International Review of the Red Cross (2024), **106** (927), 1202–1221.
IHL & Peace
doi:10.1017/S1816383124000249

IRRC

Whose war is it anyway? Proportionate reparations in wars of aggression

Arnaaz Nizami Ameer[1,2]*
[1]LLM, Harvard Law School, Cambridge, MA, United States
[2]LLM in International Humanitarian Law and Human Rights, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, Switzerland
Email: aameer@sjd.law.harvard.edu

Abstract

This article proposes a hybrid legal framework combining jus ad bellum *and* jus in bello *to govern the attribution of State responsibility for reparations at the end of a war of aggression. To this end, the article considers former international mass claims processes and proposes a complementary approach that, on the one hand, acknowledges the role of the aggressor State in waging the war, and on the other, takes a cautionary approach to prevent a disproportionate burden of compensation being imposed on the aggressor State as a form of collective punishment. The consequences of respective violations of the prohibition of the use of force and the law of war are blurred in a war of aggression, resulting in complexities around liability for aggressor States. In response, this article concludes with a nuanced proposal to calculate compensation based on (1) the aggressor party's capacity to*

* The author is grateful to Bruno Demeyere, Jillian Rafferty and the peer reviewers at the *Review* for their kind encouragement and feedback in refining the article.

The advice, opinions and statements contained in this article are those of the author/s and do not necessarily reflect the views of the ICRC. The ICRC does not necessarily represent or endorse the accuracy or reliability of any advice, opinion, statement or other information provided in this article.

© The Author(s), 2024. Published by Cambridge University Press on behalf of International Committee of the Red Cross

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

comply with jus in bello*; (2) the extent of damage caused by the war of aggression, factoring in* jus ad bellum *considerations if a party is found to be intentionally maximizing destruction; and (3) the incorporation of tort law principles for equitable attribution of responsibility.*

Keywords: reparation, aggression, international humanitarian law, *jus ad bellum*, *jus in bello*, tort law.

Prelude: Challenges related to reparations under the *lex lata* of international law

In ancient Egyptian culture, the talisman of the Ouroboros (the "tail-swallower") depicts a snake eating its own tail, signifying the world's descent into chaos as the snake's body remains, while engulfing all of existence and stability, returning to life before law and order.[1] Nearly eight decades after the Second World War and the global community's numerous multilateral commitments to rebuild an international world order premised on "sav[ing] succeeding generations from the scourge of war",[2] war persists. This article is concerned specifically with wars of aggression, defined as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the United Nations (UN) Charter.[3] Advances in means and methods of warfare have not been complemented by innovations in frameworks for attributing responsibility for internationally wrongful acts or delivering justice to victims of armed conflict. At the end of every war of aggression, States and the international criminal justice community are beleaguered by the question: what comes after the cessation of hostilities? This article argues that much like the Ouroboros, there must be a renaissance of international law to account for the modern-day complexities of aggression, starting with the matter of reparations at the end of war.

Since the Second World War, there has been an expansion of the "humanization of humanitarian law",[4] influenced by the international human rights movement. This marks a departure from collectivism and a move towards individualism. The law of war now concerns itself with the protection of all individuals – including not only one's own nationals, but also those who were formerly considered "enemy nationals".[5] Historically, there has been a shift in the traditional conception of reparations as a form of poetic "victor's justice", where

1 Erik Hornung, *Conceptions of God in Egypt: The One and the Many*, Routledge and Kegan Paul, London, 1983, p. 164.
2 Charter of the United Nations, 21 UNTS 16, 26 June 1945 (entered into force 24 October 1945) (UN Charter), Preamble.
3 UNGA Res. 3314 (XXIX), "Definition of Aggression", 14 December 1974, Annex.
4 See Theodor Meron, "The Humanization of Humanitarian Law", *American Journal of International Law*, Vol. 94, No. 239, 2000.
5 Gabriella Blum, "The Individualization of War: From War to Policing in the Regulation of Armed Conflicts", in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (eds), *Law and War*, Stanford University Press, Stanford, CA, 2014, p. 48.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

the morally just party exercising the right to self-defence in response to the aggressor party's initiation of an armed conflict would be granted reparations at the end of the war. In demonstrating this shift from individualism to collectivism, Blum cites the example of State-focused reparations directed from one State to another at the end of the First World War, as through the "War Guilt Clauses" of the Treaty of Versailles (1918), vis-à-vis the case of modern reparations for war crimes or other violations of international humanitarian law (IHL) that are premised on wrongdoing.[6] In the decades after the Second World War, at the end of the conflict, the victorious States were motivated to rebuild the countries they had waged war against.[7] Reparations are now based on the idea of securing justice for all parties adversely impacted by war, including those belonging to the enemy.

Reparations have been a common feature of peacebuilding for centuries.[8] When a State breaches an obligation, giving rise to an internationally wrongful act attributable to it, reparations are owed as remedy for a legal injury – either to one State, to several States, or to the international community as a whole.[9] Various international instruments[10] have asserted the customary international law principle of States' responsibility and duty to provide reparations for damages arising from international law violations. Articles 28–41 of the International Law Commission's (ILC) Draft Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA) detail the responsibility of a State for internationally wrongful acts, including during wartime, to make full reparations comprising "restitution, compensation and satisfaction, either singly or in combination".[11]

Under international law, the remedial purpose of reparations is the restoration of the *status quo ante*, by reinstating an aggrieved party into the same position that it would hold if no wrongful act had occurred "without respect to the cost or consequences for the wrong-doer".[12] All three forms of reparations – satisfaction, compensation and restitution – are meant to eliminate the moral or material

6 *Ibid.*, p. 54.

7 John R. Crook, "Is Iraq Entitled to Judicial Due Process?", in Richard Lillich (ed.), *The United Nations Compensation Commission: Thirteenth Sokol Colloquium*, Transnational Publishers, Irvington, NY, 1995, pp. 85, 87.

8 Emmerich de Vattel, *The Law of Nations or Principles of the Law of Nature*, Cambridge University Press, Cambridge, 2011; David J. Bederman, "Historic Analogues of the UNCC", in R. Lillich (ed.), above note 7.

9 See ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, in *Report of the International Law Commission on the Work of Its Fifty-Third Session*, Vol. 2, Part 2, Supp. No. 10, UN Doc. A/56/10, November 2001 (ARSIWA), Arts 2, 31, 33–39.

10 See Rome Statute of the International Criminal Court, 17 July 1998 (last amended 2010), Art. 75; Second Protocol to the Hague Convention for the Protection of Cultural Property, 1999, Art. 38; Convention on Enforced Disappearance, 2006, Art. 24; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, annexed to UNGA Res. 60/147, 16 December 2005, paras 8, 9, 11–17, 24; ARSIWA, above note 9, Art. 31. For a comprehensive list of various countries' military manuals and case law, see Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 2: *Practice*, Cambridge University Press, Cambridge, 2005, Practice relating to Rule 150, available at: https://ihl-databases.icrc.org/en/customary-ihl/v2/rule150 (all internet references were accessed in May 2024).

11 See ARSIWA, above note 9, Art. 34.

12 Dinah Shelton, "Reparations", in *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2015, para. 3.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

damages caused as a consequence of the internationally wrongful act,[13] and not to punish the responsible State, have an exemplary character, or impose punitive damages.[14]

International law adopts a range of mechanisms for determining reparations. These include judgments by the International Criminal Court (ICC) or the International Court of Justice (ICJ),[15] as well as deliberations by *ad hoc* international mass claims commissions (IMCCs) like the UN Compensation Commission (UNCC) for the Gulf War of 1991,[16] the Commission for Real Property Claims of Displaced Persons and Refugees for the war in Bosnia and Herzegovina, and arbitration tribunals such as the Eritrea-Ethiopia Claims Commission (EECC).[17] Most recently, the UN General Assembly has recommended a Register of Damages for Ukraine to document losses accruing to all legal and natural persons.[18] This is a replication of a similar UN Register of Damages set up by the General Assembly to implement the ICJ's Advisory Opinion for Palestine,[19] as a record of damage caused to all legal and natural persons by the construction of the wall by Israel in the Occupied Palestinian Territory.

This article focuses on analysing the role of IMCCs in attributing State responsibility for reparations after wars of aggression. IMCCs are unique in their ability to devise reparations systems specifically suited to the context of a particular conflict.[20]A recent study of IMCCs since the 1980s identifies the following common features: first, that they are binding dispute resolution processes; second, that their structure and authority are similar to a judicial body and their actions are *ad hoc*; third, that they are established in the aftermath of an international armed conflict; fourth, that they are set up through international agreements and instruments; and fifth, that they focus on State responsibility for violations of international law and not on individual criminal responsibility.[21]

Despite their promise, based on an analysis of literature on prior post-war reparations mechanisms, I identify three limitations within existing IMCC processes: First, reparations are imposed as collective punishment on the losing State and its civilian population in order to compensate victims of internationally

13 See ARSIWA, above note 9, Art. 31 commentary, paras 3, 5.
14 See *ibid.*, Art. 36 commentary, para. 1; Art. 37 commentary, para. 8; Chap. III, "Serious Breaches of Obligations under Peremptory Norms of General International Law", para. 5.
15 See e.g. ICJ, *Corfu Channel Case* (*United Kingdom of Great Britain and Northern Ireland v. Albania*), Merits, *ICJ Reports 1949*, pp. 4, 23; ICJ, *Case concerning Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*), Merits, *ICJ Reports 1986*, pp. 14, 283. See also ICJ, *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment, *ICJ Reports 2005*; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004* (Wall Advisory Opinion), para. 152.
16 UNSC Res. 687, 3 April 1991.
17 Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia, 2138 UNTS 94, 12 December 2000 (Algiers Agreement).
18 UNGA Res. L.6/2022, 7 November 2022.
19 Wall Advisory Opinion, above note 15.
20 Lea Brillmayer, Chiara Giorgetti and Lorraine Charlton, *International Claims Commissions: Righting Wrongs after Conflict*, Edward Elgar, Cheltenham, 2017, p. 1.
21 *Ibid.*, pp. 6, 10.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

wrongful acts. International law provides legal mechanisms[22] for delivering reparations, without consideration of whether those reparations are motivated by a sense of punishment, or compensation, or both. However, it is only if the outcome of the war is "just" and the victors "prudent" that the aims of global justice are purportedly upheld; otherwise, they are not.[23] Second, the rules governing these post-war mechanisms are usually not independent of political considerations, therefore disrespecting basic principles of procedural fairness and due process.[24] This shifts the focus away from the concerns of those suffering direct or indirect loss and damage, belonging to either party to the conflict. Third, existing IMCCs have failed to clearly delineate between *jus in bello* and *jus ad bellum* as the applicable framework for governing post-conflict reparations.[25]

The overall successes and shortcomings of various historic IMCCs in achieving their objectives are outside the scope of this article, and there exists sufficient documentation on this subject elsewhere.[26] However, existing IMCC models serve as useful precedents for understanding the attribution of blame to both sides of an armed conflict in cases of wars of aggression. Judgments by various IMCCs highlighted in this article include deliberations on allegations of war crimes by both sides involved in wars of aggression. While the gravity and scale of war crimes committed by either party differ substantially owing to the asymmetric nature of the conflict, this article argues that it is imperative to prosecute allegations against both parties, as per the principle of proportionality.

Current efforts to establish an international tribunal on the crime of aggression[27] aside, a war of aggression raises substantial questions relating to peacebuilding post-conflict. In considering these questions, this article proceeds as follows. First, I focus on the conflict between *jus ad bellum* and *jus in bello* as the applicable framework governing reparations in wars of aggression, through a detailed analysis of judgments by the EECC and UNCC in which they incorporate proportionality-related considerations when deciding on the quantum of damages awarded to either party. Second, I consider analogies to Anglo-American tort law in order to determine relevant private law principles that can be extrapolated to international law, contributing to a more robust methodology for attributing State

22 Such as a peace treaty or Security Council resolution.

23 Richard A. Falk, "Reparations, International Law, and Global Justice: A New Frontier", in Pablo de Grieff (ed.), *The Handbook of Reparations*, Oxford University Press, Oxford, 2006, p. 487.

24 Frederic Kirgis, "The Security Council's First Fifty Years", *American Journal of International Law*, Vol. 89, No. 506, 1995, p. 525.

25 See EECC, *Decision 7: Guidance Regarding* Jus ad Bellum *Liability*, PCA Case No. 2001-02, 27 July 2007, para. 5; EECC, *Final Award: Ethiopia's Damages Claims*, Vol. 26, 17 August 2009, paras 309, 312; UNCC Governing Council Decision No. 10, UN Doc. S/AC.26/1991/10, 26 June 1992; Veijo Heiskanen and Nicolas Leroux, "Applicable Law: *Jus ad Bellum*, *Jus in Bello*, and the Legacy of the UN Compensation Commission", in Timothy J. Feighery, Christopher S. Gibson and Trevor M. Rajah (eds), *War Reparations and the UN Compensation Commission*, Oxford University Press, Oxford, 2015, p. 58.

26 See L. Brillmayer, C. Giorgetti and L. Charlton, above note 20, p. 8. See also Howard Holtzmann and Edda Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives*, Oxford University Press, Oxford, 2007.

27 Oona A. Hathaway, "The Case for Creating an International Tribunal to Prosecute the Crime of Aggression against Ukraine", *Just Security*, 20 September 2022, available at: www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

responsibility for internationally wrongful acts. Third, I conclude with a tripartite framework for governing reparations in cases of wars of aggression, proposing a complementary application of *jus ad bellum* and *jus in bello*, alongside the incorporation of tort law principles of contributory negligence, comparative fault, proportionality and causation, to determine compensation. By contributing to the literature on reimagining reparations, this article is an appeal to broaden the scope of reparations in aggression in order to account for disproportionate damage caused by both parties to the conflict.

Jus ad bellum versus *jus in bello*: The conflict between applicable bodies of law for a reparations mechanism

Under international law, the applicable law governing the use of force is divided into two distinct regimes: first, the law of war, or *jus in bello,* that applies when force is actually used, and second, the *jus ad bellum*, which is founded on the principle of the prohibition of the use of force. In the earliest Western scholarly iterations of just war, there was an attempt to reconcile might (*sein*) with right (*sollen*), such that might would either serve right or be restrained by right.[28] War was therefore viewed as the ultimate method of remedying the violation of a right (*consecutio juris*), and a just reaction to unconscionable aggression.[29] In exceptional situations where *jus ad bellum* or the right to wage war exists, only one side is justified, while the enemy party has necessarily violated the *jus contra bellum*[30] which prohibits the use of force as per the UN Charter.[31] Under modern *jus in bello*, regardless of the legality of the initial attack, the use of force is not *per se* prohibited – it is only the excessive or disproportionate use of force that is prohibited.[32] Intuitively, therefore, there is a strict distinction between *jus in bello* and *jus ad bellum* since the former applies during the conflict when force is, as a matter of fact, used, and the latter regulates the use of force where States may resort to war, such as for self-defence.

Past mass claims commissions, notably the UNCC (for the 1991 Gulf War) and the EECC (for the 1998–2000 war between Eritrea and Ethiopia), have refrained from addressing the systemic distinction between *jus ad bellum* and *jus in bello* in the context of reparations for the unlawful use of force, occupation and war crimes committed in the course of international armed conflict following an act

28 Robert Kolb, "Origin of the Twin Terms *Jus ad Bellum/Jus in Bello*", *International Review of the Red Cross*, Vol. 37, No. 320, 1997.

29 Peter Haggenmacher, *Grotius et la doctrine de la guerre juste*, Graduate Institute Publications, Geneva, 1983, p. 457.

30 Marco Sassòli, "*Jus ad Bellum* and *Jus in Bello* – the Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?", in Michael N. Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein*, Martinus Nijhoff, Leiden, 2007, p. 242.

31 See UN Charter, above note 2, Art. 2(4).

32 See Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 22; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 35.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

of aggression.[33] This article attempts to address the distinction between these two legal regimes in order to recommend, first, that *jus in bello* complemented by *jus ad bellum* should be the applicable law in this framework, drawing upon the precedent of past IMCCs, and second, that future IMCC judgments must systemically address this matter and clarify the scope of a complementary regime of applicable law in order to strengthen precedent.

The academic and philosophical debate

In contemporary interpretations of States' obligations under international law, the strict separation between *jus ad bellum* and *jus in bello* has been called into question, specifically in case of acts of aggression. The UN Human Rights Committee (HRC), under its General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights (ICCPR), proposes that "States parties engaged in acts of aggression as defined in international law, resulting in deprivation of life, violate *ipso facto* article 6 of the Covenant".[34]

International law scholars have explored the doctrinal implications of General Comment No. 36 on the extent of States' ensuing obligations when the right to life is violated in cases of aggression.[35] The ICJ has held the HRC's General Comments to be worthy of "great weight" as interpretations of the ICCPR.[36] The authoritativeness of General Comment 36 remains undetermined, and only time will tell whether this principle will be accepted in State practice and *opinio juris*.[37] The Geneva Conventions require that all States Parties respect and ensure respect for the Conventions "under all circumstances",[38] "without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict".[39] One interpretation of General Comment 36 suggests that even in cases where an aggressor State complies with the rules of IHL regarding military targeting and proportionality, the State shall still be liable for a violation of the right to life under international human rights law (IHRL).[40]

Greenwood argues that *jus in bello* and *jus ad bellum* are "separate but complementary systems of rules", and although operating "at different stages" in the past, they now "apply simultaneously".[41] Other scholars have categorized this

33 V. Heiskanen and N. Leroux, above note 25, p. 55.
34 HRC, General Comment No. 36, "Article 6: The Right to Life", UN Doc. CCPR/C/GC/36, 30 October 2018, para. 70.
35 See e.g. Shane Darcy, "Accident and Design: Recognising Victims of Aggression in International Law", *International and Comparative Law Quarterly*, Vol. 70, No. 103, 2021.
36 ICJ, *Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*), Merits, Judgment, *ICJ Reports 2010*, p. 639, para. 66.
37 For a favourable reading, see European Court of Human Rights, *Georgia v Russia* (II), Appl. No. 38263/08, Judgment, 21 January 2021, Concurring Opinion of Judge Keller, paras 28, 30.
38 Art. 1 common to the Geneva Conventions of 1949.
39 AP I, Preamble.
40 Eliav Lieblich, "The Humanization of *Jus ad Bellum*: Prospects and Perils", *European Journal of International Law*, Vol. 32, No. 579, 2021.
41 Christopher Greenwood, "The Relationship between *Jus ad Bellum* and *Jus in Bello*", *Review of International Studies*, Vol. 9, No. 4, 1983, pp. 232–233.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

debate into two schools of thought: the first holds that both branches of law apply simultaneously under the UN Charter, and the second believes that "punishment for the use of force in contravention of *jus ad bellum*, regardless of its legality under the *jus in bello*, inevitably leads to an erosion of the *jus in bello*".[42] An obvious corollary of this reading of General Comment 36 has resulted in questions regarding the incentives and benefits for States to comply with IHL at all,[43] if all their actions within the armed conflict will be subjected to a different standard than those of enemy belligerents.[44] Scholars offer a two-part response to this postulation. First, *jus ad bellum* under international law already addresses IHL-compliant killings of the aggressor – recent practice has shown that in the course of aggression, compensation for *jus ad bellum* breaches was calculated to include damages that did not amount to breaches of IHL.[45] This was the position espoused by the EECC in awarding damages for civilian deaths and injuries attributable to *jus ad bellum* violations by Eritrea. Additionally, in the Final Award, the EECC awarded Ethiopia compensation for damages caused by Eritrea's conduct that did not breach IHL.[46] Second, compliance with IHL has far-ranging benefits for States even while waging a war of aggression – these include the maintenance of troop discipline and the furtherance of reciprocal treatment by the opposing State.[47] Additional reasons for compliance could include acceptance of IHL's authority by relevant actors and institutions, as well as the adoption of applicable IHL rules into military manuals, standard operating procedures and domestic laws.[48]

Looking into the past: Case studies of the UNCC and the EECC

Arguably, there is minor overlap between the *jus ad bellum* and *jus in bello* principles of warfare such as necessity, proportionality and even compensation under certain circumstances. Under *jus in bello*, necessity entails that the only legitimate objective of a State during the conduct of hostilities is to weaken the military power of the enemy, and that the killing of combatants and civilians directly participating in hostilities, within this context, is justified. The principle of proportionality is inspired directly by the principle of necessity, propounding that civilians should be spared to the greatest possible extent. According to *jus ad bellum*, the principles of necessity and proportionality entail that a defending State can only use force to the

42 S. A. J. Boelaert-Suominen, "Iraqi War Reparations and the Laws of War: A Discussion of the Current Work of the United Nations Compensation Commission with Specific Reference to Environmental Damage During Warfare", *Zeitschrift für öffentliches Recht*, Vol. 50, 1996, pp. 298, 302.
43 Hersch Lauterpacht, "The Limit of the Operation of the Law of War", *British Yearbook of International Law*, Vol. 30, 1953, pp. 206, 212.
44 Dapo Akande and Miles Jackson, "The Right to Life and the *Jus Ad Bellum*: Belligerent Equality and the Duty to Prosecute Acts of Aggression", *International and Comparative Law Quarterly*, Vol. 71, No. 2, 2022.
45 *Ibid*.
46 EECC, *Final Award*, above note 25, paras 333–349.
47 Sean D. Murphy, Won Kidane and Thomas R. Snideret, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission*, Oxford University Press, Oxford, 2013, p. 136.
48 D. Akande and M. Jackson, above note 44.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

degree that is necessary to counter an armed attack.[49] If measures taken by a State, even in self-defence, are disproportionate, unnecessary and go beyond the scope of securing the goal of self-defence, this attack is seen as an unlawful use of force giving rise to a State's responsibility under international law.[50]

The UNCC: The "effective justice" model

An analysis of UN Security Council resolutions regarding Iraq's occupation of Kuwait during the Iraq–Kuwait war[51] highlights various violations of IHL that were identified by the Security Council.[52] Yet some scholars have contended that the Security Council's establishment of the UNCC[53] was premised on Iraq's *jus ad bellum* violations, since the act of invading and occupying Kuwait was a clear breach of Article 2(4) of the UN Charter and triggered the law of State responsibility for internationally wrongful acts, obliging Iraq to make complete reparations.[54] Security Council Resolution 687 of 1991, which authoritatively established Iraq's liability "under international law for any direct loss, damage … or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait",[55] fell short of specifying whether the applicable international law here would be restricted to *jus in bello* or would also include *jus ad bellum.*

The UNCC's mandate was to process claims for compensation relating to loss, injury or damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait.[56] According to the UNCC Governing Council's decision, only governments and international organizations were permitted to submit claims on behalf of individuals and corporations.[57] The UNCC Governing Council classified claims into six categories.[58] Category A claims were those submitted by individuals who had to flee from Iraq or Kuwait between 2 August 1990 and 2 March 1991. Category B comprised claimants who had suffered serious personal injuries or the death of a parent, spouse or child. Category C claims included individual claims for damages up to $100,000 each, and referenced twenty-one types of losses such as the loss of personal property, financial assets, income or real

49 Louise Doswald-Beck, "International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons", *International Review of the Red Cross*, Vol. 27, No. 316, 1997, p. 53.

50 Erik V. Koppe, "Compensation for War Damage Resulting from Breaches of *Jus ad Bellum*", in Andrea de Guttry, Harry H. G. Post and Gabriella Venturini (eds), *The 1998–2000 Eritrea-Ethiopia War and Its Aftermath in International Legal Perspective*, T. M. C. Asser Press, 2021, p. 517.

51 UNSC Res. 661, 6 August 1990. See also UNSC Res. 660, 2 August 1990.

52 See UNSC Res. 670, 25 September 1990, Preamble; UNSC Res. 674, 29 October 1990, para. 1.

53 UNSC Res. 692, 20 May 1991.

54 E. V. Koppe, above note 50, p. 519.

55 UNSC Res. 687, 3 April 1991, para. 16.

56 UNSC, Res. 687, 3 April 1991, paras 16, 18; UNSC Res. 692, 20 May 1991, para. 3; *Report of the Secretary-General Pursuant to Paragraph 19 of Security Council Resolution 687 (1991)*, UN Doc. S/22559, 2 May 1991, Part 1.

57 UNCC Governing Council Decision No. 10, above note 25, Art. 5(1).

58 See Hans van Houtte, Hans Das and Bart Delmartino, "The United Nations Compensation Commission", in P. de Grieff (ed.), above note 23, pp. 335–338.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

property, and business losses. Category D was the final class of individual claimants with claims similar to category C, in excess of $100,000. Category E referred to claims by corporations, public sector enterprises and other private legal entities. Finally, category F claims were filed by governments and international organizations for losses incurred in evacuating and providing relief to citizens, and for damages to diplomatic premises, other government property and the environment.

Each of the aforementioned claims is presumably premised on the assumption that none of these claims would have arisen but for Iraq's invasion of Kuwait. Since Iraq expressly accepted its legal responsibility as determined by the Security Council, the UNCC operated as an *ad hoc* claims resolution facility and not as an adversarial process.[59] The UNCC received approximately 2.69 million claims worth $352.5 billion sought in compensation, out of which $52.4 billion was awarded for around 1.5 million claims.[60] A comprehensive analysis of all UNCC Governing Council decisions demonstrates that the issue of defining an applicable law in terms of the distinction between *jus in bello* and *jus ad bellum* was never clearly addressed.[61] The applicable law used by the UNCC was broad enough to permit the Governing Council to invoke other branches of international law in addition to IHL;[62] in practice, however, other rules of international law were applicable only when necessary to remove ambiguity and where Security Council resolutions and Governing Council decisions did not provide sufficient guidance.[63]

The Governing Council suspended the distinction between *jus in bello* and *jus ad bellum* under Decision 1, where it defined the circumstances for claiming compensable loss, damage and injury as including any loss resulting from military operations or threat of military action by either side.[64] Iraq was to be liable for all such claims. This is problematic for a number of reasons. First, in cases where Iraq could be held liable for death, damage, personal injury or loss caused by military operations conducted by Iraq's armed forces, in compliance with IHL, the aforementioned decision is a departure from the *jus in bello* principle permitting legitimate targeting by combatants, in pursuance of military objectives.[65] Second,

59 Michael E. Schneider, "The Role of Iraq in the UNCC Process with Special Emphasis on the Environmental Claims", in Timothy J. Feighery, Christopher S. Gibson and Trevor M. Rajah (eds), *War Reparations and the UN Compensation Commission*, Oxford University Press, Oxford, 2015, p. 137.

60 L. Brillmayer, C. Giorgetti and L. Charlton, above note 20, p. 105.

61 V. Heiskanen and N. Leroux, above note 25, p. 58.

62 UNCC Governing Council Decision No. 10, above note 25.

63 UNCC, *Report and Recommendations of the Panel of Commissioners concerning the Third Instalment of Environmental (F4) Claims*, UN Doc. S/AC.26/2003/31, 2003, para. 34. See also UNCC, *Report and Recommendations Made by the Panel of Commissioners concerning the First Instalment of Individual Claims for Damages up to US $100,000 (Category C Claims)*, UN Doc. S/AC.26/1994/3, 1994 (Category C Claims Report), paras 9–10.

64 UNCC Governing Council Decision No. 1, UN Doc. S/AC.26/1991/1, 2 August 1991, para. 18. See also UNCC Governing Council Decision No. 7, UN Doc. S/AC/26/1991/7/Rev.1, 17 March 1992, paras 6, 21, 34; John R. Crook, "The United Nations Compensation Commission – A New Structure to Enforce State Responsibility", *American Journal of International Law*, Vol. 87, No. 1, 2017.

65 See Hague Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907, Art. 3; AP I, Art. 91.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

the decision does not clarify whether Iraq was to be held liable for its own forces, or the other side's forces, even in situations where loss, death or damage arose due to actions by either side that were otherwise in compliance with *jus in bello*. Third, this categorization breaches the principle of equality of belligerents by holding Iraq liable for damages, losses and injuries resulting from military operations by either side, including the Coalition forces. Even while the Governing Council decisions or the reports of the panel of commissioners do not explicitly refer to this issue, there is still no indication that this matter was raised by Iraq at any point in the proceedings.[66] Fourth, the Governing Council made no elaboration of its reasons for holding Iraq liable for losses resulting from the military operations of the Coalition forces. The two panels that issued opinions on this matter based their judgment on the Governing Council decision, since the latter was "in accordance with the general principles of international law".[67]

While not explicitly stipulated in these exact terms, Iraq was held liable to pay compensation for the damages caused by its invasion of Kuwait, based on a line of argument that indirectly applied the principle of strict liability.[68] Under reparations regimes based on strict liability, even when the acting State has committed no legal wrong, it is deemed equitable for it to repair the harm caused by actions from which it has benefited at the expense of the other party.[69] Such liability has been supported by Lauterpacht, who wrote that the maxim "*Ex injuria jus non oritur*"[70] might be relevant in determining the financial damages for destruction caused in a war, even when this principle would be rejected within the *jus in bello* context.[71] This principle of liability for *jus ad bellum* breaches in the course of a war of aggression is not established explicitly under international law – neither through treaties, nor as a component of customary international law. As acknowledged by Fitzmaurice, even in the aftermath of both the World Wars, the liability of the Axis powers was determined based on mutually agreed-upon treaties.[72] Similarly, in the case of the Gulf War, the ceasefire terms were finalized after Iraq's formal consent. The UNCC therefore missed out on an important opportunity to clarify the status of *jus ad bellum* in expanding or restricting the scope of the aggressor party's liability to provide compensation for war-related damage and losses.

The UNCC was empowered by the Security Council in Resolution 687 to devise "appropriate procedures for evaluating losses, listing claims and verifying their validity".[73] Based on this resolution, the UN Secretary-General drafted a

66 V. Heiskanen and N. Leroux, above note 25, p. 62.
67 UNCC, *Report and Recommendations Made by the Panel of Commissioners Appointed to Review the Well Blowout Control Claim*, UN Doc. S/AC.26/1996/Annex, 18 December 1996, para. 86. See also UNCC, *Report and Recommendations of the Panel of Commissioners concerning the Third Instalment of Environmental (F4) Claims*, UN Doc. S/AC.26/2003/31, 2003, para. 176.
68 E. V. Koppe, above note 50, p. 519.
69 D. Shelton, above note 12, para. 3.
70 "Law does not arise from injustice."
71 H. Lauterpacht, above note 43, p. 212.
72 G. Fitzmaurice, "The Juridical Clauses of the Peace Treaties (Volume 73)", in *Collected Courses of the Hague Academy of International Law*, Brill, Leiden, 1948, pp. 235–236.
73 UNSC Res. 687, 8 April 1991, para. 19.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

report that was then adopted by the Security Council as the framework for compensation,[74] where he emphasized the "political role" of the UNCC instead of categorizing it as a quasi-judicial process:

> The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved.[75]

Some authors have commented on the complexity of upholding the customary international law norm of offering full compensation[76] in the case of the UNCC.[77] While it would theoretically have been possible for claims to be compensated as per customary international law, in practice, the scale of claims brought before the UNCC, juxtaposed against the limited funding available, the significant challenges associated with securing evidence to support the claims in a situation of post-war chaos, and the urgency of some of the claims, made the prospect difficult and potentially impossible to realize. The UNCC has, however, been criticized as having repeated the mistakes of the Treaty of Versailles, considering that Iraq, akin to Germany in this regard, was denied a meaningful role in the claims process.[78] Nonetheless, despite its shortcomings, the UNCC's mass claims processing model was unique and unprecedented, providing an innovative mechanism that involved the prioritization of urgent claims and the use of computerized sampling and statistical modelling for determining valuations in mass claims.[79]

Principles of valuation in the EECC: Complementary applications of jus ad bellum and jus in bello

According to the peace agreement between Eritrea and Ethiopia, the mandate of the EECC was to decide, through binding arbitration, all claims for loss, damage or injury by one government against the other government, or by entities controlled or owned by either government.[80] The EECC addressed claims for damages

74 UNSC Res. 692, 20 May 1991.
75 *Report of the Secretary-General*, above note 56, para. 20.
76 See e.g. Iran–United States Claims Tribunal, *SEDCO, Inc. v. National Iranian Oil Co. and the Islamic Republic of Iran*, 10 Iran-U.S.C.T.R. 180, 1986 (declaring the customary international law principle of compensation as "compensation is equivalent to the full value of the property taken"); Permanent Court of International Justice, *Factory at Chorzów*, Merits, 1928 PCIJ (Ser. A) No. 17, 1928, p. 47 (compensation is intended "to wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed").
77 Arif H. Ali and Marguerite C. Walter, "Principles of Valuation Taken from the UNCC Perspective", in T. J. Feighery, C. S. Gibson and T. M. Rajah (eds), above note 25.
78 Elyse J. Garmise, "The Iraqi Claims Process and the Ghost of Versailles", *New York University Law Review*, Vol. 67, No. 4, 1992, p. 842.
79 See e.g. EECC, *Final Award*, above note 25, para. 38 (acknowledging the EECC's reliance on the UNCC model for "damages suffered by large, but uncertain, numbers of victims and where there is limited supporting evidence").
80 See Algiers Agreement, above note 17, Art. 5.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

arising from violations of IHL, including injury to civilian populations such as physical, sexual or mental abuse, or displacement of people; looting and destruction of private, public or cultural property; and injuries suffered by prisoners of war.[81] The Rules of Procedure of the EECC permitted governments to file claims on their own behalf, or on behalf of affected persons.[82]

The Final Award of the EECC, awarding compensation for Eritrea's *jus ad bellum* violations, did not discuss the actual relationship between *jus in bello* and *jus ad bellum* as it relates to compensation for damages resulting in the course of conduct of hostilities, including otherwise lawful acts of war.[83] From the outset, the EECC recognized that Eritrea had violated Article 2(4) of the UN Charter by commencing hostilities. Across various deliberations and corresponding awards, the EECC acknowledged Eritrea's liability arising from its violation of *jus ad bellum*,[84] established the scope of these damages and issued reparations.[85] During the proceedings, Ethiopia argued for Eritrea to be held extensively liable for its use of force and subsequent occupation of parts of Ethiopia, and presented claims for injuries that the EECC had earlier held to be violations of *jus in bello*. Ethiopia contended that a standard of legal causation should be adopted, based on a "reasonable, direct, proximate, foreseeable or certain" connection,[86] following similar standards that were adopted by reparations programmes after the two World Wars and the 1990–91 Gulf War. Based on this standard, Ethiopia argued for an expansion of Eritrea's liability, to also compensate for the "wider conditions of wide-scale hostilities" beyond the "times and places specifically mentioned" in the EECC's partial award for *jus ad bellum* liabilities.[87]

Eritrea, however, refused to bear any financial responsibility for a number of reasons. First, based on the legal causation standard of "proximate cause", Eritrea acknowledged its responsibility of providing reparation for wrongful conduct but argued that this responsibility was limited, and that Ethiopia's claims far exceeded the scope of such liability. Second, Eritrea contended that it bore no financial liability since reparations should be restricted to satisfaction in the form of a declaration by the EECC. Third, Eritrea argued that the precedent cited by Ethiopia was not comparable and did not apply to the Eritrea–Ethiopia war, since the Security Council had not explicitly held Eritrea responsible for waging a war of aggression, as in the case of Iraq during the Gulf War, and since Eritrea's *jus ad bellum* violation and corresponding liability were not established "through a multilateral process enjoying broad international approval".[88]

The EECC rejected both parties' contentions, holding that it did not "regard its *jus ad bellum* finding [to mean] that Eritrea initiated an aggressive war for which it

81 L. Brillmayer, C. Giorgetti and L. Charlton, above note 20, p. 110.
82 EECC, *Rules of Procedure*, October 2001, Art. 23, Chap. 2.
83 E. V. Koppe, above note 50, p. 533.
84 See EECC, *Partial Award:* Jus ad Bellum, *Ethiopia's Claims 1–8*, PCA Case No. 2001-02, 19 December 2005, p. 7; *dictum* under B.
85 EECC, *Decision 7*, above note 25; EECC, *Final Award*, above note 25.
86 EECC, *Decision 7*, above note 25, para. 7.
87 *Ibid.*, para. 15.
88 *Ibid.*, para. 18; see also paras 9, 17–18.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

bears the extensive financial responsibility claimed by Ethiopia. At the same time, it [did] not accept Eritrea's argument that there [was] no financial responsibility."[89] The EECC applied several principles to calculate the amount of compensation that was due. First, it clarified that the purpose of awarding damages was not to deter future violations of Article 2(4) of the UN Charter, but to provide appropriate compensation, thereby indirectly reiterating that damages awarded as reparations are not meant to be punitive in nature. Second, it concluded that the question of "whether an award of compensation should reflect a precise quantification of … damage caused by Eritrea, not otherwise compensable under the *jus in bello*, or a more general assessment of the character of the injury inflicted upon … Ethiopia in light of … Eritrea's *jus ad bellum* liability",[90] would be governed by the nature of claims and underlying evidence. Third, the EECC invoked the principle of proportionality, claiming that "the law of State responsibility must maintain a measure of proportion between the character of a delict and the compensation due".[91] The EECC agreed that Eritrea's violation of Article 2(4) of the UN Charter had serious consequences, but stated that it was "different in magnitude and character from the aggressive uses of force" in the Second World War, the 1950 invasion of South Korea, or the Gulf War of 1990–91.[92] Fourth, further extending this principle of proportionality, the EECC held that the amount of compensation must be restricted, to "ensure that the ultimate financial burden imposed on a Eritrea would not be so excessive, given its economic condition and its capacity to pay, as seriously to damage Eritrea's ability to meet its people's basic needs."[93] To support this finding, the EECC relied on precedent of State practice, citing examples of how the amount of compensation paid by States during the Second World War and the 1990–91 Gulf War was equivalent to only a fraction of the damage caused by their *jus ad bellum* violations.

The EECC awarded damages for Eritrea's violations of *jus ad bellum* that did not, in principle, constitute *jus in bello* violations. For instance, it awarded $8.5 million for civilian deaths and injuries related to Eritrea's *jus ad bellum* breaches.[94] Further, it awarded damages amounting to $2.5 million for Eritrea's *jus ad bellum* violations resulting from looting, destruction and damage caused to religious institutions, in addition to the $4.5 million already awarded for this *jus in bello* violation. At the same time, the EECC acknowledged that if it had granted damages for Eritrea's *jus ad bellum* violations that were otherwise compliant with *jus in bello*, this would have resulted in extensive liability for Eritrea. It summarized the distinction between granting damages for *jus ad bellum* violations vis-à-vis *jus in bello* violations as follows:

> Imposing extensive liability for conduct that does not violate the *jus in bello* risks eroding the weight and authority of that law and the incentive to comply with it,

89 *Ibid.*, para. 5.
90 EECC, *Final Award*, above note 25, para. 309.
91 *Ibid.*, para. 312.
92 *Ibid.*
93 *Ibid.*
94 *Ibid.*, para. 349.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

> to the injury of those it aims to protect. … [W]hile appropriate compensation to a claiming State is required to reflect the severity of damage caused to that State by the violation of the *jus ad bellum*, it is not the same as that required for violations of the *jus in bello*.[95]

Private law solutions to international law complications

The inherent inequity of the international world order renders any attempt at post-war reparations and justice susceptible to imperfection. Vattel explained this phenomenon, through what May refers to as his "reasonable compensation principle",[96] as follows:

> [R]igid justice is not always to be insisted on: – peace is so essential to the welfare of mankind, and nations are so strictly bound to cultivate it, to procure it, and to re-establish it when interrupted, – that, whenever … obstacles impede the execution of a treaty of peace, we ought ingenuously to accede to every reasonable expedient, and accept of equivalents or indemnifications, rather than cancel a treaty of peace already concluded, and again have recourse to arms.[97]

Expounding on the aforementioned bona fide need to "cultivate peace", in an effort to outline reasonable manoeuvres to circumvent the IMCCs' practice of awarding damages for *jus ad bellum* violations by the aggressor State that appear to have a punitive character, this section of the article attempts to seek solutions from private law. In his treatise on private law analogies for international law, Lauterpacht explains how various aspects of State responsibility, including reparations and damages, relate to private law.[98] In recent times, there has been an emerging stream of scholarship that draws upon lessons from private law to inform alternative methods of interpreting States' responsibility and liability under international law.[99]

Similar to the protections afforded to legal persons under domestic law, international law provides States with rights and corresponding duties that protect them from being invaded and injured.[100] Scholars argue that the domain of international law, including the ARSIWA, dealing with duties owed "from all

95 *Ibid*., para. 316.
96 Larry May, *After War Ends: A Philosophical Perspective*, Cambridge University Press, Cambridge, 2012, p. 51.
97 E. de Vattel, above note 8, Book IV, Chapter 1, para. 51.
98 Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*, 1927, pp. 134–148.
99 See Gabriella Blum and John Goldberg, "The Unable or Unwilling Doctrine: A View from Private Law", *Harvard International Law Journal*, Vol. 63, No. 1, 2022; Roger Alford, "Apportioning Responsibility among Joint Tortfeasors for International Law Violations", *Pepperdine Law Review*, Vol. 38, No. 233, 2011; Stephan Wittich, "Joint Tortfeasors in Investment Law", in Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich (eds), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press, New York, 2009.
100 G. Blum and J. Goldberg, above note 99. See also UN Charter, above note 2, Art. 2(4).

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

the world to all the world" is analogous to domestic tort law.[101] On the link between causation and States' responsibility for internationally wrongful acts, it has been argued that since causation is invoked at the stage of determining the breach of an obligation and assigning consequent reparations, a tort law analogy is appropriate.[102] A recent analysis has demonstrated that scholarly iterations and case law fall short of precisely clarifying how the causation element of breaches of international obligations is determined.[103] The most common legal causation test under tort law is the *sine qua non* or the but-for test, stipulating that a harmful outcome is caused by the act or omission of a defendant if the outcome would not have ensued but for the act or omission. The second step of this test is to determine whether the harm that occurred was the proximate cause and foreseeable consequence of the defendant's actions.

For instance, the EECC held proximate cause to be the standard for causation, requiring damage to be "reasonably foreseeable"[104] without expanding upon a definition for reasonable foreseeability. Similarly, the UNCC Governing Council simply stated that "direct loss"[105] was to be compensated without proposing a causal standard for determining direct loss. One of the UNCC panels stated that "direct" or "indirect" were to be understood as synonyms for "proximate" and "remote" respectively, and that "[l]ogic, fairness and equity must enter into this determination".[106] These judgments refer to Anglo-American tort law principles, even while not directly alluding to tort law standards of adjudicating causation. Since IMCCs have failed to clarify how they adjudicate causation for reparations, international law would benefit from a methodical incorporation of tort law standards for determining legal and proximate causation in order to attribute responsibility across parties for internationally wrongful acts. This is especially pertinent since reparations have a remedial function.[107]

The prohibition of aggression is a peremptory norm of general international law, and a serious breach of this norm entails consequences for the aggressor State.[108] Simultaneously, the ILC recognizes that the legal regime of serious breaches is dynamic and that the ARSIWA is conducive to developing a more elaborate regime

101 R. Alford, above note 99, referring to Oliver Wendell Holmes, "Codes, and the Arrangement of the Law", *American Law Review*, Vol. 5, No. 1, 1870, pp. 5–6.

102 Ilias Plakokefalos, "Causation in the Law of State Responsibility and the Problem of Overdetermination: In Search of Clarity", *European Journal of International Law*, Vol. 26, No. 2, 2015 pp. 475–476.

103 *Ibid.* See also ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase, *ICJ Reports 1971* (where the ICJ refrained from discussing the matter of causality); ICJ, *Corfu Channel* (*Albania v. United Kingdom of Great Britain and Northern Ireland*), Assessment of the Amount of Compensation Due from the People's Republic of Albania to the United Kingdom of Great Britain and Northern Ireland, Dissenting Opinion by Judge Ečer, *ICJ Reports 1949* (observing that "the juridical value of the Judgment would have been increased by a few short observations on causality as a juridical element for determining the amount of compensation").

104 EECC, *Decision 7*, above note 25, para. 13.

105 UNCC Governing Council Decision No. 1, above note 64, para. 18.

106 Category C Claims Report, above note 63, para. 22.

107 Dinah Shelton, "Righting Wrongs: Reparations in the Articles of State Responsibility", *American Journal of International Law*, Vol. 96, No. 833, 2002.

108 ARSIWA, above note 9, Art. 41.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

on the consequences of such breaches.[109] According to the ILC's commentaries on reparations under the ARSIWA, in cases where separate factors combine to cause damage, "international practice and the decisions of international tribunals do not support the reduction or attenuation of reparation for concurrent causes, except in cases of contributory fault".[110] Further, the commentaries draw an analogy with tort law where the tortfeasor is held liable for all of the harm caused by its behaviour to a victim, regardless of whether there was a concurrent cause for the harm and whether another entity was responsible for that cause.[111]

Article 39 of the ARSIWA deals with contributory negligence in instances where a State's internationally wrongful act causes damage but the injured State also materially contributes to the damage through wilful or negligent act or omission.[112] While the scope of the injured State's contribution is restricted to wilful or negligent conduct, the relevance of such considerations is widely reflected in literature and State practice.[113] It is further acknowledged that reparations must not be disproportionate to the gravity of the breach.[114] Specifically with respect to compensation, the amount must "correspond to the financially assessable damage suffered by the injured State" and must not be punitive or exemplary.[115] Regarding the assessment of damages, the ILC proposes that the behaviour of the respective parties should be evaluated and that, in general, the outcome reached must be equitable and acceptable.[116] This corresponds with the tort law principle of comparative fault, where the damages awarded to the injured party are adjusted to account for their contribution to their own harm.

Moving towards *lex ferenda*: An alternative reparations determination model

The UNCC and EECC awards follow a similar trend of holding the aggressor State responsible for *jus ad bellum* violations that did not otherwise violate *jus in bello*. International scholars agree that the post-First World War reparations for Germany exemplified a "punitive peace" that produced a political environment conducive to Nazi extremism during the Second World War.[117] And yet, as evidenced in the above analysis, a similar model of "punitive peace" was imposed on Iraq after the Gulf War, such that extensive sanctions and the obligation to pay compensation to victims of Iraqi aggression affected Iraq's economy, adversely impacting the lives of ordinary Iraqis who were penalized for the actions of a

109 *Ibid.*, Art. 41 commentary, para. 14.
110 *Ibid.*, Art. 31 commentary, para. 12; UNGA Res. 56/83, 12 December 2001s.
111 Tony Weir, "Complex Liabilities", in André Tunc (ed.), *International Encyclopedia of Comparative Law*, Mohr Siebeck, Tübingen, 1986, p. 43.
112 ARSIWA, above note 9, Art. 39 commentary, para. 1.
113 *Ibid.*, Art. 39 commentary, para. 4.
114 *Ibid.*, Art. 31 commentary, para. 14.
115 *Ibid.*, Art. 36 commentary, para. 4.
116 *Ibid.*, Art. 36 commentary, para. 7.
117 R. A. Falk, above note 23.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

dictatorial regime.[118] By contrast, the EECC followed a more nuanced approach, awarding proportionate damages for Eritrea's conduct that was otherwise compliant with *jus in bello* while restricting the amount of compensation so as not to impose an undue financial burden on Eritrea that would cripple the State's economy.

For IMCCs, international law serves as the governing framework for attributing responsibility and outlining the applicable legal framework for awarding reparations. Yet, in practice, feasibility considerations tend to constrain the actual degree of compensation that is finally awarded to claimants. In judgments at the EECC or the UNCC that implicitly or explicitly acknowledged the *jus ad bellum* liability of States to provide compensation to civilians, considerations of prudence or the capacity to fund damages significantly influenced the final amount of compensation that was awarded. This observation lends support to the first two elements of this article's three-part approach for awarding compensation: first, the aggressor party's capacity to comply with *jus in bello*, and second, the extent of the damage caused by the war of aggression.

The first of these two elements involves adapting the sliding scale of obligations[119] approach, where the military conduct of the aggressor party is evaluated based upon the party's capacity to comply with all the rules of *jus in bello* on military operations, complemented by its access to sophisticated means and methods of warfare and its corresponding ability to minimize disproportionate damage. Additionally, the duration of the war – whether lasting for over a year (as in the case of Russia–Ukraine) or for a period of five days (as in the case of the Georgia–Russia war over South Ossetian territory) – would also contribute to understanding the intention of the aggressor party over waging the war. According to the ARSIWA, States are under a responsibility to cease an internationally wrongful act if it is continuing.[120] The application of *jus ad bellum* principles to complement such an analysis can be justified since wars of aggression are usually asymmetric, where the aggressor party actively attempts to prolong the war and to utilize means and methods of warfare that might comply with *jus in bello* in principle, but which in practice demonstrate the party's intent to maximize human suffering. Such a goal in itself is antithetical to the ethos of *jus in bello*.

Regarding the second element, it is pertinent to evaluate the extent of damage caused by the war of aggression, considering, *inter alia*, the number of lives lost and individuals injured, the amount of personal or business property and public infrastructure damaged, the economic costs imposed on the injured State, and the wide-reaching environmental consequences of the war. Based on an analysis of these factors, a choice may be made to either restrict the corpus of reparations imposed, based on a logical categorization of claims (especially in the case of mass claims, as was done by the UNCC), or conduct a case-by-case analysis of claims to determine the appropriate compensation. Here too, the

118 *Ibid.*, p. 487.
119 See Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar, Cheltenham, 2019, p. 587.
120 ARSIWA, above note 9, Art. 30.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

extent of damage would serve as a valuable indicator of the aggressor party's intent to wage a purposefully destructive war (or not). The complementary application of *jus ad bellum* principles in this analysis would be pertinent to measure whether the party was waging a purposefully destructive war with the intention of amplifying destruction and debilitating the enemy party's economy. Past judgments from the UNCC and EECC show how judges have considered these factors while asking States to compensate for actions that were otherwise not violations of *jus in bello*.

Finally, based on the aforementioned analogy to tort law, the following five-step analysis influenced by tort law principles could enrich the international law framework of determining reparations for aggression. First, consistent with existing practice, as a general principle, reparations should cover the full extent of the harm caused by the aggressor party's internationally wrongful acts, unless the injured State is found to have contributed to the damage. Considering the grave nature of a war of aggression, the aggressor State must be held strictly liable for inherently harmful acts, such as the deliberate targeting of civilians, the use of chemical or biological weapons, or committing mass atrocities or genocide. Second, there must be an assessment of whether the injured State has contributed materially to the damage caused, either through wilful or negligent acts or omissions. In cases where contributory negligence is established, compensation should be adjusted based on comparative fault, to account for the injured State's liability. Third, reparations should be proportionate to the severity of the breach; the injured State should be compensated for actual damages instead of imposing punitive measures on the aggressor State. An assignment of liability should incorporate an equitable assessment of the conduct of both the aggressor State and the injured State, accounting for the actions of all parties involved. Fifth, incorporating legal and proximate causation principles into the attribution of responsibility would make the process more transparent and equitable for all parties.

Conclusion

The purpose of this article has been twofold. First, it has aimed to document how prior IMCCs have approached the question of whether violations of *jus ad bellum* give rise to reparations in wars of aggression. When an act of aggression, which comprises an *ipso facto* violation of international law, causes loss and damage, must all consequences of the ensuing armed conflict be compensated solely by the aggressor State? An analysis of decisions by the UNCC and the EECC, two disparate claims processes that dealt with armed conflict resulting from a violation of Article 2(4) of the UN Charter, reveals that the States violating the prohibition against the use of force were held liable, to varying degrees, for their *jus ad bellum* liabilities, even for actions after the commencement of hostilities that would otherwise have been lawful under *jus in bello*.

Though previous claims commissions have not explicitly addressed the distinction between *jus ad bellum* and *jus in bello*, the UNCC and EECC adopted a hybrid model of applying the two bodies of law as complementary frameworks

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press

to govern the calculation of damages and attribution of responsibility to the aggressor State. While these fields of law operate distinctly, the consequences of respective violations of *jus ad bellum* and *jus in bello* are blurred in a war of aggression, resulting in nuanced complexities around causality and liability for aggressor States. This article therefore proposes a more principled approach that, on the one hand, acknowledges the role of the aggressor State in waging the war and inflicting disproportionate damage, and on the other hand, takes a more cautionary approach to prevent an unreasonable burden of compensation on the aggressor as a form of punitive collective punishment.

Second, this article has advocated for an expansion of the outer limits of determining liability for reparations under international law, starting with drawing inspiration from Anglo-American tort law. This proposition is hardly contentious, and it contributes to contemporary literature drawing analogies between international law and private law. Incorporating principles of contributory negligence, comparative fault, proportionality and causation in the attribution of damages would render objectivity to the process of determining reparations.

A proportionate and equitable framework would, in turn, incentivize aggressor States to comply with an international mass claims compensation process at the cessation of hostilities. More generally, it could also improve compliance with *jus in bello* by all parties to the conflict, who would be operating with the knowledge that their respective contributions to maximizing harm will be factored into the *ex post* calculation of damages. History is testament to the fact that peace treaties are significantly influenced by the individual bargaining power of all parties involved and the geopolitical standing of States participating in the conflict. An objective standard would equip injured States with more power to negotiate favourable terms for a peacebuilding agreement.

Even as this article has focused on reparations, it is pertinent to acknowledge that there are instrumentalities of responses to wrongs that must be in dialogue with each other in framing a comprehensive toolkit for peacebuilding post-conflict. The complexity of each conflict requires taking a nuanced approach in order to understand the external social, political and economic factors that influence decision-making around the attribution of State responsibility. This theoretical proposal could benefit from in-depth inquiry regarding the practice of arbitration tribunals and domestic fora adjudicating civil claims for tortious violations of international law. Further, an analysis of the law of remedies within Anglo-American private law could enrich the practical process of calculating damages for actual harm at the end of conflict. Finally, this article has stopped short of capturing the authentic sentiments of victims of aggression. Understanding victims' needs through an analysis of their responses to IMCCs would be crucial in determining the utility of the proposals made herein.

Reiterating the allegory of the Ouroboros, as wars of aggression threaten to swallow the world whole, the carcass of international law frameworks envisioned in the 1950s must be shed to make way for innovations enlightened by the successes and failures of past IMCCs, complemented by the rigour of the centuries-old practice of tort law.

https://doi.org/10.1017/S1816383124000249 Published online by Cambridge University Press