77] Henckaerts, J., et al. (2005) rule 150.
[78] Henckaerts, J., et al. (2005) rule 150.
[79] See, *Al-Skeini and Others v. United Kingdom.* Also see Kleffner (2002) p. 238.
[80] Article 72 of AP I Preamble of Protocol II
[81] ICRC (1973); see also (Pictet) p. 15. Assumedly there was also an institutional motivation for the ICRC to keep its distance from human rights, which were associated with the " politicised " organs of the United Nations.

"human rights continue to apply concurrently with IHL in time of armed conflict."[82] The position that human rights do not generally cease to apply in armed conflicts is now broadly established and has been confirmed by the ICJ with respect to the International Covenant on Civil and Political Rights (ICCPR)[83] as well as by regional human rights instruments accordingly.[84] The details of the interaction between the two bodies of law interaction remain under discussion.[85]

2.3 Reparations in human rights law applicable in Africa

Human rights instruments applicable in Africa contain references to reparations. Article 2(3) of the ICCPR puts the states under an obligation to provide an effective remedy to any person whose rights have been violated.[86] Furthermore, Article 2(1) of the Covenant obliges the states parties "to respect and ensure to all individuals (…) the rights recognized (…) without distinction of any kind, such as race, colour, sex, language, religion political or other opinion, national or social origin, property, birth or other status." The only reference to reparations (the word 'compensation') is found in articles 9(5) and 14(6) in the contexts of unlawful arrest, detention and conviction.[87] Though the ICCPR does not contain a general reparation clause, the Human Rights Committee has, relying on Article 2(3) recognized that this right entails a duty of the state to grant reparation, in the forms of e.g. restitution, compensation, rehabilitation and satisfaction.[88] Recommendations based on article 2(3)(a) of the ICCPR on awarding compensation as forms of reparations are also found in several concluding observations of the Committee.[89]

Though the Human Rights Committee has in its General Comment No. 31 affirmed that reparation is a central part of an effective remedy, it has maintained a rather narrow interpretation of article 2(3) in individual petitions, and has not developed remedies in

[82] Sandoz et al. (1987). para. 4429.
[83] See i.e. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (*The Wall*) and *Democratic Republic of Congo v Uganda*.
[84] See ie. *Al-Jedda v The United Kingdom* (ECHR) 27021/08 (2011) and *Abella v Argentina Case* (IAm Comm of HR).
[85] Droege (2008) p.506.
[86] Articles 2(1) and 2(3) of the ICCPR.
[87] Articles 9(5) and 14(6) of the ICCPR.
[88] ICJ (2016) p.153–213. The case law of the Human Rights Committee confirms the arguments, most recently in *Andrei Strizhak v Belarus*, para. 8 where the Committee puts emphasis on the need to provide *full* reparations (italics added).
[89] Concluding Observations of the Committee on the Elimination of discrimination against women: Libyan Arab Jamahiriya, para 7. See also Concluding Observations of the Human Rights Committee: on Mexico, UN para 6. and Guatemala, para 12.

line with the General Comment.[90] The Concluding observations of the Committee have, however, provided a platform to pronounce on the positive obligation of the state enshrined in the ICCPR: under certain circumstances, i.e. disappearances, a failure to ensure Covenant rights such as required by Article 2 may result to violations by the state parties, as a result of a failure to take appropriate action or to exercise due diligence to prevent, punish investigate or redress the harm caused by private actors.[91]

The Human Rights Committee has referred to reparations in the context of an armed conflict in several Concluding observations, and has interpreted remedies quite broadly. In its review of Bosnia and Hertzegovina, the Committee noted that the failure of the state to investigate the cause and circumstance of death and provide information on the burial of the victims may amount, among other provisions, to a violation of article 2(3). What was to be done according to the Committee was to "take immediate steps to investigate". The Committee also requested the finalization of a missing person database, and a prompt commencement of payments to the families of the deceased.[92] Not only did the Committee consider reparations to be awarded to the family members of the victims, it also required another measures to be commenced to prevent similar violations from happening and to better monitor the situation of missing persons in the state. The link between reparations and effective investigations was highlighted by the Committee also in i.e. on its Concluding observation on the Democratic Republic of the Congo in 2006.[93] The Committee's observations on the Central African Republic also highlight the congruence of human rights law and humanitarian law. It notes the practical implementation of effective remedies awarded to the "victims of serious violations of human rights and international humanitarian law", "including the right to as full compensation and reparations as possible".[94]

Somewhat similarly to the ICCPR, the African Charter does not have an explicit article on the right to reparation.[95] Article 7(1)(a) provides that everyone has the right to have his cause heard, including "a right to an appeal to competent national organ against acts of violating his fundamental rights as recognised and guaranteed by convictions, laws, regulations and customs in force." However, the African Commission has interpreted

[90] See Evans (2012) on General Comment No. 31 p. 52.
[91] General Comment No. 31 of the Human Rights Committee, para. 8.
[92] Concluding Observations on Bosnia and Hertzegovina 2006, para. 14.
[93] Concluding Observations on the Democratic Republic of the Congo 2006, para 16.
[94] Concluding Observations Central African Republic 2006, paras. 8, 10.
[95] The only reference to reparations relates to the plundering of natural resources in Article 21 of the Charter, where it states, "the disposed people shall have the right to the lawful recovery of its property as well as to adequate compensation."

the protection awarded by Article 7(1) as wider than the explicit wording, pointing towards reparations, by stating that

"The protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the rights of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief."[96]

Other cases could also be seen as evidence of the African Commission's willingness to read the African Charter as a document providing for the right to reparation. In *Embga Mekongo v Cameroon,* the victim was entitled to reparations, the value of which was however to be determined in accordance with the Cameroonian legislation.[97] In *Malawi African Association & Others v Mauritania,* the African Commission ordered the Mauritanian government to e.g. pay compensatory benefits to the dependents of the victims.[98] According to Sarkin, this, in addition to the other existing human rights instruments and international law on state responsibility, presents a well-established legal basis for reparations for victims of human rights and humanitarian abuses in Africa.[99] As the African Commission has noted in its General Comment No. 4, the right to redress encompasses "the right to an effective remedy and to adequate, effective and comprehensive reparation".[100]

Musila presents as a possibility that the drafters of the African Charter could have considered it superfluous to include a right that would be seen as an implied, self-evident right, reflecting the principle *ubi jus ibi remedium:* for the violation of every right, there must be a remedy.[101] The challenging political realities prevailing at the time of the Charter's adoption have also been presented as a reason for the 'omission'.[102] Musila however supports the arguments criticizing the jurisprudence of the African Commission for 'situational' interpretations and the lack of theorisation[103], as well as the lack of

[96] Zimbabwe Human Rights NGO Forum v Zimbabwe, para.213.
[97] *Embga Mekongo v. Cameroon*, Findings and recommendations.
[98] Malawi African Association & Others v Mauritania, Findings and recommendations.
[99] Sarkin (2014) p.539. In his article, Sarkin argues for the right to reparation to exist specifically in the Ugandan context.
[100] General Comment of the ACHPR, No. 4, (2017).
[101] Musila (2006) p.447.
[102] See generally Heyns (2002) 'Civil and political rights in the African Charter' in M Evans & R Murray (eds.) The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000 (2002).
[103] The African Commission has according to Musila (2006 p.459) elaborated the general state obligations under the African Charter as entailing the duties to respect, protect, promote and fulfil, it has not offered much jurisprudential guidance to states on the question of how to supply redress.

connections[104] between the Charter and norms on the international level,[105] creating ambiguity on the victim's position in terms of reparation claims.

From another point of view, the lack of willingness from the African Commission's side to address reparations for a long time, and the continuous vagueness of its reasonings, speaks for a contrary, or at least a slightly different argument to Musila's.[106] According to Ssenyonjo, the African Commission for several years, instead or ordering specific actions to be taken by the states, intentionally promoted a 'positive dialogue', leading to fairly conciliatory resolutions.[107] This is demonstrated by cases such as *RADDHO v Zambia*,[108] where the African Commission decided not to afford victims an adequate remedy, but to "continue efforts to pursue an amicable resolution."[109] Ssenyonjo however concludes that the African Commission has over the years made, despite the lack of an express mandate, significant improvements in efforts to award remedies to victims of human rights violations. Even in the absence of a consistent approach, it has made some notable non-monetary recommendations.[110] It has also acknowledged the significance of monetary awards, in the form of 'just and adequate' or 'fair and equitable' compensation, to victims of human rights violations against several states, providing a basis to develop a more consistent approach.[111] In the absence of proof of what the intentions of the drafters of the Charter were, it could be reasonable to assume that what was too difficult to agree on at the time of the drafting, was intentionally left out. The inconsistency of the jurisprudence and the lack of reference to reparation-related instruments in cases provide additional evidence, pointing towards the difficulty of circumstances during the time of drafting, as well as in the 2000's and 2010's. The fact that the African Commission for a long time utilized an approach promoting dialogue

[104] See *Jawara* para.33-34. The Commission simply pronounced that the local rules must be applied in alignment with article 7. Musila (2006 p.459) states that the Commission has not, in any of its decisions or elsewhere, clarified the broad principles or what specific remedies would be applicable generally under the Charter. Where reference has been made to international law, this has mostly been general, as in *Amnesty International and Others v Sudan*.
[105] Musila, (2006), p. 442, 444, 459.
[106] Ssenyonjo (2018) p.12.
[107] Ssenyonjo (2018) p.12.
[108] See Senyonjo (2018) comment on *RADDHO v Zambia,* p. 13.
[109] RADDHO v Zambia, Holding
[110] Ssenyonjo (2018) p. 12 and 14. The Commission has made recommendations such as that complainants under detention should be released (See e.g. *Centre for Free Speech v Nigeria*, *Constitutional Rights Project v Nigeria,* (the Commission urged Nigeria to release 11 soldiers of the Nigerian army found innocent) and afforded a fair trial including access to family and legal representatives, no name some. See. *Article 19 v Eritrea*.
[111] Ssenyonjo (2018) p. 15-17, referring to countries such as Benin (see Odjouoriby Cossi Paul v Benin), Congo (Antoine Bissangou v Republic of Congo), DRC (Marcel Wetsh'okonda Koso and others v Democratic Republic of Congo), Kenya (Centre for Minority Rights Development (Kenya)) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya), and Sudan (Sudan Human Rights Organisation v Sudan).

and avoiding the topic of reparations could be seen as a continuum for the situation at the time of drafting: in volatile circumstances the African Commission might have kept the strategy of still not pronouncing on topics too controversial. This would, however, not point towards an intention to rule out the possibility of reparations.

While the African Commission for a long time struggled with pronouncing on reparations, the Human Rights Committee has also not succeeded in consistency. As a most consistent element in the Committee's jurisprudence, it has required the state party to publish the view of the Committee when violations have been found.[112] It has also from time to time used terms such as 'full reparation' or 'adequate reparation', yet without great coherence.[113] As the Committee lacks the mandate to order financial awards in individual cases, it has approached reparations more broadly. Its orders have also in individual petitions considered practical action, relating to i.e. providing information, or 'compensation' for the anguish suffered by the families of the victims.[114] Whereas the African Commission took its time to get to a point where it considered necessary to start pronouncing on reparations, the approach of the Human Rights Committee, though clearly established in its General Comment, has not greatly contributed to the actual realisation of reparations for victims either.

A fairly little attention has focused on an African instrument particularly pronouncing on women's rights in an armed conflict. The Maputo Protocol[115] requires states to "provide for appropriate remedies to any woman whose rights or freedoms . . . have been violated", departing from the approach of the African Charter by clearly pronouncing on reparations.[116] Article 4(f) obliges the states that have ratified the Protocol to "establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women."[117] Article the 11 of Maputo Protocol particularly addresses the protection of civilians, including women, and calls for the states parties to the Protocol to "undertake to protect "…" against all forms of violence, rape and other forms of sexual exploitation, … " in armed conflicts.[118] Article 11(2) of the

[112] Kurbonov v. Tajikistan, Final Views, para. 9; Medjnoune v. Algeria, No. Final Views, para. 11; Mulezi v. Democratic Republic of Congo, Final Views, para. 8 as noted by Evans (2012) p. 47.
[113] Evans (2012) p.47.
[114] Sankara v. Burkina Faso, Final Views, para. 14.
[115] The Maputo protocol has been ratified by 36 of 54 African Union member nations. See Maputo Protocol website, accessed 26 July 2019.
[116] Maputo Protocol, Art. 25(a)
[117] Maputo Protocol, Art. 4(f). The mechanism of the Special Rapporteur on the Rights of Women in Africa was created by the Commission in 1999 to 'serve as a focal point for the promotion and protection of the rights of women in Africa amongst the 11 members of the African Commission', assumedly based on the article 4(f) obligation. See the website of the African Commission (2019)
[118] Maputo Protocol Art. 11(3).

Protocol refers to the state obligation to act "in accordance with the obligations incumbent upon them under international humanitarian law" to protect civilians.[119] The instrument directly refers to IHL in certain provisions, which may be the reason the times they have been applied have been so few.

The African Court has an express mandate to award reparation, by making "appropriate orders to remedy the violation, including the payment of fair compensation or reparation."[120] As of today, only nine[121] of the 30 states parties[122] to the Protocol have made the declaration to recognize the competence of the Court to receive cases from NGOs and individuals. The referral of cases to the African Court when necessary, for instance in situations dealing with grave violations of human rights, or when a state has not complied with its resolution, would be another way of strengthening and clarifying victims' rights.[123] Being at a very early stages of its operations, not a lot can be said about its effectiveness in terms of reparations. Though the Protocol changes the situation normatively by expressly providing for certain forms of remedies,[124] reaching a greater level of clarity will take time. Even in the absence of a consistent approach with reparations, the creation of a clear mandate for the African Court, in addition to the African Commission's growing amount of reparation recommendations, speaks for a willingness to strengthen the position of an individual as a receiver of reparations on the continent.

To conclude, as a larger, favourable context for the existence of a right to reparation within the African regional system, Evans highlights the African Commission's interpretation of Article 55 of the Charter. The non-existence of a reparations provision has, according to Evans, permitted NGOs, both national and international, to lodge cases to the African Commission, allowing for the review of cases relating to large-scale human rights abuses. This has been possible since the Commission has interpreted the provision in article 55 on "communications other than those of States parties" to refer to the possibility of receiving claims from NGOs and individuals as well.[125] At least 14 coun-

[119] Maputo Protocol Art. 11(2).
[120] Protocol to the African Charter On Human and Peoples` Rights on the Establishment of an African Court on Human and Peoples` Rights, Article 27(1)
[121] Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Mali, Malawi, Tanzania and Rep. of Tunisia.
[122] Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Côte d'Ivoire, Comoros, Congo, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda.
[123] Redress Report (2016) p. 19-20.
[124] Musila (2006) p.464.
[125] Evans (2012) p. 76 referring to Umozurike (2001) The Complaint Procedures of the African Commission on Human and Peoples' Rights', in Alfredsson, Grimheden, Ramcharan and de Zayas (eds), pp. 713–30; Viljoen,(2002) Admissibility under the African Charter', in Evans and Murray (eds), pp. 61–99.

tries in Africa have prescribed reparation initiatives.[126] While this indicates and reinforces the acceptance of the imperative of reparation, the design and implementation of reparation regimes has often been fraught with challenges. At least partially due to this, multiple African countries, such as Rwanda, Uganda, Sierra Leone and Mozambique have drawn use of local or indigenous justice mechanisms, instead of or in addition to the courts, that often times had mandates concerning reparative measures. While the lack of a reparations clause may even out the road for cases of a larger scale, the initial problem, especially relevant to the victims of armed conflicts still stands. When violations are large scale, the need for resources enabling the enforcement of reparations is just as large.

[126] Algeria, Uganda, Sudan, South Africa, Rwanda, Nigeria, Liberia, Kenya, Ghana, Ethiopia, DRC, Chad, Tunisia, Morocco and Sierra Leone.

3 THE RELATIONSHIP BETWEEN IHL AND INTERNATIONAL HUMAN RIGHTS LAW IN ARMED CONFLICTS

3.1 The application of human rights law in armed conflicts

While international humanitarian law itself does not provide an individual with a clear and direct lane through which seek reparations for violations during an armed conflict, human rights bodies, offering an individual possibilities to seek remedy, may be helpful in addressing events that constitute violations of IHL, but are also breaches of human rights law. As both the African Charter and the International Covenant on Civil and Political Rights contain provisions that have been interpreted as providing for the right to reparation, the individual has an actual remedy. The issue and uncertainty of the outcome, however, lies in the applicability of human rights law in armed conflicts, and the way in which human rights bodies are interpreting the relationship between IHL and human rights law.

Identifying conflict-related gender-based violence is not necessarily straightforward since violence of such nature takes place also in the absence of conflicts. Making the connection between individual gender-based violations and conflict-related violence such as the use of rape as a systematic tool of warfare requires substantially more evidence than identifying individual crimes. Since proving the systematic nature of this form of gendered violence is often difficult, the victims may reach justice more effectively if the connection of the violations to the hostilities is not established. Since other type of violence towards the civilian population also often affects women disproportionately, multiple violations towards civilians may possibly also be violations of gendered nature. The gendered nature of these type of offences, when it exists, may also remain hidden. The manner in which the human rights treaty bodies have connected the violations to the prevailing conflict and therefore affirmed the applicability of IHL affect the individual.

Chapters 3.2 and 3.3 address the issue of the relationship between IHL and human rights law and seek to identify the ways in which the Human Rights Committee and the African human rights bodies have applied IHL in situations of armed conflicts. Though that was not necessarily meant to take place, ways to harmonize their co-existence and application must be sought for.[127] In situations where there is overlap between IHL and

[127] Droege (2008) p. 501-502.

IHRL, their relationship has in general been interpreted through the concept of complementarity and the principle of lex specialis.[128]

3.2 Complementarity of IHL and human rights law

Complementarity means that human rights law and humanitarian law, being based on the same principles and values, can influence and reinforce each other, while not contradicting each other.[129] According to Iguyovwe, human rights law, being broader in its scope of application, can sometimes benefit from the more narrowly applicable rules of IHL. On the other hand, the increasingly specific body of jurisprudence of human rights law can influence IHL that has less interpretative jurisprudence at hand.[130] The jurisprudence on reparations created by human rights bodies serves as an example.

Complementarity reflects the method of interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties, according to which when a norm is interpreted, ”any relevant rules of international law applicable in the relations between the parties” shall be taken into account. It has been suggested that this principle, also referred to as the principle of systemic integration, enshrines the idea of understanding international law as a comprehensive and coherent system, where different sets of norms co-exist in harmony, without controversy.[131] This would reinforce the possibility of interpreting IHL in the light of human rights and the opposite way around.[132]

In many cases IHL and human rights law do not contradict each other, but rather regulate different aspects of a situation, or in a mutually reinforcing way, provide regulations for it in more or less detail. There are, however, limits on the areas of mutual reinforcement, one of which being the right to remedy and reparation.[133] All major human rights instruments have a form of individual mechanism for receiving complaints, but humanitarian law does not directly provide such a channel, as established in the previous chapter. Droege, however, points out that the increasing awareness of the application of human rights in armed conflicts as well as an increasing call for transparency and accountability in military operations can potentially have an impact on the way certain rights under IHL are understood, reflecting the principle of complementarity.[134] For

[128] Iguyovwe (2008) p. 779.
[129] Iguyovwe (2008) p. 779.
[130] Droege (2007) p.341.
[131] McLachlan (2005) p.279–320.
[132] Droege (2008) p. 521.
[133] Iguyovwe (2008) p. 781.
[134] Droege (2007) p.354-355.

an individual, this would possibly mean greater coherence and less friction in the rights granted to them by the two bodies of law. It seems clear that the provisions in human rights law granting the individual a right to reparations may complement the IHL regime applicable during armed conflicts. Complementarity does not, however, clearly provide a solution to situations where these two regimes seemingly contradict each other, and in that way, affect the rights of an individual.

3.3 Lex specialis

Another principle of interpretation can be detected from international jurisprudence. According to Hathaway et al, it is useful to distinguish between three different approaches to the applicability of human rights law in armed conflicts: one in which international humanitarian law prevails in cases of conflicts between the two bodies of law; another in which human rights prevail; and, finally, one in which the more specific law in the particular context and question at hand applies, the *lex specialis* principle.[135] The principle has been used by the ICJ in its advisory opinions on the *Legality of the Threat or Use of Nuclear Weapons case*[136] and the *Wall case*[137] and reiterated in the *DRC v Uganda case*[138], to illustrate the relationship between the two bodies of law. The ICJ pronouncements on this principle do provide significant interpretative tools and guidelines in the relatively blank starting position, but there is a large amount of academic writings proposing that the pronouncements in fact bring up additional questions and are not practically helpful when applying the law in cases of dealing with the relationship between human rights law and IHL,[139] especially when breaking it down to a level of an individual. Whether *lex specialis* only means that the special provision prevails over the general, or that the former actually displaces the latter, is not clear.[140] Whether an individual has suffered a breach of his or her rights granted by human rights instruments during an armed conflict, is suddenly a less straightforward question.

Hampson makes three different propositions for the interpretation of *lex specialis*. It seems that what the ICJ had first meant, was that where both IHL and human rights law are applicable, **priority should be given to IHL**. She suggests that the ICJ meant for the human rights body to make a finding based on IHL, while expressing it in the lan-

[135] See Hathaway, Crootof ,Levitz, Nix & Perdue (2011)
[136] Legality or Threat of Use of Nuclear Weapons, Advisory, para. 25
[137] *The Wall,* para. 106.
[138] Case concerning armed activity on the territory of the Congo, paras. 216–220.
[139] Hampson (2008) p.551.
[140] Hampson (2008) p. 558.

guage of human rights law.[141] This interpretation, however, does not provide practical guidance on the application of the principle.[142] An alternative would be to assume that IHL prevails where it contains **an express provision** addressing a similar field to that of a human rights provision. The problem with this interpretation is that while IHL affects some human rights law rules significantly, it leaves some provisions almost totally unaffected. The question would then be to what extent the conflict context would affect the applicability of human rights law, when there is no express provision. Human rights treaty bodies would in this case have quite a lot of freedom in applying the limitation clauses many human rights provisions contain. The role of customary law is unclear in this situation, and the lack of treaty provisions applicable to non-international armed conflicts would in some cases lead to irrational outcomes.[143] Yet another option would be to interpret lex specialis **according to the issue** at hand. In that case, where IHL provides a provision regarding a situation, such as a fair trial, but does not further specify that, human rights law would be applicable, and would address the aspects of the right not covered by IHL. An obvious issue to this interpretation is the question, whether only treaty provisions determine the content of human rights law, or would other pronouncements, such as the concluding observations of treaty bodies and their General Comments, have a place in specifying the IHL norm in question. [144] Assuming that the relationship will be formulated by means of litigation seems an arbitrary method, since it is not exclusively an inter-state affair but also an affair of the state and those within its jurisdiction.[145]

Though stemming from the idea of complementarity, the principle of **systemic integration** has also been discussed in relation to *lex specialis*. It has been suggested that the ICJ, in the case *Legality of the Threat or Use of Nuclear Weapons*, in fact did not resort to *lex specialis.* Since it does not as a matter of fact set aside human rights law*,* it could be said to have rather applied the VCLT article 31(3)(c) in considering all the international rules that might be relevant to the interpretation of a certain norm, and in this way

[141] See Hampson (2008) p. 559 on the Legality or Threat of Use of Nuclear Weapons, para. 25; the Wall para. 106, and on the Case concerning armed activity on the territory of the Congo, paras. 216–220.
[142] See Arnold, Roberta – Quénivet, Noëlle (eds.) International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law. For example, it could be that once IHL is applicable, human rights body would have to base its decisions solely on that. In that case, where IHL does not have anything to say on a matter, such as the right not to be discriminated based on gender, there would be no violation. This interpretation where IHL displaces the applicability of human rights law would, according to Hampson (2008, p.560) however, be contrary to the ruling of the ICJ that IHRL remains applicable.
[143] Hampson (2008) p.560. Detentions provide an illustrative example. The treaty law on NIACs is silent on permissible grounds for detention, which according to this interpretation would mean treaty bodies were able to apply human rights law in those situations since IHL is not specific, but IHL where is does have a say, such as the protection of certain objects crucial to survival, such as food.
[144] Hailbronner (2016) p. 345, Hampson (2008) p.560.
[145] Hampson (2008) p.559

applying the principle of systemic integration.[146] According to Todeschini, the ICJ uses IHL to give meaning to the convention article in question.[147] Many human rights bodies, including the Human Rights Committee, have frequently employed the principle.[148]

Out of the three *lex specialis* interpretations, Hampson proposes the second alternative could be the best compromise, but emphasises the need for agreement between the states and the human rights bodies on which way to go about the problem.[149] The first option suggested by Hampson, giving priority to IHL, could also in principle work as a simple solution. Human rights bodies would therefore need to thoroughly investigate the areas of horizontal overlap between the human rights norms and IHL. The issue regarding non-international armed conflicts would be one of the most urgent ones to resolve. It is suggested that the solution to *lex specialis* issue should be one that has the ability to be applied at the moment of decision by those responsible for it, or it should be abandoned altogether.[150] Interpreting the relationships according to the issue at hand, regardless of the fact that it would require the human rights bodies to develop a solid jurisprudence on the matter, would be a starting point for moving forward in the matter. Even though litigation is slow, the most frequent questions brought in front of the human rights bodies would slowly start being addressed, and the paralysis caused by inability to find a perfect solution would be avoided.

In practical terms, the extent to which it is possible for human rights bodies to take other international law into account, depends on whether the human rights treaties in question include derogation clauses or whether they refer to other sources of international law.[151] As covered, even in the absence of a reference to other international treaties, article 31(3)(c) of the Vienna Convention plays a role.[152] The jurisprudence of the Human rights Committee and the African Commission and the Court will be addressed through these three lenses. The interpretations of treaty bodies have been divided into three categories; derogation clauses, references to other sources of international law, and specific references to article 31(3)(c) of the Vienna Convention.

---

[146] The Legality of the Threat or Use of Nuclear Weapons para. 25.
[147] Todeschini (2017) p. 207 referring to Kälin (2004) pp. 25–34, 30–31.
[148] Todeschini (2017) p. 207.
[149] Hampson (2008) p. 562.
[150] Todeschini (2017) p. 207. Todeschini argues that while invoking the principle in its advisory opinion of *the Wall,* the ICJ fails to even mention it in the following *Armed Activities on the Territory of the Congo case,* see paras. 216–19. Due to this, systemic integration should be preferred and lex specialis abandoned.
[151] Hailbronner (2016) p.343.
[152] See the ICJ on derogations in The Legality or Threat of Use of Nuclear Weapons, para. 25; The Wall para. 106, and Case concerning armed activity on the territory of the Congo, (Judgement) paras. 216–220.

3.4 Human rights bodies addressing the relationship between IHL and international human rights law

3.4.1 Derogation clauses

Whether an individual has access to reparations based on human rights violations naturally depends on whether certain violations can be read into violations of human rights, or violations at all under the circumstances. Derogations from human rights obligations enshrined in treaties are permissible only to the extent to which they are inevitably required based on the situation and do not in any other way conflict with the state's other international obligations. They are also only acceptable when they do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin.[153] Bearing this in mind that gender-based violence, often taking the form of discrimination, is unlikely to be considered a norm from which derogations are allowed.

To set the stage for other forms of interpreting the relationship between IHL and human rights law during armed conflicts, a brief review of derogations is however in place. In general, derogations lead to occasions where human rights law and IHL interact, and the positions taken by the human rights bodies may assist in interpreting the relationship between the bodies of law in general. The ICCPR allows for derogations when it comes to certain rights in times of public emergency, while some rights, e.g. article 6, the right to life, are not subject to derogations under any conditions. Article 14 of the ICCPR, the article referring to compensation, is not among the non-derogable articles listed in article 4. The African Charter does not in general allow derogations, based on which the Commission has deduced that the rights enshrined in the Charter remain operational during armed conflict.[154] A number of cases have given the African Commission a chance to conclude and affirm that the states are never allowed to derogate from their human rights obligations.[155]

Since the ICCPR prohibits e.g. arbitrary killings but does not define 'arbitrary', the meaning of the word could be affected by the existence of an armed conflict, even when

[153] The ICCPR article 4.
[154] Viljoen (2014) p. 312. As an example, in the *Amnesty International* case concerning Sudan, the African Commission emphasised that restricting human rights could not be a solution to national difficulties, while also noting that when Sudan was going through a civil war, civilians in certain areas were especially vulnerable, providing that the state must take all possible measures to ensure their rightful treatment in accordance with international humanitarian law. See *Amnesty International & Others v Sudan* paras. 79, 50.
[155] See e.g. Chad Mass Violations case, para 21, Media Rights Agenda case para 67.

there is no possibility to derogate. The Human Rights Committee could, according to Hampson, still use IHL to determine whether there was a violation of human rights law, without the question of derogation.[156] Practically, and similarly to the ICCPR, the Charter does not e.g. in Article 4 provide a definition for what constitutes 'arbitrary' when it comes to the deprivation of life.[157] General Comment No. 3 of the African Commission on the Right to Life, however provides the scope of the prohibition on the 'arbitrary' deprivation of life and specifically refers to armed conflicts by stating that during those times the right to life needs to be interpreted with regard to the rules of IHL.[158] Even without officially allowing for derogations, the African Charter does allow room for interpretation. When it comes to arbitrary deprivation of life, gendered violence, e.g. violence towards women usually takes the form of civilian casualties. When IHL rules for targeting are followed and the military activity leads to civilian victims, it could be assumed that no violation has occurred.

Considering derogations as a factor related to a right to reparation is relevant due to the differing regimes in IACs and NIACs. IHL regulates international armed conflicts (IAC) differently to non-international armed conflicts (NIAC), which may in practice result in different levels of protection to an individual in cases where derogations invite interpretations from the IHL regime that currently stands. The Human Rights Committee addressed Article 6 of the ICCPR in its General Comment No. 36 in situations of armed conflict, in a rather general and unsatisfactory way. Todeschini however mentions that the Committee's reluctance or failure to distinguish between IACs and NIACs in General Comment No. 36 did not in this case create too much confusion. Since the IAC rules governing targeting, namely the principles of distinction, proportionality and precaution, while namely applying in IACs have attained a customary status and therefore apply in NIACs as well, the situation from the point of view of an individual would not be substantially different.[159] Violations of gendered nature would typically fall into a category of violations that would in this case not be affected by the characterization of the conflict. More important would be identifying the conflict nexus of the violations.

The use of force against a person could either relate to the armed conflict, or, in the absence of a nexus to it, be governed under the paradigm of law enforcement. The fact that human rights law continues to govern law enforcement, even when a conflict occurs, is

[156] Hampson (2008) p. 564, referring to examples of the constructive use of IHL that can be found in the case law of the Inter-America Commission and Court of Human Rights, such as IACHR, *Abellav.Argentina* and IACtHR, *Bamaca Velasquez Case*.
[157] The African Charter, article 4: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."
[158] General Comment No. 3. of the African Commission, paras 12-13.
[159] Henckaerts et al. Rules 1, 6, 14–15.

relevant especially when it comes to low intensity NIACs and NIACs taking place only in certain parts of the territory of a state.[160] According to Todeschini, General Comment No. 36 does not succeed in separating these two paradigms; in fact by failing to differentiate the paradigms of law enforcement and the conduct of hostilities, it risks giving states more leeway in using lethal force according to IHL rules, while law enforcement paradigm should be the one applicable.[161] In this case, the rights of an individual suffering any kind of violence are at stake, if NIAC rules are applied when no real connection to the armed conflict exists. This violence can most often disproportionately affect women and children. In terms of reparation clauses, the law enforcement paradigm gives an individual a more uncomplicated channel to reparations, since human rights law provisions are at place without IHL influence.

In General Comment No. 29 the Human Rights Committee stated that even rights that are potentially derogable have a non-derogable core.[162] According to Hampson, this would likely mean that human rights bodies would treat rights with a close relationship to a non-derogable norm in fact also non-derogable. Todeschini presents the same argument by highlighting General Comment No. 29 as remarkable since the Human Rights Committee makes a pronouncement on IHL's role in helping to prevent the abuse of a state's emergency powers regarding derogations, acting as an outer boundary.[163] Additionally, the Committee used IHL to limit the states' abilities to derogate from certain ICCPR provisions[164], which are not listed as non-derogable norms in the convention per se.[165] The Committee seemed to rely on the fact that IHL recognises fair trial rights in armed conflicts[166] and maintained that states are not to derogate from the 'constitutive elements' of this right even in other situations of emergency.[167] Todeschini refers to this as IHL providing and additional layer of protection of certain human rights.[168] Article 14 of the ICCPR enshrines similar rights granted to the individual, i.e. 14(1) equality before the courts and tribunals and 14(2) the right to be presumed innocent until proven guilty. Leaning on this interpretation, it would seem unlikely that the Human Rights Committee would due to the lack of a an explicit right to reparation in

[160] Lesh (2014) in De Wet and Kleffner (eds.) pp.100-102
[161] Todeschini (2017) p.2015 on the Draft Comment. See further comments on the Final General Comment reinforcing original arguments, in Todeschini (2017b).
[162] Human Rights Committee, General Comment No. 29 para.11.
[163] General Comment No. 29 of the Human Rights Committee para. 3.
[164] Such as article 14 of the ICCPR.
[165] Todeschini (2017) p. 208.
[166] E.g. GC IV art 146
[167] Todeschini (2017) p.208 referring to General Comment No. 29 of the Human Rights Committee para.16.
[168] Todeschini (2017) p. 209.

IHL, limit the rights enshrined in article 14, when it has previously used IHL to protect the individual.

Though the interpretive effect of IHL on human rights in derogations during different types of conflicts does not necessarily differ, the protective impact of IHL is not similar without exception when it comes to conflicts of different nature. The Human Rights Committee's General Comment No. 35 has sparked conversation since its approach there can be seen as one implicitly differentiating between international and non-international armed conflicts regarding detention: a measure not directly regulated in non-international armed conflicts. The Committee in General Comment No. 35 states that

"During international armed conflict, substantive and procedural rules of international humanitarian law remain applicable and limit the ability to derogate, thereby helping to mitigate the risk of arbitrary detention."[169]

which has been suggested to infer that the issue under consideration only relates to international armed conflicts.[170] Todeschini, however, challenges the argument by saying that the reference to IHL as a limit to derogation powers should be read while also considering General Comment No. 29, where the Committee has supposedly not made a distinction. The emphasis on the convergent relationship between IHL and the ICCPR should be seen as indicators of their complementary relationship, and the pronouncements not as differentiating conflicts specifically.[171] Todeschini does note that the question of the regulation of internment in non-international armed conflicts remains unclear, as it is not clearly settled whether IHL expressly regulates internment in them.[172]

Hampson highlights that human rights bodies have been applying human rights law in cases of killings during NIACs in several cases where the existence of an international armed conflict has not been acknowledged, and have not received criticism for it.[173] Human rights bodies have even used human rights law in its entirety in cases of non-international armed conflict, when there have been no derogations.[174] Detecting the impact of the cases considering derogations on reparation provisions in human rights in-

[169] General Comment No. 35 of the Human Rights Committee, para. 66.
[170] See Shaheed Fatima's (2014) comment on the UN HRC's General Comment No. 35.
[171] Todeschini (2017) p. 213.
[172] Todeschini (2017) p. 214.
[173]Hampson (2008) p. 562 referring to e.g., Human Rights Committee: Suarez de Guerrero v. Colombia, ECtHR, Ergi v. Turkey; ECtHR, Gulec v. Turkey; ECtHR, Isayeva and others v. Russia; Inter-Am.Court of.H.R, Case of Plan de Sanchez Massacre v. Guatemala.
[174] ECtHR, Isayeva and others v. Russia.

struments has not properly been touched upon. However, considering the Human Rights Committee's approach to limit the possibility to derogate on certain norms would point towards a strengthened position for the individual; considering Hampson's take, especially in non-international armed conflicts.

3.4.2 References to other sources of international law

Articles 60 and 61 of the African Charter explicitly allow the African Commission to have regard to other sources of international law, more specifically to 'draw inspiration from international law on human and peoples' rights'[175] and "take into consideration, as subsidiary measures (…) consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine."[176] In *Amnesty International*, while not finding a violation directly in terms of humanitarian law, the African Commission used IHL language when it identified a violation of the right to life under the African Charter in the killing of 'unarmed civilians'.[177] The African Commission's approach in the case is part of the reason why it has sometimes been detected having a human rights-based approach. *Amnesty International* as well as *Chad Mass Violations* dealt with situations of civil war and, hence, non-international rather than international armed conflicts, where humanitarian law is least worked out as a matter of law. While serious violations of human rights were found to have taken place during the armed conflict in Chad, the African Commission was silent on the states responsibility to provide reparation measures.[178] The contribution of the case has, according to Evans, been the affirmation of the positive duty of the state to prevent violations by non-state actors,[179] being consistent with other international treaty bodies and regional human rights systems[180] and furthermore strengthening the position of an individual victim in a NIAC. The African Commission has multiple times also emphasised e.g. that the successor governments inherit the previous government's obligations, "including the responsibility for the previous government's mismanagement."[181]

[175] African Charter Art. 60.
[176] African Charter Art. 61.
[177] Amnesty International & Others v Sudan para 48.
[178] See *Chad Mass Violations case.*
[179] Heyns (2002) in Evans & Murray (eds.) p. 148.
[180] Evans (2012) p. 77.
[181] See e.g. Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v Malawi, para.12.

The Human Rights Committee has generally avoided the use of the *lex specialis* formulation and has instead found that "both spheres of law are complementary, not mutually exclusive".[182] According to Todeschini, the Human Rights Committee has in its General Comment No. 31 taken a complementary approach, considering IHL and human rights law as mutually reinforcing bodies of law.[183] The Committee there rejects the idea that the applicability of IHL excludes the concurrent applicability of human rights law but fails to explain how the complementarity approach would work in practice.[184] Concluding observations of the Committee also support the interpretation that the convergence of IHL and human rights law is acknowledged in protecting certain rights,[185] as discussed in 3.1. Complementary approach has been affirmed also in General Comment No. 35.[186] No specific examples of the effect of IHL norms on the reparation provision in human rights law emerge from the Human Rights Committee's jurisprudence and highlighting the complementarity approach is not bringing new clarity on the issue. Since complementary has been acknowledged with an aim to protect rights, one could assume the references to complementarity in the Human Rights Committee's jurisprudence would at least not seek to weaken the reparatory dimension of human rights law.

As another way of referring to other sources of international law, the African Commission has in some cases sought 'interpretative guidance' from IHL, though only finding violations of human rights law.[187] Concerning the question of occupation and its effects on the rights of the civilian population in *the DRC case*, the African Commission engaged more explicitly with IHL, while only finding violations of the African Charter as such. It did acknowledge that the alleged violations by the armed forces fell "within the province of humanitarian law", holding that the events were covered by the Geneva Convention and their Additional Protocols.[188] The Commission was therefore most likely again drawing inspiration from these "general principles of law recognized by African states" by the virtue of articles 60 and 61 of the African Charter.[189] Alternatively, if the Commission intended to incorporate IHL within a Charter right, a much more detailed legal analysis on the rights would have been expected.[190] The African Commission has, to some extent similarly to the Human Rights Committee, in its General Comment No. 3 highlighted the conflict nexus of the use of force and stated that

[182] General Comment No. 31 of the Human Rights Committee para.11.
[183] Todeschini (2017) p. 205, 209 on the General Comment No. 31 of the Human Rights Committee para. 11.
[184] Todeschini (2017) p. 209.
[185] Concluding Observations on the USA (18 December 2006) para. 5.
[186] General Comment No. 35 of the Human Rights Committee para. 15.
[187] Viljoen (2014) p. 314.
[188] *The DRC case*, para. 69.
[189] *The DRC case*, para. 70.
[190] Hailbronner (2016) p. 351.

"International humanitarian law on the conduct of hostilities must only be applied during an armed conflict and where the use of force is part of the armed conflict. In all other situations of violence, including internal disturbances, tensions or riots, international human rights rules governing law enforcement operations apply".[191]

Whereas the approach of the Human Rights Committee was criticized for its inability to distinguish between the paradigms of law enforcement and the conduct of hostilities, the African Commission is here clearly, though not with abundant wording, making the distinction. Whether the General Comment No. 3 would actually mean the African Commission would consider it possible to read IHL into human rights, or only continue to draw inspiration from general principles of law by the virtue of article 60 and 61, is not completely clear only based on this.

Although articles 60 and 61 of the African Charter are often cited together,[192] they refer to different sources of international law and different 'methods' of allowing the influence of other sources of international law to affect the interpretation of the Charter. Viljoen points out that a distinction should be made between the two provisions. A strict interpretation of article 60 would exclude international humanitarian law thereto, based on which it could be assumed that the African Commission finds its mandate to rely on humanitarian law treaties in article 61. The sources of international law where the commission finds the referred IHL treaties are 'other general or specialised international conventions laying down rules expressly recognised' by AU member states and "other conventions", referring to treaties that do not deal with human rights.[193] The Geneva Conventions and the Additional Protocols thereto are in the situation referred to by the Commission as 'special international conventions'.[194] Viljoen suggests that, although the Commission did not explicitly use the term at this point, it in fact categorises the treaties as *lex specialis.* The fact that the Commission did not consider the issue of whether the relevant treaties are expressly recognised by African states (as presented in article 61 as the second source to take into consideration), and also did not strive to clarify how and why they have gained recognition as 'general principles' is possibly explained by the prevailing situation that a majority of African states, with the exception of Eritrea, Angola and Somalia, are all parties to the Geneva Conventions and their Ad-

[191] General Comment No. 3 of the African Commission, para. 33.
[192] See e.g. *Legal Resources Foundation v Zambia.*
[193] See Viljoen (2014) p. 315 on articles 60 and 61. Article 61 allows the African Commission to also 'take into consideration' a number of subsidiary sources of international law.
[194] Legal Resources Foundation v Zambia para 78.

ditional Protocols.[195] Ratification of the Convention is however, not a prerequisite for interpretative recourse[196] since some humanitarian law standards could be considered to have acquired a customary law status.[197] According Hailbronner, both the African Commission and the African Court are just now starting to address questions on the application of humanitarian law, due to which their articulations on the relationship often raise a multitude of questions. She does however suggest that due to the comparatively broad formulation of rights in the African Charter on Human and Peoples' Rights (African Charter), an interpretive approach that reads international humanitarian law into human rights law could be both 'feasible and convincing'.[198]

Evidence of this can be detected in one of the most recent cases dealing with an armed conflict, *Thomas Kwoyelo v. Uganda.*[199] In the case, the African Commission took a step towards what Viljoen had suggested, and now explicitly referred to *lex specialis* as a principle in an event of tension between IHL and the human rights provisions in the African Charter.[200] Accordingly, for the particular case the African Commission applies the standard of treatment specified in Common Article 3, which is generally considered to have achieved a status of customary international law, referring to the principle of *lex specialis* as the norm giving the most detailed guidance priority.[201] Furthermore, it goes on to affirm that acts taking place outside the conduct of hostilities are to be regulated by reference to human rights law.[202] On the basis of articles 60 and 61 of the African Charter, in making reference to IHL rules, the African Commission accordingly said it uses, instead of the Charter standards that apply in normal conditions and peace times, the standards of the IHL rules for making a determination of the existence of violations of the provisions of the African Charter in such situations of NIACs.[203] This was a position previously stated in General Comment No.3.[204] The expression 'giving the most detailed guidance priority' does not yet shed light on the question, what happens in a situation where IHL is silent. The Commission did refer to *lex specialis* as applicable in situations of 'tension' arising from the concurrent application of the bodies of law.[205] Where IHL is silent, no tension arises, and the Charter provisions on reparations can be applied without IHL influence.

---

[195] Viljoen (2014) p. 315.
[196] Viljoen (2014) p. 316.
[197] See Henckaerts et al. Customary IHL rules 352-371
[198] Hailbronner (2016) p. 341.
[199] See Thomas Kwoyelo v. Uganda.
[200] Thomas Kwoyelo v. Uganda para. 152.
[201] Thomas Kwoyelo v. Uganda, para 150-152.
[202] Thomas Kwoyelo v. Uganda, para. 153.
[203] *Thomas Kwoyelo v. Uganda* para. 150
[204] General Comment No. 3 of the African Commission, paras 13 and 32.
[205] See Thomas Kwoyelo v. Uganda, para 152.

Thomas Kwoyelo v. Uganda illustrates this, since the Commission found violations of the rights under articles 3 and 7(1)(a), and a partial violation under article 7(1)(d) of the African Charter, and ordered the Government of Uganda to pay adequate compensation to the victim, stating that the mode of payment of compensation should be guided by international norms and practices relating to payment of compensatory damages.[206] Both of articles 3 and 7(1)(d) were considered to be violations on their own, not by reference to IHL rules. This statement goes hand in hand with the Commission's General Comment 3, where it highlights the conflict nexus as a benchmark in determining whether it is IHL or human rights law that governs the use of force against individuals.[207] The African Commission here succeeds in addressing an issue that e.g. the Human Rights Commission in General Comment No. 36 did not, as stated, satisfyingly touch upon. The reason based on which the African Commission yet again refers to both articles is not clarified. Since it now expressly refers to *lex specialis*, it could be assumed that reference to article 60 is, in alignment with Viljoen, done either because it does consider IHL conventions 'instruments on human and people's rights', or due to the large numbers of state parties to the treaties on the continent acknowledging the standards.

The African Commission has been blunt to articulate that it will only make findings of violations of the African Charter.[208] The human rights based approach often taken by human rights bodies is particularly well understood in non-international armed conflicts, where the IHL provisions are not abundant. The African Commission is not facing an easy task when pursuing to use, instead of Charter standards, the standards of IHL in situations of NIACs, as it stated in *Thomas Kwoyelo v. Uganda.* Whether this may strengthen the individual rights of civilians in NIACs in comparison with civilians in IACs has not been further researched. It has been argued that a less developed body of law it is not alone a reason to adopt a pure human rights based approach, but a context-specific analysis is needed.[209] The one-sided implementation of humanitarian law through human rights bodies may entail the risk of transforming humanitarian law into a law applicable exclusively to states.[210] Although the African Commission and the African Court are mainly mandated to apply the African Charter, the Commission's material jurisdiction extends further than the African Charter, due to which it has the competence

[206] *Thomas Kwoyelo v. Uganda,* para. 294-295.
[207] General Comment No. 3 of the African Commission, para.33.
[208] *Thomas Kwoyelo v. Uganda,* para. 150.
[209] Halibronner (2016) p. 360.
[210] Kleffner (2002) p. 242.

to adjudicate the Maputo Protocol.[211] Maputo Protocol makes specific reference to IHL in article 11, requiring for the state parties to respect the rules of international humanitarian law that affect the population, 'particularly women'.[212] Article 11 of the Maputo Protocol will be further discussed in the following chapter.

3.4.3 References to article 31(3)(c) of the Vienna Convention

General Comment No. 31 of the Human Rights Committee exemplifies the principle of systemic integration with the statement "... more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights"[213], by making implicit reference to Article 31(3)(c) of the Vienna Convention. Todeschini further notes that the Committee refrains from any reference to the *lex specialis* principle also in this connection.[214] General Comment No. 31 further acknowledges that the ICCPR imposes a duty on States to provide domestic remedies for violations of its provisions, including the possibility to obtain full redress,[215] while at the same time, a breach of IHL that translates into a violation of the ICCPR will entitle the individual to seek redress against a state accountable for the violation.[216] In its concluding observations, the Human Rights Committee has stated that states need to make redress available for victims of human rights and IHL violations occurred during armed conflicts.[217] Similar to the African Commission's approach based on articles 60 and 61 of the African Charter, the Human Rights Committee seems to consider IHL as interpretative inspiration in finding violations of the ICCPR.

The African Court on human and peoples' rights has so far only dealt with one case where it has addressed an armed conflict; the decision on provisional measures against Libya. Though the African Court makes mention to factors violating "human rights and international humanitarian law"[218], it does not itself draw from humanitarian law. It, however, calls on Libya to end actions violating both the African Charter and addition-

[211] According to the African Charter, article 60, the Commission shall also draw inspiration from various African instruments on human and people's rights.
[212] Maputo Protocol, article 11(3).
[213] General Comment No. 31 of the Human Rights Committee para. 11.
[214] Todeschini (2017) p. 209.
[215] General Comment No. 31. of the Human Rights Committee para 15.
[216] Todeschini (2017) p. 219.
[217] Concluding Observations: Colombia (4 August 2010) para.10.
[218] African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, para 21.

ally, 'other international human rights instruments to which it is party'.[219] Considering the African Commission's assessment in *the DRC* decision, whether the African Court considers the Geneva Conventions and their Additional Protocols 'other international human rights instruments' on which it is specifically allowed to draw, seems unlikely.[220] They would rather be characterised as other international treaties or general principles of international law, referred to in article 61 of the African Charter, at least. The question of whether the African Court's interpretation is categorized under article 61 or under the principle of systemic integration does not seem relevant, since both refer to fairly similar sources of international law.

Hailbronner recommends an approach that according to the article 61 of the African Charter, IHL could only be considered as 'subsidiary measures', implying a subsidiary role of IHL, helping to fill gaps and give content to Charter provisions while assisting with their application in practise.[221] This approach would provide clarity and predictability to the deliberations of the human rights bodies. The possible disproportional effect of this approach on international armed conflicts, in comparison with non-international armed conflicts, would need to be further studied but is outside the scope of this thesis. While Chapter 2.1 concludes that under IHL there is no individual right to claim reparations, it must also be noted that nothing in IHL precludes the right to reparation.[222] Greenwood affirms that the monitoring mechanisms of human rights conventions could be used in an indirect way to assist in ensuring compliance with IHL.[223] As both the Human Rights Committee and the African Commission and the Court, in their own ways, take IHL into considerations in finding violations of their respective conventions, an individual has the possibility to access a human rights body in cases where both bodies of law apply. The matter of how much foothold human rights bodies have already taken in the matter in terms of reparations in an armed conflict settings and gendered violence, will be looked at next.

[219] African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya, paras 21, 25
[220] Article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned."
[221] Hailbronner (2016) p.353.
[222] Iguyovwe (2008) p. 781, 784.
[223] Greenwood (2000) at 240–241 and 251–252.

4 REPARATIONS FOR GENDER-BASED VIOLENCE IN AFRICA

4.1 Reparations for violations of human rights law on the African continent

4.1.1 Gender-based violence as discrimination

Due to the increased awareness of the gendered effects of armed conflicts and human rights violations taking place during them, a gender approach to reparations has somewhat gained international attention. The ICC, in its first ever reparations case, highlighted the need of all victims to be considered, particularly the victims of sexual or gender violence, among other vulnerable groups. This meant that reparation should be granted and implemented without any discrimination, such as regards to age, ethnicity, political belief or gender.[224] The Human Rights Committee has also noted gender-based violence but has mostly focused on it by statements in the reviewing of the country reports.[225] The African Commission has passed a number of resolutions calling on member states to guarantee the victims of sexual and gender-based violence the right to just and equitable reparation.[226]

The acknowledgement of gender-violence as a form of discrimination may assists in detecting gender-based human rights violations. In the case of *Egyptian Initiative for Personal Rights and Interights v Egypt*[227] the African Commission expressly found that the violations that have taken place were gender-based violence, a form of discrimination.[228] More specifically, the African Commission found the Egyptian government responsible for discrimination against the victims in violation of articles 2 and 18(3). The victims had alleged a series of human rights violations, such as sexual assault, commit-

[224] See *the Prosecutor v Thomas Lubanga*.
[225] See HRC Concluding Observations on the seventh periodic report of El Salvador, para 13 where the Committee raised concerns "at the high rates of domestic and sexual violence women, girls and adolescents. … The Committee is further concerned about the accessibility, particularly for women living in rural areas, of the special courts set up to ensure that women can lead a life free from violence and discrimination."
[226] See the following resolutions: Resolution on the Situation of Women and Children in Armed Conflict; Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence and Resolution Condemning the Perpetrators of Sexual Assault and Violence in the Arab Republic of Egypt.
[227] *EIPR and INTERIGHTS v Egypt.*
[228] Ibid para. 165.

ted during a demonstration by the Egyptian authorities, amounting to discrimination and furthermore a violation of their dignity and ill treatment in violation of Article 5. The African Commission held that the incidents were targeted at the women participating or present at the demonstration, and were perpetrated, even though the perpetrators themselves seemed to be aware of the effect of these type of violations in the context of the Egyptian society, an Arab Muslim society where women's virtue is measured by keeping herself physically and sexually unexposed except to her husband.[229] Compensation was awarded, according to the applicants requested amount, for the physical and emotional damage and trauma suffered. The Commission found that the acts were perpetrated by state actors or/and non-state actors under the control of state actors.[230] In no point did the Commission refer to any of its resolutions on gender-based violence and reparations, which i.e. provide guidance in ensuring that reparation afforded to victims of sexual violence is adequate and comprehensive, in particular in the light of "the extent of physical and psychological trauma that women and girls face as a result of sexual violence."[231] I.e. the Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence calls on State parties to the African Charter to ensure accountability of perpetrators of sexual violence and to "put in place efficient and accessible reparation programmes that ensure information, rehabilitation and compensation for victims of sexual violence."[232]. Had it done so, it could have with the support of the instrument, awarded measures specifically tailored to address the gender aspects of the violations for which it found the State responsible.[233]

More broadly related to discrimination, the African Commission has addressed discrimination and draw use of other sources of international law. In *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea* a radio speech by the President of Guinea encouraged the armed forces and citizens of Guinea to engage in mass discrimination against Sierra Leonean refugees in Guinea, resulting in a number of human rights violations against refugees, including the widespread rape of Sierra Leonean women in Guinea.[234]As provided by articles 60 and 61 of the Charter, the Commission yet again found it appropriate to look into the principles and standards of international law, especially drawing use of international

[229] Ibid para. 162.
[230] *EIPR and INTERIGHTS v Egypt* para. 233 (b),
[231] See i.e. the African Commission, Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence. Recommendations.
[232] African Commission, Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence. Recommendations.
[233] Redress (2013) p.83.
[234] *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea.*

refugee law.[235] The Commission found, among other articles, a violation of article 2, 4 and 5 of the African Charter. It did not specify which actions fell under which article, but it did take note of the complainants allegation that the speech gave rise to "wide-spread sexual violence against the Sierra Leonean women in Guinea with the Guinean soldiers using rape as a weapon to discriminate against the refugees and to punish them for being so-called rebels." The African Commission also noted that "the complainants contend that the violence described in the statements made under oath was undeniably coercive, especially since the soldiers and the civilians used arms to intimidate and threaten the women before and during the forced sexual relations."[236]

The case approaches violence against women through discrimination, instead of leaning on provisions on torture. This is most likely because of the group of victims was clearly identified as refugees, 'women' not being the only common factor. Discriminatory practices have further been found, now with a specific reference to gender, in *Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 Others) v Republic of Angola* where the Commission ordered the country to "ensure that immigration policies, measures and legislations do not have the effect of discriminating against persons on the basis of any prohibited ground (including race, colour, descent, national, ethnic origin, or any other status), and particularly take into account the vulnerability of women, children and asylum seekers."[237] The resembling connection, this time to asylum seekers, but also to women and children, can be identified.

4.1.2 Sexual violence as torture

Sexual violence, a form of gender-based violence, cannot necessarily always be identified as discrimination, and in its gravest forms, a different acknowledgement and classification is at place. Article 14 of the Convention against Torture (CAT) stipulates the right of victims of torture to redress.[238] As a customary norm of international law, the prohibition of torture has been recognized already in the Lieber Code[239] and further in Article 3 Common to the Geneva Conventions where it prohibits "cruel treatment and

[235] Ibid. paras 37 and 41.
[236] Ibid para 58, 59.
[237] Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh & 13 Others) v Republic of Angola, para 87.
[238] Convention against Torture (CAT), Article 14 states that 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.'
[239] Lieber Code, Article 16

torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment" of civilians and persons *hors de combat*.[240] While no explicit reference to gender-based or sexual violence is made, there is international consensus on the extreme gravity of rape as a form of human rights violation. The characterization of rape as torture has been affirmed, in addition to the Committee against Torture,[241] by other human rights treaty bodies.[242] As a non-derogable norm of international law, the prohibition of torture and the characterization of rape as torture provides a strong foundation for a right to reparations for situations where rape has for been used as a weapon of warfare.

The Committee for the Prevention of Torture in Africa issued in 2017 a General Comment No. 4 considering the right to redress for victims of torture and other cruel, inhuman or degrading treatment.[243] The General Comment specifically refers to "those acts of sexual and gender-based violence that amount to a form of torture and other ill-treatment, (…) such as rape"[244] and highlights both the applicability of human rights norms during armed conflicts and the need for state parties to adopt specific measures to ensure that victims of sexual and gender-based violence obtain redress. The paragraphs on sexual and gender-based violence explicitly state that the "acts of sexual violence, particularly rape, are also systematically used as a tool of war in armed conflict".[245] The General Comment does not address all gender-based violations taking place during armed conflicts but it does serve as recognition of the issue in its gravest forms.

Though the African Commission has not eagerly used references to its resolutions in its decisions, a resolution more specific to the African context needs to be mentioned. The African Commission has in 2002 adopted the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa' (the Robben Island Guidelines), that provide among other duties the obligation to provide reparation to victims of torture and ill-treatment.[246]

---

[240] Geneva Conventions, Common Article 3. Furthermore, "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" constitutes a crime against humanity under the Statute of the International Criminal Court. See The Rome Statute Art. 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi).

[241] See ie. case *C.T. and K.M. v. Sweden* which was the first case where the Committee against Torture stated that rape can amount to torture under Article 1 of the convention. See also *V.L. v. Switzerland* where the Committee provided more detailed legal analysis of the definition of torture and rape as constituting torture, and by referring to the shame and fear related to sexual violence, for the first time shows sensitivity and attentiveness to gender issues.

[242] See e.g. *Martí de Mejía v Peru,* (IACommHR) and *Aydin v Turkey*, (ECHR).

[243] General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5).

[244] General Comment No. 4 paras 57 and 58.

[245]See General Comment No. 4, chapters VIII and IX.

[246] Robben Island Guidelines, Part III.

The international recognition of rape as torture[247] ties the resolution to gender-based violence on the African continent, reinforcing the need to address and respond to the needs of victims through reparations. According to the Robben Island Guidelines, an obligation to provide reparation exists regardless of a successful criminal prosecution.[248]

Regarding findings on torture, the Human Rights Committee has only occasionally clearly articulated the obligation of the state party to provide (medical) assistance, though as Evans notes, it is widely agreed that victims of torture generally require not only immediate medical attention, but also rehabilitation.[249] This serves yet as another example of the little attention to remedies the Human Rights Committee has given in its jurisprudence. Evans notes that this may be due to the absence of consultations with the victim on remedies as the complaint is under consideration.[250] Though the normative framework around torture, and rape as torture is undoubtedly strong, the Human Rights Committee jurisprudence related to reparations for torture does not provide additional strength to victims of gender-based violence.

4.1.3 Gender-specific human rights instruments and reparations

In addition to successfully being identified as forms of violations such as discrimination and torture, gender-based violence has been identified through the creation of treaties and treaty bodies focused on the elimination of gender-based violence. As a gender-specific treaty body, the Committee on the Elimination of Discrimination against Women has recommended, among other things, that states parties to the Convention "provide and enforce appropriate, timely remedies for discrimination against women". The recommendations further specify remedies as i.e. restitution, compensation and rehabilitation, [251] but also goes on to recommend the creation of women specific funds to guarantee the receipt of reparations in situations in which the violating party is unable or unwilling to provide such reparations.[252] By naming remedies constituting reparations, the recommendation draws a line from remedy to reparations. More specific to gender-

[247] See, e.g., *Delalić case*, Judgment (§§ 1328 and 1731) (ICTY); *Aydin v. Turkey* (§§ 1344 and 1741) (ECHR); *Case 10.970 (Peru)* (paras. 1349 and 1743) (IACtHR).
[248] Robben Island Guidelines, para. 50.
[249] Evans (2012) p. 49-50, referring to cases where the petitioners were found to be victims of torture; but where no mention is made in the decisions regarding medical attention and rehabilitation: *Isidore Kanana v. Zaire,* No. 366/1989, Final Views, 8 November 1993; *Rodrı´guez v. Uruguay,* No. 322/1988, Final Views, 9 August 1994; *Ndong Bee v. Equatorial Guinea,* Nos 1152/2003 and 1190/2003, Final Views, 30 November 2005.
[250] Evans (2012) p. 50.
[251] CEDAW (2015) General recommendation No. 33 on women's access to justice, para 19(a–b).
[252] CEDAW (2015) General recommendation No. 33 on women's access to justice, para 19(d).

based violence in armed conflicts and post-conflict settings, the recommendation calls for different forms of institutional reforms in accordance with international human rights standards, and the rejection of amnesties for gender-based human rights violations.[253] In connection with the institutional reform, the text acknowledges the Nairobi Declaration Women's and Girls Right to a Remedy and Reparation, a declaration highlighting the access for women and girls to reparations.[254]

The recommendation could be considered a document helping to connect human rights instruments pronouncing on remedies, to actual reparations for violations taking place in conflict settings. While Musila has noted that the term 'remedy', found in article 2(3) of the African Charter, does not equal reparations but rather covers a range of measures that include, but are not limited to, declarations, compensation and reparation,[255] the evidence points to the willingness of the African Commission to interpret the Charter as a document allowing for the providing of reparations, even if the reparations recommended have sometimes been read into a 'right to remedy', rather than 'a right to reparations' per se.[256] The African Commission has not, however, often referred to resolutions or other reinforcing documents but rather seemed to come to conclusions without shedding light on all the factors considered in the analysis of cases, making the evaluation of the weight of resolutions and declarations difficult. On the other hand, the lack of references to additional instruments may acts as proof that the African Commission does not consider the question as a controversial one.

The African Court has in one case, *APDF & IHRDA v Republic of Mali*[257] found a violation of the Maputo Protocol, relating to harmful traditional practices, ordering Mali to amend its national law to ensure it abides by its obligation under the Maputo Protocol, among other sources of international law. Budoo argues that it would be safe to assume the African Court would not hesitate to give another verdict against a country violating the Maputo Protocol, if all the preliminary conditions were met. Budoo however states that in most cases the admissibility requirements have been difficult to satisfy. A member state needs to make a declaration under article 34(6) of the African Court Protocol[258] for NGOs to be able to access the Court.[259] The fact that for an NGO to bring a case

[253] CEDAW (2015) General recommendation No. 33 on women's access to justice, para 19(e–g).
[254] The Nairobi Declaration Women's and Girls' Right to a Remedy and Reparation (2007) part 2.
[255] Musila (2016) p. 446.
[256] See i.e. previously mentioned *Malawi African Association & Others v Mauritania.*
[257] See Association pour le progrès et la defense des droits des femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali.
[258] The Protocol to the African Charter On Human and Peoples` Rights on the Establishment of an African Court on Human and Peoples` Rights, Art 34(6).
[259] Budoo (2018) Part 3.1

against a state requires this action from the states themselves, possibly charged with violations against them, seems a rather laborious procedure, negatively affecting the actualization of the rights of the individual.

Gender-based violence in an armed conflict was considered directly in *the DRC case*, where approximately 2,000 HIV-positive Rwandan and Ugandan soldiers raped Congolese women and young girls in order to spread AIDS to the Congolese population.[260] The DRC brought the complaint asserting, among other things, that the mass rape and deliberate infection of women and girls with HIV constituted a violation of human rights under the African Charter. By referring to both articles 60 and 61 of the Charter, the African Commission held that the Geneva Conventions and the two Additional Protocols are to be taken into consideration as subsidiary measures to determine the principles of international law.[261] The African Commission noted that the alleged acts of violence against women are prohibited under article 76 of the First Protocol Additional to the Geneva Conventions (Protection of Women), as well as are offensive to both the African Charter and the Convention on the Elimination of All Forms of Discrimination against Women.[262] How these breaches were found, the Commission does not elaborate on. Among other articles, the African Commission found violations of articles 18(1) and (3), apparently since it also found violations of the CEDAW. In addition to ordering an immediate withdrawal of the offending states' armed forces, the Commission requested adequate reparations to be paid to the DRC for the victims of human rights violations committed.[263] The complaint was brought to the African Commission by the DRC on behalf of its citizens. Whether this factor had an impact on the large amount of IHL referred to in the communication is not evident. The Maputo Protocol, specifically requiring states to establish services for i.e. reparation for victims of violence against women was adopted after the case, in July 2003.

There is currently no case law on the application of article 11 of the Maputo Protocol and reparations in the African Court. However, the fact that the Maputo Protocol directly addresses reparations and violence against women in armed conflicts could be considered a development towards a more consistent realisation of reparations for an individual. Viljoen suggest that the formulation of article 11(3) of the Maputo Protocol incorporates the corpus of IHL – both treaty-based and customary law, at least as far as it relates to women – into the Protocol, and therefore brings those provisions under the

[260] *Democratic Republic of Congo v. The Republics of Burundi, Rwanda and Uganda.*
[261] Ibid. paras. 70, 86
[262] Ibid para. 86.
[263] Ibid. Holding

jurisdiction of the African Commission and the Court.[264] Viljoen suggests, based on his assumption that the African Commission has also not yet developed a firm stance on the role of international humanitarian law in its jurisprudence[265], that it developed a more consistent approach, in line with *the DRC* findings, also highlighting its mandate that is not restricted to the African Charter alone. It could rely on IHL in an increasing manner even as the source of violations in respects of treaties it has jurisdiction over, such as the Maputo Protocol, already applied by the African Court.[266] Considering *the DRC case* that involved state parties rather than an individual on one side, it remains difficult to assess whether similar line of rulings would affect the standing of an individual in terms of reparations.

As the flow of cases in front of the African Court is most likely not going to significantly rise and therefore not remarkably affect the access to justice for individuals in practice, the emphasis on the handling of cases related to gender-based violations taking places on armed conflicts will remain on other human rights bodies. The reference to the Maputo Protocol by the African Court is however, a valuable one, and since the African Commission has, similarly to the references to IHL, referred to CEDAW, and is likely to follow to adjudicate the Protocol as its jurisdiction also covers it.

4.1.4 The responsibility of states for non-state actors to provide reparations

As human rights typically protect the individual against the abuse of state powers, modern warfare poses a challenge regarding the state's ability to protect its citizens. The relevance of the question of the responsibility of states for the actions of non-state actors is evident in armed conflicts of a non-international character and conflicts with multiple parties to the conflict. Relevant also to the definition of torture, the CAT definition refers to a public official or a person acting in an official capacity,[267] not addressing private parties or the states' responsibility regarding them. However, the Human Rights Committee's General comment 31 describes state responsibility to provide reparation for acts of torture or ill-treatment committed by private actors in cases where states have not succeeded in taking appropriate measures or in exercising "due diligence

[264] Viljoen (2014) p. 322.
[265] See *Darfur case* from 2009 where the African Commission once again seemed to chance its direction, falling back on its initial position of avoiding any reference to IHL standards. According to Viljoen this not only contrasts with its approach in *the DRC* case, but also with its report of its 2004 fact-finding mission to Darfur. Differences between *Darfur case* and *the DRC case* demand an explanation. See Viljoen (2014) p. 322.
[266] Viljoen (2014) p.331.
[267] CAT Article 1.

to prevent, investigate, prosecute and punish such non-state officials or private actors."[268] The Inter-American Court has also addressed the issue of due diligence and the requirements of it in its jurisprudence, which will be discussed in the next sub-chapter in comparison with the African Commission's jurisprudence.

One of the first African Commission cases dealing with gender-based violence, *Zimbabwe Human Rights NGO Forum v. Zimbabwe,* was the one to establish that a state can be held accountable for the violations committed by private actors. The complainant argued that even if the alleged perpetrators were not agents of the government, the government would still be held liable for a violation of the African Charter, since the government has an obligation under article 1 of the Charter to ensure that people within its jurisdiction are treated in accordance with international norms and standards,[269] likely assuming the African Commission would go on to determine whether the state had fulfilled its due diligence obligation or not and could be held responsible for violations conducted by private actors.

The African Commission did refer to the well-known *Velásquez Rodriguez* case of the Inter-American Court of Human rights, where the Inter-American Court affirmed that states must prevent, investigate and punish any violation recognized by the Convention.[270] It was stated that if the state did not address mass rape with due diligence, the state itself could be held accountable. More specifically, the African Commission held that that a "State can be held complicit where it fails systematically to provide protection of violations from private actors who deprive any person of his/her human rights." The African Commission did, however, note that "unlike for direct State action, the standard for establishing State responsibility in violations committed by private actors is more relative", and it is demonstrated by establishing that the state confines a pattern of abuse through pervasive non-action. To avoid complicity, "States must demonstrate due diligence by taking active measures to protect, prosecute and punish private actors who commit abuses."[271] Similar approach was encouraged by the African Commission's Fair Trial and Legal Assistance Guidelines that recommend the state to investigate and punish all complaints of violence against women, whether the alleged acts are perpetrated by the state, its officials or agents or by private persons, and that ensure a non-discriminatory approach towards victims.[272]

---

[268] General Comment of the Human Rights Committee No. 31 para. 8.
[269] *Zimbambe Human Rights NGO Forum v. Zimbabwe*, para. 137.
[270] *Zimbambe Human Rights NGO Forum v. Zimbabwe*, para. 206 referring to *Velásquez Rodriguez* para 166.
[271] Zimbabwe Human Rights NGO Forum v. Zimbabwe, para. 160.
[272] Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Sections P (e), F (i), G (a) among others.

The case offers some clarity on the boundaries of the responsibility of the state opposed to non-state actors in the African regional system. The African Commission found that the state had exercised due diligence in its response to the violence: "it had investigated the allegations, amended some of its laws and in some cases, paid compensation to victims." According to the African Commission, "it suffices for the state to demonstrate that the measures taken were proportionate to deal with the situation" and the fact that "all the allegations could not be investigated does not make the state liable for violations committed by non-state actors."[273] The African Commission has also in the case of *Egyptian Initiative for Personal Rights and Interights v Egypt*[274] highlighted the control exercised over the non-state perpetrators by the state of Egypt as a factor establishing responsibility.[275]

It has been suggested that the African Commission is starting to develop a more solid line of reasoning regarding the obligation of states for the illegal acts of non-state actors,[276] since it has addressed the issue in other cases, i.e. the complaint focused on the behaviours of an oil consortium between the state oil company and Shell in Nigeria. [277] Whether this development will address actors such as armed groups or private military companies is not evident but could naturally follow as complaints in front of the African Commission emerge.

4.2 Comparison to the approach of the Inter-American human rights treaty bodies on gender-based violence

4.2.1 Reparations for violence against women in the Inter-American Human rights system

Celorio has researched the Inter-American human rights instruments and their application by the Inter-American Court and the Commission of human rights and has identified a time period ("The First line of Merits Rulings by the Inter-American Commis-

[273] Zimbambe Human Rights NGO Forum v. Zimbabwe, para. 210.
[274] *EIPR and INTERIGHTS v Egypt.*
[275] EIPR and INTERIGHTS v Egypt para. 233 (b),
[276] See e.g. Murray (2000).
[277] The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria.

sion"), 1994-2001, during which the commission, according to the author, began to set standards in several areas, including "the obligation of States, including their respective judicial branches, to act with the due diligence necessary and without delay to prevent, investigate, sanction, and offer reparations for acts of violence against women, even when the acts are perpetrated by non-State actors."[278] As the conditions for reparations to be granted, the author also notes that standards regarding "the obligation to guarantee a de jure and de facto access to adequate and effective judicial remedies when acts of violence against women occur" was set." The legal characterization of rape as torture when perpetrated by public officials is also brought up.[279]

A second line of ruling in 2007-2009, giving more content to the standards, strengthened the Court's ability to rule on women's rights.[280] According to the author, the main contributions of three specific judgements related to gender-based violence include among others the jurisprudence on reparations.[281] An analysis on the scope of the state obligation provides a useful parallel that the norms applicable and their manifestation in the case law of the African Commission and the Court will be compared with. The obligation of states to investigate, sanction and offer reparations for gender-based violations of human rights, an element derived from Celorio's study, will be discussed regarding the jurisprudence related to gender-based violence on the African continent. More recent case law from the Inter-American Court will also be taken into consideration regarding the obligations concerning the acts of non-state actors.[282] Whether and in which way these obligations may be influenced by IHL, during an armed conflict, will be discussed.

Though *Cotton Field* does not refer to IHL, the Inter-American Court has had several cases that have allowed it to consider IHL as a source of interpretation of the Inter-American Convention, such as situations of internal armed conflicts, where both IHL

[278] Celorio (2011) p. 824. Furthermore, the Commission has indicated that the due diligence duty to investigate, prevent and sanction violence against women includes acts perpetrated by private actors, including the contexts of domestic violence. See *Jessica Lenahan (Gonzalez) et al. v. United States*, paras 120 and 133. Another more recent judgement regarding the rights of women*, IV v. Bolivia*, paras. 152–57, 175, a decision on forced sterilization, highlighted the relationship between maternal health and the rights to privacy and to personal integrity. In respect of the previous, free, and informed consent of women to medical interventions is essential. Both rulings build on the IACtHR's prior gender jurisprudence and set important new precedents by providing detailed content to the duties of due diligence and by explaining the circumstances in which States can be held liable for breaching them.
[279] Celorio (2011) p. 825.
[280] Celorio (2011) p. 825.
[281] Celorio (2011) p. 841.
[282] *The López Soto v Venezuela* decision is the IACtHR's first ruling on State responsibility for acts of sexual torture and sexual slavery by a private actor and its first case for gender-based violence against Venezuela. Also, *The Women Victims of Sexual Torture in Atenco vs Mexico* decision sets out the State obligations in cases of sexual torture by state security forces

and human rights law apply.[283] It has also emphasized the protective aspect of IHL, deriving from Article 3 Common to the Geneva Conventions, and the Additional Protocol II thereto, providing the individual with not only passive protection, but also requiring the state to impede violations against third parties.[284]

While on one hand the case law of the Inter-American Court and the Commission discussed here only have authority related to the specific rights they concern, it can also guide states on how to effectively implement the rights contained in their respective instruments at the national level.[285] The guidance-providing dimension of the case law serves as an interpretative aid for the purposes of this thesis**.** In order to establish the length the two systems functioning in realms of traditional justice mechanisms have gone to pronounce on reparations for gender-based violence, a comparison is helpful.

4.2.2 The obligations of a state or a non-state actor to prevent and investigate as foundation for reparations

Celorio highlights the role of certain cases in enhancing the nature of the state obligations related to due diligence and access to justice when the victims are at the risk of facing violations of human rights on the basis of factors such as their age, race, ethnicity, gender and multiple others.[286] In *Cotton Field,* the Inter-American Court, by confirming its competency to review claims under the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (the Convention of Belém do Pará)[287], opened a door for future petitions alleging human rights violations with gender-specific causes, in the realm of violence against women. Building on *Cotton Field*, the Inter-American Court has in its later case law reiterated what it had al-

[283] See i.e. *Santo Domingo Massacre case* para. 21.
[284] See i.e. *Mapiripán Massacre v. Colombia* (Case of the "Mapiripán Massacre" v. Colombia. Merits, Reparations and Costs. v. Colombia. Judgment of September 15, 2005. Series C, No. 134, par. 114.) " Carrying out said obligations is significant in the instant case, insofar as the massacre was committed in a situation in which civilians were unprotected in a non-international domestic armed conflict."
[285] Celorio (2011) p. 822.
[286] Celorio (2011) p. 842.
[287] Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará) Article 7: "The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: …" after which it goes on to list certain measures, along which the due diligence to prevent, investigate and impose penalties for violence against women.

ready found constituting 'violence against women'.[288] The obligations identified in *Cotton Field* have been identified in multiple cases such as *Raquel Martin de Mejía v. Peru*,[289] *Morales de Dierra v. Guatemala*[290], *González Pérez v. Mexico*[291] and *Da Penha Maia Fernandes v. Brazil*[292].

The factors identified in the creation of a state obligation related to due diligence and access to justice, highlighted in *Cotton Field* were the recognition of the gravity of the problem of violence against women and the "culture of discrimination" influencing the society, reports by international actors indicating the actions were manifestations of gender-based violence, the disadvantaged position of the victims and the evidence demonstrating that the victims had suffered forms of ill-treatment and probably sexual abuse before they had been murdered.[293] The Inter-American Court recognized that the State had the obligation to adopt all the positive measures necessary to guarantee the rights of girls, within a context of known disappearances, because they formed a group at particular risk to human rights violations.[294] Celorio considered the judgement to highlight link between discrimination and violence against women, following the Committee on the Elimination of Discrimination against women.[295]

Cotton Field provides clarity of the scope and the content of the state obligation in cases of violence against women particularly in the realms of prevention, investigation, and reparations from the perspective of gender-based violence and discrimination.[296] When it comes to **prevention**, the Inter-American Court found that the obligation includes the adoption of legal, public policy and institutional measures for the protection of women from risk factors and the prevention of acts of violence.[297] Celorio notes that the Inter-

[288] Celorio (2011) p. 843. In *Cotton Field* paras. 228–231 the Court says it "considered as factors: (1) that the State had recognized before the Court both the gravity of the problem of violence against women and the influence of a "culture of discrimination" in Ciudad Judrez; (2) reports from international bodies and non- governmental organizations indicating that many of these murders were manifestations of gender-based violence; (3) that in this case the victims were young, socioeconomically disadvantaged women, who were workers or students, as many of the victims were in this context; and (4) that the evidentiary record demonstrated that the victims had all suffered forms of ill-treatment and probably sexual abuse before they were murdered."
[289] *Martin de Mejía v. Peru*, Case 10.970, Inter-Am. Comm'n H.R., Report No. 5/ 96, OEA/Ser.L.IVIII.91, doc. 7 (1996);
[290] *Morales de Sierra v.Guatemala,* Case 11.625, Inter-Am. Comm'n H.R., Report No. 4/01, OEA/Ser.L.N/II.1 11, doc. 20 rev. (2001).
[291] *Gonzdlez Pdrez v. Mexico,* Case 11.565, Inter-Am. Comm'n H.R., Report No. 53/01, OEA/Ser.L./VIII.1 11, doc. 20 rev. (2001).
[292] *Da Penha Maia Fernandes v. Brazil,* Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L.IV/II.111, doc. 20 rev. (2001).
[293] *Cotton Field* para. 228–231.
[294] *Cotton Field* paras 430–411.
[295] Celorio (2011) p.845.
[296] Celorio (2011) p.847.
[297] *Cotton Field* paras. 242-58.

American Court specifically refers to **'strict due diligence'**, even though it does take into account its precedent about the limited responsibility of the state for human rights violations committed by private individuals and the requirement of knowledge of a situation of real and immediate danger in order to incur liability. The strict due diligence obligation arises in a known context of serious acts of violence against women.[298]

Similar obligations can be found in the realm of IHL. Where *Cotton Field* elaborates on the obligation to prevent, IHL, in order to prevent serious violations of its protective provisions during a conflict, contains a foundational obligation to implement. According to the Common Article 1 to the Geneva Conventions of 1949, the state has an obligation to ensure national implementation of IHL, which will contribute to preventing serious violations of its provisions during a conflict, making the transition process after the hostilities have ended much more viable.[299] Article 76 of the Additional Protocol I to the Geneva Conventions elaborates even further and considers women as ”the object of special respect” stating that they ”shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”[300] The implementation of this special obligation of ”special respect” serves as prevention of the listed violations. The explicit mention of women to be considered with ”special respect” could be considered a due diligence of some type in the realm of IHL.

The Inter-American Court states that the obligation to **investigate** human rights violations in the general context of violence against women is, in addition to be performed in a prompt, serious, impartial and an exhaustive manner, has a “wider scope”.[301] It also highlights the negative and positive obligations of the State in cases of violence against women, including the obligation to remove all factual and juridical obstacles to the due investigation of the facts and the conduct of the proceedings and also to ensure that investigations have a gender perspective.[302]

Despite the importance of investigations, there is a lack of detail about the standards, principles and international law on investigations relevant to investigations in armed conflicts. In addition to provisions on providing for effective penal sanctions for persons suspected of having committed or ordering the commission of ”graves breaches” and ”other serious violations of the laws and customs of war” (synonymous with ”war

[298] Celorio (2011) p. 848, referring to *Cotton Field* paras 283 and 409.
[299] Salmn (2006) p. 328
[300] AP I Article 76.
[301] *Cotton Field* para 293.
[302] *Cotton Field* para 455(b)

crimes"),[303] Salm argues there is a duty under customary international law to prosecute those who have committed violations of the laws and customs of war in a non-international armed conflict.[304] Though amnesties sometimes come up in the aftermath of a conflict, violations of international law are generally not what amnesties are aimed at. The United Nations Human Rights Committee, on the subject of torture, has stated that: "Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future."[305] For its part, the Inter-American Commission on Human Rights has asserted that it is necessary to "…ensure compatibility of recourse to the granting of amnesties or pardons for persons who have risen up in arms against the State with the State's obligation to clarify, punish, and make reparation for violations of human rights and international humanitarian law…"[306] The obligation to investigate is essentially linked to the obligation to make reparation.

The Inter-American Court has also contributed to **reparations** per se, namely by stating which reparations should be awarded from a gender perspective. Though the content of reparations falls outside the scope of the thesis, it should be mentioned that the Inter-American Court, setting a standard for the actualization of reparations, further elaborates the obligation of states to guarantee adequate access to justice to victims and their family members, in order to obtain remedies in cases of discrimination and violence against women.[307] It seems that the Inter-American Court will not address reparations separately from the due diligence obligations to prevent and investigate violations and it has stated that obstacles in the pursuit of justice may amount to serious violations of human rights.[308]

4.2.3 The elements of gender-based violence in Cotton Field in comparison with the jurisprudence of the African Commission and the Court

The African Commission has taken a similar approach to the Inter-American Court and the CEDAW Committee and identified the link between discrimination and gender-

[303] Articles 49, 50, 129 and 146 respectively of the four Geneva Conventions contain obligations related to suppressing all the violations of IHL, to search for and prosecute those responsible for the violations.
[304] See Salmn (2006) p. 328 referring to the decisions and statutes of international criminal tribunals, such as ICTY, Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 134; Art. 4 of the ICTR Statute; Art. 3 of the SCSL Statute and Art. 6(1)(c) and (e) of the East Timor Special Panel Statute.
[305] UN Human Rights Committee General Comment No. 20, 1992, para. 15.
[306] Inter-American Commission on Human Rights (2004) para. 11.
[307] *Cotton Field* paras. 412-440.
[308] *Cotton Field* para. 440.

based violence. In *EIPR and INTERIGHTS v. Egypt* the violations that took place were specifically identified as gender-based violence, a form of discrimination.[309] Similarly to *Cotton Field*, the high-risk culture of the Egyptian society was referred to in the African Commissions reasoning. The African Commission took note of the fact that the perpetrators seemed to be aware of the context of the Egyptian society where the consequences of their actions would yield especially severe consequences for women.[310] In *Cotton Field*, the corresponding observation was further strengthened by several reports of international organisations indicating that the violations in question were manifestations of gender-based violence.[311] The African Commission continues to state that the perpetrators were aware of the consequences of such acts on the victims and their families.[312] Both the Inter-American Court and the African Commission refer to a similar factor; the Inter-American Court further leaning on the international acknowledgement of the state of the society.

A third element that the Inter-American Court highlighted in Cotton Field was that it was proved that the victims suffered of physical ill treatment and very probably sexual abuse.[313] In *EIPR and INTERIGHTS v. Egypt* the African Commission also acknowledged the physical injuries and emotional trauma established by medical reports.[314] The African Commission additionally noted that the physical assaults described were gender-specific as the acts occurred could only be directed to women, and highlights that the victims were targeted in this manner because of their gender.[315] As another element, the African Commission notes that the threats and accusations of the victims for practicing prostitution, when they refused to withdraw their complaints can also be characterized as gender-specific.[316] As a fourth element in Cotton Field the Inter-American Court highlighted the disadvantageous position of the victims; they were young, socioeconomically disadvantaged women who were workers or students.[317] In *EIPR and INTERIGHTS v. Egypt* all the victims were female journalists who had different reasons

[309] Ibid para. 165. In comparison, see *Cotton Field* paras 129&228.
[310] Referring to the culture in the Egyptian society, the African Commission stated that the perpetrators 'seemed to be aware of the context (…); an Arab Muslim society where a woman's virtue is measured by keeping herself physically and sexually unexposed except to her husband.' in EIPR and INTERIGHTS v Egypt. para 152.
[311] *Cotton Field* para 229 and para 133.
[312] EIPR and INTERIGHTS v Egypt. para 152.
[313] *Cotton Field* para 230.
[314] EIPR and INTERIGHTS v Egypt. paras 12, 19, 164.
[315] *EIPR and INTERIGHTS v Egypt.* Paras 144. Whether the Commission holds that acts can be described as gender-specific if they are of such nature that they can only be directed to women is not clear.
[316] Ibid. Para 145.
[317] Celorio (2011) p. 834.

for being present at the time the assaults took place; the first victim was only passing by, the second was covering the events in her capacity as a journalist.[318]

Similar recognition of the vulnerable or disadvantageous position of the group of victims (in addition to the fact that they were women living in a society characterized by "a culture of discrimination") was not made in *EIPR and INTERIGHTS v. Egypt*, apparently since the victims had a different common denominator; they were all journalists, though not all present in their official capacities. The African Commission has, however, identified groups by referring to refugees in *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea.* The African Commission referred to international refugee law by reference to articles 60 and 61 of the African Charter and stated that in that particular case rape had been used as a weapon to discriminate against refugees.[319]

The African Commission is yet to follow the example of the Inter-American Court regarding the Inter-American Convention and the Convention of Belém do Pará, and elaborate on the link of obligations enshrined in the Charter and in the Maputo Protocol. As noted earlier, the Maputo Protocol can be seen to incorporate IHL, and has already been applied by the African Court. The African Commission could also strengthen its argumentation in future cases by aiming to identify particular factors of vulnerability, which often characterizes especially victims of armed conflict, in order to create consistency and strength. In *EIPR and INTERIGHTS v. Egypt,* identifying the women's occupation as a common denominator could have perhaps lead to suspecting violations of another kind, for example freedom of expression. The issue with the African Commission's statement lies in the fact that gender-based violence does not only appear through acts that can be 'only directed to women'. Though this was not the only reason behind identifying gender-based violence, it cannot be considered an element creating a solid reasoning to build on.

The existence of an armed conflict is unlikely to alter the definition of gender-based violence. The consideration of women as the object of 'special respect' would in itself suggest IHL assumes the vulnerable position of women in armed conflicts straightforwardly. When considering IHL as an interpretive aid in applying the quite broadly formulated Charter rights, the African Commission could possibly strengthen its definition of gender-based violence by drawing inspiration from IHL that seems to highlight the

[318] *EIPR and INTERIGHTS v Egypt*. Paras 5, 10.
[319] African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v. Republic of Guinea. paras 37 and 41.

specific needs for protection afforded to women, at least in international armed conflicts.[320]

4.2.4 The scope of state obligations to prevent, investigate and offer reparations in Cotton Field in comparison with the jurisprudence of the African Commission and the Court

On the state obligation to prevent violations of human rights, the Inter-American Court in *Cotton Field* highlighted the obligation to adopt legal, public policy and institutional measures to protect women from risk factors and prevent violence and referred to "strict due diligence" with respect to a report of missing women and the efforts to locate them during the first hours and days, since there was a real and imminent risk of them being ill-treated and killed.[321] In a more narrow way, the African Commission previously in *SERAC* case affirmed the governments' "duty to protect their citizens, … through appropriate legislation and affective enforcement."[322] The approaches are fairly alike, however, the African Commission does not refer to due diligence in any stricter manner when it comes to gender-based violations. It does, however, emphasize that the said obligation involves the protection of citizens from damaging acts that may be perpetrated by private parties.[323] In *EIPH INTERIGHTS v Egypt*, the African Commission made an observation that it was evident that the victim's had not been protected from the perpetrators and other actors during the events that took place, referring to an obligation to protect.[324] The African Commission has further leaned on the Inter-American Court's pronouncements, the 'due diligence principle', on a state's responsibility also for violations not directly imputable to the state.[325] The reference to a 'more relative' standard i.e. the need to establish that the state confines a patterns of pervasive non-action was brought up in *Zimbabwe Human Rights NGO Forum v. Zimbabwe,* with a requirement to take measures to offer protection and to prosecute and punish private actors who commit abuses.[326]

---

[320] Article 76 of the Additional Protocol I, applicable in international armed conflicts.
[321] *Cotton Field* para 283.
[322] *SERAC case* para 57.
[323] *SERAC case* para 57.
[324] *EIPH INTERIGHTS v Egypt* para. 137(b)
[325] *Zimbabwe Human Rights NGO Forum v. Zimbabwe* para 115. The African Commisison refers to the Inter-American Court's observation in the *Velásquez Rodriguez case* (para. 172) that a lack of due diligence to prevent the violation or to respond to is as required by the Convention can lead to international responsibility of the state.
[326] Zimbabwe Human Rights NGO Forum v. Zimbabwe, para. 160.

The African Commission also found that state responsibility can be generated by the lack of due diligence in preventing the violation or for not taking necessary steps in providing victims with reparation.[327] Reparations seem to be interlinked with the duty to prevent and offer protection also in the jurisprudence on the African Commission. The influence of IHL provisions on the due diligence obligation needs to be discussed to understand the effect of an armed conflict. Though the African Commission will not pronounce on violations other than the instruments it is mandated to apply, mainly the Charter, it has found Charter violations by reference to IHL and by virtue of articles 60 and 61 of the Charter. In *the DRC case*, the African Commission found a violation of the Charter by considering Article 76 of the Additional Protocol I to the Geneva Conventions. [328] By taking this article referring to "special respect of women" into consideration, stricter due diligence obligations regarding violations against women during armed conflict would possibly become applied.

Building on the principles of international law, the Inter-American Court stated it based its decisions in the matter on article 63(1) of the American Convention, the article on remedy and compensation.[329] Though the Inter-American Court has in cases such *Cotton Field* simply referred back to the principle that any violation of an international obligation resulting in harm entails the obligation to make adequate reparation, it has also connected the investigatory obligations to reparations. In *Cotton Field* it referred to the Inter-American Commission, who has indicated that "a full reparation requires that the state investigate the disappearances and subsequent murders (of the victims) with due diligence and impartiality, and exhaustively, in order to clarify the historic truth of the facts. To this end, the State must adopt all necessary judicial and administrative measures to complete the investigation, find, prosecute and punish the perpetrator or perpetrators and mastermind or masterminds and provide full information on the results."[330] Though there is a clear obligation in international law, followed by the Inter-American Court's jurisprudence on the obligation to make adequate reparation, the Inter-American Court finds that investigation and reparations are critically linked – there cannot be "full reparation" without an impartial and exhaustive investigation conducted with due diligence. The African Commission, in *Zimbabwe Human Rights NGO Forum*

[327] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, para 143.
[328] See i.e. case *Democratic Republic of Congo v. The Republics of Burundi, Rwanda and Uganda*. para. 83, 86. the African Commission also found a violation of the Charter by considering Article 56 of the Additional Protocol I to the Geneva Conventions.
[329] Cotton Field para 446, referring back to cases such as Case of *Velásquez Rodríguez v. Honduras*. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para. 25, and Case of Dacosta Cadogan v. Barbados. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 24, 2009. Series C No. 204, para. 94.
[330] *Cotton Field* para 452.

v. Zimbabwe, similarly refers to *Velásquez Rodríguez* where providing victims with adequate compensation was essentially linked to other elements of state responsibility; investigation, prevention, identifying the responsible and punishing them appropriately.[331] The African Commission similarly regards reparations, in the case at hand 'compensation', as an integral part of the due diligence process. Since, as earlier noted, state responsibility can be triggered by neglecting to take the steps to provide victims with reparations, the term compensation could be read to point to the full measure of different forms of reparation.

Cotton Field was the first case to establish that the obligation to investigate has a 'wider scope' when the case in question deals with a woman who had been killed, ill-treated and whose "personal liberty was affected within the framework of a general context of violence against women."[332] Referring to the approach taken by the European Court of Human Rights on racially motivated violence, the Inter-American Court held that the wider scope is necessary in order to reassert society's condemnation of gender-based violence and to build and maintain the confidence of the group of people protected in the capabilities of the authorities to indeed offer them protection from the threat of gender-based violence.[333] The Inter-American Court highlighted the negative and positive obligations of the state in cases of violence against women, including the obligation to remove all factual and juridical obstacles to the proper investigation of the facts and also to ensure a gender perspective in the course of the investigation. By gender perspective it meant an investigation that had a specific line of inquiry related to sexual violence, and among other things, was conducted by officials trained in addressing discrimination and gender-based violence.[334] In *EIPR and INTERIGHTS v. Egypt* it was according to the African Commission evident, without an in-depth elaboration of the scope of the obligation, that the state had not fulfilled its obligation, since it had failed to conduct an effective investigation and hold anyone accountable.[335] The state's obligation to investigate does not stand out in the case law of the African Commission as a separate element so much as it is mentioned in connection with the obligation to prevent violations, in reference to the requirement of due diligence. IHL does not similarly connect the obligation to investigate to reparations. However, since the efforts to identify a

[331] *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, para 144.
[332] *Cotton Field* para 293. In the same paragraph the Inter-American Court refers to the European Court who has stated simliarly on the discriminatory element of a violation that where an "attack is racially motivated, it is particularly important that the investigation is pursued with vigor and impartiality… ". The Inter-American Court held that " this criterion is wholly applicable when examining the scope of the obligation of due diligence in the investigation of cases of gender-based violence."
[333] *Cotton Field* para 293.
[334] *Cotton Field* para 455.
[335] *EIPR and INTERIGHTS v Egypt* para 206.

pure, individual right to reparation have not been successful in practise, allowing the mutual reinforcement of IHL and human rights law to enter the sphere of investigations could possibly have an effect on the content of the obligation to investigate, and, possibly highlight the reparatory dimension.

The Inter-American Court, in determining the scope of investigation has clearly taken an approach with a goal to educate the society and reaffirm the values enshrined in the conventions, for example steer the society from the "culture of discrimination" towards a more egalitarian environment. Considering the nature of the African Commission's decisions and recommendations as authoritative interpretations, yet not judgements per se, it may have a more difficult job if pursuing to follow this line of action. However, in its approach to due diligence, similar desire could be identified. Due diligence is discussed by the African Commission in many cases with the threat of attributing the responsibility for the acts of private and non-state actors directly or indirectly the state, if no effective investigation is being conducted. This might be evidence of a political motive in the work of the African Commission; an encouragement or a threat towards the states to actually start taking more extensive measures in guaranteeing the rights of their citizens. Essentially, the African Commission and the Inter-American Court are referring to a very similar element in the obligation to investigate: the need to push for change and, as the Inter-American Court further elaborated, to build and maintain the confidence of the group of people protected in the capabilities of the authorities to offer them protection. In a more recent case, the Inter-American Court directly notes that the states "must adopt the required measures to modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and other practices based on the idea of the inferiority or superiority of either of the sexes, and on stereotyped roles for men and women."[336] The Inter-American Court carries this task out with a specific tool – the requirement for a "wider scope" in the investigation of gender-based violence in high-risk contexts. Whether the African Commission follows this line of rulings is to be discovered.

The African Commission has for the time being addressed reparations specifically in gender-based violence related cases in a rather undefined manner. In *the DRC case* it recommended "adequate reparations be paid, according to the appropriate ways to the

[336] *Jessica Lenahan (Gonzales) et al. v United States*, para 126.

Complainant State for and on behalf of the victims of the human rights" [337], without any specification or further requirements. Even more distantly, the African Commission has recommended that a commission to be established, to assess the losses of victim with a view to compensate them.[338] Reparations, when mentioned by the African Commission, have been most regularly brought up in connection with cases concerning the legality or rather, unconstitutionality of amnesties, leading to situations where in theory, domestic remedies may have been available for victims, but "as a matter of practicality were not capable of yielding any prospect of success to the victims of the criminal assaults."[339]

[337] *Democratic Republic of Congo v. Burundi, Rwanda and Uganda*, Holding. See also Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v Mauritania where the Commission recommends the gorvernment to take diligent measures for the restitution of looted belongings and to take the necessary steps for the reparation for the deprivations of the victims of the events that took place. (Recommendations, para 2).
[338] *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*, Holdings.
[339] *Zimbabwe Human Rights NGO Forum v. Zimbabwe* para 71. See also *Thomas Kwoyelo v Uganda.*

5 CONCLUSION

Both criticism and praise have been raised about the blurring distinction between the two bodies of law; international humanitarian law and human rights law. Critics point to the fact that the increasing application of IHL by the regional human rights bodies might lead to IHL becoming fragmented in its application.[340] On the other hand, the convergence, and more specifically, the influence of human rights law on other branches of international law has been recognized having potential to strengthen the position of a victim of violations of international law.

Though human rights law has undoubtedly affected the interpretation of international humanitarian law, a right to present reparation claims based in IHL towards a violating party of in armed conflict, is not sustainable. Human rights mechanism, however, provide an individual an access to a body receiving individual claims, since it has been thoroughly established that international human rights law does not cease to apply, even during armed conflicts. Though no explicit reparation clauses exist in human rights instruments applicable in Africa, both the African Commission and the Human Rights Committee have seen their respective instruments as ones granting and individual the right to reparation for violations of the conventions. The African regional system has awarded individuals with different forms of remedies, whereas the Human Rights Committee has in its Concluding observations highlighted the States' responsibility in implementing the right to compensation and reparation. While the Human Rights Committee is clear on its position regarding the right to reparation and it has in its Concluding observations suggested multiple remedies to improve the position of an individual, its stance has had little value to an individual claiming to be a victim. On the other hand, the lack of a reparation clause in both the ICCPR and the African Charter may have contributed to the formation of regional, quasi-judicial bodies with reparations mandates.

Given the lack of mandate among IHL mechanisms to deal with non-international armed conflicts, mechanisms and bodies of other branches of international law such as the UN Commission on Human Rights, later the Human Rights Council, and the Inter-American Commission on Human Rights have taken initiative in this regard. The absence of a formal mandate for international humanitarian law however restricts their practice. The African Commission has been suggested to have approached IHL as only a 'subsidiary measure', helping to fill gaps and give content to Charter provisions while

[340] CRC (2003) pp. 59–60.

assisting with their application in practise. However, the African Commission's ability to adjudicate the Maputo Protocol brings the corpus of IHL to the sphere of application of the Commission and the Court. It could rely on IHL in an increasing manner even as the source of violations.

Human rights mechanisms lack the competence to deal directly with violations by armed groups, although they attempt to address them in reports or General Recommendations, or by finding States responsible for omission or acquiescence in the face of violations by armed groups. As the Human Rights Committee has highlighted the state's responsibility to prevent, protect and punish violations of human rights conducted by private, non-state actors, the African Commission has highlighted the states' responsibility for acts committed by armed groups. Though important developments for the individual, they does not address the issue in its entirety: if and when the state cannot be held responsible for the violations committed by armed groups, how can the individual access reparations, since the human rights mechanisms only regulate the relationship between the individual and the state?

The Inter-American Court has taken significant steps in creating sustainable standards for state responsibility for violations of human rights, specifically on terms of gender-based violence. Similar obligations to prevent, investigate and provide reparations for violations of human rights can be identified in the jurisprudence of the African Commission, but to a lesser extent. The obligation to investigate is essentially interlinked with the obligation to provide reparations, through which the obligation to repair can been seen as strengthened on the African continent. In the context of an armed conflict, instruments such as the Maputo Protocol highlight the application of human rights, specifically women's rights, and are moulding the bigger picture towards a more seamless interplay between the two regimes. Though consistency has not been reached in terms of creating a solid jurisprudence, there are likely to come plenty of opportunities to make it happen.

Though the case law of both the African Commission and the Court and the Human Rights Committee have confirmed the existence of the right to reparation and have utilized their respective treaty provisions in order to award individuals with reparations, a solid and accomplished jurisprudence on the actualisation of the right to reparation in armed conflicts cannot yet be detected. The given acknowledgements about the existence of a right to reparation have, however, very likely contributed to the number of initiatives and resolutions on the topic specifically. When the concept of a 'right to reparation' for gender-based violations in armed conflicts is still to be consistently executed, another question regarding the practicalities of reparations needs to be asked. If the tra-

ditional forms of justice are being utilized and effective reparations awarded through them, is a strengthened ‘right to reparation’ even necessary on the continent? In the aftermath of a conflict, the vast number of claims puts unusual pressure on the legal systems and in those situations traditional forms of justice may prove more efficient and prompter in responding to victim’s needs. Additional questions arise, relating to the needs of the victim: Is ‘official recognition’ needed, and what constitutes ‘official’ for the victims? In order to find out the actual effectiveness and gain from the reparation regime applicable in Africa from a victim-perspective, a study on the ground, comparing the non-judicial, traditional mechanisms and their effectiveness to the judicial ones would need to be conducted.

REFERENCES

Treaties and statutes

African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

American Convention on Human Rights 1969, 1144 UNTS 123. Adopted 22 November 1969. Entered into force 18 July 1978.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 10 December 1984, United Nations, Treaty Series, vol. 1465. Adopted 10 December 1984, entered into force 26 June 1987.

Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249. Adopted 18 December 1979. Entered into force Sept. 3 1981.

Protocol to the African Charter On Human and Peoples` Rights on the Establishment of an African Court on Human and Peoples` Rights. Adopted June 10, 1998, entered into force January 25 2004.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol). Adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, 11 July 2003.

Regulations Respecting the Laws And Customs of War On Land: Military Authority Over The Territory Of The Hostile State – Annex to the Convention: Regulations. The Hague, 18 October 1907.

GC I – Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Adopted 12 August 1949.

GC II – Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Adopted 12 August 1949.

GC III – Convention relative to the Treatment of Prisoners of War. Adopted 12 August 1949.

GC IV – Geneva Convention relative to the Protection of Civilian Persons in Time of War (GCIV). Adopted 12 August 1949.

AP I – Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977.

AP II – Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977.

Convention relative to the Treatment of Prisoners of War. Adopted 27 July 1929.

International Covenant on Civil and Political Rights 1966, 999 UNTS 171. Adopted 16 December 1966. Entered into force 23 March 1976.

Rome Statute of the International Criminal Court, adopted 17 July 1998, by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/9.

Universal Declaration on Human Rights, GA Res. 217A (III). 1948, A/810 at 71. Adopted 10 December.

Vienna Convention on the Law of Treaties, UNTS vol. 1155, A/CONF.39/11/Add.2. Adopted 23 May 1969.

Protocol to the Convention for the Protection of Cultural Property in the Event of Armed conflict 1954, The Hague. Adopted 14 May 1954.

The Lieber Code – Instructions for the Government of Armies of the United States in the Field. Adopted April 24, 1863.

Monographs and articles

Arnold, Roberta – Quénivet, Noëlle (eds.) International Humanitarian Law and Human Rights Law, Towards a New Merger in International Law, Brill/Martinus Nijhoff, Leiden, 2008.

Bílková, Veronika (2007) Victims of War and Their Right to Reparation for Violations of International Humanitarian Law, Miskolc Journal of International Law Vol. 4. No.2.

Budoo, Ashwanee (2018) Analysing the monitoring mechanisms of the African Women's Protocol at the level of the African Union, African Human Rights Law Journal Vol.18 No.1, Pretoria.

Camins, Emily L. (2016) Needs or Rights? Exploring the Limitations of Individual Reparations for Violations of International Humanitarian Law. International Journal of Transitional Justice Vol.10, No. 1:126–45.

Celorio, Rosa M. (2011) The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting, 65 U. Miami L. Rev. 819.

Chappell, Louise (2017) The gender injustice cascade: 'transformative' reparations for victims of sexual and gender-based crimes in the Lubanga case at the International Criminal Court. The International Journal of Human Rights, Vol.21. No.9.

D'Argent (2006) Compliance, Cessation, Reparation and Restitution in the Wall Advisory Opinion, in M. Dupuy, B. Fassbender, M. N. Shaw & K.-P. Sommermann (eds.) Völkerrecht als Wertordnung/Common values in International Law, Festschrift für Christian Tomuschat/Essays in Honour of Christian Tomuschat, Gebundenes Buch, Kehl, Germany.

Droege, Cordula (2007) Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict, Israel Law Review, Vol. 40, No.2, pp. 310-355.

Droege, Cordula (2008) Elective affinities? Human rights and humanitarian law International Review of the Red Cross. Vol. 90 No. 871.

Evans, Christine (2012) The right to reparation in international law for victims of armed conflict, (Cambridge Studies in International and Comparative Law), Cambridge University Press, New York.

Gaeta, Paola (2011) Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation? in Ben-Naftali, Orna (ed.) International Humanitarian Law and International Human Rights Law, Oxford University Press, Oxford.

Greenwood, C. (2000) International Humanitarian Law, in F. Kalshoven (ed.), The Centennial of the First International Peace Conference 161–259, Kluwer Law International, The Hague.

Gillard, Emanuela-Chiara (2003) Reparation for violations of international humanitarian law, International Review of the Red Cross, Vol. 85, No. 851.

Hailbronner, Michaela (2016) Laws in conflict: The relationship between human rights and international humanitarian law under the African Charter on Human and Peoples' Rights. 16 African Human Rights Law Journal pp. 339-364.

Hampson, Francoise J. (2008) The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body. International Review of the Red Cross, Vol. 90, No. 871.

Hathaway, Oona – Crootof , Rebecca – Levitz, Philip – Nix, Haley – Perdue, Williams (2011) 'Which law governs during armed conflict? The relationship between international humanitarian law and human rights law' (2011) 96 Minnesota Law Review 1883.

Henckaerts, J., Doswald-Beck, L., Alvermann, C., Dörmann, K., & Rolle, B. (2005) Customary International Humanitarian Law (pp. I-Iv) Cambridge University Press, Cambridge.

Heyns, Christof (2002) Civil and political rights in the African Charter' in Evans, Malcolm & Murray, Rachel (eds.) The African Charter on Human and Peoples' Rights: The system in practice, 1986-2000, p.137–177. Cambridge University Press, Cambridge.

Iguyovwe, Ruona (2008) The Inter-play between International Humanitarian Law and International Human Rights Law, Commonwealth Law Bulletin, Vol. 34 No.4, 749-789.

International Law Association (ILA), 'The Hague Conference (2010): Reparation for Victims of Armed Conflict (Substantive Issues)'. Report of the International Law Association.

Kalshoven, Frits (1991) State Responsibility for Warlike Acts of the Armed Forces. From Article 3 of Hague Convention IV to Article 91 of Additional Protocol I and Beyond, International and Comparative Law Quaterly Vol. 40, No. 4 pp. 827-858.

Kleffner, Jann. K. (2002) Improving Compliance with International Humanitarian Law Through the Establishment of an Individual Complaints Procedure, Leiden Journal of International Law 237– 250.

Kälin, Walter (2004) 'The Covenant on Civil and Political Rights and its Relationship with International Humanitarian Law' Expert Meeting on the Supervision of the Lawfulness of Detention during Armed Conflict (Geneva 24–25 July 2004).

Lesh, Michelle (2014) 'Interplay As Regards Conduct of Hostilities' in Erika De Wet and Jann Kleffner (eds), Converge and Conflicts of Human Rights and International Humanitarian Law in Military Operations. Pretoria University Law Press, 2014.

McLachlan, Campbell (2005) "The principle of systemic integration and Article 31(3)© of the Vienna Convention ", International and Comparative Law Quarterly, Vol. 54 (2005), pp. 279–320.

Modirzadeh, Naz K. (2014) Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance, Harvard National Security Journal Vol.5 Issue 1.

Musila, Godfrey, M. (2006) The right to an effective remedy under the African Charter on Human and Peoples' Rights', in African Human Rights Law Journal, (2006).
Norgaard, C.A. (1962) The Position of the Individual in International Law, Munksgaard, Copenhagen.

Peters, Anne (2016) Beyond Human Rights: The Legal Status of the Individual in International Law, Cambridge University Press, Cambridge.

Pictet, Jean (1975) Humanitarian Law and the Protection of War Victims, Sijthoff D. Henry Dunant Institute, Leyden/Geneva 1975.

Quénivet, Noëlle (2004) The Varvarin Case: The Legal Standing of Individuals as Subjects of International Humanitarian Law, Journal of Military Ethics (2004) Vol.3 No.2: 181–187.

Rau, Markus (2005) State Liability for Violations of International Humanitarian Law - The Distomo Case Before the German Federal Constitutional Court, German Law Journal Vol. 7 No. 7. 2005.

Salmn G., Elizabeth (2006) 'Reflections on international humanitarian law and transitional justice: lessons to be learnt from the Latin American experience.' International Review of the Red Cross 2006, Vol.88(862), pp.327-353

Sandoz, Yves – Swinarski, Christophe – Zimmermann, Bruno (eds.) (1987) Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Geneva: International Committee of the Red Cross and Martinus Nijhoff, Geneva.

Sarkin, Jeremy (2014) Providing reparations in Uganda: Substantive recommendations for implementing reparations in the aftermath of the conflicts that occurred over the last few decades, African Human Rights Law Journal, 14 AHRLJ 526-552.

Schwager, Elke (2013) 'Reparation for Individual Victims of Armed Conflict,' in Kolb, Robert and Gaggioli, Gloria (eds.) Research Handbook on Human Rights and Humanitarian Law in Kolb, Edward Elgar, Cheltenham.

Ssenyonjo, Manisuli (2018) Responding to Human Rights Violations in Africa Assessing the Role of the African Commission and Court on Human and Peoples' Rights, International Human Rights Law Review (1987–2018), 7 (2018) 1-42.

Tomuschat, Christian (2007) Reparations in Cases of Genocide, Journal of International Criminal Justice 5 (2007).

Tomuschat, Christian (2014) Human Rights: Between Idealism and Realism, 3rd. Edition, Oxford University Press, Oxford.

Todeschini, Vito (2017) The ICCPR in Armed Conflict: An Appraisal of the Human Rights Committee's Engagement with International Humanitarian Law, Nordic Journal of Human Rights, Vol. 35. No. 3, 203-209.

Umozurike, O. (2001) 'The Complaint Procedures of the African Commission on Human and Peoples' Rights', in G. Alfredsson, J. Grimheden, B. Ramcharan and A. de Zayas (eds.), International Human Rights Monitoring Mechanisms (The Hague: Kluwer Law International, 2001).

Viljoen, Frans (2014) 'The relationship between international human rights and humanitarian law in the African human rights system: An institutional approach' in De Wet &

Kleffner (eds.) Convergence and conflicts of human rights and international humanitarian law in military operations (2014). Pretoria University Law Press (PULP)

Viljoen, Frans (2011) Human rights in Africa: normative, institutional and functional complementarity and distinctiveness, South African Journal of International Affairs, 18:2, 191-216.

Viljoen, Frans (2002) 'Admissibility under the African Charter', in M. Evans and R. Murray (eds), The African Charter on Human and Peoples' Rights, the System in Practice 1986–2000. Cambridge University Press, 2002.

Zegveld, Lisbeth (2003) Remedies for victims of violations of international humanitarian law, International Review of the Red Cross, Vol. 85, No. 851, September 2003.

International case law

International Court of Justice

Application of the Genocide Convention Case (Bosnia and Herzegovina v. Serbia and Montenegro), ICJ Report 2007. Judgment of 26 February 2007.

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005.

Factory at Chorzow (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) Series A No. 8.

Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening) Judgment, I.C.J. Reports 2012.

Th Wall – Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, ICJ Report 2004.

Legality or Threat of Use of Nuclear Weapons, Advisory Opinion, 8 July 1996.

Other international case law

Delalic case – The Prosecutor v. Zejnil Delalic and Zdravko Mucic, Hazim Delic and Esad Landzo, International Criminal Tribunal for the former Yugoslavia, Judgment (§§ 1328 and 1731).

Prosecutor v. Tadic, International Criminal Tribunal for the former Yugoslavia, Case No. IT-96-21-Y, Judgment, 16 November 1998.

The Prosecutor v Thomas Lubanga Dyilo, International Criminal Court; Decision establishing the principles and procedures to be applied to reparations, 7 August 2012, ICC-01/04-01/06.

European Court of Human Rights

Al-Jedda v. United Kingdom, Application no. 27021/08, Council of Europe: European Court of Human Rights, 7 July 2011.

Al-Skeini and Others v. United Kingdom, Application no. 55721/07, Council of Europe: European Court of Human Rights, 7 July 2011.

Aydin v. Turkey, Application no. 57/1996/676/866, Council of Europe: European Court of Human Rights, 25 September 1997.

Ergi v. Turkey, 40/1993/435/514, Council of Europe: European Court of Human Rights, 28 July 1998.

Isayeva v. Russia, 57950/00, Council of Europe: European Court of Human Rights, 24 February 2005.

Inter-American Commission of Human Rights

Abella v. Argentina, Inter-American Commission on Human Rights (IACHR), Case 11.137, Report No. 55/97, OEA/ Ser.L/V/II.95 Doc. 7 rev. at 271 (1997)

Da Penha Maia Fernandes v. Brazil, Case 12.051, Inter-American Commission on Human Rights (IACHR), Report No. 54/01, OEA/Ser.L.IV/II.111, doc. 20 rev. (2001).

Gonzdlez Pdrez v. Mexico, Case 11.565, Inter-American Commission on Human Rights (IACHR), Report No. 53/01, OEA/Ser.L./VIII.1 11, doc. 20 rev. (2001).

Jessica Lenahan (Gonzales) et al. v. United States. Inter-American Commission on Human Rights (IACHR), Report No. 80/11, CASE 12.626 July 21, 2011.

Morales de Sierra v. Guatemala, Case 11.625, Inter-American Commission on Human Rights (IACHR), Report No. 4/01, OEA/Ser.L.N/II.1 11, doc. 20 rev. (2001).

Raquel Martí de Mejía v. Perú, Case 10.970, Inter-American Commission on Human Rights (IACHR), 1 March 1996.

Inter-American Court of Human Rights

Bamaca-Velasquez v. Guatemala, Inter-American Court of Human Rights (IACrtHR), Judgment of 25 November 2000, (Ser. C) No. 70 (2000).

González et al. ("Cotton Field") v. Mexico, (Preliminary Objection, Merits, Reparations, and Costs), Inter-American Court of Human Rights (IACrtHR), 16 November 2009.

I.V. v. Bolivia, Inter-American Court of Human Rights (IACrtHR), (ser. C) No. 329, (Nov. 30, 2016).

Plan de Sanchez Massacre v. Guatemala, Inter-American Court of Human Rights (IACrtHR), (Ser. C), Judgment of 29 April 2004.

Santo Domingo Massacre v. Colombia, Case N. 12.416, Inter-American Commission on Human Rights (IACHR), 8 July 2011.

The López Soto y otros Vs. Venezuela. Sentencia de 26 de septiembre de 2018. (Fondo, Reparaciones y Costas), Corte Interamericana de Derechos Humanos (Corte IDH), 26 Septiembre 2019.

Velasquez Rodriguez Case (Preliminary Objections), Inter-American Court of Human Rights (IACrtHR). (Ser. C) No. 1 (1994), Inter-American Court of Human Rights (IACrtHR), 26 June 1989.

African Commission on Human and Peoples' rights

African Commission on Human Rights v Great Socialist People's Libyan Arab Jamarihiya (2011) Application 004/2011.

Amnesty International & Others v Sudan (2000) AHRLR 297 (ACHPR 1999)

Antoine Bissangou v Republic of Congo, Communication 253/2002, 21st Annual Activity Report, (2006) AHRLR 80.

Article 19 v Eritrea, Communication 275/2003, 22nd Activity Report, (2007) AHLRL 73. the 41st ordinary session, May 2007, 22nd Activity Report.

Centre for Free Speech v Nigeria, Communication 206/97, 13th Annual Activity Report, (2000) AHLRL 250.

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Communication 276/2003, 27th Activity Report, (2009) AHLRL 75 (Endorois).

Constitutional Rights Project v Nigeria, Communication 148/96, 13th Annual Activity Report, (2000) AHLRL 241

Chad Mass Violations – Commission Nationale des Droits de l'Homme et des Libertés v Chad, Merits. Communication 74/92, 9th Annual Activity Report 1995-1996, (2000) AHRLR 66 (ACHPR 1995), (1997) 4 IHRR 94, IHRL 164 (ACHPR 1995), October 1995.

Constitutional Rights Project v. Nigeria, Communication 148/96, 13th ACHPR AAR Annex V (1999-2000).

Darfur case – Sudanese Human Rights Organisation & Another v Sudan (2009) AHRLR 153 (ACHPR 2009).

The DRC case – Democratic Republic of the Congo v Burundi, Rwanda and Uganda (2004) AHRLR 19 (ACHPR 2003).

EIPH and INTERIGHTS v Egypt – Egyptian Initiative for Personal Rights and Interights v Egypt, Communication 323/06. Judgement of June 18 2016.

Embga Mekongo v. Cameroon, Comm. 59/91, 8th ACHPR AAR Annex VI (1994-1995)

Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v. Guinea, 249/02, African Commission on Human and Peoples' Rights, December 2004.

Thomas Kwoyelo v. Uganda, Communication 431/12, ACHPR 129. 17 October 2018.

Legal Resources Foundation v. Zambia, Communication No. 211/98 (2001)

Malawi African Association & Others v Mauritania (2000) AHRLR 149 (ACHPR 2000).

Marcel Wetsh'okonda Koso and others v Democratic Republic of Congo, Communication 281/2003, 26th Activity Report, (2008) AHLRL 93.

Media Rights Agenda and Others v Nigeria (2000) AHRLR 200 (ACHPR 1998).

Odjouoriby Cossi Paul v Benin, Communication 199/97, 17th Annual Activity Report, (2004) AHLRL 15.

RADDHO v Zambia – Rencontre Africaine pour la Défence des droits de l'Homme (raddho) v Zambia, Communication 71/92, 7th Annual Activity Report, (2000) AHLRL 321.

The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria. Communication No. 155/96). 20th Session, 13-27 October 2001.

Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (cohre) v Sudan, Communication 279/2003 and 296/2005, 28th Activity Report, (2009) ahrlr 153, para 229.

Zimbabwe Human Rights NGO Forum v Zimbabwe, Communication No. 245/2002. ACHPR 73. 25 May 2006.

African Court of Human and Peoples' Rights

Association pour le progrès et la defense des droits des femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali African Court on Human and Peoples' Rights. Application 46/2016, Judgement 11 May 2018.

Other documents by the African Commission

General Comment No. 3 African Commission on Human and Peoples' Rights (AComHPR), 'General Comment 3: The Right to Life (Article 4)'. The African Commission on Human and Peoples' Rights, 57th Ordinary Session, 4–18 November 2015.

General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), The African Commission on Human and Peoples' Rights, 21st Extra-Ordinary Session, 23 February to 4 March 2017.

Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, November 2011, The African Commission on Human and Peoples' Rights, 42nd Ordinary Session, Brazzaville, Republic of Congo, 15 - 28 November 2007.

Robben Island Guidelines – Guidelines and measures for the prohibition and prevention of torture, cruel, inhuman and degrading treatment or punishment, adopted by the African Commission in 2002.

Human Rights Committee

Andrei Strizhak v. Belarus, UN Doc. CCPR/C/124/D/2260/2013, 1 November 2018.

Isidore Kanana Tshiongo a Minanga v. Zaire, Doc. CCPR/C/49/D/366/1989 (1993). 8 November 1993.

Kurbonov v. Tajikistan, CCPR/C/86/D/1208/2003, 16 March 2006.

Medjnoune v. Algeria, CCPR/C/87/D/1297/200414 July 2006.

Mulezi v. Democratic Republic of Congo, CCPR/C/81/D/962/2001, 8 July 2004.

Ndong Bee v. Equatorial Guinea, CCPR/C/85/D/1152 & 1190/200, 17 October – 3 November 2005.

Rodríguez v. Uruguay, CCPR/C/51/D/322/1988, 9 August 1994.

Sankara v. Burkina Faso, CCPR/C/94/D/1472/2006, 28 March 2006.

Suarez de Guerrero v. Colombia (45/79), Communication No. R.11/ 45, 5 February 1979, UN Doc. Supp. No. 40 (A/37/40) at 137 (1982).

General Comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13.

UN Human Rights Committee (HRC) General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992.

Concluding Observations on Bosnia and Herzegovina, CCPR/C/BIH/CO/1 (November 2006).

Concluding Observations on Central African Republic, CCPR/C/CAF/CO/2, (July 2006).

Concluding Observations on Colombia' CCPR/C/COL/CO/6 (4 August 2010).

Concluding Observations on Democratic Republic of Congo, UN Doc. CCPR/C/COD/CO/3 (26 April 2006).

Concluding Observations on Guatemala, UN Doc. CCPR/CO/72/GTM (27 August 2001).

Concluding Observations: Mexico, CCPR/C/79/Add.109, (27 July 1999).

Concluding Observations on USA' CCPR/C/USA/CO/3/Rev.1 (18 December 2006).

Committee against Torture

C.T. and K.M v. Sweden, Communication No. 279/2005, 17 November 2006, UN Doc. CAT/C/37/D/279/2005 (2007).

V.L. v. Switzerland, CAT/C/37/D/262/2005, UN Committee Against Torture (CAT), 22 January 2007.

The Women Victims of Sexual Torture in Atenco vs Mexico. Alternative Report to CAT, 37th session. 15 August 2006.

CEDAW Committee

CEDAW *Concluding observations of the Committee on the Elimination of Discrimination against Women: Libyan Arab Jamahiriya*, 6 February 2009.

CEDAW General Recommendation No. 19: Violence against women, 1992.

CEDAW General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations (2013).

CEDAW, General Recommendation No. 33 on women's access to justice, UN Doc CEDAW/C/GC/33 (2015).

CEDAW, General Recommendation 25, on Temporary Special Measures, U.N. Doc./CEDAW/C/2004/I/WP.1/Rev.1 (2004).

The Council of Europe

The Istanbul Convetion – The Council of Europe Convention on preventing and combating violence against women and domestic violence. Signed on 11 May 2011, entered into force 1 August 2014.

National case law

Bridge of Varvarin case (OLG – Oberlandesgericht – Higher Regional Court) Köln, 58 NEUE JURISTISCHE WOCHENSCHRIFT. 28.07.2005 - 7 U 8/04.

Dedovic v. Kok et al., Gerechtshof Amsterdam, Vierde meervoudige burgerlijke kamer, Dedovic v. Kok et al., Judgment of 6 July 2000.

Distomo case –Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), 2 BvR 1476/03, (February 15, 2006).

UN Documents

Human Rights Council (2010) Promotion and protection of all human rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development. *Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo.* UN Doc. A/HRC/14/22 19 April 2010.

International Law Commission (2001) Articles on State Responsibility for Internationally Wrongful Acts. Adopted by the Commission at its fifty-third session. Annex to General Assembly resolution 56/83 of 12 December 2001.

Report of the Office of the United Nations High Commissioner for Human Rights (2014); Analytical study focusing on gender-based and sexual violence in relation to transitional justice, UNGA A/HRC/27/21 HRC.

The UN Secretary-General, "In-depth study on all forms of violence against women", UN Doc A/61/122/Add.1 (2006).

UN Charter – United Nations, *Charter of the United Nations*, 24 October 1945.

UN (2006) UN General Assembly, 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: resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147.

UN General Assembly Declaration on the Elimination of Violence against Women. Proclaimed by General Assembly resolution 48/104 of 20 December 1993.

Other sources

CRC report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 28th International Conference of the Red Cross and Red Crescent, ICRC, Geneva, 2003.

IACHR, Access to Justice for Women Victims of Violence in the Americas, Inter-Am. C.H.R., OEA/Ser.L/V/II, Doc. 68 (January 20, 2007).

ICJ (2016) The International Commission of Jurists, Women's Access to Justice for Gender-Based Violence A Practitioners' Guide No. 12, February 2016, Geneva, Switzerland.

ICRC (2003) ICRC Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 28th International Conference of the Red Cross and Red Crescent, Geneva, 2003.

ICRC (1973) Draft Additional Protocols to The Geneva Conventions of August 12, 1949 – Commentary 131.

Inter-Agency Standing Committee (2005) Guidelines for Gender-Based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies (Field Test Version) Geneva: Inter-Agency Standing Committee. September 2005.

Redress report (2016) Lazarus, Liora – Ndeunyema, Ndjodi (eds.) A Report on Reparations and Remedies for Victims of Sexual and Gender Based Violence – A Report for REDRESS (London), University of Oxford, Faculty of Law. Oxford Pro Bono Publico.

Online sources

African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, accessed at http://www.achpr.org/instruments/fair-trial/ on 10.9.2019.

Bafaki, Regina (2011) Exploring Access To Justice Through Traditional Mechanisms And The Formal Justice System For Women Who Experience Violence in Uganda, ac-

cessed at https://www.svri.org/forums/forum2011/Exploringaccesstojustice.pdf on 7 December 2019.

International Center for Research on Women – Gender-based Violence Prevention Network – South African Medical Research Council (2012) Strengthening Research and Action on Gender-based Violence in Africa, accessed at https://www.icrw.org/wp-content/uploads/2016/10/strengthening_research_and_action_africa.pdf on 7 December 2019.

Inter-American Commission on Human Rights (2004) Report on the demobilization process in Colombia, OEA/Ser.L/V/II.120, Doc. 60, 13 December 2004, para. 11, available at <http://www.cidh.org/countryrep/Colombia04eng/toc.htm.> Accessed July 7 2019.

Maputo Protocol website, accessed at <https://maputoprotocol.com/the-countries-that-have-ratified-it> on July 26 2019.

Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation, the International Meeting on Women's and Girls' Right to a Remedy and Reparation, Nairobi, March 2007. Accessed at <https://www.legal-tools.org/en/doc/b22586/> on 21.8.2019.

Redress (2013) Reaching for Justice – The Right to Reparation in the African Human Rights System October 2013. Accessed at https://redress.org/publication/reaching-for-justice-the-right-to-reparation-in-the-african-human-rights-system/ on 10.9.2019.

Shaheed Fatima, 'UN HRC's General Comment on the Right to Liberty and Security: A Missed Opportunity? (Part Two)' (Just Security 20 November 2014) <https://www.justsecurity.org/17596/human-rights-committees-general-comment- no-35-security-detention/> accessed 10 May 2019.

The ICC Forum, March 2013 to January 2014, accessed at <https://iccforum.com/africa>, accessed July 7 2018.

Todeschini (2017b) Further comments on the Final General Comment reinforcing original arguments, in http://opiniojuris.org/2019/01/21/the-human-rights-committees-general-comment-no-36-and-the-right-to-life-in-armed-conflict/, accessed 11 May 2019.

Todeschini (2019) The Human Rights Committee's General Comment No. 36 and the Right to Life in Armed Conflict <http://opiniojuris.org/2019/01/21/the-human-rights-committees-general-comment-no-36-and-the-right-to-life-in-armed-conflict/>, accessed 11 May 2019.

UN-Women (2012) A Window of Opportunity: Making Transitional Justice Work for Women. Second edition, October 2012. Accessed at < https://www.unwomen.org/~/media/Headquarters/Attachments/Sections/Library/Publications/2012/10/06B-Making-Transitional-Justice-Work-for-Women.pdf> on 17.12.2019.

Website of the African Commission, Accessed http://www.achpr.org/mechanisms/rights-of-women/about/ on 26 July 2019.