Repairing Harm to Common Interests and Common Spaces: Recent Institutional Developments Across Public International Law

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Abstract

Common spaces and interests are taking central stage in international law. In the context of judicial proceedings concerned with such interests and spaces, reparation raises particularly complex legal issues. For one, the common or shared character of these interests and spaces makes traditional avenues to seek reparation in bilateral disputes inadequate. Similarly, the requirement that only victims harmed by a wrongful conduct be entitled to reparation prompts reflections as to the relevance of the common character of the interest protected for the actual determination of victims. In acknowledging the limited tools available under international law, this paper aims to review some creative institutional solutions at the reparations stage that have recently emerged across various legal regimes. It will consider first the potential role of international organisations as claimants representing the rights and interests of the international community. Secondly, attention will shift to the role of 'trust

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funds' as concrete tools for implementing reparations, focusing on both funds established by treaties offering legal protection for common spaces as well as funds set up in the context of international criminal justice as an additional avenue for guaranteeing redress to victims. Pursuing this aspect further, the paper will focus on the emergence of a human right to reparation and on the advantages of collective solutions, while taking into account concerns relating to the capacity of such solutions to effectively reach victims and to accurately reflect the harm inflicted upon them.

Keywords

Reparations – human rights – common spaces – international responsibility – victims' rights

I. Introduction

It is a generally accepted principle under international law that a finding of responsibility for an internationally wrongful act gives rise to an obligation to make full reparation[1], the objective being 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'.[2] However, the application of this principle may appear problematic when common spaces and interests are at stake, given the factual and conceptual issues that characterise certain categories of international disputes – e. g., environmental ones.

Multiple causality is without any doubt a relevant aspect. Harm to common spaces is usually the result of the conduct of several States: even when they can be identified, the link between conduct and its effects may be hard to prove, making the apportioning of reparations difficult to perform. Furthermore, the presence of several responsible subjects can raise doubts as to the actual function of reparations, as the rectification of one's conduct may ultimately prove pointless if all others do not modify theirs, as well. In a similar vein, in situations of harm to common interests and space, victims and perpetrators may even coincide.

1 See ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts', (2001) ILCYB, Vol. II, Part Two, Art. 31. The document will be hereinafter referred to as ARSIWA.

2 PCIJ, *Case concerning the Factory at Chorzów*, merits, judgment of 13 September 1928, Collection of judgments, Ser. A, No. 17 (1928), 47.

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Looking more closely at the forms of reparations available in an inter-State context, prioritising restitution – in accordance with the Permanent Court of International Justice (PCIJ) in *Chorzów* as well as by the International Law Commission (ILC) in its work of codification[3] – sits well with its capacity to best serve the global value of common spaces and interests. Nevertheless, restitution poses significant challenges, especially in the environmental sphere, due not only to the often-irreversible nature of harm and to the disproportionate burden on the respondent, but also to the type of obligation breached: as was made clear by the International Court of Justice (ICJ) in *Pulp Mills*, restitution does not provide an appropriate remedy for procedural obligations.[4] At the same time, the difficulty to quantify environmental harm is a common feature of litigation in this field, especially when the very existence of a species is at stake.

In this scenario, conceiving of international law as resting on reciprocity, centred around bilateral types of disputes, makes it particularly ill-equipped to deal with the adjudication of breaches concerning common spaces and interests. As it is known, non-reciprocal situations might find expression in *erga omnes partes*[5] or *erga omnes* obligations.[6] As reiterated in the case-law of the ICJ since the famous *Barcelona Traction*,[7] these obligations concern obligations of a State towards the international community as a whole (*erga omnes*), or the parties to a treaty (*erga omnes partes*), thus entailing the legal interest of all States in their protection.[8] As it will be better illustrated in the next section, even assuming that a breach of obligation based on primary norm can be identified, issues of responsibility and reparation are far from settled.

Before entering into the merits of the analysis, some terminological remarks are necessary, the first of which concerns the term 'common spaces and interests', that will be employed to refer to physical spaces and interests whose protection transcends the perspective of individual States and requires

3 See the ILC, ARSIWA (n. 1), Commentaries on Article 35, 96-97.

4 ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), merits, judgment of 20 April 2012, ICJ Reports 2010, 14 (para. 275).

5 ILC, ARSIWA (n. 1), Art. 48 para. 1 lit. a). In this case, of course, the obligation is due to all States parties to a treaty.

6 ILC, ARSIWA (n. 1), Art. 48 para. 1 lit b).

7 ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Gambia v. Myanmar), preliminary objections, judgment of 22 July 2022, ICJ Reports 2022, 477 (paras 107 ff.); ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip* (South Africa v. Israel), provisional measures, order of 26 January 2024, ICJ Reports 2024, (para. 33).

8 ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), merits, judgment of 5 January 1970, ICJ Reports 1970, 3 (para. 33).

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the action of the whole international community. For the purposes of the present analysis, common spaces are not necessarily situated beyond national jurisdiction (such as Antarctica or high seas), but can also fall under one State's jurisdiction (e. g. cultural property), their main feature lying in their relevance for the whole humankind. Though the idea of common interests (e. g. the preservation of international peace) is mainly linked to immaterial aspects, the two notions may overlap as, for example, the protection of cultural property of outstanding value or of biological diversity can be referred to both a physical space and to the underlying interest.

A further terminological remark concerns the terms 'damage', 'harm' and 'injury': as these terms might acquire different nuances in the various areas of international law that are relevant for the present article, I will mainly draw from the work of the ILC in related areas. Considering that this work focusses on compensation as a form of reparation, and consistently with the language used by Art. 36 ARSIWA (Articles on the Responsibility of States for Internationally Wrongful Acts), the term 'damage' will refer to any harm that has already taken place[9] and that is susceptible of being financially assessed, while 'harm' will be given a generic meaning, concerning any 'detrimental effect'[10] on a given legal good, and without any specific reference to compensation. Finally, for the sake of simplicity, and notwithstanding the broad resort to this term made by human rights jurisprudence, the term 'injury' or 'injured' will only be used in relation to Art. 31 ARSIWA or in other textual quotations.

In the light of the above, the purpose of this paper is to take stock of recent institutional developments in international law addressing reparations of harm to common interests and spaces. In particular, it will zoom in on the potential role of international organisations in their protection, on the function and rationale of 'trust funds' as a means to ensure reparation and on the prospects of success of using international human rights law to obtain remedy. This paper is structured as follows: after a short introduction (section I.), section II. will consider international organisations as representatives of a general interest for the purpose of reparations. Section III. will discuss the use of 'trust funds', either established under international criminal law procedures (sub-section III. 1.) or created in order to provide protection for a legal

9 The distinction, from a temporal viewpoint, between 'harm' and 'damage' has been sketched by the ILC in its work on allocation of loss in case of transboundary harm. See ILC, 'Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities with Commentaries', (2006) ILCYB, Vol. II, Part Two, 63, Princ. 1 para. 11.

10 ILC, 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities with Commentaries', (2001) ILCYB, Vol. II, Part Two, 152, Art. 2 para. 4.

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good within the framework of treaty law (sub-section III. 2). Finally, section IV. will focus on the possible synergies between the individual 'right to a remedy' and the use of 'trust funds', followed by some concluding observations in section V.

II. The Identification of Claimants Entitled to Represent a Common Interest: A Role for International Organisations?

Protecting common spaces and interests under current international law demands that the entities concerned by the harm are identified and that they are entitled to invoke the breach and to benefit from reparation, including financial compensation. If, as mentioned above, at the level of primary norms, such a purpose can form the object of *erga omnes partes* or *erga omnes* obligations, the corresponding secondary norm is found in Art. 48 ARSIWA, allowing the invocation of the breach by any State other than the injured one, when the obligation is owed to a group of States or to the international community as a whole. According to para. 2 of this provision, any State from the relevant community is entitled to invoke responsibility, including performance of the obligation of reparation 'in the interest of the injured State or of the beneficiaries of the obligation breached'. Despite being clearly inspired by the idea of overcoming a strictly reciprocal notion of international obligation, Article 48 does not necessarily offer an easy avenue for the protection of common spaces and interests, *inter alia* because of the conceptually complex distinction it introduces between injured and not (directly) injured States.

In the light of these elements, it is suggested that international organisations or Non-Governmental Organisations (NGOs) could play an important role in invoking state responsibility for breaches of common interests – that is, in this context, in representing a legal interest shared by multiple legal subjects or even by the international community as a whole. A recent example in this respect has been provided by the European Court of Human Rights in the well-known *KlimaSeniorinnen* case. While reaffirming the general prohibition of *actio popularis* enshrined in its mandate,[11] the Court underlined the progressive recognition of the role of environmental NGOs in climate change-related cases.[12] This prompted the judges to admit the *locus*

11 ECtHR (Grand Chamber), *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, judgment of 9 April 2024, no. 53600/20, para. 460; *ex multis* ECtHR, *Asselbourg and others v. Luxembourg*, decision of 29 June 1999, no. 29121/95, 10.

12 ECtHR, *KlimaSeniorinnen* (n. 11), para. 491, 497-498.

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standi of the applicant association, in order to protect the human rights of those who are or might be affected by the impact of climate change, provided that some requirements are complied with.[13]

International practice offers some interesting examples where international organisations have been or might be allowed to act for a common space or interest. In this regard, a prominent example concerns the law of the sea and, specifically, the *régime* applicable to the seabed and the ocean floor (the 'Area') as regulated by Part XI of the United Nations Convention on the Law of the Sea (UNCLOS), the provisions of which clearly assert the relevance of this space for the entire international community, considered also in its human perspective, and establish obligations for *all* States.[14] While qualifying the Area as 'common heritage of mankind',[15] the Convention bars the exercise of State jurisdiction in this space[16] and, accordingly, considers the geographical locations of States irrelevant.[17] A pivotal role in this system is assigned to the International Seabed Authority (ISA) which, according to Article 137, paragraph 2, acts on behalf of humankind. In its advisory opinion on the responsibility of sponsoring States for activities in the Area adopted in 2011, the International Tribunal for the Law of the Sea (ITLOS) addressed the potential liability of any State sponsoring exploration and exploitation activities in the Area, therefore touching upon the issues of reparation and compensation. When considering a scenario in which damage is inflicted on the Area and on its resources constituting the common heritage of humankind, the Tribunal postulated that 'subjects entitled to claim compensation may include the Authority, entities engaged in deep seabed mining, other users of the sea, and coastal States'.[18]

Leaving aside the vagueness of this wording, and focussing instead on the first of these entities, a question arises as to whether the institutional nature of the ISA could justify a privileged *status* in this respect, enabling it to claim compensation without any further justification but the position it occupies in

13 ECtHR, *KlimaSeniorinnen* (n. 11), para. 499-502.

14 Meagan S. Wong, 'The United Nations Convention on the Law of the Sea 1982' in: Malgosia Fitzmaurice, Attila Tanzi and Angeliki Papantoniou (eds), *Multilateral Environmental Treaties* (Edward Elgar Publishing 2017), 145-165 (161). Emphasis in the text.

15 United Nations Convention on the Law of the Sea of 10 December 1982, 1833 UNTS 3, Art. 136.

16 Art. 137 United Nations Convention on the Law of the Sea (n. 15).

17 Art. 140 United Nations Convention on the Law of the Sea (n. 15).

18 ITLOS, Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, advisory opinion of 1 February 2011, case no. 17, para. 179. The point is further strengthened in the following paragraph where, based on the entitlement of the Authority to act on behalf of humankind, the Tribunal stresses that each State Party 'may also be entitled to claim compensation in light of the erga omnes character of the obligations relating to preservation of the environment of the high seas and in the Area' (para. 180).

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the governance of the Area, even in the absence of an explicit provision. Besides the possible need of formal amendment, further concerns might stem from practical and political challenges. These latter would be linked, notably, to the actual capacity of the ISA to represent the common interest in the protection of the seabed without being influenced by conflicting private constituencies. Doubts in this respect were expressed, in particular, on the occasion of the adoption of the controversial 'Mining Code', i. e. the set of norms establishing the legal framework for the exploration and exploitation of seabed. In that context the ISA was severely criticised for its allegedly close relationships with mining corporations, resulting in an embedded 'industry-driven agenda'. According to this view, the advancement of private interests linked to mining would be pursued through a biased use of its institutional structures, whose impartiality would be jeopardised by the presence of mining industry representatives within State delegations or by 'sliding doors' between ISA organs and corporations. A further issue of debate concerns the alleged lack of transparency of the Authority affecting, among other things, the functioning of the Legal and Technical Commission, the ISA advisory scientific organ, normally working in closed and unrecorded meetings and through working groups whose mandate and composition are often not made public.[19]

With more specific regard to the negotiation of the Mining Code that should take place in 2025, the doubts about the capacity of the ISA to genuinely represent the interests of mankind in the 'Area' have been also raised in relation to procedural issues affecting decision-making in this field and, notably, to the modalities through which agenda items can be proposed in view of an Assembly meeting. The problem is all but theoretical, given the polarisation currently taking place within the ISA, with some Members arguing in favour of the possibility to start deep seabed exploitation within two years even in the absence of any regulation, and other Members calling for the adoption of a general policy based on precaution before any activity takes place. When the latter group asked for the inclusion of a specific agenda item on this topic in 2023, the initiative was blocked by other Members, with a renewed proposal being submitted at the following meeting.[20]

19 David Billet et al., 'Enhancing Scientific Expertise at the ISA', 12 April 2023, 10, available at: <https://www.pewtrusts.org/-/media/assets/2023/04/code-project_enhancing-scientific-expertise-at-the-isa.pdf>, last access 19 February 2025.

20 Pradeep Singh, 'Deep Seabed Mining: A General Policy at the International Seabed Authority?', EJIL: Talk!, 10 June 2024; British Institute of International and Comparative Law, Deep Seabed Mining & International Law: Is a Precautionary Pause Required?, 31 May, 2023, available at: <https://www.biicl.org/documents/166_deep_seabed_mining_event_report.pdf>, last access 19 February 2025.

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A further example of the potential role played by international organisations in the representation and advancement of common interests may be found in the context of cultural property protection, especially when such property is deemed to have universal value. While this area forms the object of the well-known 1972 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on World Heritage,[21]relevant legal norms are also found in international humanitarian law, including those codified in the Statute of the International Criminal Court.[22] While the Court is concerned with individual criminal responsibility and not with state responsibility, the universal value vested in cultural property might nevertheless raise the issue of representing a common interest at the reparation stage. A possible role in this respect for an international organisation finds reflection, *inter alia*, in Article 85 of the Rules of Procedure of the Court, whose paragraph b) includes, within the notion of 'victim', organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion. Moreover, under Article 98, paragraph 4, reparations might be addressed through the Trust Fund to an intergovernmental, international or national organisation.

The obligation to make good any intentional destruction of cultural property of outstanding value – in that case, ancient buildings and mausoleums in Timbuktu (Mali) – was at the centre of the *Al-Mahdi* case before the International Criminal Court (ICC), which resulted in the imposition of a nine-year sentence on the defendant. Despite recognising the interest of the entire international community in world cultural heritage,[23] the Court did not actually identify any tangible mechanism for representing this viewpoint at the reparations phase and decided to subsume harm caused to the national or international community under that suffered by local inhabitants.[24] The decision was grounded on the 'prioritisation' of reparation for the benefit of those groups whose enjoyment of cultural heritage is particularly intense,[25] strengthened by the lack of any application for this purpose,

21 Convention Concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972, 1037 UNTS 152 (World Heritage Convention).

22 Art. 8 para. 2 lit. e) iv, Rome Statute of the International Criminal Court of 17 July 1998, 2187 UNTS 3 (ICC Statute).

23 ICC, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, judgment of 27 September 2016, ICC-01/12-01/15, para. 17.

24 ICC, *Al Mahdi*, Reparations, order of 17 August 2017, ICC-01/12-01/15, paras 52 ff.

25 ICC, *Al Mahdi*, Reparations (n. 24), para. 53. The influence of a 'human rights lens' on the decision to prioritise reparations for local inhabitants is emphasised by Haydee J. Dijkstal, 'Destruction of Cultural Heritage before the ICC: The Influence of Human Rights on Reparations Proceedings for Victims and the Accused', JICJ 17 (2019), 391-412 (405-406).

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including any attempt in this sense by the UNESCO.[26] In this respect, it is important to note that the interest of the national and international community that this latter organisation aims to advance and represent[27] should not be seen merely as an inter-State one, as opposed to a victim's interest, but rather as a common interest, taking account of the universal value of the cultural property destroyed. This is evident from the trial judgment, in which the Court stressed the international community's condemnation of the crimes[28] and the 'particular gravity' of the facts, as they affected not only the direct victims, but also people more widely throughout Mali and the international community.[29]

When compared to the previous example, the *Al-Mahdi* case offers less straightforward solutions for imagining an institutional avenue for channelling compensation towards the international community, especially considering that UNESCO is not endowed with the same capacity and authority to represent the interest of such community as that explicitly attributed to the ISA by UNCLOS. Even admitting that UNESCO be entitled to submit a claim, additional doubts might stem from the power asymmetry that would result between the World Heritage Committee, on the one hand, and the General Conference and the Executive Board, on the other. As the protection of cultural heritage under the 1972 Convention is assigned to the former, the latter would play a secondary role in this kind of decision, in contrast to their apical role within UNESCO structure. In addition, any potential role for such Committee in the framework of a criminal procedure would raise legal and political issues if one considers its restricted composition, i. e. twenty-one elected Parties: the sensitive nature of this feature is confirmed by the request, addressed by the General Assembly to State Parties in the Operational Guidelines, to voluntarily reduce their term of office from six to four years.[30] Yet the very fact that the Court did mention UNESCO's failure to act suggests that international organisations of this kind may in the future apply for victim status under the ICC legal framework and receive judicial recognition of their standing to claim reparations for common interests protected by the ICC Statute.

26 ICC, *Al Mahdi*, Reparations (n. 24), para. 52.

27 This idea notably emerges in the Preamble of the Convention on Cultural and Natural Heritage, underlining that parts of such heritage 'need to be preserved as part of the world heritage of mankind as a whole'.

28 ICC, *Al Mahdi*, Reparations (n. 24), para. 67.

29 ICC, *Al Mahdi*, Reparations (n. 24), para. 80.

30 Operational Guidelines for the Implementation of the World Heritage Convention, 31 July 2024, para. 21.

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III. Compensation for Damage and Redress Through 'Trust Funds'

As codified by Art. 31 ARSIWA, 'reparation for injury' caused by an international wrongful act can take different forms – restitution, compensation for damage, satisfaction – which are hierarchically ordered.[31] However, especially when mass violations of human rights are concerned, a distinction must be made between compensation following responsibility for an internationally wrongful act and other remedial measures whose main purpose is to provide redress. What is underlined here is that compensatory measures may be strictly informed by the logic of Art. 36 ARSIWA and provide an amount of money as a way to compensate damage caused by a wrongful act or, under a different perspective, be more focussed on the victim and on the harm suffered, leaving the responsibility of the perpetrator somehow in the background. Rather than a matter of context (judicial or non-judicial), such a distinction is a matter of approach – that, according to the terminology used by authoritative doctrine, can be brought under the categories of 'retributive' and 'transitional' justice[32] – and, when common spaces and interests are at stake, is not always easy to translate into practice. The complexities inherent in the protection of these latter often lead competent organs to adopt, more or less knowingly, hybrid institutional avenues such as retrieving of financial resources to the benefit of harmed individuals.

In this respect, an interesting solution is increasingly being provided by 'trust-funds', i. e., for the purposes of this article, institutional mechanisms targeted at the collection and distribution of financial resources for the sake of victims or with a view to protecting specific spaces or interests. This kind of institutional device can, of course, take on very different forms, also depending upon the sub-set of international law norms at issue: for simplicity, a distinction will be drawn between funds established within the framework of international criminal justice and funds set up by treaties or United Nations resolutions.

31 According to ILC, ARSIWA (n. 1), Art. 36.1, the State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

32 Dinah Shelton, *Remedies in International Human Rights Law* (online edn, Oxford University Press 2015), 17, 20 ff.

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1. The Use of 'Trust Funds' Between Reparations for International Crimes and 'Crowdfunding'

The first category of 'trust funds' is part and parcel of the institutional structure of courts and tribunals established in the area of international criminal law. Before taking a closer look at some of these funds, it is worthwhile underscoring some of the characteristics of reparations in this context, especially when compared to international human rights law. In the latter area reparations are based on a finding concerning a breach of obligations incumbent on States, with related orders generally made in favour of the victims; conversely, in the field of international criminal justice, orders are issued after the defendant has been found guilty of a crime and are therefore issued against him or her.[33] Although some authors warn against the potential conceptual difficulties encountered when mixing individual criminal responsibility with the right to reparation,[34] the common root of these notions – i. e., the breach of human rights – makes cross-fertilisation between the two a fruitful exercise from both a theoretical and a practical viewpoint.[35]

One of the most remarkable examples of 'trust fund' is represented by the Trust Fund for Victims (TFV) of the ICC, the rationale of which is to offer an additional avenue for the implementation of reparation orders, especially when defendants are unable to pay the amount requested or due to the high number of victims.[36] Alongside the 'money and other property collected through fines or forfeiture' referred to in Article 79, paragraph 2, of the Statute of the Court, the Fund is regularly financed through 'other resources',[37] i. e. donations by ICC Member States. The 'crowdfunding' nature of this mechanism transcends the adversarial approach to criminal justice and rather reinforces the transitional justice side of the procedure, as the entities that are technically not involved in the judicial activity of the Court may actively contribute to the reparation of damage.

The TFV has been resorted to in the *Al-Mahdi* case mentioned above, where the intentional destruction of religious buildings was partially repaired through the payment of individual compensation to victims who were direct descendants of the saint entombed in one of the mausoleums, or whose

33 Miriam Cohen, Realizing Reparative Justice for International Crimes: From Theory to Practice (Cambridge University Press 2020), 32.

34 Frédéric Mégret and Raphael Vagliano, 'Transitional Justice and Human Rights' in: Cheryl Lawther and Luke Moffet (eds), *Research Handbook on Transitional Justice* (Elgar 2017), 95-116 (105).

35 Cohen (n. 33), 32.

36 Art. 79 ICC Statute; Rule 98 paras 2, 3 ICC Rules of Procedure and Evidence.

37 Rule 98 para. 5 ICC Rules of Procedure and Evidence.

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livelihood depended exclusively on these latter.[38] However, the most substantial part of reparations was collective in nature – i. e. directed at a community or group – and comprised measures such as the restitution of buildings in conjunction with UNESCO, assistance for the return of victims to Timbuktu and programmes providing psychological support[39]. Interestingly, collective reparations have also been awarded by way of the payment of one euro in symbolic compensation to the Government of Mali (representing Malians) and to UNESCO (representing the international community).[40]

The TFV is not an isolated case. Similar bodies have been established within hybrid courts, such as the Special Panels for Serious Crimes in East Timor[41] or the Extraordinary Chambers in the Courts of Cambodia (ECCC).[42] Despite the differences in their respective origin and functioning, common features of these judicial institutions include not only the mere existence of a 'fund', but also the possibility for it to be replenished by entities that were not directly involved in the crime. If, on the one hand, this technique can be traced back to the frequent difficulties faced by international criminal courts in gathering financial resources, it is submitted that the common nature of the values at stake (attaching e. g. to fundamental rights) should also be taken into account, thus making a 'trust fund' a particularly suitable solution both in terms of forms of reparation and the retrieval of the necessary resources.

The practice of these tribunals, including the use of funds, also displays some weaknesses linked to the tendency to frame compensation as projects. In particular, their over-reliance on external funding would work as an 'entry point' for the so-called 'projectification'[43] that, in turn, has negative consequences in terms of transparency. According to this view, the need to ensure adequate funding of donors leads to the proliferation of actors involved in the reparations phase and in the design of projects, with many decisions

38 ICC, Al Mahdi, Decision on the Updated Implementation Plan from the Trust Fund for Victims, judgment of 4 March 2019, ICC-01/12-01/15, paras 23 ff.

39 ICC, *Al Mahdi*, Implementation Plan (n. 38), paras 62 ff.

40 ICC, *Al Mahdi* (n. 23), para. 106.

41 Under this system, compensation obtained by submitting a civil claim can be complemented by a Trust Fund, financed through money and other property collected through fines, forfeiture, foreign donors or other means. Regulation No. 2000/30 on Transitional Rules of Criminal Procedure, Art. 25, Art. 49.

42 According to the EECC Internal Rules, only collective and moral reparations may be awarded. In setting out the modalities of implementation, the Chamber may decide either that the costs will be borne by the convicted person or that reparations will be funded externally; in this latter case, reparations will be given effect through a project. EECC Internal Rules (Rev. 9) as revised on 9 January 2015, Art. 23 *quinquies*.

43 Christoph Sperfeldt, *Practices of Reparations in International Criminal Justice* (Cambridge University Press 2022), 243-244.

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between donors, implementing organisations and concerned populations taken out of court,[44] as well as lawyers and judges turned into 'managers' with no expertise.[45]

Further criticism is directed against a general lack of accountability that informs the procedure of these tribunals and that inevitably also extends to the reparations phase: not only are international criminal courts far from acting on behalf of humanity and are not really accountable to any constituency,[46] but they also manage reparations without genuinely representing the interests of the victims. This is often the result of specific institutional arrangements that allow them very limited room to express their viewpoint, as in the case of the ECCC, where 'Lead Co-Laywers' selected by the Court will file a single claim for collective and moral reparations on behalf of the whole group of victims.[47] Similar concerns have been raised about the ICC procedure, where all the victims are represented by a single counsel.[48] Moreover, it has been observed how reliance on donors for funding and on NGOs for implementation of projects risks make courts more accountable to these entities than to the victims.[49] In the case of the ECCC, this tendency finds confirmation, for instance, in the cooperation between NGOs, the Victims Support Section and Lead Co-Lawyers in the design of reparation projects.[50]

Finally, the use of trust funds and the ensuing resort to collective reparations adds to existing concerns on fairness and equitable distribution of resources between victims. Unlike remedies granted under genuine transitional justice schemes, reparations decided by international criminal courts reflect the necessary selectivity of prosecutorial choices[51] but also, as remarked by some scholars, the procedures regulating victims' participation.[52] This latter is fraught with obstacles stemming from the obligation to be

44 Sperfeldt (n. 43), 259.

45 Sperfeldt (n. 43), 252 ff.

46 The point is emphasised by: Frédéric Mégret, 'In Whose Name? The ICC and the Search for Constituency' in: Christina De Vos, Sarah Kendall and Carsten Stahn (eds), *Contested Justice* (Cambridge University Press 2015), 23-45 (23 ff.).

47 Rule 12 *ter* para. 4 Rule 23 EECC Internal Rules.

48 Rule 22 ICC Rules on Procedure and Evidence. See Isha Jain, 'Theorizing the International Criminal Court's Model of Justice: The Victims' Court?', Journal of Victimology and Victim Justice 2 (2019), 1-10 (5 ff.).

49 On the role of NGOs in reparation projects see, among others: Rachel Killean and Luke Moffett, 'What's in a Name? "Reparations" at the Extraordinary Chambers in the Courts of Cambodia', Melbourne Journal of International Law 21 (2020), 115-143 (128 ff.).

50 Rule 12 *bis* para. 3 EECC Internal Rules.

51 Randle C. De Falco, Invisible Atrocities: The Aesthetic Biases of International Criminal Justice (Cambridge University Press 2022), 232.

52 Claire Garbett, 'The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice', Restorative Justice 5 (2020), 198-220 (207 ff.).

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represented up to linguistic barriers, leading to a 'pyramid', with only the top benefiting from a remedy.[53] Some modalities adopted in the management of 'trust funds' might even exacerbate said selectivity, especially as far as the use of 'other resources' (i. e. voluntary contributions) are concerned. This is particularly true of the practice of setting aside resources to secure funding in view of future orders, which might discriminate between victims who will receive compensations and others that, though in urgent need, could be deprived of this possibility.[54]

2. 'Treaty-Based' Funds: A Complementary Resource to Achieve Protection of Common Spaces and Interests?

Unlike trust funds, which form part and parcel of judicial mechanisms, treaty-based funds have a completely different origin and rationale, as they are based on treaties pursuing the protection of a specific legal good. In other words, financial resources made available under these schemes do not repair harm stemming from a breach of a norm, nor they constitute a form of penalty against a responsible subject. They are solely instruments geared towards the accomplishment of a shared purpose. Within this broad landscape, a distinction can be nevertheless made between funds established under human rights instruments, that are somehow inspired by a transitional justice logic, and funds set up by treaties on the protection of the environment and of cultural property, falling under the category of technical assistance.

Starting from the former type of funds, it is worthwhile recalling the attempts made at United Nations (UN) level, in particular the Voluntary Trust Fund on Contemporary Forms of Slavery,[55] the Voluntary Trust Fund for Victims of Trafficking in Persons[56] and the Voluntary Fund for Victims of Torture.[57] Without entering into the merits of the characteristics and operation of each individual fund,[58] for the purposes of the present analysis, it is

53 Fiona McKay, 'What Outcomes for Victims?' in: Dinah Shelton (ed.), *The Oxford Handbook of International Human Rights Law* (online edn, Oxford University Press 2015), 921-954 (944-945).

54 William Schabas, 'Art. 79' in: William Schabas (ed.), *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford University Press 2016), 1190.

55 UNGA Res 46/122 of 17 December 1991, A/RES/46/122.

56 UNGA Res 64/293 of 30 July 2010, A/RES/64/293.

57 UNGA Res 36/151 of 16 December 1981 A/RES/36/151.

58 For a thorough and detailed analysis see Miriam Cohen, 'Reparación de las violaciones de los derechos humanos: ¿Qué papel tienen los fondos fiduciarios? Una visión exploratoria de los fondos internacionales', Revista do Instituto Brasileiro de Direitos Humanos 22 (2022), 243-258 (248) ff.

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sufficient to note that their rationale is not to allocate financial resources based on applications by victims, but rather to benefit these latter though the implementation of projects proposed by NGOs and other associations. Despite the limited role assigned to individuals, the mission of these funds is nevertheless reparative in nature, in seeking to offer redress following the perpetration of serious breached of human rights. UN funds do not receive any contributions out of the regular UN budget and accept donations from a wide range of actors, including States, non-governmental organisations, businesses and other private entities, including individuals.

Shifting to the second category, there are various examples of 'trust funds' set up by treaties with the purpose of protecting specific spaces, especially when these are deemed to represent a common interest of humankind. In this respect, the 'special fund'[59] set up by Article 52 of the Agreement under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (hereinafter *BBNJ Convention*) undoubtedly deserves to be mentioned. According to the Convention, the fund will obtain resources from a variety of sources, including annual contributions by developed Parties,[60] 'payments' based on the sharing of monetary benefits from the utilisation of marine genetic resources and related digital sequence information,[61] 'additional contributions' from Parties and private entities, 'additional funds' set up by the Conference of the Parties for the same purposes[62] and the Global Environmental Facility[63] (GEF) set up within the World Bank. The 'special fund' and the GEF will be used, *inter alia*, to support capacity-building projects on conservation and sustainable use of marine resources[64] that, in the light of the broader principles informing the *BBNJ Convention*, include the maintenance and restoration of ecosystem integrity and resilience.[65]

59 Art. 52 para. 4 lit. b) Agreement Under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction of 19 June 2023 (BBNJ Treaty), not yet in force. The provision also sets up a 'voluntary trust fund', the objective of which is however limited to facilitating the participation of representatives of developing States Parties in the meetings of the relevant bodies.

60 Art. 14 para. 6 BBNJ Treaty (n. 59).

61 Art. 14 para. 7 BBNJ Treaty (n. 59).

62 Art. 52 para. 5 BBNJ Treaty (n. 59).

63 Given the limited scope of this paper, it is only possible to mention in passing the Global Environmental Fund, which serves the purposes of several environmental treaties; the Fund is mainly intended for developing States and receives funding from both State and private actors. Contributions are managed via a set of trust funds managed by the World Bank acting as a trustee and served by a Secretariat. See Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law* (Cambridge University Press 2018), 336 ff.

64 Art. 52 para. 6 BBNJ Treaty (n. 59).

65 Art. 7 lit. h) BBNJ Treaty (n. 59).

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Although the funds mentioned in this paragraph are not linked to any dispute settlement mechanism, their contribution to the pursuance of a common space or interest should not be underestimated. As far as human rights-related funds are concerned, it is submitted that they could be used, prior the necessary institutional arrangements, as a subsidiary contribution to reparations awarded on the basis of international criminal proceedings – not differently, after all, from the 'other resources' collected under 'trust funds' set up in that context. If such a hypothesis is difficult to implement in relation to technical assistance to parties to treaties on the protection of the environment, both for the difficulties inherent in litigation in this field and for the lack of adequate institutional structures aimed at guaranteeing the effectiveness of States' obligations, then the capacity of some of these instruments to provide 'global public goods' through the financing of additional costs incurred by developing States could encourage forms of institutional connection and cooperation between different international organisations, including international courts.[66]

IV. The Human Right to a Remedy as an Additional Avenue for the Restoration of Common Spaces and Interests

The picture sketched out above must be completed by taking into account a different aspect of reparation measures, i. e. the so-called 'human right to a remedy'. Whilst the customary status of this right is still to some extent controversial,[67] its progressive consolidation in international law is now

66 Laurence Boisson de Chazournes, 'Financial Assistance' in: Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021), 937-955 (945). More specifically, the Author distinguished these legal tools, defined as 'second generation mechanisms', from 'first generation' ones, simply aimed at financing general functions of the environmental agreement.

67 Some hesitancy in acknowledging a customary right to reparation is expressed, for example, by those authors who, whilst admitting the 'growing tendency' to recognise an individual right to direct action, point to the vitality of diplomatic protection (Dominique Carreau and Fabrizio Marrella, *Droit international* (Pedone 2022), 546. A nuanced view is also expressed by Peters, who draws a distinction between an emerging customary right to procedural remedies and the substantive obligation of reparation, which is still 'an open question' (Anne Peters, *Beyond Human Rights* (Cambridge University Press 2016), 180 ff. Tomuschat strengthens this point by highlighting the fact that compensation is necessarily linked to the activity of a competent treaty body (Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, Oxford University Press 2014), 408.

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evident.[68] The notion covers both 'formal' access to justice by individuals as well as the 'substantive' availability of an effective remedy, without which the corresponding duty to provide redress would be deprived of all meaning.[69] Focussing, for the purposes of our analysis, on this second aspect, it is interesting to note that a right to a remedy, including financial compensation, is provided for under several human rights treaties[70] as well as in EU law.[71]

The customary nature of this right has been supported by a number of authoritative voices, including some ICJ judges: one instance of this may be found, in particular, in Judge Cançado Trindade's opinion in the *Diallo* case, where he repeatedly underlined the status of *titulaire* of rights and beneficiary of reparations of not only Mr Diallo[72] but also, more generally, victims of human rights breaches.[73] The reasoning was invoked and strengthened by Judge Yusuf in his separate opinion in *Armed Activities on the Territory of the Congo*, where he restated the idea by quoting Article 33 of the ARSIWA, paragraph 2 of which contains a reference, albeit under the

68 Heidy Rombouts, Pietro Sardaro and Stef Vandeginste, 'The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights' in: Koen De Feyter, Stephan Parmentier, Marc Bossuyt and Paul Lemmens (eds), *Out of the Ashes. Reparation for Victims of Gross and Systematic Human Rights Violations* (Intersentia 2005), 345-503 (451); Francesco Francioni, 'The Rights of Access to Justice' in: Francesco Francioni (ed.), Access to Justice as a Human Right (Oxford University Press 2007), 1-56 (33 ff.); Antonio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (Oxford University Press 2011), 197 ff.; Dinah Shelton (n. 32), 17; Ludovic Hennebel and Hélène Tigroudja, *Traité de droit international des droits de l'homme* (2nd edn, Pedone 2018), 1390; Riccardo Pisillo Mazzeschi, *International Human Rights Law. Theory and Practice* (Springer 2021), 362-363.

69 In this respect, it is important to note that the literature is not unanimous in its response to the question as to whether the right to obtain reparation following a breach of human rights is separate from (although linked to) the right of access to justice, or whether this latter right includes the right to reparation (Mazzeschi (n. 68), 361).

70 A set of international treaties establishes an obligation for States to repair damage suffered by victims of human rights abuses through domestic proceedings: see e. g. Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Istanbul, 11 May 2011, entered into force on 1 August 2014, Article 30. The direct award of reparation and compensation by international human rights courts based on their constitutive instruments represent a different case: Art. 41 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213-I-2889 UNTS 222; Art. 63 para. 1 American Convention on Human Rights of 22 November 1969, 1144-I-17955 UNTS 144.

71 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and Replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14 November 2012, 57-73, Article 16.

72 ICJ, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), compensation, judgment of 19 June 2012, ICJ Reports 2012, 324 Separate opinion of Judge Cançado Trindade (para. 5).

73 ICJ, *Diallo* (n. 72), para. 30.

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form of a mere no-prejudice clause, to any right arising from the international responsibility of a State, accruing directly to 'any person or entity other than a State'.[74]

In this context, it is once again useful to remember the distinction, mentioned above, between reparations following an internationally wrongful act and remedies having as their main purpose assistance to vulnerable victims. However, as already observed in relation to the use of trust funds, existing international practice shows that it is often hard to draw a line between retributive and transitional justice. Such uncertainties overlap with those relating to the distinction between different forms of reparations: if the difficulties in the application of the *Chorzów* principle often make compensation and satisfaction the only viable options to repair, especially when reparations are collective in nature, some measures are actually hard to classify under one or the other heading. These ambiguities also find reflection in the hortatory language used by the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (hereinafter *Basic Principles*)[75] according to which restitution 'should, whenever possible, restore the victim to the original situation'.

These issues are effectively exemplified by the international legal framework and case-law on the protection of indigenous rights, especially – though not exclusively – in relation to illegal deprivation of land. According to the current state of the art, the fullest codification of this right may be found in a non-binding instrument, namely the United Nations Declaration on the Rights of Indigenous Peoples,[76] Article 28 of which sets out the right to a remedy or, 'when this is not possible', to just, fair and equitable compensation (para. 1), pointing out that it 'shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress' (para. 2).[77]

These principles have been consistently upheld within the case-law of the Inter-American Court of Human Rights (IACtHR) in its application of Article 21 of the American Convention on Human Rights, codifying the

74 ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), reparations, judgment of 9 February 2022, 13, Separate opinion of Judge Yusuf (para. 38). ILC, ARSIWA (n. 1), with Commentaries, 2001, 67.

75 UNGA Res 60/147 of 15 December 2005, A/RES/60/147.

76 UNGA Res 61/295 of 17 September 2007, A/RES/61/295.

77 On this point and, in general, on the UN Declaration on the Rights of Indigenous Peoples, see Malgosia Fitzmaurice, 'The 2007 United Nations Declaration on the Rights of Indigenous Peoples', Austrian Review of International and European Law Online 17 (2015), 137-265 (231).

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right to property. In the *Sarayaku* case,[78] the Court ordered collective reparations based on the damage suffered by the community and, in the case of the *Garífuna Community*, underlined how individual reparations would have been inconsistent with the community's world view and collective way of life[79]. Within this perspective, the obligation to title, delimit and demarcate land that usually accompanies any finding by the Court that Article 21 has been breached may be seen not just as a legal remedy for wrongful appropriation of land, but also as the restoration of environmental and cultural conditions that are essential for the survival of these peoples.[80] Finally, recent IACtHR reparation orders in favour of indigenous peoples award financial compensation not to individual households but to the community itself, through the creation of a Community Development Fund intended for development projects, as well as for the restoration of forested areas.[81]

In a similar vein, in its case-law concerning the rights of indigenous populations, the African Commission on Human and People's Rights (ACHPR) has since the beginning matched 'classical' reparation measures such as compensation and recognition of land rights (through demarcation, delimitation and titling) to information and consultation rights, relief and resettlement assistance, environmental restoration and compulsory impact assessments for potentially harming economic projects.[82] However, it was not until the *Ogiek* case that the collective dimension of indigenous rights has been explicitly endorsed[83]: beside pecuniary reparations for material and moral damage to the community, the African Court obliged the State to guarantee title to land 'with legal certainty' and to fully recognise the com-

78 IACtHR, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, merits and reparations, judgment of 27 June 2012, paras 317, 323.

79 IACtHR, *Case of the Garífuna Community of Triunfo de la Cruz and Its Members v. Honduras*, merits, reparations, and costs, judgment of 8 October 2015, para. 55.

80 IACtHR, *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, merits, reparations and costs, judgment of February 6, 2020, paras 241, 331. See in this respect Ludovic Hennebel, Hélène Tigroudía, 'Art. 63-1' in: Ludovic Hennebel and Hélène Tigroudía (eds), *The American Convention on Human Rights: A Commentary* (Oxford University Press 2022), 1326. The Authors note, however, that in cases concerning mass human rights claims, the Court maintained an approach centred on an individualised approach to harm suffered.

81 IACtHR, *Garífuna Community* (n. 79), paras 295 ff.; IACtHR, *Lhaka Honhat (Our Land) Association v. Argentina* (n. 80), paras 337 ff.

82 African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Center, et al. v. Nigeria*, report of 27 October 2021, case no. 155/96; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, report of 25 November 2009, case no. 276/2003.

83 Lucie Paiola, 'La jurisprudence de la Cour Africaine des droits de l'homme et des peuples relative aux droits des peuples' in: Guillaume Le Floch (ed.), *La Cour Africaine des droits de l'homme et des peuples* (Pedone 2023), 280-304 (303-304).

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munity as an indigenous people of Kenya.[84] The decision also put particular emphasis on consultation obligations, to be complied with during the whole reparations process, in relation to leases or concessions that had been granted over indigenous land, and to any future project on ancestral land. Finally, the Court set out the establishment of a community development fund to serve as a repository of all the funds ordered as compensation, together with a Committee for its management.

Looking at these examples, it is clear that the creation of funds to compensate damage stemming from human rights violations represents a meaningful institutional feature from multiple points of view, first of all because it strengthens the very idea of a right to a remedy by consolidating States' practice; in addition, it is consistent with the collective (as referred to a group) nature of the underlying rights and of the damage caused. Thirdly, the emphasis on restorative rather than compensatory solutions adequately reflects the needs of communities concerned, while making it clear that the corresponding 'duty to repair' is in no way jeopardised by the special characteristics of common spaces and interests.

The undeniably positive aspects of the use of 'trust funds' in this area do not however completely displace some doubts concerning their effectiveness and, notably, their actual capacity to provide redress. According to this view, such arrangements essentially amount to a 'lump sum agreement', embracing multiple claims without actually addressing victims' needs and often underassessing harm. Similar issues arose with respect to the reparations order issued by the ICJ in the case of *Armed Activities on the Territory of the Congo* mentioned above. After having underlined the evidentiary difficulties inherent in any armed conflict of a large scale[85] and in the one at issue in particular,[86] the Court declared itself *convinced*[87] that the best available approach was the one balancing a low standard of proof with a limited amount of evidence and decided to award, albeit on an exceptional basis, compensation under the form of a global sum.[88] Quoting the jurisprudence of the Ethiopia-Eritrea Claims Commission, it further noted that, in cases of mass claims, courts have adopted such a solution that, in the light of 'equitable considerations' reflects the damage that can be established with sufficient certainty through the available evidence (though probably not reflecting the

84 African Court of Human and Peoples' Rights, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, reparations, judgement of 23 June 2022, case no. 006/2012, 51 ff.

85 ICJ, *Armed Activities* (n. 74), paras 93-94.

86 ICJ, *Armed Activities* (n. 74), para. 64.

87 ICJ, *Armed Activities* (n. 74), para. 108. Emphasis added.

88 ICJ, *Armed Activities* (n. 74), para. 106.

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totality of damage suffered by each victim).[89] This general approach informed the whole reasoning of the Court on reparations, prompting it to determine, for almost each category of damage alleged by the Democratic Republic of the Congo (DRC), a lump sum, while at the same time underlining the insufficient evidence provided, the exceptionality of the context and the undeniable existence of harm.[90] According to the judgment, the entire amount of compensation should be managed through a fund established by the DRC and effectively distributed to victims, with the supervision of civil society representatives and of international experts; at the same time, the Court encouraged – but did not order – the adoption of measures for the benefit of affected communities as a whole.[91]

This solution was heavily criticised by Judge Yusuf who, in his separate opinion, objected to the choice made by the Court to allocate 'global sums' to victims on the basis of 'equitable considerations', instead of identifying and quantifying heads of damage.[92] According to the Judge, this methodological flaw resulted in a narrow, State-centred approach to reparations, which was closer to the logic of diplomatic protection than that of redress for human rights violations.[93] Based on this and other examples,[94] Judge Yusuf seized the opportunity to clearly assert the entitlement of individuals and communities 'who directly suffered the injury' to receive compensation for damage and defined the Court's choice to award compensation through a global fund as an 'easy solution'.[95] This latter was therefore directly linked to the failure to identify damage clearly, thus sacrificing of the needs of victims: on the contrary, in the Judge's opinion, the situation required both individual and collective reparations, compensation, rehabilitation, and non-pecuniary satisfaction,[96] which was considered to be the most appropriate in this type of situation.[97] By referring to the case-law of the IACtHR, the practice of the TFV within the ICC, as well as the Paris Principles on Children Associated with Armed Forces or Armed Groups,[98] the opinion emphasised the appro-

89 ICJ, *Armed Activities* (n. 74), para. 107.

90 This conclusion has been reached with respect to the loss of civilian lives (ICJ, *Armed Activities* (n. 74), para. 166), injuries to persons (para. 181), rape and sexual violence (para. 193), recruitment of child soldiers (para. 206), displacement of populations (para. 225), damage to property (para. 258), damage to natural resources (para. 366).

91 ICJ, *Armed Activities* (n. 74), para. 408.

92 ICJ, *Armed Activities* (n. 74), para. 24ss.

93 ICJ, *Armed Activities* (n. 74), para. 37.

94 ICJ, *Armed Activities* (n. 74), para. 39.

95 ICJ, *Armed Activities* (n. 74), para. 40.

96 ICJ, *Armed Activities* (n. 74), para. 43.

97 ICJ, *Armed Activities* (n. 74), paras 41 ff.

98 The Principles were adopted by the United Nations Children's Fund in February 2007.

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priateness of collective reparations, especially when compared to direct cash benefits, and taking into account the long period of time that had elapsed between the commission of the crimes and the launch of judicial action.[99]

The main purpose of the separate opinion is thus to reject any easy equation between an individual right to a remedy and an individualised approach to compensation, consistent with the idea that a well-targeted rehabilitation program may fulfil its purpose more appropriately than a 'general fund'.[100] At the same time, one should not forget that this judicial decision took place in an adversarial context where the task of the court is to adjudge and declare possible violations of international law and to establish a just and fair compensation based on legal principles, including those about evidence and burden of proof. In this broader scenario, the specificities of the ICJ also have a relevant bearing: despite forming a part of its judicial function, the awarding of reparations is not a frequent task for the Court. In the light of these elements, the choice to apply a low standard of proof, and to resort to pieces of evidence other than those provided by the parties, already represents a significant deviation from the methods usually followed by judicial organs and is on the contrary more in line with the methodology frequently used in the context of mass claims.[101] Though 'convinced' that the *do ut des* between such flexibility and a 'traditional' approach to compensation was the only avenue to reach a politically acceptable outcome, the Court did not miss the chance to remark how its compromise was mainly due to the failure by the parties in dispute to both negotiate on the issue and to collect evidence in view of a reparations judgement.[102] With respect to the former aspect (negotiations), it is interesting to note that the Court did not limit itself to stigmatising the conduct of the parties, but made clear that the search for an agreement is the standard practice in international law.

The *Armed Activities* case clearly shows that, while the collective nature of damage and of related reparations in the context of mass violations may not allow one to completely eschew legal principles governing the consequences of a wrongful act, it is true that the specific features of these situations may lead to a softening of some categories. At the same time, it also teaches that the design of reparations measures should not be seen as an *aut aut* process,

99 ICJ, *Armed Activities* (n. 74), para. 45.

100 The argument is made in particular by Frédéric Mégret, 'The Case for Collective Reparations Before the International Criminal Court' in: Jo-Anne M. Wemmers (ed.), *Reparation for Victims of Crimes against Humanity. The Healing Role of Reparations* (Routledge 2014), 171-189 (171 ff.).

101 The point is emphasised by Jacomijn van Haersolte-van Hof, 'Innovations to Speed Mass Claims: New Standards of Proof' in: Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes* (Oxford University Press 2013), 14-23 (22-23).

102 ICJ, *Armed Activities* (n. 74), paras 66-67.

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but rather as a starting point for the identification of hybrid solutions. The latter might take on the shape of individualised reparations matched to collective projects – as the ICJ, albeit mildly, actually suggested – based on the possibility in some fora of granting *locus standi* to both individuals and collective entities. As has been remarked, a further option in this respect is represented, for example, in the 'pilot judgment' technique under the European Court of Human Rights that, while dealing with an individual claim, tries to address the underlying structural problem and therefore reach a higher number of prospective victims.[103]

V. Concluding Observations

The protection of common spaces and interests calls for specific institutional solutions during the reparations phase. This paper has first analysed whether and through which means some international organisations may be entitled to represent the interest of the international community to the protection of common spaces and interests. In this regard, suggestions from both non-contentious (the ITLOS advisory opinion issued in 2011) and contentious (the ICC reparations judgment in the *Al-Mahdi* case) proceedings have been raised to support of the possibility of reparations being claimed through international organisations. At the same time, as the ICC ruling has shown, the concrete implementation of these approaches may prove to be challenging, not least given the participation of victims more directly harmed by the offence.

Subsequently, this paper has focussed on the use of 'trust funds' not only as collectors of financial resources, but also as institutional venues where reparations can be designed, taking into account the framework of international criminal justice on one side and of international treaties for the protection of common spaces (notably, the *BBNJ Convention*) on the other. As far as the former are concerned, the paper analysed, in particular, the relationship between their rationale and their institutional features, highlighting how the specific characteristics of the harm caused to the victims of international crimes has resulted both in a preference for collective solutions as well as in the 'crowdfunding approach' to gathering resources. While funds set up by treaties protecting common spaces simply aim to provide financial and technical assistance to States parties, the relevance of their purpose raises a question as to whether it is possible to resort to them in order to complement remedies granted under dispute settlement mechanisms and, in a broader

103 McKay (n. 53), 946.

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sense, with a view to advance a goal benefitting the whole international community.

From a cross-sectional perspective, a common feature of these funds consists in the support they might receive from the whole international community, even regardless of the actual involvement of a given State in the relevant situation. This approach is consistent with the diffuse enjoyment of common spaces and interests, which in turn finds reflection in the preference, emerged in several international venues, for restoration and rehabilitation rather than pure compensation. At the same time, generalised financial support for this kind of purpose confirms the consolidation of a human 'right to a remedy', often taking the shape of collective reparations projects with a view to redressing the harm suffered by a large number of victims. In this respect, the case-law on the protection of indigenous rights is particularly meaningful, as it shows the clear relationship between the legal and moral drivers for settling disputes – often concerning the enjoyment of ancestral land and the related community links – and the institutional mechanism identified, i. e. the creation of common funds managed by the indigenous community as a whole.

However, the institutional choices sketched out above and, in particular, the use of common funds, are not entirely devoid of challenges, as the effective implementation of a human right to a remedy cannot be achieved simply by labelling reparations as 'collective'. On the contrary, such a right requires a methodological approach aimed precisely at identifying harm and, at the same time, adopting remedies that are actually targeted at victims' rehabilitation, whilst offering the most appropriate avenue for the restoration of common spaces and interests.

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