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RESEARCH ARTICLE

# Access to Redress for Stateless Persons Under International Law: Challenges and Opportunities

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Every wrongful act gives rise to an obligation to redress the offense. In the international legal context, following the 'traditional' claims approach for wrongful acts, it is the state of nationality that has the duty to request redress for the violations incurred by its nationals through diplomatic protection. However, this 'traditional approach' excluded stateless persons, who are not considered nationals by any state. This article explores the manners in which stateless persons have been able to access mechanisms of redress for violations of their rights under international law, by exploring the challenges and opportunities their situation of statelessness creates for them in terms of accessing justice at the international level. For this purpose, three different existing international mechanisms with the powers to issue measures for redress have been selected. Through exploring access to redress for stateless persons at the international level, this article also provides an overview and analysis of the selected mechanisms, exploring their law and practice.

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**Keywords:** Access to Redress; Statelessness; Diplomatic Protection; Inter-American Court of Human Rights; UNCC; International Criminal Court

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## 1 Introduction

The notion that wrongful acts committed by a state give rise to an obligation to redress the harm caused has a strong basis under international law, rooted in both international legal documents and jurisprudence. The 1907 Hague Convention (IV) on the Laws and Customs of War on Land, for instance, establishes under Article 3 that a 'belligerent Party which violates the provisions of the...Regulations shall, if the case demands, be liable to pay compensation'.<sup>1</sup> A similar provision can be found under Article 91 of Additional Protocol I to the Geneva Conventions.<sup>2</sup> Furthermore, the Permanent Court of International Justice (PCIJ), in its 1928 *Factory at Chorzow* case, established that under international law any harm resulted from a wrongful act creates an obligation to grant measures to redress the harm.<sup>3</sup> International law was initially conceived as the law that regulates the interaction among states, in order to maintain the international order. Consequently, only states were traditionally deemed subjects of international law, giving rise to relationships hinged on 'full rights and obligations'<sup>4</sup> among states. Access to redress for individuals was consequently inextricably linked with being a state's national. A question that arises is what happens to persons who do not hold the nationality of any state, stateless persons.

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<sup>1</sup> International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, (18 October 1907).

<sup>2</sup> *Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts* (8 June 1977).

<sup>3</sup> 'it is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form' *Factory at Chorzow (Claim for Indemnity) case, (Germany v Poland)* [1927] PCIJ, Series A—No 9 at 21, and *Factory at Chorzow (Claim for Indemnity) case, (Germany v. Poland)* 'Merits' [1928] PCIJ Ser. A No. 17 at 29; see also EC Gillard, 'Reparation for violations of International Humanitarian Law' (2003) 85(851) *International Review of the Red Cross* 529. However, it should be noted that this decision did not relate to violations of the laws and customs of war.

<sup>4</sup> EC Gillard, 'Reparation for violations of International Humanitarian Law' (2003) 85(851) *International Review of the Red Cross* 529.

Under the “traditional approach”, through diplomatic protection, stateless victims of wrongful acts were ‘left entirely without any recourse’,<sup>5</sup> as under the traditional approach any wrongful act committed against an individual was a wrongful act committed against the individual’s state.<sup>6</sup> This gave rise to an obligation of the harmed individual’s state to “vindicate” both itself and its citizen by demanding that the offending state redress the harm. This meant that victims of internationally wrongful acts depended on their state of nationality to file claims for reparations on their behalf against the state which harmed them,<sup>7</sup> normally through diplomatic channels (diplomatic protection). Under this practice, nationality is a key element of access to redress for harm committed by a state. Therefore, the application of the traditional approach left stateless victims of wrongful acts ‘entirely without any recourse’.<sup>8</sup>

While today international law continues to be state-oriented to a large extent, access to redress for internationally wrongful acts<sup>9</sup> is becoming less state-dependent.<sup>10</sup> This is evident particularly when the victims of said internationally wrongful acts are individuals and not states or (international) entities. Today, there is a clear and well-established legal basis under international law which provides for the obligation to provide reparations to be given to victims affected by internationally wrongful acts. In the area of international human rights law, there is an extensive body of jurisprudence from regional human rights courts<sup>11</sup> where a state is found guilty of committing human rights violations and is subsequently ordered to make reparations to the victims of said violations. This growing body of jurisprudence has contributed to shaping approaches to redress in the general field of international human rights law. Redress is also available for violations of international criminal law, especially before a relatively new international organism: The International Criminal Court, which has a victims’ mandate and places a greater emphasis on redress, in addition to punishing perpetrators. These developments have facilitated access to redress for stateless persons, who under the traditional approach were excluded from obtaining redress due to their lack of nationality.

<sup>5</sup> C Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (1st, Cambridge University Press, 2012), at 92–93.

<sup>6</sup> P De Greiff (ed.), *The Handbook of Reparations* (1st, Oxford University Press, 2006), at 482.

<sup>7</sup> EC Gillard, ‘Reparation for violations of International Humanitarian Law’ (2003) 85(851) *International Review of the Red Cross* 529.

<sup>8</sup> C Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (1st, Cambridge University Press, 2012), at 92–93.

<sup>9</sup> For the purposes of this article, internationally wrongful acts will be understood as violations of human rights law (codified in international human rights instruments), international crimes (genocide, crimes against humanity, war crimes, as codified under the Rome Statute and other instruments of international criminal law), and any other gross violation of human rights and international humanitarian law as established in the van Boven/Bassiouni principles; see n21 below.

<sup>10</sup> According to Mapp, for instance, the idea that states are the sole subjects of international law is “not absolute”. See W Mapp, *The Iran-United States Claims Tribunal: The First Ten Years, 1981–1991: An Assessment of the Tribunal’s Jurisprudence and Its Contribution to International Arbitration* (Manchester University Press, 1993), at 262.

<sup>11</sup> It should be emphasized out that the IACtHR does not have jurisdiction over ‘crimes’, it has jurisdiction over human rights violations. Including violations to the right to life (article 4), the right to humane treatment (article 5), right to a fair trial (article 8), right to judicial protection. It has heard multiple cases on human rights violations that fall within the scope of ‘gross violations’ of human rights including torture, such as *García Lucero et al. v. Chile*, *García Cruz and Sánchez Silvestre v. Mexico*. It has heard multiple cases regarding massacres, including the “*Las Dos Erres*” *Massacre v Guatemala* (IACtHR, 2009), *Plan de Sánchez Massacre v Guatemala* (IACtHR, 2004), *Case of the Massacres of El Mozote and surrounding areas v. El Salvador* (IACtHR, 2012). It also has heard multiple cases on enforced disappearance, a common human rights violation across the region; its jurisprudence includes landmark cases *Molina Theissen v Guatemala* (IACtHR, 2004) and *Velásquez-Rodríguez v Honduras* (IACtHR, 1989). Extra-judicial killings are also common in the Court’s jurisprudence, including cases *Cruz Sanchez v. Peru* (2015) and *García Ibarra et al. v. Ecuador* (2015). See for instance also *Ticona Estrada et al. v Bolivia (Merits, Reparations and Costs)* (IACtHR, 2008); *Lysias Fleury et al. v Haiti (Merits and Reparations)* (IACtHR, 2011); *Fontevicchia and D’Amico v Argentina (Merits, Reparations and Costs)* (IACtHR, 2011); *Expelled Dominican and Haitian People v the Dominican Republic (Preliminary objections, merits, reparations and costs)* (IACtHR, 2014); *Carpio Nicolle et al. Guatemala* (IACtHR, 2004); *De La Cruz Flores v Peru* (IACtHR, 2004); *Aloeboetoe v Suriname* (IACtHR, 1993); among others. Jurisprudence on reparations at the European Court of Human Rights includes *Papamichalopoulos and others v Greece* (ECtHR, 1993); *Brumarescu v Romania* (ECtHR, 1997); *Selcuk and Asker v. Turkey* (ECtHR, 1998); *Jamil v France* (ECtHR, 1995); the ECtHR is more restrained when it comes to the reparatory measures it orders. See also I Nifosi-Sutton, ‘The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: a Critical Appraisal from a Right to Health Perspective’ (2010) 23 *HHRJ*; T Antkowiak, ‘Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond’ (2008) *Columbia Journal of Transitional Law*; D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005); E Lambert Abdelgawad, *The execution of judgments of the European Court of Human Rights* (2008) Human rights files, No. 19. The African Court on Human and Peoples’ rights is a relatively new mechanism; the Court has issued rulings on reparations, in the cases of *App. No. 013/2011 – Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples’ Rights Movement v Burkina Faso* ‘Ruling on Reparations’ (AChPR, 2015); *App. No. 009/2015 – Lucien Ikili Rashidi v. United Republic of Tanzania* ‘Judgment (Merits and reparations)’ (AChPR, 2019). For more on the court’s approach to reparations see GJ Naldi, ‘Reparations in the Practice of the African Commission on Human and Peoples’ Rights’ (2004) 14(3) *Leiden Journal of International Law* 681. See also REDRESS, ‘Reaching for Justice: The Right to Reparation in the African Human Rights System’ (2013) available at <<https://redress.org/wp-content/uploads/2017/12/1310reaching-for-justicefinal.pdf>> accessed April 9<sup>th</sup>, 2019.

Considering the attention that the issue of statelessness has gained in recent years,<sup>12</sup> and the increasing amount of (legal) support available for stateless persons, the likelihood of more stateless persons seeking redress at international level is likely to increase in the future. This article aims to elaborate on the challenges and opportunities regarding access to redress for stateless persons before existing international legal mechanisms. The article focuses on exploring the aspects of the selected mechanisms that can pose a challenge to access to redress and looks at how the practice of these mechanisms has addressed (if at all) these challenges. For this purpose, three different existing international mechanisms with the powers to issue measures for redress have been selected. The first falls under the “traditional approach” to international claims through diplomatic protection (the United Nations Compensation Commission (UNCC)). The second selected mechanism is one of the existing human rights mechanisms which give victims of human rights violations direct access to seek justice and redress (the Inter-American Court of Human Rights (IACtHR)). The third is an international criminal law mechanism of a permanent nature (the International Criminal Court (ICC)). This is in order to provide readers with a rounded overview and appraisal of the available mechanisms for victims of violations of international legal obligations,<sup>13</sup> focusing specifically on access to redress for stateless persons.<sup>14</sup>

This article takes a doctrinal and historical perspective to explore access for stateless persons to the mechanisms selected and is structured as follows. Section 2 provides a brief overview of the relationship between nationality and statelessness under international law and then discusses the link between “victimization” and statelessness, and reparations. Section 3 provides an overview of the history of the doctrine of diplomatic protection, which was the main mechanism for seeking redress internationally for many decades. It then explores the link between nationality and claims processes, and how the doctrine of diplomatic protection had to adapt to allow for stateless persons to access reparations for violations they suffered. Section 4 contains the 3 selected case-studies and an analysis of the law and practice of each mechanisms, focusing on access for stateless persons. The article ends with concluding remarks in section 5.

## 2 On nationality, statelessness, victimization, and redress

This section provides an overview of the relationship between nationality and statelessness under international law, and later discusses the link between “victimization” and statelessness on the one hand, and redress on the other. The term nationality denotes the membership of an individual to a community, based on various shared factors<sup>15</sup> resulting in the legal recognition<sup>16</sup> of the individual’s membership. Nationality is a legal concept which has been largely regulated by both domestic and international law, but in practice is granted to individuals through domestic law.<sup>17</sup> Nationality serves various important roles under international law,<sup>18</sup> among which—in some instances—is that of functioning as distinctive and triggering factor for access to redress. This is due to its usefulness in determining ‘the scope of application of basic rights and obligations of states vis-à-vis other states’<sup>19</sup> as well as the scope of application of treaties and diplomatic protection.<sup>20</sup> Nationality is the legal link between the individual and the state, and since traditionally only states were subjects of international law, nationality also serves as ‘the link between the individual and the law of

<sup>12</sup> With the launch of the UNHCR #ibelong campaign to end statelessness in the next 10 years, the issue has gotten a significant amount of attention over the last 5 years.

<sup>13</sup> International norms codified under human rights law, international criminal law, and international humanitarian law instruments.

<sup>14</sup> The IACtHR was selected due to the fact that it has taken a progressive and holistic approach in issuing rulings on reparations, not limiting itself to compensation as for instance the ECtHR has done. The UNCC was selected due to its innovative position to overcome the challenged posed by the ‘traditional approach’ to diplomatic protection for access to redress, and the ICC was selected because it is the only permanent international criminal tribunal, which in the future might hear cases concerning stateless persons, including the situations in the Occupied Palestinian Territories and Myanmar.

<sup>15</sup> K Hailbronner, ‘Nationality in Public International Law and European Law’ in R Bauböck (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries* (1st, AUP, 2006).

<sup>16</sup> For example, through documents certifying the individual’s nationality like a passport.

<sup>17</sup> International law regulates nationality through, for instance, conventions such as the European Convention on Nationality of the Council of Europe. Domestic law ascribes nationality, normally through two principles: through birth on the territory of a state (*jus soli*) and through birth to parents who are a state’s nationals (*jus sanguinis*). Acquisition of nationality later in life is guided by the principle of *jus domicilli*, which requires, for instance, prolonged residence in a state’s territory.

<sup>18</sup> RD Sloane, ‘Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality’ (2009) 50(1) *Harvard International Law Journal* 1.

<sup>19</sup> K Hailbronner, ‘Nationality in Public International Law and European Law’ in R Bauböck (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries* (1st, AUP, 2006).

<sup>20</sup> *Ibid.*

nations',<sup>21</sup> making it an indispensable legal concept. This membership gives rise to a reciprocal relationship of mutual rights and duties between the individual and the state. On the state's part, this includes its duty to protect its nationals from violations perpetrated by other states. When its nationals have been harmed by other states, it is the state's right to exercise<sup>22</sup> diplomatic protection on their behalf for losses or harms.<sup>23</sup>

By definition, a stateless person is an individual who is 'not considered as a national by any state under the operation of its law'.<sup>24</sup> Statelessness is a legal concept, as it denotes a (lack of) legal status, and is often characterized as a violation of the right to nationality.<sup>25</sup> However, statelessness is not only a violation of the right to nationality, but is also a (potentially corrosive) "human condition"<sup>26</sup> which frequently makes individuals vulnerable to further human rights violations. Life without a nationality can have "destabilizing effects",<sup>27</sup> including the inability to enjoy a socio-political life,<sup>28</sup> the inability to find decent employment,<sup>29</sup> lack of access to healthcare and education, limitations on freedom of movement, lack of state protection, lack of access to official documentation, to name a few.<sup>30</sup> The challenges mentioned above can create a situation of vulnerability for many stateless persons.<sup>31</sup> Therefore, statelessness is a violation of an international right—the right to nationality—but also opens the way to the violation of other rights. In addition, some stateless persons, like the Rohingya, suffer from additional violations of their rights at the hands of state authorities, not as a direct result of their lack of nationality.

It should be stressed that even though stateless persons worldwide share a common trait—their lack of nationality—their experiences are different depending on the context they live in,<sup>32</sup> including their experiences of harm, and the degree to which they feel "victimized" by said harm.<sup>33</sup> According to Letschert & van der Velde, statelessness can victimize individuals in various ways<sup>34</sup> and to different degrees. Victimization<sup>35</sup> is defined as a process<sup>36</sup> where an external force comes in contact with a person, resulting in physical, psy-

<sup>21</sup> RD Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality' (2009) 50(1) *Harvard International Law Journal* 1.

<sup>22</sup> The ICJ has determined that diplomatic protection can only arise when there is a *genuine link* between state and individual in its landmark *Nottebohm Case*. 'Liechtenstein brought a claim on his behalf (Nottebohm) against Guatemala before the International Court of Justice but failed. The Court held that the right of protection arises only when there is a genuine link between the claimant state and its national, and that there was no genuine link between Nottebohm and Liechtenstein'. In P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th, Routledge, New York 1997), at 243.

<sup>23</sup> K Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (1st, Cambridge University Press, 2011), at 29; C Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 25 *Ottawa Law Review* 607.

<sup>24</sup> Article 1 UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28 September 1954, UNTS vol. 360.

<sup>25</sup> For an overview of international treaties which contain a provision on nationality, particularly as a right, see Institute on Statelessness and Inclusion, 'International Statelessness Law: A Pocket Edition' (Wolf Legal Publishers, 2014) available at <http://www.wolfpublishers.com/book.php?id=1077>.

<sup>26</sup> M Manly & LE van Waas, 'The State of Statelessness Research' (2014) 19 *Tilburg Law Review* 3.

<sup>27</sup> C Batchelor, 'The International Legal Framework Concerning Statelessness and Access for Stateless Persons' (2002) Contribution to the European Union Seminar on the Content and Scope of International Protection.

<sup>28</sup> R Letschert & Z van der Velde, 'Collective victimization of stateless peoples, the added value of the victim label' (2014) 19 *Tilburg Law Review* 285.

<sup>29</sup> P Malanczuk, *Akehurst's Modern Introduction to International Law* (7th, Routledge, New York 1997), at 264.

<sup>30</sup> Many of these rights are codified under international and regional human rights instruments, such as the ICCPR, ICESCR, ACHR, ECHR, ACHPR, to name a few.

<sup>31</sup> For instance, many stateless persons fear being known to the authorities, as they are frequently arrested and put in arbitrary detention, awaiting deportation. Since there is no state where they can be deported to, they often remain in detention for a long time, or are in and out of detention, which creates a systemic situation of vulnerability and for many, fear. This leads many stateless to distrust the authorities and attempt to remain 'hidden'. See European Network on Statelessness, 'Protecting stateless persons from arbitrary detention: an agenda for change' (report) (2017) available at <[https://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS\\_LockeInLimbo\\_Detention\\_Agenda\\_online.pdf](https://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS_LockeInLimbo_Detention_Agenda_online.pdf)> accessed 16<sup>th</sup> March 2019.

<sup>32</sup> Katja Swider, 'Why End Statelessness?' in Tendayi Bloom, Katherine Tonkiss and Phillip Cole (eds), *Understanding Statelessness* (Routledge Studies in Human Rights 2017).

<sup>33</sup> It should also be stressed that this article does not intend in any way to speak for stateless persons. It merely explores the challenges they have faced or might face when seeking redress as a result of their situation as stateless persons, and how these challenges have been or could be overcome.

<sup>34</sup> Including physical, emotional, psychological forms of harm. See R Letschert & Z van der Velde, 'Collective victimization of stateless peoples, the added value of the victim label' (2014) 19 *Tilburg Law Review* 285.

<sup>35</sup> The risk or likelihood of victimization can be measured by various factors, including vulnerability, which refers to an individual's ability or inability to resist victimization and 'susceptibility', which refers to how frequently one is victimized. See R Elias, *The Politics of Victimization: Victims, Victimology and Human Rights* (Oxford University Press USA, 1986).

<sup>36</sup> The word 'process' is key: victimization should be understood as a process, not as an isolated event see SN Verdun-Jones & KR Rossiter, 'The psychological impact of victimization: mental health outcomes and psychological, legal and restorative interventions' in S Shoham, P Knepper & M Kett (eds), *International Handbook of Victimology* (CRC Press, 2010).

chological, or emotional harm.<sup>37</sup> The term victim in this context refers to the individual who experienced said harm.<sup>38</sup> This harm can be temporary or can have lifelong effects and can sometimes result in death.<sup>39</sup> As it was previously mentioned, under international law, any harm caused as a result from a violation of an international norm gives rise to an obligation to redress said harm. However, due to the previously mentioned vulnerability experienced by some stateless persons, some are fearful of coming forth to state authorities or seek legal assistance from international organisations and NGOs when they are harmed. This can hinder access to redress, since accessing redress often requires making themselves visible to state authorities or other entities that can assist them in the process.<sup>40</sup> The next paragraph will elaborate on how redress is understood for the purposes of this article.

Redress refers to the act of repairing a harm; redress is obtained through remedies, which refers to the measures through which redress is obtained. According to Shelton, the concept of remedies refers to two concepts, the first a procedural concept and the second a substantive concept.<sup>41</sup> As a procedural concept, remedies refer to the processes through which claims of human rights violations are heard before a competent authority and decided upon.<sup>42</sup> As a substantive concept, remedies refer to the outcome of the aforementioned processes, the concrete relief afforded<sup>43</sup> to the successful claimant. The concept of remedies is deeply linked to the concept of access to justice, since the obligation to afford any form of remedy for any form of violation requires 'the existence of remedial institutions and procedures to which victims may have access'.<sup>44</sup> As previously mentioned, the right of victims of internationally wrongful acts to seek and obtain redress for the harm they experienced finds its legal basis under various international legal instruments at both international<sup>45</sup> and regional levels.<sup>46</sup>

The term "reparations" is normally used in international legal documents instead of the term "remedies".<sup>47</sup> "Reparations" refers to the concrete measures through which an entity—typically a state—can repair consequences of a violation of international norms.<sup>48</sup> The main goal of reparations is to 'eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed',<sup>49</sup> which can be done through reparatory measures including restitution, compen-

<sup>37</sup> In some situations—like that of the Rohingya—the harm they experience can potentially even amount to genocide. See for instance Al-Jazeera, 'UN investigator says Myanmar genocide against Rohingya 'ongoing' (2019) <<https://www.aljazeera.com/news/2018/10/investigator-myanmar-genocide-rohingya-ongoing-181025035804009.html>> accessed 15<sup>th</sup> March 2019.

<sup>38</sup> The term 'victim' often has a negative connotation, being associated with a sense of weakness and powerlessness. However, the word 'victim' is used widely by the international mechanisms explored in this article, to refer to the person who was harmed; it denotes a status, particularly in mechanisms where multiple parties are involved.

<sup>39</sup> JPJ Dussich, 'the challenges of victimology: past, present and future' (2010) The 144th International Senior Seminar: Visiting Experts Papers.

<sup>40</sup> Normally, redress is available through legal channels which require filing a complaint before local or international entities with the power to grant them redress after a typically long juridical process.

<sup>41</sup> D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005), at 7.

<sup>42</sup> *Ibid*, at 7.

<sup>43</sup> *Ibid*, at 7.

<sup>44</sup> *Ibid*, at 8.

<sup>45</sup> Human rights instruments such as article 8 UDHR, article 2 ICCPR, article 6 ICERD, article 14 CAT, article 39 CRC, and International Humanitarian Law instruments such as article 3 of the Hague Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Hague Convention IV), article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, and articles 68 and 75 of the Rome Statute of the International Criminal Court.

<sup>46</sup> Such as: article 7 of the African Charter on Human and Peoples' Rights, article 25 of the American Convention on Human Rights, and article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>47</sup> This is due to the fact that 'remedies' does not have an equivalent in other official UN languages, which makes the translation of international treaties that contain mentions to remedies challenging. For standardization purposes, the term 'reparations' is widely used. See D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005), at 7.

<sup>48</sup> D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005), at 7. In order to facilitate the decision-making process for establishing suitable reparatory measures, the UN General Assembly adopted the *UN Basic Principles and Guidelines*, also known as the van Boven/Bassiouni principles, a soft-law document which contains the basis for reparations for victims of (gross) violations of international human rights law and international humanitarian law. *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, available at <<https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>> accessed 15<sup>th</sup> March 2019.

<sup>49</sup> EC Gillard, 'Reparation for violations of International Humanitarian Law' (2003) 85(851) *International Review of the Red Cross* 529. Gillard also points out that 'violations of all rules of international humanitarian law give rise to an obligation to make reparation, and not only violations of the grave breaches provisions for which there is individual criminal responsibility' and that the obligation to make reparations for any wrongful acts arises automatically after the unlawful act is committed and there is no need for said obligation to be spelled out in treaties and other legal documents.

sation, and ‘measures to ensure satisfaction’, among others.<sup>50</sup> Remedies are therefore the widely accepted consequences of an internationally wrongful act, and reparations are the concrete measures through which said act is remedied. The aim of reparations is to dictate the concrete measures that should restore the victim to his/her situation prior to the violation suffered, as established in the PCIJ’s landmark *Factory at Chorzow* case.<sup>51</sup> Reparatory measures that are suitable for one set of victims will perhaps not be suitable for a different set of victims. Therefore, reparations should always be proportional to the harm incurred and considering the context and background of the harmed individual(s).<sup>52</sup> While reparations can repair only the consequences of violations, it is important to note that reparations are also important in enforcement and determent from future violations,<sup>53</sup> for example by requiring measures like guarantees of non-repetition.<sup>54</sup> The importance of reparations lies in the significance for the victim. While it is often impossible to restore the victim to the situation existing prior to the violation, redress can aid in mending the wounds caused by said violations, helping victims move forward with their lives. For the purposes of this article, the term reparations will be used when referring to the concrete substantive measures to redress a wrong, whereas redress will be used to refer to the overall aim of the measures.

### 3 On diplomatic protection and nationality

This section provides an overview of the history of the doctrine of diplomatic protection, which was the main mechanism for seeking redress on the international plane for many decades. It then explores the link between nationality and claims processes, and how the doctrine of diplomatic protection had to adapt to allow for stateless persons to access reparations for the violations they suffered. In the context of inter-state claims for internationally wrongful acts, ‘the “traditional” position concerning stateless persons is simple: no state may claim on their behalf.’<sup>55</sup> In fact, according to Hailbronner, ‘a state may not [...] protect foreign or stateless individuals, even if they have taken up prolonged residence on its territory’.<sup>56</sup> Therefore, in line with the previously mentioned “traditional approach”, they cannot avail themselves of diplomatic protection<sup>57</sup> and its benefits, which includes having claims filed on their behalf. The section concludes with a discussion on the change that resulted from the development of human rights in recent years relating to diplomatic protection.

#### 3.1 The “traditional approach”

The “traditional” framework for diplomatic protection—rooted in the writings of Vattel<sup>58</sup>—developed during the early years of international law, a time when the individual had no standing under international law and thus held no role in the international legal order: the system was exclusively state-centric.<sup>59</sup> For this

<sup>50</sup> See *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, available at <<https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>> accessed 15<sup>th</sup> March 2019.

<sup>51</sup> According to the PCIJ, reparations aim, as far as possible, to eliminate the consequences of the violation and to ‘restore the situation that would have existed if the act had not been committed’. See *Factory at Chorzow (Claim for Indemnity) case, (Germany v Poland) (Merits) [1928] PCIJ, Series A—No 17 at 47*.

<sup>52</sup> It should be noted that the word ‘victim’ is problematic for many people, including people who have been ‘victimized’. Some suggest alternative terms, like ‘survivor’. However, international mechanisms often use this term to refer to persons who have suffered a harm that falls within their jurisdiction. For instance, the International Criminal Court has an Office of Public Counsel for the Victims (OPCV) and a Victims and Witnesses unit. The Inter-American Court of Justice has referred to stateless persons as ‘victims’ in their proceedings, in both cases concerning stateless persons, *Case of the Girls Yean and Bosico v Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 2005), para 2, and *Case of Expelled Dominican and Haitian People v the Dominican Republic*, Preliminary objections, merits, reparations and costs (IACtHR, 2014), para 1. For these reasons, this article will continue to use the term ‘victim’, although it is important to point out the issues with the use of this term.

<sup>53</sup> EC Gillard, ‘Reparation for violations of International Humanitarian Law’ (2003) 85(851) *International Review of the Red Cross* 529.

<sup>54</sup> See for instance Article 23, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, available at <<https://www.ohchr.org/en/professionalinterest/pages/remedyandrepairation.aspx>> accessed 15<sup>th</sup> March 2019.

<sup>55</sup> P Malanczuk, *Akehurst’s Modern Introduction to International Law* (7th, Routledge, New York 1997).

<sup>56</sup> K Hailbronner, ‘Nationality in Public International Law and European Law’ in R Bauböck (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries* (1st, AUP, 2006).

<sup>57</sup> DE Arzt, ‘The Right to Compensation: Basic Principles Under International Law’ (Palestinian Refugee Research Net 1999), <<http://prrn.mcgill.ca/research/papers/art4.htm>> accessed September 17<sup>th</sup>, 2015.

<sup>58</sup> Vattel discussed the principle of diplomatic protection in his book *The Law of Nations, or the Principles of Natural Law*, stating that ‘Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen’ E Vattel, *The Law of Nations, or the Principles of Natural Law, Classics of International Law, Book II, Chapter VI*, p. 136 (ed. C Fenwich transl. 1916) as cited in J Dugard, ‘Articles on Diplomatic Protection’ (United Nations Audiovisual Library of International Law 2006) <<http://legal.un.org/avl/ha/adp/adp.html>> accessed September 17<sup>th</sup>, 2015.

<sup>59</sup> International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries* (2006), 2 YBILC, A/61/10, at 25–26.

reason, diplomatic protection was “traditionally” considered an exclusive right of the state.<sup>60</sup> What does diplomatic protection entail? Diplomatic protection is based on the premise that ‘an injury to a national is an injury to the state itself’,<sup>61</sup> which entitles the state to seek redress for the offense through diplomatic protection. This concept refers to a state’s right and ability<sup>62</sup> to take up a claim on behalf of its nationals. Therefore, if a national was injured by a state other than his/her own, protection could only be ensured through a “fiction”,<sup>63</sup> which meant that an injury to a national became an injury to the state of nationality of the harmed individual. This became the common practice for claiming reparations owed to victims of an internationally wrongful act.<sup>64</sup>

A State’s ability to exercise diplomatic protection has historically been considered—under international customary law<sup>65</sup>—an essential tool for the protection of (human) rights, property, and economic resources of its nationals. Diplomatic protection can take several different forms, including ‘negotiation, mediation, conciliation (including by conciliation commission), arbitration, adjudication...’<sup>66</sup> among others. When reparations are owed, payments—typically in the form of a lump sum<sup>67</sup>—are made by the liable state to the harmed individual’s state<sup>68</sup> in its name, rather than in the victims’ name. The state then *usually* pays the victims.<sup>69</sup> It is therefore the state, rather than the individual, who has a say in the claims process<sup>70</sup> under this “traditional approach”. Furthermore, when a state takes up a claim of one of its nationals, the claim is ‘automatically raised to the international plane resulting in international rights and obligations.’<sup>71</sup> Traditionally, diplomatic protection encompassed ‘both the economic interests and the treatment of individuals abroad’,<sup>72</sup> the latter which would cover any violations of the individual’s human rights.

There is a body of case law of fundamental value for legal doctrine on diplomatic protection. The PCIJ—in its landmark *Mavrommatis* case—elaborated on this concept, stating that ‘it is an elementary principle of international law that a state is entitled to protect its subjects when injured by acts contrary to international law committed by another state’.<sup>73</sup> Therefore, by resorting to diplomatic protection, ‘a state is in reality asserting its own rights’<sup>74</sup> and the respect for international law. Following this reasoning, under the “traditional approach”, the state has the right to assert claims for violations—internationally wrongful acts—incurred by its nationals in the hands of another state. However, it should be kept in mind that *Mavrommatis* does not necessarily reflect current perspectives, as the judgment on the case was issued in 1924, a time when states were the ‘single and most important subject(s) of international law’.<sup>75</sup> At the time, the doctrine

<sup>60</sup> Ibid, at 25.

<sup>61</sup> Ibid, at 23; see also A Vermeer-Künzli, ‘As If: The Legal Fiction in Diplomatic Protection’ (2007) 18(1) European Journal of International Law, at 37–38.

<sup>62</sup> However, the state does not have the *obligation* to take up a claim on behalf of one of its nationals against another state.

<sup>63</sup> The doctrine of the ‘fiction’ regarding diplomatic protection was developed by the PCIJ in its landmark *Mavrommatis* case; see also International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries* (2006), 2 YBILC, A/61/10, at 25–26.

<sup>64</sup> Ibid, at 25–26.

<sup>65</sup> K Hailbronner, ‘Nationality in Public International Law and European Law’ in R Bauböck (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries* (1st, AUP, 2006).

<sup>66</sup> DE Arzt, ‘The Right to Compensation: Basic Principles Under International Law’ (Palestinian Refugee Research Net 1999), <<http://prrn.mcgill.ca/research/papers/art4.htm>> accessed September 17<sup>th</sup>, 2015.

<sup>67</sup> FE McGovern, ‘Dispute System Design: The United Nations Compensation Commission’ (2009) 14 Harvard Negotiation Law Review 171.

<sup>68</sup> M Frigessi di Rattalma & T Treves, *The United Nations Compensation Commission: A Handbook* (Kluwer Law International, 1999), at 8.

<sup>69</sup> DE Arzt, ‘The Right to Compensation: Basic Principles Under International Law’ (Palestinian Refugee Research Net 1999), <<http://prrn.mcgill.ca/research/papers/art4.htm>> accessed September 17<sup>th</sup>, 2015.

<sup>70</sup> M Frigessi di Rattalma & T Treves, *The United Nations Compensation Commission: A Handbook* (Kluwer Law International, 1999), at 8.

<sup>71</sup> C Whelton, ‘The United Nations Compensation Commission and International Claims Law: A Fresh Approach’ (1993) 26 Ottawa LR 607.

<sup>72</sup> F Orrego Vicuña, ‘Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement’ (2000)15(2) ICSID Review, at 5.

<sup>73</sup> *Mavrommatis Palestine Concessions (Greece v. UK)* [1924] PCIJ ser. B No. 3, para. 21.

<sup>74</sup> *ibid*; *Panevezys-Saldutiskis Railway Case (Republic of Estonia v. Republic of Lithuania)* [1939] PCIJ, Ser. A/B, No. 76, at 16; see also, for example, the *Avena and Others Case* before the ICJ, where Mexico asserted ‘its own claims, basing them on the injury which it contends that it has itself suffered, directly and through its nationals, as a result of the violation by the United States’ *Avena and Other Mexican Nationals (Mexico v. United States of America)*, ‘Judgment’ [2004] ICJ, (at 35–36).

<sup>75</sup> F Orrego Vicuña, ‘Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement’ (2000)15(2) ICSID Review, at 1–2.

of the “fiction”—which gave the state the necessary *locus standi* to espouse claims on behalf of its nationals—was essential, since individuals had no other mechanisms to turn to which would bring them redress for the violations they suffered. This view was also upheld in *Nottebohm*, where the International Court of Justice (ICJ) stated that ‘Diplomatic protection and protection by means of international judicial proceedings constitute measures for the defence of the rights of the state’.<sup>76</sup> This has changed with the advent of human rights law and its oversight bodies, as will be discussed later.

The *Panevezys-Saldutiskis Railway Case* is another landmark case for the doctrine of diplomatic protection regarding the necessity of a link between individual and state through the legal bond of nationality. In this case, the PCIJ pronounced itself on the issue of nationality<sup>77</sup> and diplomatic protection, stating that ‘it is the bond of nationality between the state and the individual which (...) confers upon the state the right of diplomatic protection’.<sup>78</sup> In other words, without the existence of this bond of nationality, the state does not have the *locus standi* it needs in order to bring claims against another state.<sup>79</sup> Nationality is an essential element for the possibility of the state to exercise diplomatic protection, since without that bond, the necessary “fiction” of the injury against the state resulting from an injury towards one of its nationals cannot be present. For this reason, under the “traditional approach”, stateless persons could not benefit from diplomatic protection. However, there have been exceptions to this doctrine. The ICJ, as early as 1949 in its *Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion*, stated that ‘there are cases in which protection may be exercised by a state on behalf of persons not having its nationality’.<sup>80</sup> In addition, the increasing ability of individuals to access redress mechanisms confronts the “traditional” doctrine of diplomatic protection,<sup>81</sup> pushing it towards becoming obsolete. Adding to this is the fact that stateless persons have been able to access justice and seek redress for violations suffered before various international legal mechanisms,<sup>82</sup> as the subsequent sections will show.

### 3.2 Diplomatic protection and its interaction with human rights

The fast-paced development of international human rights standards, practices and judicial/semi-judicial mechanisms over the last few decades have decreased the use for diplomatic protection as a means for individuals to obtain redress for internationally wrongful acts. According to Vermeer-Künzli, there is ‘no doubt that the injury that stands at the basis of the exercise of diplomatic protection is an injury of individual rights’.<sup>83</sup> However, the tenets of “traditional” diplomatic protection can be at odds with the premises of international human rights law, especially regarding the ‘autonomy of the individual to seek redress for injury’<sup>84</sup> under international law.<sup>85</sup> This is because autonomy is not permitted under the diplomatic protection approach for seeking redress. Even though both approaches have a similar goal—redress for violations of rights—they take very different paths to attain their goal. According to Orrego Vicuña, ‘The law of human rights...opened up a clear path for the direct access of the individual to international mechanisms for the assertion of claims’.<sup>86</sup> On the other hand, the diplomatic protection approach remains focused on the state,

<sup>76</sup> *Nottebohm Case (Liechtenstein v Guatemala)* ‘second phase’ [1955] ICJ, ICJ Reports 1955, at 24.

<sup>77</sup> ‘This nationality must, according to leading opinion, be present both at the time when the practice in breach of international law took place as well as at the time protection is to be exercised’. K Hailbronner, ‘Nationality in Public International Law and European Law’ in R Bauböck (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries* (1st, AUP, 2006).

<sup>78</sup> *Panevezys-Saldutiskis Railway Case (Republic of Estonia v. Republic of Lithuania)* [1939] PCIJ, Ser. A/B, No. 76, p. 16.

<sup>79</sup> H Lauterpacht, in E Lauterpacht (ed.) *International Law: Being the Collected Papers of Hersch Lauterpacht, Vol. 1* (Cambridge University Press, 1970), at 401–402 as cited in C Whelton, ‘The United Nations Compensation Commission and International Claims Law: A Fresh Approach’ (1993) 25 *Ottawa Law Review* 607.

<sup>80</sup> *Reparation for Injuries Suffered in the Service of the United Nations Advisory Opinion* [1949] ICJ, at 181.

<sup>81</sup> *Ibid.*, at 1–2.

<sup>82</sup> Such as the Inter-American Court of Human Rights (i.e. *Yean and Bosico case* and the *Expelled Dominican and Haitians case*), the European Court of Human Rights (i.e. the *Kim v Russia case*, *Karashev case*), the African Committee on the Rights and Welfare of the Child (i.e. *Nubian children case*) the African Commission on Human and People’s Rights. This is true even before international criminal tribunals, such as the International Criminal Court, which is the first international criminal tribunal which allows victims to participate in the proceedings and to seek and obtain redress for the violations suffered, irrespective of nationality or lack thereof. Furthermore, the Extraordinary Chambers in the Courts of Cambodia allows victims to participate as parties in the proceedings—as *partie civiles*—and stateless victims are currently parties to the proceedings in *case 004*.

<sup>83</sup> A Vermeer-Künzli, ‘As If: The Legal Fiction in Diplomatic Protection’ (2007) 18(1) *European Journal of International Law*, at 40.

<sup>84</sup> DJ Bederman, ‘State-to-State Espousal of Human Rights Claims’ (2011) 1 *Virginia Journal of International Law* 3, at 5.

<sup>85</sup> *Ibid.*, at 6.

<sup>86</sup> Orrego Vicuña also proposes that, in light of the increasing role of the individual under international law and the ever-decreasing role of the state in protecting its nationals for the purpose of seeking redress for human rights violations, diplomatic protection could remain as a mechanism to ‘safeguard of the economic interests of the individual’. F Orrego Vicuña, ‘Changing Approaches to

and not creating direct access for the individual. Due to the fact that international human rights law, as a field, has developed into a legal domain of its own with a large body of jurisprudence on access to redress, it is logical to conclude that human rights law is a completely separate area of law from diplomatic protection, despite their common focus on rights protection and redress for violations of rights.<sup>87</sup> While diplomatic protection in the field of protecting an individual's rights is no longer as necessary as it was in the past due to the significant developments in the domain of human rights, it remains relevant regarding the protection of economic interests.

Finally, it is important to note that often the perpetrator of human rights abuses is the state of nationality or habitual residence. States have often committed internationally wrongful acts against their own nationals, and international human rights law has developed, historically, into norms that protected the rights of individuals not only from other states, but from violations committed by their own states.<sup>88</sup> Today, human rights law provides that the victim does not need to rely on his/her state of nationality or habitual residence in order to obtain redress before international legal mechanisms.<sup>89</sup> As a matter of fact, in many cases victims are bringing claims of human rights abuses *against* their state of nationality or habitual residence.<sup>90</sup> The IACtHR has made a statement on this, affirming in one of its advisory opinions that 'the object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of states, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality'.<sup>91</sup>

In conclusion, this discussion has shown that diplomatic protection was in the past the only channel through which an individual could seek redress for harm incurred as a result of an internationally wrongful act. The right to exercise diplomatic protection was an exclusive right of the state, through the doctrine of the "legal fiction", which is anchored in nationality.<sup>92</sup> This continues to be true to some extent. While it is true that to this day only states can exercise diplomatic protection over individuals, it is undeniable that the role of the state as the exclusive link between individuals and their ability to access to redress is no longer absolute. This is especially true regarding access to redress through international legal channels, like the mechanisms selected in this article, which will be discussed in more depth in section 4.

## 4 Case-studies: The United Nations Compensation Commission (UNCC), the Inter-American Court of Human Rights, and the International Criminal Court

### 4.1 The United Nations Compensation Commission

#### 4.1.1 Background and process

The UNCC<sup>93</sup> was created by the UN Security Council (UNSC) following Iraq's invasion of Kuwait in 1990 that resulted in the Gulf War. The UNCC was set up to manage approximately 2.7 million claims<sup>94</sup> of victims who suffered violations resulting from Iraq's invasion of Kuwait in 1990.<sup>95</sup> The violation of Kuwait's territorial

the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement' (2000)15(2) ICSID Review, at 4–5. Adding to this idea, according to Bederman, 'diplomatic protection is largely indifferent to human rights claims; it is more concerned with the property interests of a national who is situated in a foreign state'. See DJ Bederman, 'State-to-State Espousal of Human Rights Claims' (2011) 1 Virginia Journal of International Law 3, at 5.

<sup>87</sup> F Orrego Vicuña, 'Changing Approaches to the Nationality of Claims in the Context of Diplomatic Protection and International Dispute Settlement' (2000)15(2) ICSID Review, at 5.

<sup>88</sup> after the atrocities committed during WWII—where Germany committed atrocities against its own Jewish population—became a matter of concern for the entire international community, as it became clear that states would not always protect and guarantee the rights of people within their jurisdiction. Prior to WWII, human rights were primarily addressed at the domestic level; the development of international human rights law began post-WWII. See Ed Bates, 'History', in D Moeckli, S Shah, D Harris, & S Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2<sup>nd</sup>, 2014).

<sup>89</sup> Including (regional) human rights courts, international criminal law mechanisms, and other semi-judicial mechanisms available internationally.

<sup>90</sup> See D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005).

<sup>91</sup> Inter-American Court of Human Rights, *Advisory Opinion OC-2/82, The effect of reservations on the entry into force of the American Convention on Human Rights (arts. 74 & 75)* (ACTHR, 1982), para 27.

<sup>92</sup> International Law Commission (ILC), *Draft Articles on Diplomatic Protection with commentaries* (2006), 2 YBILC, A/61/10, at 25.

<sup>93</sup> Up until 2012, the UNCC had received approximately 2.7 million claims. In C Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (1st, Cambridge University Press, 2012), at 141.

<sup>94</sup> CL Lim, 'On the Law, Procedures and Politics of United Nations Gulf War Reparations' (2000) 4 Singapore Journal of International and Comparative Law 435.

<sup>95</sup> By the year 2000, the UNCC had 'awarded more than US\$ 34 billion in compensation and has disbursed through claimant governments more than US\$ 11 billion. The amount sought in the remaining claims is almost US\$ 215.5 billion'. As cited in CL Lim, 'On the Law, Procedures and Politics of United Nations Gulf War Reparations' (2000) 4 Singapore Journal of International and Comparative Law 435.

sovereignty resulted in Iraq's international responsibility<sup>96</sup> for violations of the laws and customs of armed conflict (*jus in bello*) and for an act of aggression against another state. Acting under its powers in Chapter VII of the UN Charter, the UNSC established Iraq's liability<sup>97</sup> and set up the UNCC, which would grant financial compensation to victims who incurred 'any loss, damage or injury...as a [direct] result of the invasion and illegal occupation...'<sup>98</sup> funded by the proceeds of Iraqi oil. The creation of this organ was the UNSC's 'first attempt to establish an international claims settlement agency against a state'.<sup>99</sup> The UNCC was not set up as a court or a tribunal<sup>100</sup> and served an administrative rather than judicial role. The first aspect of redress, namely finding the perpetrator of the wrongful act guilty, had, in fact, already been addressed by the UNSC before the UNCC was established.

The UNCC was based on three existing models, namely '(1) the Iran-U.S. Claims Tribunals, (2) a variety of government-sponsored compensation programs, and (3) a broad range of claims resolution facilities from other contexts'.<sup>101</sup> These mechanisms followed the "traditional" diplomatic protection approach, which requires the State of nationality to file claims on behalf of its nationals. The acts for which compensations were due included 'arbitrary killings, torture, enforced disappearance, and the seizure and destruction of property'<sup>102</sup> among others. Claims were categorized into six categories (A–F), with categories A–C corresponding to claims by individuals.<sup>103</sup> Regarding individual claims, successful claims had to be paid to the government, and the government in turn had to compensate the individuals within six months.<sup>104</sup> Only States and international organisations were granted competence *ratione personae* to submit claims before the UNCC on behalf of individuals, corporations or on their own behalf.<sup>105</sup> Therefore, when 'seeking compensation, individuals [...] rely on their state of nationality'<sup>106</sup> which is in line with international practice on diplomatic protection. For this reason, stateless persons were initially unable to file claims for compensation.

#### 4.1.2 Statelessness at the UNCC: challenges and opportunities

Ensuring that everyone affected by the Gulf War could 'have recourse to a remedy, regardless of nationality, or more importantly, non-nationality'<sup>107</sup> was, nevertheless, a priority for the UNCC. Its model presented a response to the challenges and opportunities arising from their mandate to ensure that the stateless victims of the war could access redress, in the form of compensation. It became clear from the start that some individuals would not be able to access compensation, among which Palestinians represented the largest group. Drafters felt that the international community bore responsibility to protect their interests,<sup>108</sup> and included

<sup>96</sup> G Townsend, 'The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & (and) U.S. Remedies' (1995) 17(4) *Loyola of Los Angeles International and Comparative Law Review* 973.

<sup>97</sup> See also UN Security Council (UNSC) Res. 674 (29<sup>th</sup> October 1990), para. 8.; UN Security Council (UNSC) Res. 686 (2<sup>nd</sup> March 1991), para. 2(b); UN Security Council (UNSC) Res. 687 (3<sup>rd</sup> April 1991), para. 16; G Townsend, 'The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & (and) U.S. Remedies' (1995) 17(4) *Loyola of Los Angeles International and Comparative Law Review* 973.

<sup>98</sup> UN Security Council (UNSC) Res. 674 (29<sup>th</sup> October 1990), para. 8; However, 'although this is not expressly spelled out it means losses arising out of Iraq's violation of *jus ad bellum*. The UNCC therefore does not look at whether a loss was caused by a violation of international humanitarian law. However, it is possible that the circumstances of the invasion and occupation, that many of the claims for which compensation is awarded, such as death, torture, personal injury, mental pain and anguish, hostage-taking, and loss and damage to real and personal property, are factually based on violations of international humanitarian law' in EC Gillard, 'Reparation for violations of International Humanitarian Law' (2003) 85(851) *International Review of the Red Cross* 529.

<sup>99</sup> G Townsend, 'The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & (and) U.S. Remedies' (1995) 17(4) *Loyola of Los Angeles International and Comparative Law Review* 973.

<sup>100</sup> This is due to the fact that Iraq's liability had already been determined by the UNSC. See CR Payne & PH Sand, *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (1st, Oxford University Press, 2011); United Nations Secretary General, *Report of the Secretary General pursuant to paragraph 19 of Security Council Resolution 687* (1991) UN. Doc. S/22559, para 20.

<sup>101</sup> FE McGovern, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14 *Harvard Negotiation Law Review* 171.

<sup>102</sup> C McCarthy, *Reparations and Victim Support in the International Criminal Court* (1st, Cambridge University Press, 2012), at 22.

<sup>103</sup> C Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (1st, Cambridge University Press, 2012), at 141.

<sup>104</sup> G Townsend, 'The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & (and) U.S. Remedies' (1995) 17(4) *Loyola of Los Angeles International and Comparative Law Review* 973; H Van Houtte, H Das & B Delmartino, 'The United Nations Compensation Commission' in P De Greiff (ed) *The Handbook of Reparations* (Oxford University Press, 2006), at 362.

<sup>105</sup> D Campanelli, 'The United Nations Compensation Commission (UNCC): Reflections on its Judicial Character' (2005) 4(1) *The Law & Practice of International Courts and Tribunals* 107.

<sup>106</sup> C McCarthy, *Reparations and Victim Support in the International Criminal Court* (1st, Cambridge University Press, 2012), at 22.

<sup>107</sup> C Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 26 *Ottawa Law Review* 607.

<sup>108</sup> UNCC Governing Council, S/AC.26/1991/5 (23 October 1991), at 4.

Article 5.1 of the UNCC's Rules which allowed a state to submit claims 'at its discretion, of other persons resident in its territory'<sup>109</sup> who were not their nationals.<sup>110</sup> Some states were willing to adopt a more expansive definition, while others continued to adhere to the "traditional" rule of diplomatic protection and submitted claims only on behalf of their own nationals.<sup>111</sup> However, part of the requirements for individuals to be able to file claims through this mechanism was to hold legal residence in the country where they were at the moment of filing the application, and this translated into many individuals being unable to file claims.<sup>112</sup> Another challenge became clear: some states would be unwilling or unable to submit claims on behalf of stateless persons. For this reason, Article 5.2 of the Rules was included in the UNCC's Rules, allowing for an appointed body or authority to submit claims on behalf of individuals whose claims could not be submitted by a state.<sup>113</sup> Three UN agencies, the UN Development Program (UNDP), UN Relief and Works Agency for Palestine Refugees (UNRWA),<sup>114</sup> and UN High Commissioner for Refugees (UNHCR) were appointed to submit claims on behalf of stateless individuals.<sup>115</sup>

Another challenge the UNCC faced was late claims, as not everyone who had been affected by the Gulf War was able to file claims on time; this challenge affected stateless persons, especially Palestinians.<sup>116</sup> However, the UNCC was able to turn this challenge into an opportunity to ensure access to redress. In 2001, a late claims<sup>117</sup> program was established, taking care of Palestinians who had been unable to file claims during the regular period.<sup>118</sup> Under the late claims program, the Palestinian Authority (PA) was able to submit approximately 46,400 claims.<sup>119</sup> This was an unprecedented occurrence, as it appears that the PA was able to exercise State powers and submit claims, even though initially only formally recognized States could file claims.<sup>120</sup> Furthermore, in 2004, a "special accelerated program"<sup>121</sup> was created for Bidoon stateless persons living in Kuwait.<sup>122</sup> While three UN agencies were able to file claims on behalf of Palestinians, no entity took the responsibility to file claims on behalf of the Bidoon.<sup>123</sup> Eventually, Kuwait requested to the UNCC's

<sup>109</sup> UNCC Governing Council, S/AC.26/1992/10 (26 June 1992), at 5.

<sup>110</sup> Additionally, the UNCC allowed for a 'widening of the definition of 'resident', by allowing states to determine their own definition'. See C Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 26 Ottawa Law Review 607.

<sup>111</sup> C Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 26 Ottawa Law Review 607.

<sup>112</sup> For example, Canada was willing to submit claims on behalf of stateless persons and refugees who had a claim to compensation before the UNCC, as long as these individuals met the residency criteria. However, those who did not meet the criteria were able to file claims through UNHCR in Canada. See C Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 26 Ottawa Law Review 607.

<sup>113</sup> UNCC Governing Council, S/AC.26/1992/10 (26 June 1992), at 5.

<sup>114</sup> UNRWA's mandate focuses on Palestinian refugees. See L Bartholomeusz, 'The Mandate of UNRWA at Sixty' (2009) 28(2-3) Refugee Survey Quarterly 452.

<sup>115</sup> CR Payne & PH Sand, *Gulf War Reparations and the UN Compensation Commission: Environmental Liability* (1st, Oxford University Press, 2011), at 9.

<sup>116</sup> LA Taylor, 'The United Nations Compensation Commission' in C Ferstman, M Goetz, & A Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity* (1st, Nijhoff, 2009), at 202.

<sup>117</sup> Ibid, at 202.

<sup>118</sup> D Campanelli, 'The United Nations Compensation Commission (UNCC): Reflections on its Judicial Character' (2005) 4(1) The Law & Practice of International Courts and Tribunals 107.

<sup>119</sup> LA Taylor, 'The United Nations Compensation Commission' in C Ferstman, M Goetz, & A Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity* (1st, Nijhoff, 2009), p. 202; United Nations Security Council, *Report and recommendations made by the Panel of Commissioners concerning the first instalment of Palestinian "late claims" for damages up to USD 100,000 (category C claims)* (2003) S/AC.26/2003/26, at 4.

<sup>120</sup> Palestine has several of the characteristics required for statehood (territory, population, government, among others) and in the present day enjoys some degree of recognition as a state within the international community. Several states recognize Palestine as a state. Furthermore, in 2012 Palestine was upgraded to 'non-member observer state' at the United Nations and has acceded to various international treaties, including the Rome Statute of the ICC which only allows states to become parties. However, Palestinians are often considered stateless persons, but not due to lack of a legal link with a state, but due to their state's lack of full-statehood. However, at the time when the UNCC was formed, this was not the case, and Palestine did not enjoy the level of recognition as a state as it does in the present.

<sup>121</sup> LA Taylor, 'The United Nations Compensation Commission' in C Ferstman, M Goetz, & A Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity* (1st, Nijhoff, 2009), at 202.

<sup>122</sup> Ibid, at 202.

<sup>123</sup> TJ Feighery, CS Gibson, & T.M. Rajah (eds), *War Reparations and the UN Compensation Commission: Designing Compensation After Conflict* (1st, Oxford University Press, 2014), at 126.

governing council<sup>124</sup> to be allowed to file claims on their behalf.<sup>125</sup> Under this program, the government of Kuwait was able to submit approximately 32,000 claims on behalf of Bidoons.<sup>126</sup> It should be noted that the UNCC's Governing Council—as a norm—generally did not allow for late claims to be filed.<sup>127</sup> However, it is clear that special cases—like the cases of stateless individuals—were taken into account and leniency was required.

For these reasons, the UNCC's work has been hailed as an innovative 'departure from previous war reparations practice'<sup>128</sup> for its various special measures to address the challenges faced by stateless persons in accessing redress. They were able to turn challenges into opportunities. However, caution is necessary. It should be emphasized that the UNCC's practice did *not* change the international law of diplomatic protection<sup>129</sup> but deviated from it, creating—at least in the domain of claims mechanisms—a new model to be applied in special circumstances. In some respects, the UNCC has departed from the "traditional approach" of diplomatic protection and has developed its own approach to fit its needs. According to McGovern, due to these departures from the "traditional" approach, it is possible to say that the UNCC 'is *sui generis* and its holdings are *lex specialis*'.<sup>130</sup> This is evident if compared to other claims mechanisms and tribunals of a similar nature which strictly required the state of nationality to bring claims on behalf of its nationals.

Furthermore, the UNCC's departure is not absolute, as it still required a state or an "entity" to file claims on behalf of individuals. However, the fact that it did not strictly require the state of nationality to carry out this function and actively sought solutions to ensure that those who could not have their state of nationality file claims on their behalf through other "entities" was new. In this sense, its practice was also not in line with that of human rights mechanisms existing at the time.<sup>131</sup> Furthermore, through the work of the UNCC, humanitarian considerations began to enjoy a more central role in war reparations processes, a trend which has continued to the present day and will most likely continue in the future.<sup>132</sup> In fact, according to Frigessi di Rattalma and Treves, all 'these departures go in the direction of the humanization of the international law of state responsibility'.<sup>133</sup> The individual, as a victim, is beginning to gain a more central role in the international law of state responsibility as the benefactor of compensation efforts, rather than as a means for the state to assert its rights vis-à-vis another state under international law. The UNCC's practice is in line with a trend that began to develop in the 20<sup>th</sup> and 21<sup>st</sup> centuries with the creation of human rights mechanisms and (international) criminal tribunals.<sup>134</sup>

Regarding challenges and opportunities for access to redress for stateless persons under this mechanism, it should be emphasized the fact that the UNCC had to adopt special strategies to ensure their access. This

<sup>124</sup> One of the conditions was that, under paragraph 1.e, claimants 'have not held the nationality of any State during the period from 1 January 1992 to 1 January 1996' in UNCC Governing Council, *Decision concerning the filing of "late" claims of the "Bidoon" taken by the Governing Council of the United Nations Compensation Commission at its 137th meeting, on 2 July 2004*. (2 July 2004) S/AC.26/Dec.225.

<sup>125</sup> TJ Feighery, CS Gibson, & TM Rajah (eds), *War Reparations and the UN Compensation Commission: Designing Compensation After Conflict* (1st, Oxford University Press, 2014), at 126.

<sup>126</sup> LA Taylor, 'The United Nations Compensation Commission' in C Ferstman, M Goetz, & A Stephens (eds), *Reparations for victims of genocide, war crimes and crimes against humanity* (1st, Nijhoff, 2009), at 202.

<sup>127</sup> F Woolridge & O Elias, 'Humanitarian considerations in the work of the United Nations Compensation Commission' (2003) 85(851) *International Review of the Red Cross* 555.

<sup>128</sup> FE McGovern, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14 *Harvard Negotiation Law Review* 171.

<sup>129</sup> C Whelton, 'The United Nations Compensation Commission and International Claims Law: A Fresh Approach' (1993) 26 *Ottawa Law Review* 607.

<sup>130</sup> FE McGovern, 'Dispute System Design: The United Nations Compensation Commission' (2009) 14 *Harvard Negotiation Law Review* 171.

<sup>131</sup> The UNCC was established long after regional human rights courts had already begun hearing cases; however, it does predate mechanisms like the International Criminal Court (ICC) which, like human rights mechanisms, do not require a state to 'assist' the individual in bringing a claim. However, it should be noted that even though individuals in human rights mechanisms (such as regional human rights courts and UN semi-judicial mechanisms) are generally acknowledged as participants—not as parties—to the proceedings.

<sup>132</sup> F Woolridge & O Elias, 'Humanitarian considerations in the work of the United Nations Compensation Commission' (2003) 85(851) *International Review of the Red Cross* 555; H Van Houtte, H Das & B Delmartino, 'The United Nations Compensation Commission' in P De Greiff (ed) *The Handbook of Reparations* (Oxford University Press, 2006), at 341.

<sup>133</sup> M. Frigessi di Rattalma & T. Treves, *The United Nations Compensation Commission: A Handbook* (Kluwer Law International, 1999), at 8.

<sup>134</sup> The regional human rights courts (European, Inter-American, African), the International Criminal Tribunals of Rwanda and the Former Yugoslavia, the ICC, and the Special Court for Sierra Leone and the Extraordinary Chambers for Cambodia, which are mixed (international and domestic) mechanisms.

meant deviating from common practice, which posed both a challenge and an opportunity. It also showed that sometimes international legal challenges require innovative solutions. The creation of the UNCC itself set 'an important precedent in international law',<sup>135</sup> because it was the first time an international claims agency was created by the UNSC. Another important precedent set by the UNCC is that, according to Townsend, it 'has left behind the formalities of classic diplomatic espousal for a more flexible approach'<sup>136</sup> by allowing United Nations (UN) agencies and states that would normally not be able to file claims on behalf of stateless persons to file claims on their behalf. Its work contributed to recent developments in placing the individual, rather than the state, at the centre of international law.<sup>137</sup>

## 4.2 The Inter-American Court of Human Rights

### 4.2.1 Background and process

The Inter-American system's 'origins lie in two distinct, though interrelated, instruments',<sup>138</sup> the American Convention on Human Rights (ACHR), adopted in 1969, and the American Declaration on the Rights and Duties of Man (American Declaration), adopted in 1948. Both instruments are overseen by the same authority, the Inter-American Commission on Human Rights (IACCommHR). This authority has the power to receive and process communications<sup>139</sup> from Member States of the Organization of American States,<sup>140</sup> individuals and organizations for any alleged violations of human rights enshrined in the American Declaration or the ACHR.<sup>141</sup> The Commission must first establish whether a complaint meets the requirements for admissibility, and can then 'hold hearings on the complaint, and (...) try to effectuate a friendly settlement'.<sup>142</sup> If no settlement is reached, the Commission can submit the case to the Inter-American Court of Human Rights (IACtHR). The IACtHR has the power to adjudicate cases where violations of the ACHR are alleged, after referral to the Court by the Commission.<sup>143</sup> Cases can be referred to the IACtHR if the state in question has accepted the court's jurisdiction.<sup>144</sup> The ACHR does not allow for individuals to bring a case before the IACtHR;<sup>145</sup> only the Commission can receive petitions from individuals, and then can bring cases before the Court on behalf of the victims. Therefore, the Commission is party to the proceedings before the Court, and not the individual.<sup>146</sup> Individuals are fully dependent on the Commission regarding any prospects of obtaining redress for the violations they suffered.<sup>147</sup>

<sup>135</sup> G Townsend, 'The Iraq Claims Process: A Progress Report on the United Nations Compensation Commission & (and) U.S. Remedies' (1995) 17(4) *Loyola of Los Angeles International and Comparative Law Review* 973.

<sup>136</sup> *Ibid.*

<sup>137</sup> Additionally, the UNCC's practice has also contributed to claims resolution practices. See H Van Houtte, H Das & B Delmartino, 'The United Nations Compensation Commission' in P De Greiff (ed), *The Handbook of Reparations* (Oxford University Press, 2006), at 341.

<sup>138</sup> 'The Evolution of Victims' Access to Justice' in K Booth & J Sulzer, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* (International Federation for Human Rights (FIDH), Paris 2007), at 18.

<sup>139</sup> While the Commission can make decisions on communications, said decisions are not legally binding despite being 'of a legally authoritative and persuasive nature' because the Commission is a semi-judicial body. The Commission can also suggest remedial measures to the state which has been found responsible of the violation(s). See 'The Evolution of Victims' Access to Justice' in K. Booth & J Sulzer, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* (International Federation for Human Rights (FIDH), Paris 2007), at 18; D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005), at 208.

<sup>140</sup> OAS' members are all countries in the American continent (also known as the 'Americas' region except for French Guyana which is a French territory).

<sup>141</sup> 'The Evolution of Victims' Access to Justice' in K. Booth & J Sulzer, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* (International Federation for Human Rights (FIDH), Paris 2007), at 18; D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005), at 208.

<sup>142</sup> D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005), at 208; regarding the friendly settlement, see Art 48(1)(f) ACHR.

<sup>143</sup> 'The Evolution of Victims' Access to Justice' in K Booth & J Sulzer, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* (International Federation for Human Rights (FIDH), Paris 2007), at 19.

<sup>144</sup> C Medina, 'The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights: Reflections on a Joint Venture' (1990) 12(4) *Human Rights Quarterly* 439, at 446.

<sup>145</sup> 'The Evolution of Victims' Access to Justice' in K Booth & J Sulzer, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* (International Federation for Human Rights (FIDH), Paris 2007), at 20; D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005), at 216.

<sup>146</sup> See Arts. 48 & 57, Organization of American States (OAS), *American Convention on Human Rights, 'Pact of San Jose'* (22 November 1969).

<sup>147</sup> According to Shelton, 'the Commission's role has been likened by the IACtHR to that of a public prosecutor'. See D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005), at 216.

Professor Cassin, during a speech before OAS during the preparatory meetings for the creation and adoption of the ACHR, stated that the most important goal to achieve with the emerging instrument and court was to have a mechanism that would effectively prevent human rights violations and provide reparations for violations.<sup>148</sup> Regarding reparations, the IACtHR seeks to achieve 'integral reparation', which refers to a comprehensive reparatory framework—composed of various reparatory measures—which can help fully redress human rights violations.<sup>149</sup> Access to justice in the Inter-American system must therefore ensure—within a reasonable time period—the right of the (alleged) victims for the truth to be known, to see the responsible party punished and see compensation for the violation they suffered.<sup>150</sup> In this spirit, it is clear that the purpose of the Inter-American Human Rights System as a whole is to ensure that the human rights of all persons in the Americas are protected, irrespective of their nationality or lack thereof, rather than to protect state interests.<sup>151</sup> Every individual in the region whose rights are violated by a state has the right to seek redress for said violations before the system, irrespective of nationality or lack thereof. Regarding stateless persons, the IACtHR has heard and decided on two cases, the *Yean and Bosico v Dominican Republic case* and the *Expelled Dominican and Haitian People v the Dominican Republic case*.<sup>152</sup>

#### 4.2.2 Statelessness at the IACtHR: challenges and opportunities

In *Expelled Dominican and Haitian People v the Dominican Republic*, a number of applicants submitted a communication to the IACommHR on the detention and mass expulsion of over 20,000 individuals from the Dominican Republic in 1999.<sup>153</sup> The applicants claimed that excessive force was used by the authorities, including sexual abuse, psychological damage, and economic hardship resulting from the forced expulsions.<sup>154</sup> Impediments in obtaining nationality for those of Haitian origin<sup>155</sup>—despite being born on Dominican soil—had left thousands stateless.<sup>156</sup> The case was first heard before the IACommHR and was later on referred to the IACtHR. In *Yean and Bosico*, two Dominican girls of Haitian origin had been denied birth certificates by the Dominican authorities.<sup>157</sup> This denial rendered the girls stateless and unable to access various essential rights, and in danger of expulsion. One of the girls was unable to attend school due to lack of documentation.<sup>158</sup> In both cases the IACtHR ruled in favour of the applicants.

Identification of stateless victims during proceedings was the primary challenge faced by stateless persons in *Expelled Dominican and Haitian People v Dominican Republic*. For example, the state claimed one of the victims had suffered from identity theft, as the person who had been recognized as a victim allegedly could not be identified by his family members as the person he claimed to be.<sup>159</sup> However, these claims were rejected by the court and the individuals were later on allowed to participate as victims in the proceedings and eventually were granted reparations for the violations they experienced once the IACtHR found the state had violated their rights. This is a potential challenge posed by a person's statelessness regarding

<sup>148</sup> Organization of American States (OAS), 'Speech by Professor Rene Cassin before the first plenary session on November 8<sup>th</sup>, 1969', *Inter-American Specialized Conference on Human Rights (Preparatory Works of the American Convention on Human Rights)*, (OAS, 1969) OEA/Ser.K/XVI/1.2, doc 25, at 434.

<sup>149</sup> CM Pelayo Moller, 'La reparación del daño y la efectiva protección de los derechos humanos' (2010).

<sup>150</sup> Case 12.271 *Case of Tide Méndez et al. v Dominican Republic*, Merits (IACommHR, 2012) Report No 64/12, para 286; see also *Case of the Miguel Castro Castro Prison v Peru*, Merits, Reparations and Costs. (IACtHR, 2006), para 382; citing the *Case of the Ituango Massacres v Colombia*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 2006), para 289.

<sup>151</sup> Inter-American Court of Human Rights, *Advisory Opinion OC-2/82, The effect of reservations on the entry into force of the American Convention on Human Rights (arts. 74 & 75)* (IACtHR, 1982), para 27.

<sup>152</sup> This case was litigated under the name *Tide Méndez et al. v Dominican Republic* before the Commission and the proceedings before the IACtHR. However, for the final ruling, it was renamed *Expelled Dominican and Haitian People v the Dominican Republic*.

<sup>153</sup> Provisional Measures Requested by the Inter-American Commission on Human Rights in the matter of the Dominican Republic (IACtHR, 2000), para 2(e).

<sup>154</sup> *Ibid*, para 2(e).

<sup>155</sup> *Case of Expelled Dominican and Haitian People v the Dominican Republic*, Preliminary objections, merits, reparations and costs (IACtHR, 2014), paras 2 & 24.

<sup>156</sup> The victims complained of violations of articles 3 (juridical personality), 20 (nationality), 18 (name), 7 (personal liberty), 22 (freedom of movement) of the ACHR, among others.

<sup>157</sup> *Case of the Girls Yean and Bosico v Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 2005), para 3.

<sup>158</sup> Violations of articles 3 (Juridical Personality), 8 (Fair Trial), 19 (Rights of the Child), 20 (Nationality), 24 (Equal Protection) and 25 (Judicial Protection) of the ACHR, among others were claimed. See *Case of the Girls Yean and Bosico v Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 2005), para 2.

<sup>159</sup> *Case of Expelled Dominican and Haitian People v the Dominican Republic*, Preliminary objections, merits, reparations and costs (IACtHR, 2014), para 61.

access to redress. Due to their lack of recognition by the state as its nationals, stateless persons frequently lack identification documents. This lack of documentation makes it difficult to ascertain if the individual in question is in fact who he/she claims to be. In relation to this, one of the legal challenges the Dominican Republic posed during proceedings was related to the inability to ascertain claims to “victimhood” by some of the claimants. The state alleged that the individuals in question had not suffered a violation of the right to nationality (article 20) as they could not prove they were being deprived of Dominican nationality because they could not prove they were Dominican by birth. The Dominican Republic claimed that it was not possible to determine the country of birth of some of the applicants, due to their lack of a birth certificate.<sup>160</sup>

This challenge posed by the state could have potentially disqualified stateless individuals as claimants in the case, since it would cast into doubt their right to Dominican nationality by virtue of *jus soli*, a right they claimed was being violated.<sup>161</sup> This posed a challenge to their ability to access redress because had they not been recognized as legitimate claimants in the case, they would not be able to benefit from any reparatory measures issued by the IACtHR. However, the Court considered that this lack of evidence did ‘not prevent them from continuing to be presumed victims in this case’.<sup>162</sup> In the same case, there were individuals who did possess identification documents, but the state argued that some of the documents presented by the applicants as evidence had ‘shortcomings that jeopardize the authenticity of the document’.<sup>163</sup> However, the victims’ representatives stated that the IACtHR should consider the specific circumstances of the case since following the expulsions, the victims were placed in marginalized living conditions, which made it difficult for them to notarize the documents for submission.<sup>164</sup> On this matter, the Court found in favour of the applicants. In *Yean and Bosico*, the victims (who were children at the time) did not face documentation challenges in accessing the Court.

The IACtHR has referred to article 63 ACHR<sup>165</sup>—which grants it the power to rule on appropriate recommendations—as an embodiment of customary international law and a key principle regarding state responsibility.<sup>166</sup> Reparations, as the IACtHR has established, must have a ‘causal nexus with the facts of the case, the violations declared, the harm proved, and the measures requested to repair the respective harm’.<sup>167</sup> Under article 63 ACHR, the IACtHR<sup>168</sup> enjoys broad<sup>169</sup> remedial jurisdiction, having the power to order remedies other than monetary compensation.<sup>170</sup> Most human rights violations can never be fully redressed, since human rights violations often leave deep scars in the victims. For this reason, the IACtHR considers that there are other measures to ‘ensure the rights that have been violated and to redress the consequences of

<sup>160</sup> *Case of Expelled Dominican and Haitian People v the Dominican Republic*, Preliminary objections, merits, reparations and costs (IACtHR, 2014), para 87.

<sup>161</sup> Article 20 ACHR enshrines the right to nationality. The provision contained in article 20 is the most comprehensive provision on the right to nationality among all human rights instruments that contain such a provision.

<sup>162</sup> *Case of Expelled Dominican and Haitian People v the Dominican Republic*, Preliminary objections, merits, reparations and costs (IACtHR, 2014), para 87.

<sup>163</sup> *Ibid*, para 121.

<sup>164</sup> *Ibid*, para 122.

<sup>165</sup> Article 63:

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied, and that fair compensation be paid to the injured party.
2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

<sup>166</sup> *Case of Velásquez-Rodríguez v Honduras*, Reparations and Costs (IACtHR, 1989), para 25; *Case of Cantoral Benavides v Peru*, Reparations (IACtHR, 2001), para 40; *Case of the “Street Children” (Villagrán-Morales et al.) v Guatemala*, Reparations and Costs (IACtHR, 2001) Series C No 77, para 62.

<sup>167</sup> *Case of Expelled Dominican and Haitian People v the Dominican Republic*, Preliminary objections, merits, reparations and costs (IACtHR, 2014), para 445; see also *Case of Ticona Estrada v Bolivia*, Merits, Reparations and Costs (IACtHR, 2009), para 110.

<sup>168</sup> It should be added that the IACtHR can also make recommendations regarding reparations, and often recommends financial compensation. When such recommendations are made, the state incurs a duty to compensate which cannot be limited by domestic law, since it becomes an international legal obligation. See D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005), at 212–213.

<sup>169</sup> Interestingly, among the debates prior to the adoption of the ACHR, there was no evident debate on the subject, which can show that American states in general did not oppose giving the IACtHR broad remedial powers. See D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005), at 216.

<sup>170</sup> D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005), at 216.

the violations'.<sup>171</sup> According to the IACtHR, 'the purpose of reparations is to eliminate the effects of the violations that have been committed'.<sup>172</sup> This purpose is also known as *restitution in integrum*.<sup>173</sup> They should not make the victim richer or poorer;<sup>174</sup> they should restore the individual to the situation he/she enjoyed before the violation, repair the consequences of the violation and indemnify the victim for damages, including non-quantifiable harm such as emotional harm.<sup>175</sup>

In *Expelled Persons*, the IACtHR considered that it was necessary to 'award different reparatory measures to ensure the violated rights and to redress the harm integrally'.<sup>176</sup> In both of the cases concerning stateless persons, the primary reparatory measure ordered was restitution of the right to nationality of the victims.<sup>177</sup> Furthermore, compensation was issued for pecuniary damage, which refers to any form of damage that can be quantified, such as loss of income, in both cases paid to the victims and in *Yean and Bosico*, to the parents of the children.<sup>178</sup> Payments to the victims were made directly to them,<sup>179</sup> but it is not specified whether they faced any challenges in relation to obtaining the payments. The reason why this is of concern is that stateless persons often face issues in opening bank accounts.<sup>180</sup> Regarding non-pecuniary damage, in *Yean and Bosico* the IACtHR considered that the judgment—together with the various measures of satisfaction and the guarantees of non-repetition—constituted an adequate form of reparation. In the same decision, as part of 'other forms of reparation', the IACtHR ordered the state to publicly acknowledge its international responsibility for the violations through a public apology<sup>181</sup> and make the relevant sections of the judgment public. Furthermore, the state was ordered to amend its laws and adopt measures that can permit acquisition of nationality through late declaration of birth,<sup>182</sup> a provision that if implemented would have ended the issue of statelessness in the country. A program to provide human rights training to state officials was also ordered by the IACtHR.<sup>183</sup> These actions would also serve as guarantees of non-repetition.<sup>184</sup>

It has been shown how one of the main challenges faced by stateless persons in accessing redress at the IACtHR has been proof of identity, through identification documents proving who they claim to be. The reason why this could pose a challenge is that being identified as victims of the alleged human rights violations is a requirement for access to redress in the form of reparatory measures. As mentioned previously, challenges regarding proof of identity almost disqualified some of the victims from being able to access redress, regarding the acknowledgement the state's responsibility for violating their rights and, consequently, to access reparations for said violations. The IACtHR turned this challenge into an opportunity, by taking into account the special situation of stateless persons and showing leniency regarding identification documents. Regarding reparatory measures, the IACtHR in both cases focused on restitution as the primary measure: it ordered the Dominican state to restore the stateless victims with their Dominican nationality. This measure sought to redress the violation of article 20 ACHR, the right to nationality, they suffered which caused

<sup>171</sup> *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v Chile*, merits, reparations and costs (IACtHR, 2014), para 413.

<sup>172</sup> *Case of the Girls Yean and Bosico v Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 2005), para 211.

<sup>173</sup> *Case of Velásquez-Rodríguez v Honduras*, Reparations and Costs (IACtHR, 1989), para 26.

<sup>174</sup> *Case of the Girls Yean and Bosico v Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 2005), para 211.

<sup>175</sup> *Case of Velásquez-Rodríguez v Honduras*, Reparations and Costs (IACtHR, 1989), para 26.

<sup>176</sup> *Case of Expelled Dominican and Haitian People v the Dominican Republic*, Preliminary objections, merits, reparations and costs (IACtHR, 2014), para 444; *Case of Norín Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v Chile*, merits, reparations and costs (IACtHR, 2014), para 414; *Case of Velásquez-Rodríguez v Honduras*, Reparations and Costs (IACtHR, 1989), para 25; see also *Case of Neira-Alegría et al. v Peru*, Reparations and Costs (IACtHR, 1996), para 56.

<sup>177</sup> *Case of Expelled Dominican and Haitian People v the Dominican Republic*, Preliminary objections, merits, reparations and costs (IACtHR, 2014), Para 456.

<sup>178</sup> See *Case of Expelled Dominican and Haitian People v the Dominican Republic*, Preliminary objections, merits, reparations and costs (IACtHR, 2014), para 477; *Case of the Girls Yean and Bosico v Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 2005), para 229.

<sup>179</sup> *Case of the Girls Yean and Bosico v Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 2005), para 252.

<sup>180</sup> While this may sound simplistic, stateless persons often struggle with opening bank accounts, since frequently they lack any form of documentation, which is frequently required to open a bank account. See for instance <<http://www.institutesi.org/world/impact.php>> accessed 16<sup>th</sup> March 2019.

<sup>181</sup> *Case of the Girls Yean and Bosico v Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs (IACtHR, 2005), para 235.

<sup>182</sup> *ibid*, para 239.

<sup>183</sup> *ibid*, para 242.

<sup>184</sup> *ibid*, para 235.

several other violations. Regarding other reparatory measures the IACtHR, in line with its general practice, issued specific reparatory measures including compensation and guarantees of non-repetition.

### 4.3 The International Criminal Court

#### 4.3.1 Background and process

A mechanism that, for the time being, has not heard cases on stateless persons but is nevertheless worth considering is the ICC. As previously mentioned, stateless persons are vulnerable to violations of their rights, with the recent Rohingya crisis serving as a shocking example of this.<sup>185</sup> It is possible that in the future, the ICC could prosecute some of the perpetrators of gross abuses against the Rohingya. In fact, the ICC's prosecutor announced a preliminary examination into the gross violations which resulted in the violent and forced displacement, perpetrated by Myanmar's army, of Rohingyas from Myanmar into Bangladesh.<sup>186</sup> A submission on behalf of the victims has been submitted to the court's Pre-Trial Chamber I.<sup>187</sup> The situation in the Occupied Palestinian territories<sup>188</sup> is also under investigation for violations against Palestinians, who are among the world's largest stateless populations. Furthermore, the ICC plays a central role in international justice: it has strong provisions allowing for greater participation of victims in proceedings and has granted reparations to victims in its rulings.<sup>189</sup> For these reasons, the ICC was also considered for this study.

The ICC was established following the creation of two *ad hoc* tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) during the 1990s. The creation of these two special courts was preceded by decades of talks about creating an international tribunal to prosecute the worst internationally wrongful acts. It was only after the creation of these tribunals that the necessity for an international criminal court of a more permanent character became clear. Following a complex process, in 1998 the UN General Assembly adopted the Rome Statute (RS), which entered into force in 2002 and, by 2003, the ICC became fully functional. The RS grants the court jurisdiction over war crimes, crimes against humanity, genocide and crimes of aggression that have taken place after it entered into force. What sets the ICC apart from its predecessors is the role it grants victims. During the preparatory meetings before the adoption of the Rome Statute, some states noted that the victim was 'notably absent from the penal system'.<sup>190</sup> The expansion of the role of victims was eventually adopted into the rules and practice of the court.<sup>191</sup> Unlike previous international criminal tribunals, victim participation before the ICC has a wider scope,<sup>192</sup> providing a prominent role for victims in the proceedings,<sup>193</sup> and allowing for measures to redress violations.<sup>194</sup> In this sense, the ICC's mandate leads an emerging trend under international criminal justice.<sup>195</sup>

<sup>185</sup> UN Human Rights Council, 'Report of the independent international fact-finding mission on Myanmar' (2018) A/HRC/39/64, available at <[https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A\\_HRC\\_39\\_64.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/FFM-Myanmar/A_HRC_39_64.pdf)> accessed 13<sup>th</sup> May 2019; Amnesty International, *Mapping Myanmar's Atrocities Against the Rohingya* (2019) available at <<https://mapping-crimes-against-rohingya.amnesty.org/>> accessed 13<sup>th</sup> May 2019; Human Rights Watch, 'Rohingya Crisis' (2019) available at <<https://www.hrw.org/tag/rohingya-crisis>> accessed 13<sup>th</sup> May 2019.

<sup>186</sup> Press Office of the International Criminal Court, 'Statement of ICC Prosecutor, Mrs. Fatou Bensouda, on opening a Preliminary Examination concerning the alleged deportation of the Rohingya people from Myanmar to Bangladesh' (2018) <<https://www.icc-cpi.int/Pages/item.aspx?name=180918-otp-stat-Rohingya>> accessed 15<sup>th</sup> March 2019.

<sup>187</sup> *Preliminary Examination into the situation in Bangladesh* [2018] ICC Pre-Trial Chamber I 'Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute' ICC-RoC46(3)-01/18.

<sup>188</sup> See <<https://www.icc-cpi.int/palestine>> accessed 16<sup>th</sup> March 2019.

<sup>189</sup> The Lubanga ruling was followed by a decision on reparations shortly after.

<sup>190</sup> Preparatory Commission for the International Criminal Court Working Group on the Rules of Procedure and Evidence, *Proposal by Colombia Comments on the report on the international seminar on victims' access to the International Criminal Court (document PCNICC/1999/WGRPE/INF/2) Protection of victims and witnesses Participation of victims Protection of the identity of victims and witnesses Reparations* (United Nations, 1999) PCNICC/1999/WGRPE/DP.37, at 1.

<sup>191</sup> expanded rights of participation (before, during, and after proceedings), disclosure, and protection (for victims and witnesses); symbolic recognition as victims; and increased access to reparations, in various forms. See C Hoyle and L Ullrich, 'New Court, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court' (2014) 12 *Journal of International Criminal Justice* 681, at 683; 'The Evolution of Victims' Access to Justice' in K Booth & J Sulzer, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* (International Federation for Human Rights (FIDH), Paris 2007), at 38.

<sup>192</sup> C Stahn, H Olasolo & K Gibson, 'Participation of Victims in Pre-Trial Proceedings of the ICC' (2006) 4(2) *Journal of International Criminal Justice* 219, at 220.

<sup>193</sup> 'The Evolution of Victims' Access to Justice' in K. Booth & J Sulzer, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* (International Federation for Human Rights (FIDH), Paris 2007), at 36.

<sup>194</sup> D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005), at 231.

<sup>195</sup> C Hoyle and L Ullrich, 'New Court, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court' (2014) 12 *Journal of International Criminal Justice* 681, at 684.

### 4.3.2 Statelessness at the ICC: challenges and opportunities

Participation is important in international criminal legal proceedings. According to Cryer et al., the main purpose of victim participation is to ‘contribute to the prosecution and obtain restitution or reparation and other forms of satisfaction’.<sup>196</sup> For the victims, participation can help ensure that the experience of the violations they suffered can be heard in their own terms and own voices, and can contribute to the reconciliation of a community or an entire country.<sup>197</sup> It should be noted that victims before the ICC are not given the status of a *partie civile*—or civil party—as is common in civil law systems.<sup>198</sup> The ICC allows victims to present their views and concerns through their legal representatives.<sup>199</sup> However, despite having this possibility, victims are not party to the proceedings,<sup>200</sup> but are “participants” who can present their views and concerns under certain conditions, and whose participation is limited by the judge’s discretion.<sup>201</sup> The legal basis for victim participation can be found under the RS and the Rules of Procedure and Evidence (RPE). Victims are always represented by their legal representative during proceedings and can participate as witnesses if they wish. Under Rule 85(a) of the RPE, in order to fall within the definition of victim, an individual needs to be able to show that he/she is a natural person and suffered harm as a result of the commission of a crime under the jurisdiction of the Court.<sup>202</sup> There is no requirement to be directly affected by the crime in order to participate as a victim<sup>203</sup> which allows for families and dependents of direct victims to fall within the definition of victim.<sup>204</sup> A problem with the ICC’s approach is that the RPE provide only limited guidance on what exactly the right to participate entails.

In order to be able to participate, victims must apply for status as victims in the proceedings. Since the ICC is a criminal tribunal with the mandate to punish perpetrators, higher evidentiary standards are in place, in order to ensure fairness to the accused. To establish some necessary facts—such as the identity of the victim seeking participation—a higher standard of proof is in place due to the nature of the court.<sup>205</sup> Transparency and accuracy is required in order to ensure a fair trial to the accused. Therefore, the application process for participating as victims in the proceedings can be burdensome due to the ‘individualized processing requirements’.<sup>206</sup> In *the prosecutor v Kony, Otti, Odhjambo & Ongwen*—when deciding whether an applicant fulfils the criteria under Rule 85(a) RPE—the Appeals Chamber observed that while all judicial decisions are based on the evidence presented,<sup>207</sup> determining what evidence is sufficient cannot be pre-determined. This means that acceptable evidence varies in every case, and all relevant circumstances should be considered,<sup>208</sup> while

<sup>196</sup> R Cryer, H Friman, D Robinson & E Wilmschurst (eds), *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup>, Cambridge University Press, 2014), at 489.

<sup>197</sup> C Stahn, H Olasolo & K Gibson, ‘Participation of Victims in Pre-Trial Proceedings of the ICC’ (2006) 4(2) *Journal of International Criminal Justice* 219, at 221.

<sup>198</sup> A *partie civile* is the subject damaged by a crime, that can enter the process to see the status confirmed by a judge and be entitled to indemnification. Victims and civil parties often coincide, although a civil party might also not be the victim of a criminal conduct (in the case of a murder, for instance, civil parties could be the relatives of the victim). R Cryer, H Friman, D Robinson & E Wilmschurst (eds), *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup>, Cambridge University Press, 2014), at 488.

<sup>199</sup> ‘Participation’ in K. Booth & J Sulzer, *Victims’ Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* (International Federation for Human Rights (FIDH), Paris 2007), at 5.

<sup>200</sup> R Cryer, H Friman, D Robinson & E Wilmschurst (eds), *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup>, Cambridge University Press, 2014), at 488; L Carter & F Pocar, *International Criminal Procedure. The Interface of Civil Law and Common Law Legal Systems* (Edward Elgar Publishing, Cheltenham, UK 2013), at 172.

<sup>201</sup> L Carter & F Pocar, *International Criminal Procedure. The Interface of Civil Law and Common Law Legal Systems* (Edward Elgar Publishing, Cheltenham, UK 2013), at 172.

<sup>202</sup> R Cryer, H Friman, D Robinson & E Wilmschurst (eds), *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup>, Cambridge University Press, 2014), at 490.

<sup>203</sup> ‘The Evolution of Victims’ Access to Justice’ in K. Booth & J Sulzer, *Victims’ Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* (International Federation for Human Rights (FIDH), Paris 2007), at 37.

<sup>204</sup> *Ibid*, at 37.

<sup>205</sup> R Cryer, H Friman, D Robinson & E Wilmschurst (eds), *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup>, Cambridge University Press, 2014), at 490; Redress, *The Participation of Victims in International Criminal Court Proceedings A Review of the Practice and Consideration of Options for the Future* (Redress Trust, 2012), at 16.

<sup>206</sup> Redress, *The Participation of Victims in International Criminal Court Proceedings A Review of the Practice and Consideration of Options for the Future* (Redress Trust, 2012), at 16.

<sup>207</sup> *The Situation in Uganda in the case of the Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo & Dominic Ongwen* [2009] ICC Appeals Chamber ‘Judgment on the appeals of the Defense against the decisions entitled ‘Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06’ of Pre-Trial Chamber II’ ICC-02/04-01/05-371, para 36.

<sup>208</sup> *ibid*, para 38.

there is still room for leniency if required by the circumstances. In the case of stateless persons, leniency is certainly required, especially regarding proof of identity.<sup>209</sup>

This is a similar challenge to that faced by the stateless in accessing redress at the IACtHR, with the main difference being that the threshold of proof is higher at the ICC due to the court's nature. Since the emphasis of the application process is on eligibility to participate rather than the modes of participation, victims can become frustrated upon realizing that after having undertaken a painstaking application process, sometimes 'there is little scope for their individual voices to be heard by the Court'.<sup>210</sup> Case law of the ICC which has addressed the issue of proof of identity can be helpful in outlining potential challenges for access to redress before the ICC for stateless persons.

Reparations issued by the ICC can include restitution, compensation and rehabilitation,<sup>211</sup> and it is within the judges' power to establish the principles guiding reparations and the 'scope and extent of any damage, loss, or injury'.<sup>212</sup> According to Cryer et al., 'it appears that this [establishment of principles] will occur on a case by case basis'.<sup>213</sup> It should be noted that in the ICC, according to Shelton, 'prosecution becomes recast as an essential component of the remedy owed victims of certain grave human rights violations'<sup>214</sup> since measures such as compensation or disciplinary sanctions imposed on the perpetrator may be insufficient to redress the harm.<sup>215</sup> Only upon conviction, a request for reparations by the victims can be issued,<sup>216</sup> and can result in an order by the court to make reparations. However, article 75(1) RS allows the court to act *proprio motu* on the matter and issue an order reparation without a previous request.<sup>217</sup>

Furthermore, victims can apply to receive individual or collective reparations. Under article 75 RS and Rules 94–99 RPE, the ICC 'has the power to order reparations directly to, or in respect of, victims'<sup>218</sup> against an accused person. Under Article 75(1) RS, the Court must establish principles 'relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'<sup>219</sup> and can make the order against the convicted person. Rule 97(1) RPE implies that awards should be made on an individual basis; however, the court can decide whether to 'order reparations on an individualized or on a collective basis'.<sup>220</sup> The second option can fund projects targeted towards an entire community of victims, such as building a school or a hospital for example.<sup>221</sup> Since access to reparations under the ICC is not dependent on participa-

<sup>209</sup> In *Muthaura, Kenyatta & Hussein Ali*, the single judge stated that the following documents could be accepted as forms of identification: National ID Waiting Card, a Chief's Identification letter (which includes the name, date, gender and place of birth of the victim applicant), Notification of Birth Cards (for minors), Clinic Cards, Kenyan Police Abstract Form (for lost identity cards), and a signed declaration by two witnesses—along with their identification documents—attesting to the victim applicant's identity. See *Situation in Kenya in the case of the Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta & Mohamed Hussein Ali* [2011] ICC Pre-Trial Chamber II 'Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings' ICC-01/09-02/11, para 43.

<sup>210</sup> Redress, *The Participation of Victims in International Criminal Court Proceedings A Review of the Practice and Consideration of Options for the Future* (Redress Trust, 2012), at 16; see also *The Situation in the Democratic Republic of Congo in the case of the Prosecutor v Germaine Katanga* [2017] ICC Trial Chamber II, 'Order for Reparations pursuant to Article 75 of the Statute' ICC-01/04-01/07, paras 71 & 72.

<sup>211</sup> Amnesty International, *Ensuring an Effective Role for Victims*, IOR 40/10/99 (Amnesty International, 1999).

<sup>212</sup> See *Situation in the DRC in the case of The Prosecutor v Thomas Lubanga Dyilo* [2015] ICC Appeals Chamber 'Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012', ICC-01/04-01/06-3129, para 155; *Situation in Mali in the case of The Prosecutor v A Ahmad al-Faqi al-Mahdi* [2017] ICC Trial Chamber VIII "Reparations Order" ICC-01/12-01/15, section IV; *The Situation in the Democratic Republic of Congo in the case of the Prosecutor v Germaine Katanga* [2017] ICC Trial Chamber II, "Order for Reparations pursuant to Article 75 of the Statute" ICC-01/04-01/07, section IV; see also R Cryer, H Friman, D Robinson & E Wilmshurst (eds), *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup>, Cambridge University Press, 2014), at 495.

<sup>213</sup> R Cryer, H Friman, D Robinson & E Wilmshurst (eds), *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup>, Cambridge University Press, 2014), at 495.

<sup>214</sup> D Shelton, *Remedies in International Human Rights Law* (2<sup>nd</sup>, Oxford University Press, 2005), at 9.

<sup>215</sup> *Ibid*, at 9.

<sup>216</sup> Preparatory Commission for the International Criminal Court, *Proceedings of the Preparatory Commission at its second session 26 July–13 August 1999* (United Nations, 1999) PCNICC/1999/L.4/Rev.1, at 49, note 75.

<sup>217</sup> R Cryer, H Friman, D Robinson & E Wilmshurst (eds), *An Introduction to International Criminal Law and Procedure* (3<sup>rd</sup>, Cambridge University Press, 2014), at 495.

<sup>218</sup> *Ibid*, at 494.

<sup>219</sup> UN General Assembly, *Rome Statute of the International Criminal Court* (17 July 1998, last amended 2010).

<sup>220</sup> 'Reparations and the Trust Fund for Victims' in K. Booth & J Sulzer, *Victims' Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* (International Federation for Human Rights (FIDH), Paris 2007), at 16.

<sup>221</sup> *Ibid*, at 27.

tion in the proceedings,<sup>222</sup> victims do not need to participate in order to benefit from reparations.<sup>223</sup> This mechanism is ideal when there are many victims but limited funds, making collective reparations feasible and ideal since they can reach a great number of victims. For instance, in the *Lubanga* reparations ruling of 2015 only collective reparations were granted by the Appeals Chamber.<sup>224</sup> While access to participation in the proceedings—a form of redress for some victims—can be challenging for stateless persons due to documentation issues. It seems accessing reparatory measures is less stringent upon documentation, and therefore there is room for easy access to reparations for stateless persons if in the future there is a case concerning stateless persons who have been victims of violations of the international crimes over which the court has jurisdiction.

## 5 Conclusion

Statelessness can be said to be both a violation of a right, and also a condition that is conducive to other violations of international legal norms (namely human rights), depending on the context. As it has been established, harm gives rise to an obligation to redress. The question of who is liable to redress this harm depends on the context in which the harm was done, and also depends on which mechanisms stateless individuals are able to access in order to seek redress. The nature of the redress they obtain also depends on the mechanisms they access, as well as on the nature of the violations they experienced and who caused said harm. Another important element to consider in establishing what kind of redress they may obtain is the nature of the mechanism, as there is a difference between judicial or non-judicial mechanisms. The decision by the Court on whether a wrongdoing took place or not (merits) will also be a determinant, in situations where the mechanism accessed is judicial in nature. The specific reparatory measures significantly depend on the context, and each mechanism has its own ways to determine which measures are suitable. The three mechanisms explored in section 4 showed the different forms of redress that can be attained by stateless individuals. The UNCC, a non-judicial mechanism, for instance granted only compensation, while the IAcHR, a judicial mechanism, granted stateless individuals both monetary compensation and non-monetary forms of reparation.

Several conclusions can be drawn from this study regarding the challenges and opportunities faced by stateless persons in seeking redress for harm they experienced. The first is that for claims based on protection through diplomatic channels, nationality will continue to be an important element in the case of internationally wrongful acts for as long as states continue to be the main actors.<sup>225</sup> The “traditional approach” of diplomatic protection will likely continue to be a challenge for stateless individuals regarding the vindication of their rights under international law.<sup>226</sup> However, as this study has shown, the rise of other international mechanisms capable of providing victims of internationally wrongful acts with redress almost completely counter this challenge. That is not to say that these mechanisms are free of challenges regarding access to redress. However, it can be concluded that they present a strong framework for ensuring all victims of internationally wrongful acts—particularly highly vulnerable groups like the stateless—can access redress. This is especially true, as this article has shown, because these mechanisms have ways to address the specific challenges that statelessness has posed or can potentially pose for future attempts by stateless persons to seek redress.

<sup>222</sup> Ibid, at 4; ‘Reparations and the Trust Fund for Victims’ in K. Booth & J Sulzer, *Victims’ Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* (International Federation for Human Rights (FIDH), Paris 2007), at 10.

<sup>223</sup> In order to apply for participation in the proceedings, there is a form for victims to fill in and an application process; for requesting reparations, there is another form. ‘Reparations and the Trust Fund for Victims’ in K. Booth & J Sulzer, *Victims’ Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* (International Federation for Human Rights (FIDH), Paris 2007), at 11; ‘Reparations and the Trust Fund for Victims’ in K. Booth & J Sulzer, *Victims’ Rights Before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs* (International Federation for Human Rights (FIDH), Paris 2007), at 4.

<sup>224</sup> In *Lubanga*, it was established that the appropriate modalities of reparation are restitution, compensation, rehabilitation, as well as others with a symbolic, transformative and preventative value. Furthermore, it was established that if an individual is denied individual reparations, he/she can still benefit from collective reparations. See *Situation in the DRC in the case of The Prosecutor v Thomas Lubanga Dyilo* [2015] ICC Appeals Chamber ‘Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012’, ICC-01/04-01/06-3129, para 202; *Situation in the DRC in the case of The Prosecutor v Thomas Lubanga Dyilo* [2015] ICC Appeals Chamber ‘Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012’, ICC-01/04-01/06-3129, para 155.

<sup>225</sup> K Hailbronner, ‘Nationality in Public International Law and European Law’ in R Bauböck (eds), *Acquisition and Loss of Nationality: Policies and Trends in 15 European Countries* (1st, AUP, 2006).

<sup>226</sup> EC Gillard, ‘Reparation for violations of International Humanitarian Law’ (2003) 85(851) *International Review of the Red Cross* 529.

For instance, the precedent set by the UNCC clearly shows that challenges posed by lack of nationality can be overcome through special measures such as granting international organizations, or the state of habitual residence, the power to file claims on behalf of the stateless. This approach taken by the UNCC, where it turned a challenge into an opportunity, can serve as a basis for future mechanisms of a similar nature with the task of assisting stateless persons, among others. The examination of the IACtHR and ICC showed that access to international human rights courts and international criminal tribunals is not restricted by nationality or lack thereof. Even though issues regarding proof of identity as a result of lack of documentation initially posed a potential challenge, this article shows that these mechanisms<sup>227</sup> are willing to make exceptions and be lenient depending on the circumstances. This was the approach taken by the IACtHR, which took into account the special situation of stateless persons and opted for a more lenient approach regarding identification, to guarantee access to redress. Regarding the ICC, it is true that the threshold is higher in a criminal court, but the analysis has shown that the ICC has mechanisms in place to overcome issues regarding identification in order to prevent individuals from being denied redress.

In conclusion, for the potential challenges faced by stateless persons in accessing redress to become opportunities, judicial or non-judicial fora need to interpret decisions, rules, and procedures taking into account the context and the situation of vulnerability statelessness can create for individuals. This also creates an opportunity for international law to continue evolving, beyond the role of states as primary actors. What cannot be doubted, is that for all wrongs to be effectively righted, it is essential for international mechanisms with powers to grant redress to ensure that all who have been harmed by an internationally wrongful act—including the world's stateless individuals—can access appropriate redress.

### Competing Interests

The author has no competing interests to declare.

<sup>227</sup> The same can be said of the European Court of Human Rights, which has heard multiple cases concerning stateless persons, including *Auad v Bulgaria*, Application No 46390/10 (ECtHR, 2011); *Amie and Others v Bulgaria*, Application No 58149/08 (ECtHR, 2013); *Kim v Russia*, Application No 44260/13 (ECtHR, 2014); *Kurić and Others v Slovenia*, Application No 26828/06 (ECtHR, 2012).

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