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Reparation and reconciliation processes to overcome past conflicts and build a common peaceful future – the question of just and equal redress

Introductory memorandum

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1. Introduction

1. This introductory memorandum is based on a motion for resolution, dated 24 June 2022. The Committee appointed me as rapporteur at its meeting in Strasbourg on 2023.

2. Wars and violent conflict cause great human suffering as well as the destruction of property, homes and the environment. Negotiations between the parties involved on how to deal with the damage caused by the conflict and how to move towards reconciliation are crucial for lasting peace. However, often such discussions do not lead to adequate results and this can create a feeling of injustice which can, in turn, perpetuate conflicts or even lead to a resumption of hostilities.

3. The Council of Europe is one of the principal platforms for promoting dialogue, mutual understanding, peace and justice amongst European countries. Indeed, the opening line of the preamble to the Statute of the Council of Europe provides that the States parties are "convinced that the pursuit of peace based upon justice and international co-operation is vital for the preservation of human society and civilisation".[1] The preamble to the European Convention on Human Rights also refers to fundamental freedoms as "the foundation of justice and peace in the world". Nevertheless, significant threats to peace in Europe remain, with recent calls to develop the Council of Europe's democratic security policy to include the "comprehensive use of early warning and confidence-building measures, improve policy making, strengthen accountability and prevent future conflicts".[2]

4. Problems caused by the lack of an acceptable, achievable and enforceable package towards reconciliation and redress following a conflict continue to hamper good relations between States. Unresolved frozen conflicts persist. There is therefore a strong case for considering what more might be done, under the auspices of the Council of Europe, to help to address the conflicts of the past and to ensure a durable peace for the future.

5. Indeed, a draft Resolution currently before the Assembly, recommends that member States "commit to resolving disputes and disagreements through dialogue and diplomacy", "commit to peaceful settlement of disputes by recognising as compulsory the jurisdiction of international tribunals", "promote all efforts aimed at

* Document declassified by the Committee on 11 October 2023.
[1] Preamble to the Statute of the Council of Europe.
[2] "The role of the Council of Europe in preventing conflicts, restoring credibility of international institutions and promoting global peace", Lesia Vasylenko (Ukraine, ALDE), draft PACE Resolution at para. 7 and draft Recommendation, at para. 3.

ensuring accountability for violations of international law by recognising the jurisdiction of the International Criminal Court", and "enforce the duty to provide compensation to the victim of aggression, including by lawful confiscation of State-owned and private-owned assets" and that the Assembly strengthen its work on conflict prevention, conflict resolution and democratic security.[3]

6. In this introductory memorandum, I will start by outlining international law and practice relating to reparations, reconciliation, and transitional justice (chapter 2). I will then set out the mechanisms currently available for settling such disputes, including those under the auspices of the Council of Europe (chapter 3). Finally, I will set out the case for a new mechanism under the auspices of the Council of Europe, to assist in the resolution of these disputes (chapter 4).

2. International law and practice relating to reparations, reconciliation, and transitional justice

2.1. The international responsibility of States for internationally wrongful acts and the duty to make full reparation

7. It is well established under customary international law, as clearly set out in the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001 ["ILC draft articles"] that a State is internationally responsible for internationally wrongful acts that are attributable to it.[4] It is similarly well-established that a State has an obligation to make reparations for such internationally wrongful acts and for harm caused.[5]

8. The obligation placed on the responsible state is to make "full reparation" and, as far as possible, 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.[6] As concerns the proportionality of reparations, "concerns are sometimes expressed that a general principle of reparation of all loss flowing from a breach might lead to reparation which is out of all proportion to the gravity of the breach", or that "the principle of full reparation may lead to disproportionate and even crippling requirements so far as the responsible State is concerned".[7] Such concerns were indeed motivating factors in the reparations settlements negotiated after World War I and World War II which did not seek full reparations. The approach taken in the ILC draft articles is to assess the proportionality within the analysis of each type of reparation and the choice of means of reparation.[8] However this is not seen as justifying anything less than 'full reparation' for the injury caused. "Full reparation" is also what is called for in respect of the damages flowing from the Russian Federation's war of aggression against Ukraine.[9]

9. Whilst the legal principle is for full reparation, as the International Court of Justice (ICJ) has acknowledged, practice can vary depending on the circumstances and this principle does not necessarily translate into a requirement to pay full compensation to each individual affected: "Against the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-off, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual victim as a rule accepted by the international community of States as a whole as one from which no derogation is permitted".[10] The practice of the European Court of Human Rights, however, tends to favour a more victim-

[3] *Ibid*, draft Resolution, at paragraphs 11.4, 11.6, 12.5, 12.6 and 13.3.
[4] Article 1 of ILC draft articles. See also *Phosphates in Morocco Case*, Judgment, 1938, PCIJ, Series A/B, No. 74, p. 10; *Corfu Channel Case*, Merits, Judgments, ICJ Reports 1949, p. 4; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14; *Gabčíkovo-Nagymaros Project case (Hungary v. Slovakia)*, Judgment of 25 September 1997, at p. 38. The principle has also been repeatedly affirmed by arbitral tribunals.
[5] Article 31 of the ILC draft Articles. See also *Case concerning the Factory at Chorzów*, Merits Judgment No. 13, Permanent Court of International Justice, Series A, No. 17, judgment of 13 September 1928 "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation" (at p.29); *The M/V "SAIGA" (no. 2) case, (Saint-Vincent and the Grenadines v. Guinea)*, judgment of 1 July 1999, International Tribunal for the Law of the Sea, at paragraph 170.
[6] Article 31 of the ILC draft Articles; *Factory at Chorzów case*, at p. 47.
[7] Commentary to the ILC draft Articles, paragraph 14 of the commentary relating to draft Article 31 and paragraph 5 of the commentary relating to draft Article 34.
[8] For example, it provides that restitution should "not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation" (draft article 35(b)). Similarly, satisfaction "shall not be out of proportion to the injury and may not take a form humiliating to the responsible State" (draft article 37(3)).
[9] See, paragraph 5, "firm legal basis" of the Council of Europe Ministers of Justice Riga Declaration of 11 September 2023.
[10] *Jurisdictional Immunities of the State (Judgment), Germany v. Italy*, Greece intervening, International Court of Justice, Judgment of 3 February 2012, paragraph 94.

centred approach looking at an individual victim[11], rather than a broader package of measures to resolve a conflict.

10. The forms of reparation include restitution, compensation and satisfaction, either singly or in combination.[12] Assurances and guarantees of non-repetition are recognised as a potential form of remedy. Specific forms of satisfaction include an acknowledgement of the breach, an expression of regret, or a formal apology.[13] Cessation of the wrongful acts can also be a relevant factor. Investigations into alleged wrong-doing (such as war crimes) can also be part of a package of reparation.

11. The "duty to make reparation is a rule which exists independently of those rules which concern the means by which it is to be effected".[14] However, the ability to invoke the responsibility of another State somewhat presupposes an existing means of bringing a claim, whereas in many cases there is no available international mechanism for determining some disputes. Countermeasures may be justified under certain circumstances, notably to induce a State to comply with its obligations under the law of State responsibility, but they must be proportionate to the injury suffered and are subject to certain conditions.[15]

2.2. Practical and legal challenges to agreeing and enforcing reparations

12. Despite these rules and principles requiring reparation for wrongful acts, often there is, however, no independent legal mechanism for enforcing a claim against a State meaning that claims can fester for years without resolution, absent the legal or political means to force a state to the negotiating table. Moreover, there is a certain dichotomy between the principle of full reparation and state practice, with complex negotiations often looking at what is achievable or reasonable in practice, bearing in mind a number of different factors, including reconciliation, peace, reparations, as well as economic, social and other interests.

13. Historically, peace treaties often included provision for reparations (to cover reconstruction, civilian damage and perhaps compensating families bereaved by war) as well as indemnities (often a more punitive settlement, covering, for example, the military costs of the war). However, this often depended on political or military pressure as well as what was practical in the circumstances (for example, much as in civil law, bankrupting a debtor, whether a state, a company or an individual, is unlikely to improve relations or yield to reparation payments). By way of example, the civilian damage inflicted by World War I was so great that actual reparations for the damage caused were not considered to be feasible and reparations were based on what those responsible for civilian damage could pay.[16] Even though the level of reparations fell far below full reparations, there was a lack of political will to pay. Some writers have argued that the requirement to pay reparations and the occupation of the Ruhr region by France and Belgium (1923-1925) followed by hyperinflation and the utter impoverishment of the middle class played a role in the economic and political turmoil faced by Germany in the 1920s and early 1930s, ultimately leading to the Nazi takeover in 1933. Others argue that Germany's difficulties relate more to a lack of adequate financial management and because the Weimar Republic did not want to pay, perhaps having not directly experienced the destruction of war on its civilian infrastructure and that the issue of "reparation… kept the passions of war alive".[17] There are many lessons to be learned from the reparations of World War I where a State does not approach the payment of civilian damages in good faith, leading to a lack of responsibility for the consequences of war and of aggression. From the perspective of reconciliation and peace in Europe, a valid consideration may thus be the extent to which reparations are likely to risk perpetuating war rather than symbolising a resolution to a conflict. This also highlights the importance of communications as part of any reconciliation and reparations package – thought

[11] *Cyprus v. Turkey* (GC), judgment of 12 May 2014 (just satisfaction), at paragraph 16: "according to the very nature of the Convention, it is the individual, and not the State, who is directly or indirectly harmed and primarily "injured" by a violation of one or several Convention rights".
[12] Draft Articles 34, 35, 36 and 37 of the ILC draft articles. See also *Factory at Chorzów case*, at p. 47; *The M/V "SAIGA" (no. 2) case, (Saint-Vincent and the Grenadines v. Guinea)*, at paragraph 170 – 171 "restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination".
[13] See, for example, the *LaGrand* judgment of the ICJ, as well as drafts Articles 30 and 37 of the ILC draft Articles.
[14] *Jurisdictional Immunities of the State (Judgment), Germany v. Italy*, Greece intervening, International Court of Justice, Judgment of 3 February 2012, paragraph 94
[15] Draft Articles 49, 51 and 52, ILC Draft Articles. See also, *Gabčíkovo-Nagymaros Project case (Hungary v. Slovakia)*.
[16] The Reparation Commission considered the resources available to the relevant State and its capacity to pay and gave the State an opportunity to be heard on the subject. The exact arrangements were complex, often with commodities such as timber, coal, ore, chemical dyes, pharmaceuticals, livestock and machines being used as payments in kind.
[17] Sally Marks, 2013, «Mistakes and Myths: The Allies, Germany, and the Versailles Treaty, 1918 – 1921". The Journal of Modern History, 85(3), pp. 632-659. French economist Étienne Mantoux, noted that Germany could have paid all of the reparations if it had wanted to, and that the problem was not that Germany was unable to pay, but that it was unwilling to pay. Étienne Mantoux (1952), "The Carthaginian Peace: Or the Economic Consequences of Mr Keynes", Scribner. Taylor A.J.P., (1991) [1961] "The Origins of the Second World War", Penguin Books.

might therefore be given to communicating clearly the consequences of war on civilian populations and the reasoning to justify the sum of reparations.

14. Reparations in relation to World War II were similarly complex given the scale of the human rights violations and the huge impact on civilian populations. Many countries had severely damaged infrastructure as a result of the aggression and had nationals who had suffered human rights violations. Reparations were negotiated in different packages at different times, and "no Allied State received compensation for the full extent of the losses which its people had suffered".[18] For individuals affected, whilst the German Federal Compensation Law (Bundesentschädigungsgesetz) compensated German victims of National Socialist Persecution, those in other countries that were attacked by Germany and its allies were not entitled to compensation under that law. Issues remain to this day, whether due to differences of opinion over responsibility (for example Poland, alone, was invaded by Germany, Slovakia, Romania and Russia, at various moments in WWII) or due to differences of opinion over agreements made (for example, with Russia negotiating a reparations settlement that purportedly covered countries on the Eastern side of the iron curtain, but without those countries necessarily directly benefitting from those reparations or feeling that they had been involved in those negotiations). This has led to arguments that reparations have not been fair or full, with specific individuals feeling that they did not receive adequate compensation, and some continuing to pursue reparations from Germany for losses suffered. Such sentiment can be noted for example in recent attempts in Italy, Greece or Poland to seek reparations from Germany, and a clear feeling of resentment for what is sometimes seen as a lack of responsibility for, and reparation for, past wrongs. However, without German agreement, reparations for such incidents remain legally unobtainable due to, for example, the doctrine of state immunity and the lack of any other means of enforcing the duty on a State to make reparations.

15. The doctrine of state immunity is a general rule of customary international law, solidly rooted in the practice of States, which grants states jurisdictional immunity from any attempted assertion of jurisdiction by the courts of another State.[19] State immunity derives from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order.[20] The law of state immunity is essentially of a procedural nature. It acts as a barrier to bringing proceedings against a State for any exercise of sovereign power (whether legal or illegal). It does not have any bearing on the merits of a claim, therefore even if a State may be immune from the jurisdiction of the courts of a foreign State, this does not affect the international responsibility of the State or its obligation to make reparations.[21]

16. The ICJ has notably concluded that State immunity for acts jure imperii [an exercise of sovereign power] extends to civil proceedings for acts occasioning death, personal injury or damage to property committed on the territory of the forum State by another State's armed forces and other State organs during an armed conflict.[22] Therefore "customary international law continues to require that a State be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict".[23] Moreover, the ICJ has also concluded that, in respect of civil proceedings, "under customary international law… a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict", even in respect of a jus cogens norm.[24] This follows from the case-law of the European Court of Human Rights which also confirms that granting state immunity for breaches of human rights is not a violation

[18] *Jurisdictional Immunities of the State, Germany v; Italy*, Greece intervening, International Court of Justice, Judgment of 3 February 2012, at para 98.

[19] International Law Commission 1980. See also the European Convention on State Immunity 1972 (Council of Europe, ETS No 74), ratified by Austria, Belgium, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom. At the UN level, the 2004 UN Convention on Jurisdictional Immunities of States and their Property, was drawn up following a report of the International Law Commission, and this seeks to consolidate and develop the law of state immunity, however, this has received very few ratifications. Neither Convention exactly reflects the current state of customary international law.

[20] See, for example, *Jurisdictional Immunities of the State, Germany v. Italy* (2012), ICJ, paragraph 57.

[21] *Ibid*, para 100.

[22] *Ibid*, paragraphs 77-79. See also paragraphs 72–75, which cite many cases granting Germany jurisdictional immunity for unlawful acts perpetrated by German armed forces on the territories of other States during World War II. In reaching its conclusion, the ICJ drew on the case-law of the European Court of Human Rights, such as *McElhinney v Ireland* [GC] (2001) and *Grosz v. France* (2009) (finding that the grant of state immunity as required by customary international law is not incompatible with the ECHR).

[23] *Ibid*, at para 77. Thus contradicting Italy's argument of a developing "territorial tort principle", under which a state would no longer be entitled to immunity in respect of acts occasioning death, personal injury or damage to property on the territory of the forum State.

[24] *Ibid*, at para 91. See also para 94 in respect of jus cogens, where the ICJ highlights that there is no conflict as state immunity is a procedural rule that has no bearing on the duty to make reparation which exists independently.

of the ECHR[25] It should be noted that this relates to state immunity in respect of civil proceedings (which is distinct from individual criminal liability for torture, war crimes and crimes against humanity). The doctrine of state immunity also grants States immunity from post-judgment measures of constraint, for example as against property used for governmental purposes that is located in a foreign State, and associated exequatur proceedings.[26]

2.3. The right to remedies and reparations for individuals

17. Reparations have historically been a matter between States, not involving the individual directly. This is because, traditionally, the individual is not a subject of public international law and thus cannot act in the sphere of international law. Moreover, individuals cannot bring a claim directly against a foreign State in international law. A State can espouse the claim of a national, to seek to hold another State accountable and to seek reparations related to a breach.[27] However, the individual is not able to make a claim directly and is not necessarily entitled under international law to any specific reparations following such a claim.

18. A person can bring a claim (where available) under domestic law in their own State or indeed can bring a claim (where available) under the domestic law of a State against whom it seeks damages or reparations. However, often such legal mechanisms are lacking or unavailable in the domestic law of the individual State – for example because domestic courts may lack jurisdiction, due to the operation of State immunity laws, or because non-nationals may be barred from accessing certain compensation schemes.

19. International law can thus leave an individual victim without an adequate remedy – even where their State of nationality has received reparations. As the ICJ has said "Where the State receiving funds as part of what was intended as a comprehensive settlement in the aftermath of an armed conflict has elected to use those funds to rebuild its national economy and infrastructure, rather than distributing them to individual victims amongst its nationals; it is difficult to see why the fact that those individuals had not received a share in the money should be a reason for entitling them to claim against the State that had transferred money to their State of nationality."[28] The ICJ considered that any remaining such disputes might be a topic of further negotiations between the two States concerned. This situation can thus be unsatisfactory for the individual and can lead to a lack of a meaningful resolution if the victims are not adequately involved in finding a solution towards reconciliation and lasting peace.

20. Specific rules of international law do, however, grant individuals rights, such as international human rights law, international humanitarian law (for example in relation to prisoners of war) or the law on consular protection.[29] However, the law has not yet developed to creating an actionable right to reparations for individuals under customary international law.[30] Exceptionally, specific provisions of international law enable individuals to make claims directly against foreign States, for example, investment treaties may establish arbitration clauses enabling individuals to seek damages against a foreign State for losses. Specific bespoke compensation mechanisms have also been established at times, such as the United Nations Compensation

[25] See, for example, *Al-Adsani v. United Kingdom* [GC], (2001) relating to a refusal of the UK to allow a civil claim in respect of torture allegations against the State of Kuwait; or *Kalogeropoulou and Others v. Greece and Germany* (2002) in relation to a refusal of the Greek Government to permit enforcement of a judgment in respect of civil claims for damages against Germany for crimes against humanity committed during the Distomo massacre. See more recently *Jones and Others v. United Kingdom,* judgment of 14 January 2014, relating to the decision to strike out civil claims alleging torture on account of immunity invoked by the Kingdom of Saudi Arabia and its officials.

[26] See, for example, *Jurisdictional Immunities of the State, Germany v; Italy*, Greece intervening, International Court of Justice, Judgment of 3 February 2012, paras 118-119; 131.

[27] In the *Factory at Chorzów* case, at p. 26- 28, the PCIJ noted that even if the indemnity for the wrong corresponded to the damage which the nationals of the injured State have suffered, that did not change the nature or character of the reparation due which remained a matter between the two States (not the individuals concerned).

[28] *Jurisdictional Immunities of the State (Judgment), Germany v. Italy*, ICJ, para 102.

[29] The ICJ has held that the Vienna Convention on Consular Relations creates individual rights, which can then be invoked by the nation State of the detained person. International Court of Justice, *LaGrand* case, 27 June 2001, paragraph 77, p. 32; *Case concerning Avena and other Mexican nationals*, ICJ, 31 March 2004, paragraph 40 p. 36. The remedies in these cases involved a guarantee and assurance of non-repetition, as well as an obligation for the USA to review and reconsider the convictions in circumstances where the rights under the Vienna Convention had not been respected.

[30] The ICJ's advisory opinion of 9 July 2004 *Legal consequences of the construction of a wall in the occupied Palestinian territory*, International Court of Justice, provides that "given that the construction of the wall in the Occupied Palestinian Territory has, inter alia, entailed the requisition and destruction of homes, businesses and agricultural holdings, the Court finds further that Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned", at paragraph 152. Whilst this could suggest an increased role for natural and legal persons at the international level, arguably this approach is due to the very specific and complex situation relating to Israel and the occupied Palestinian territory, rather than something that indicates a right for individuals to claim reparations directly at the international level.

Commission, established to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait in 1990-1991.[31]

21. Human rights treaties, in particular, may establish a mechanism for individual applications against a State responsible for a violation. This is reflected in the approach set out in the UN General assembly Resolution "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" (UNGA Resolution 60/147).[32] The Principles annexed to that resolution recall, in particular, that the right to a remedy for victims of human rights violations is a right protected under numerous international and regional treaties relating to international human rights law and international humanitarian law.[33] The Principles recall the obligation on states to investigate crimes under international law and to prosecute perpetrators, where these are identified. At paragraph 11, the principles set out that remedies for gross violations of international human rights law or serious violations of international humanitarian law include (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms. Paragraph 15 provides that a State "shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law". It refers in particular to restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Whilst in practice this is generally done through domestic legal mechanisms, international mechanisms also exist. One of the most developed such mechanisms is, of course, the European Court of Human Rights.

22. An individual, or victim-centred approach, is thus more in line with a human-rights approach and is required for there to be an effective remedy under the European Convention of Human Rights (Article 13 ECHR). This is reflected, for example, in Council of Europe documents, such as the 2011 Guidelines on "Eradicating impunity for serious human rights violations" adopted by the Committee of Ministers[34] or recent work on remedies and redress to victims of the Russian military aggression in Ukraine.[35] There is thus an obligation on member States domestically to provide a means of redress for individuals whose human rights have been violated. In the context of a conflict, however, it can be difficult to oblige the responsible State to create such mechanisms (or to finance such mechanisms operating in the victim State) without their acceptance of responsibility and engagement in the process.[36] Moreover, there can be differences of opinion as to the type and extent of remedy or reparation required – for example, where resources are limited, should an individual be entitled to full compensation, particular compensation, declaratory relief, or other remedies better adapted to their individual circumstances and needs? Whilst the case-law of the ECHR has developed certain principles, some of this is left to the respondent State to determine, under the supervision of the Committee of Ministers. However even this approach can be limited to specific tools and perhaps does not look at the full range of options that might be available or that might best respond to the needs to the victims.

2.4. Reconciliation and transitional justice

23. Whilst the principle remains one of full reparation, the principle of the effectiveness of the law, and the reality of enforcement of any awards is crucial. Tools such as reconciliation, redress and transitional justice can be part of a package aimed at reconciliation and lasting peace. Such matters can be delicate as it can be

[31] Established under UN Security Council Resolution 687 (1991).
[32] UNGA Resolution 60/147 notes that it is important to address the question of remedies and reparations at both national and international levels and recognises "victims' right to benefit from remedies and reparation". The principles require states to "provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice (…) irrespective of who may ultimately be the bearer of responsibility for the violation" and to provide "effective remedies to victims, including reparation" (para 3, Annex).
[33] Including article 8 of the Universal Declaration of Human Rights; article 2 of the International Covenant on Civil and Political Rights; article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; article 14 of the Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment; article 39 of the Convention on the Rights of the Child; as well as under international humanitarian law such as common article 3 of the Hague Convention respecting the Laws and Customs of War of Land of 1907; article 91 of the 1977 Additional Protocol to the Geneva Conventions of 1949, concerning the Protection of Victims of International Armed Conflicts; articles 68 and 75 of the Rome Statute of the International Criminal Court; article 7 of the African Charter on Human and People's Rights; article 25 of the American Convention on Human Rights; and article 13 of the European Convention on Human Rights.
[34] https://rm.coe.int/1680695d6e.
[35] See paragraph 5, "victim-centred approach" of the Council of Europe Justice Ministers 2023 Riga Declaration.
[36] In the ongoing Council of Europe work on losses caused by the Russian Federations military aggression in Ukraine, there is a certain level of recognition of the challenge in establishing an effective reparation mechanism without acceptance from the responsible State, noting the need for a "future international compensation mechanism, that will help ensure full and effective reparation for Ukraine and the victims, to be established by a separate international instrument in cooperation with Ukraine". *Ibid*, paragraph 5, "work towards an effective reparation".

difficult to find a solution that is victim-centred, respects human rights, and which also contributes to lasting peace and improved reconciliation between communities.

24. The primary aim of reconciliation is to prevent conflicts from re-escalating. Meaningful reconciliation implies building new relationships between parties to the conflict and between the State and the citizen. It often requires time to engage at a community-level and can depend on buy-in from victims. Transitional justice refers to how societies respond to the legacies of massive and serious human rights violations, in order to achieve justice for the victims together with sustainable peace. It can include both judicial and non-judicial mechanisms, such as acknowledgement, memorials, lustration, civic initiatives, investigations, truth initiatives, as well as reparations to victims (e.g. financial compensation, restitution of property, guarantee of political or social rights).[37] There is no one-size-fits all approach to reconciliation or transitional justice initiatives, but the overall goal is a more peaceful, just and inclusive society[38] and in order to be successful initiatives generally should be context-specific, nationally owned, and focused on the needs of victims.[39] By its nature, transitional justice often takes place outside of State courts, with a number of scholars noting that criminal justice is not always the most appropriate manner of facilitating truth-finding.[40] There can be tensions between initiatives promoting peace, truth-finding, reconciliation and transitional justice, which often imply a certain level of compromise, and a focus solely on justice which can favour prosecutions and full redress, but may not always be capable of delivering either prosecutions or reparations.

25. Examples of transitional justice initiatives in recent decades tend to combine a mixture of truth-finding commissions and justice initiatives such as prosecutions. However there is in general a tension between initiatives favouring truth-seeking and the uncovering of remains, with those prioritising bringing perpetrators to justice. Amnesties or conditional immunity regimes are sometimes proposed to promote truth-seeking,[41] but they are controversial, especially where they could prevent responsibility for serious violations.[42] Similarly, in some countries, limitation or proscription periods on bringing prosecutions act as a barrier to justice. Importantly, such limitation periods should not apply to gross violations of international human rights law or serious violations of international humanitarian law.[43] Similarly, early releases of prisoners convicted of crimes during a conflict can be seen as a tool for reconciliation, but one that can undermine justice and can be felt as an affront by the victims of human rights violations. Prosecutions of some or all of those responsible for human rights violations is usually a central element of transitional justice.[44] However, there can be some perceived difficulties with prosecutions, particularly where certain crimes were seen to be permitted under a previous regime.[45]

26. One element is to establish a body to investigate what has happened to missing persons and to find their remains. Examples include the National Commission on the Disappeared in respect of people who disappeared during the 1976-1983 military dictatorship in Argentina; the Commission for Missing Persons in respect of people who went missing during the 1974 Turkish military intervention in Northern Cyprus (an element of the execution of the inter-State ECHR case *Cyprus v Turkey*); investigations following the 1996-2006 Nepalese Civil War;[46] the Colombian Commission for the Identification of the Truth, Coexistence and Non-Repetition.[47] Another example is Independent Commission for the Location of Victim's Remains (ICLVR)

[37] An example of a comprehensive package is the case of Colombia, which includes amnesties, pardons, a special court for peace, a Commission for the Identification of the Truth, Coexistence and Non-Repetition; reparations. The main purposes of the Commission for the Identification of the Truth, Coexistence and Non-Repetition, is to clarify events and to contribute to victim's recognition. However, it also aspires to foster coexistence in order to transform environment for the peaceful resolution of the conflict. How well it achieves this complicated balance has yet to be assessed.

[38] The International Center for Transitional Justice notes that transitional justice "is not one thing or one process, nor is it a one-size-fits-all formula to replicate institutions" but rather aims at a more peaceful, just, and inclusive society.

[39] OHCHR.

[40] See, for example, interview with Geoffroy de Lasgasner in «La Revue des juristes de Sciences Po: Les vertus du jugement à l'aune du processus de privatisation de la justice».

[41] See, for example; the Truth and Reconciliation Commission established in South Africa following Apartheid.

[42] Amnesties are increasingly seen as unacceptable in respect of grave human rights violations or acts constituting crimes under international law; see ECtHR, *Margus v. Croatia* (GC), judgment of 27 May 2014 at paragraphs 129-139.

[43] Paragraph 6 of the Annex to UNGA Resolution 60/147.

[44] See **"**The Trial of the Argentine Junta: Responsibilities and Realities**",** Paula K. Speck, The University of Miami Inter-American Law Review, Vol. 18, No. 3 (Spring, 1987), pp. 491-534.

[45] See, for example, arguments raised during the prosecution of individuals responsible for killings at the Berlin Wall. Transitional Justice: The German Experience after 1989, Markus Rau; *Streletz, Kessler and Krenz v. Germany*, Application No. 34044, 35532/97 and 44801/98, judgment of 22 March 2001, at paragraph 87.

[46] Despite receiving 60,000 complaints, no investigation was completed. Recent proposals for new legislation to promote reparations and investigations have been highly controversial since they would involve amnesties for a wide variety of serious crimes including rape, murder, torture and war crimes. See Human Rights Watch.

[47] The main purpose of the Commission for the Identification of the Truth, Coexistence and Non-Repetition, is to clarify events and to contribute to victim's recognition. It also aspires to foster coexistence for a peaceful resolution of the conflict.

in relation to 16 people who disappeared during the Troubles in Northern Ireland 1970s–1998. Information given to the commission cannot be used in criminal proceedings, preferring to encourage information that can help families to locate the remains of their loved ones. Recent legislation to address Northern Ireland legacy issues continues to be controversial, with proposals involving a controversial conditional immunity from prosecution for anyone who co-operates with the new Independent Commission for Reconciliation and Information Recovery (ICRIR). This is seen as building on the model used in South Africa to favour truth but is accompanied by limitations on bringing new litigation, which has been criticised as unduly limiting access to justice. Tensions persist around the disappeared and truth-finding commissions in finding the correct balance between the pursuit of justice and the need for truth, reconciliation and peace.

3. Mechanisms currently available to promote reconciliation and reparations

3.1. The European Court of Human Rights

27. A number of human rights protected under the ECHR can be relevant in a conflict or post-conflict scenario, including the right to life (Article 2 ECHR), freedom from torture or inhuman or degrading treatment or punishment (Article 3 ECHR), the right to private, family life and the home (Article 8 ECHR), freedom of expression (Article 10 ECHR)[48], the right to an effective remedy for a violation of human rights (Article 13 ECHR), and the right to peaceful enjoyment of possessions (Article 1 of Protocol 1 ECHR) – amongst others that may apply in particular situations.

28. It is well established under the case-law of the European Court of Human Rights that States are under an obligation to undertake adequate investigations in relation to alleged violations of the right to life (Article 2 ECHR) and the prohibition of torture (Article 3 ECHR) and that this obligation should include the possibility of identifying and punishing those responsible for such violations.[49] There are specific requirements as to the quality of investigations. One complexity in conflict situations is that different standards can apply depending on whether a person in a conflict is killed by state actors or non-state actors, which can create difficulties when seeking solutions addressing complex situations in the aftermath of a conflict. The Council of Europe guidelines on eradicating impunity for serious human rights violations set out what is required by way of investigations and provide that "States should take all appropriate measures to establish accessible and effective mechanisms which ensure that victims of serious human rights violations receive prompt and adequate reparation for the harm suffered. This may include measures of rehabilitation, compensation, satisfaction, restitution and guarantees of non-repetition".[50]

29. Inter-state cases that have been brought, or individual applications relating to conflict-type situations, can help to address and recognise specific human rights violations and award just satisfaction where appropriate. However, judgments in such cases are notoriously difficult to execute.[51] There are some concerns that the nature of this litigation does not necessarily lend itself to a holistic settlement towards comprehensive reconciliation and reparations following a conflict. Moreover, the restrictions in the types of remedies available can be unsatisfactory to the communities affected, and the lack of enforcement of remedies can lead to revictimization of the applicants as well as creating an affront to the rule of law and the principle of the effectiveness of the law. I have set out below some of the more well-known cases relating to post-conflict situations by way of illustration of how the Court can be used, with differing degrees of success in terms of implementation.

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[48] The Strasbourg Court has found that seeking historical truth is an element of the freedom of expression (Article 10 ECHR) *Monnat v. Switzerland*, Application No. 73604/01, judgment of 21 September 2006, at para 57: "it is an integral part of freedom of expression to seek historical truth, but considers that it is not called upon to settle the issue of the role actually played by Switzerland in the Second World War, which is part of an ongoing debate among historians". The Court places a positive obligation on States to provide individuals with an effective and accessible procedure allowing them to access their personal files within a reasonable timeframe (*Haralambie v Romania*, Application, n° 21737/03, judgment of 27 October 2009).

[49] *McCann and other v. The United Kingdom*, Application No. 18984/91, judgment of 27 September 1995, at para 161. Importantly, the Court has made it clear that a State practice of violating human rights cannot protect individuals from prosecution for having committed a crime. *Streletz, Kessler and Krenz v. Germany*, Application No. 34044, 35532/97 and 44801/98, judgment of 22 March 2001, at para 80 and 87, where the Court held that criminal proceedings should be capable of being brought against those who committed crimes under a former regime, and that "a State practice such as the GDR's border-policing policy, which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Article 7 § 1 of the Convention.".

[50] Eradicating impunity for serious human rights violations, Guidelines adopted by the Committee of Ministers on 30 March 2011, at paragraph XVI.

[51] See, for example, Resolution 2494 (2023) of the Parliamentary Assembly on the Implementation of Judgments of the European Court of Human Rights, at paragraph 6.

30. Inter-state cases often involve displaced people. This has been the case for example with the cases flowing from the conflict between Armenia and Azerbaijan from the early 1990s.[52] The cases of *Chiragov v Armenia* (2015) and *Sargsyan v Azerbaijan* (2015) concern the impossibility for displaced persons to gain access to their homes and properties in Nagorno-Karabakh and surrounding areas and the lack of an effective remedy for such displaced people.[53] Despite recent efforts towards agreement to a memorandum of understanding relating to the payment of just satisfaction to the individuals concerned (possibly via a Council of Europe bank account), signature of such agreements and payments of just satisfaction remain outstanding, over 30 years since the people were displaced and 8 years since the judgments in these cases. Further inter-state and individual applications have been made to the ECHR in respect of a more recent conflict between the two countries in 2020 which again caused many deaths and serious concerns remain as to the respect of human rights in the region. [54]

31. Concerningly, the situation of people living in Nagorno-Karabakh has worsened in 2022-2023 with severe restrictions on the movement of people, food and other goods to and from the area.[55] Recent interim measures of the ECHR issued in 2022, calling on Azerbaijan to ensure safe passage through the Lachin Corridor of seriously ill persons in need of medical treatment in Armenia and others who were stranded on the road, have not been respected. Such non respect of the interim measures of the ECHR, risking the well-being and lives of those living within the Council of Europe geographic space, raises serious concerns for the feasibility of solutions based on the rule of law and respect for the values of the Council of Europe.

32. The break-up for former Yugoslavia in the 1990s involved a number of conflicts, with ethnic cleansing, war crimes, genocide, huge numbers of deaths, massive displacements of population across the new borders, as well as complex issues relating to property ownership, including following the splitting up of national banks. The countries of the region only became members of the Council of Europe following the conflict. The ECHR has nevertheless been of some use in addressing issues flowing from the conflict, although this has taken time. For example, issues relating to the bank accounts and savings of individuals following the break-up for the former Yugoslavia, have been eventually resolved following judgments of the ECHR,[56] as have issues relating to individuals who lost their residence rights after Slovenia's declaration of independence,[57] or cases concerning the pension rights of those who were displaced following the war[58]. Recourse to the ECHR has also been used in cases relating to individuals accessing indemnity schemes for war damages.[59] Cases relating to investigations into deaths and war crimes during the conflict, the fairness of related proceedings, and the treatment of detainees have not been without difficulty.[60] However significant recent progress has also allowed the supervision of many of those cases to be closed. In other cases friendly settlement has been a useful tool in resolving issues.[61] Despite huge progress since the 1990s, however, some tensions remain in

[52] In accordance with the Alma-Ata principles following the dissolution of ex-USSR, Nagorno-Karabakh was recognized as part of Azerbaijan. In 1991, Armenian separatists took control of the region, leading to an armed conflict between Armenia and Azerbaijan. Following this conflict, Armenia occupied parts of Azerbaijan for a number of decades – including Nagorno-Karabakh and surrounding areas. The conflict caused tens of thousands of deaths and hundreds of thousands of displaced persons, with victims on both sides.

[53] Violations of the right to peaceful enjoyment of possessions (Article 1 of protocol 1 ECHR), the right to private and family life (Article 8 ECHR) and the right to an effective remedy (Article 13 ECHR).

[54] A renewed armed conflict in 2020 again caused many deaths and led to the return of some of the lands to Azerbaijan, albeit with the presence of Russian peacekeepers to protect the local population and to ensure the supply of good and food through the Lachin corridor, linking the Nagorno Karabakh area with Armenia.

[55] Developments this year have led to significant concerns about the humanitarian and human rights situation of the people living in Nagorno-Karabakh. Most recently, repeated military interventions by Azerbaijan to take effective control over the local area have led to heightened concerns about the welfare of the local population and the risks of abuses of international human rights law, in particular relating to ethnic cleansing, hate speech, destruction of cultural heritage, forced displacements and the use of force against civilian populations. See Parliamentary Assembly of the Council of Europe, Humanitarian consequences of the conflict between Armenia and Azerbaijan, 13 September 2021; The Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, raised concerns about the Trophy Park in Baku, Azerbaijan, which staged war scenes of Armenians soldiers injured or being killed, stating that "*such staging can only reinforce persistent hostility and widespread hate speech and encourage manifestations of intolerance".* Azerbaijan: efforts to confront the past must become the priority to foster reconciliation and lasting peace. 27th April 2021.

[56] *Alisic and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and North Macedonia* (2014); *Kovacic and Others v. Slovenia* (2008), *Suljagić v. Bosnia and Herzegovina* (2009).

[57] *Kurić and Others v. Slovenia* (2012), and *Anastasov and Others v. Slovenia* (2016).

[58] *Šekerović and Pašalić v. Bosnia and Herzegovina* (2011), *Grudić v Serbia* (2012).

[59] *Čolić and Others v. Bosnia and Herzegovina* (2008), *Đurić v. Bosnia and Herzegovina* (2015).

[60] *Rodić and Others v Bosnia and Herzegovina* (2008), *B and Others v Croatia* (2015), *Jularić v. Croatia* (2011), *Krznarić v. Croatia* (2011), *Palić v Bosnia and Herzegovina* (2011); *Maktouf and Damianović v Bosnia and Herzegovina* (2013), *Jelić v Croatia* (2014), *Sanader v Croatia* (2015), *Mijević v Croatia* (2020), *Baljak v Croatia* (2021).

[61] *Paic and Others v Croatia*, *Schubert Tapsić and Tepsić v Croatia* (2013).

the region.[62] For example, Bosnia's constitution and electoral system continues to be based on specific votes for the three ethnic constituent peoples to the exclusion of others and contrary to numerous judgments of the European Court of Human Rights.[63] Other cases are still pending implementation, such as the inability for members of the armed forces of Yugoslavia to regain possession of their pre-war apartments in the Federation of Bosnia and Herzegovina.[64]

33. The enforcement of ECHR judgments can prove difficult in separatist regions. For example, cases relating to the autonomous region of Transnistria in Moldova have been difficult to enforce. Following a conflict in the early 1990s, the separatist local government has been supported by Russia. Many human rights issues have arisen during the tensions. Applications by individuals before the ECHR in respect of human rights violations by the Transnistrian authorities have tended to be brought against Moldova (as the country with territorial jurisdiction), as well as Russia (who the Court has generally found to have effective control over the region given that the Transnistrian authorities rely militarily, economically and politically on Russia).[65] However enforcement has proven difficult, not least given the necessity of involving Russian, Moldovan and local authorities in finding a solution to often complex issues. Many of these cases, for example the *Catan* case relating to the Latin-script schools, remain unexecuted.

34. More wide-ranging inter-State cases can often be difficult to resolve, not least given the complexity and scale of the issues, differences of opinion as to how best to resolve them (e.g. between restitution or compensation in respect of property rights), and community tensions which can act as disincentives to finding a workable and practical solution. This can lead to perverse situations where there is little interest in resolving the plight of victims because this feeds into a particular conflict narrative, or a maximalist and unachievable solution is insisted upon, again because perpetuation of the conflict through a dispute on solutions maintains a particular conflictual narrative and political goals. Whilst the plight of victims is often cited as being central to such arguments, such an approach rarely delivers effective solutions for victims in a timely manner and is often a cause for renewed conflict. Finding solutions that are fair, promote reconciliation, respect the principles of justice and human rights and safeguard peace can often feel illusory in such circumstances.

35. The *Cyprus v Turkey* inter-state case (2001), covered a significant number of human rights violations flowing from the Turkish military intervention in Cyprus in 1974 and the subsequent division of the territory, including investigations into missing persons and the right to life (article 2 ECHR), property rights (Article 1 of Protocol 1), and multiple rights affecting people living in enclaved areas (e.g. Karpas peninsula/Karpasia). Other individual cases have also related to missing or killed persons,[66] and property rights.[67] More recent issues relate to the difficulties in administering a divided territory,[68] or continued tensions[69]. Whilst many human rights violations were found in the initial inter-State judgment of 2001, it was not until well over a decade later, in 2014, that the Court issued its just satisfaction judgment in which it awarded 90 million euros to be paid from Türkiye to Cyprus, to then be subsequently distributed by the Cypriot Government to affected individuals. A State has 3 months to pay just satisfaction, however, nearly a decade after the judgment, and coming up to 50 years since the initial military intervention, Türkiye has still not paid these damages. These judgments, however, are only part of a wider picture relating to the conflict, including human rights abuses pre-dating 1974 and negotiations led by the UN to find a lasting solution.[70] Work to implement those cases has been slow but has seen some results, with elements involving the progress of the Commission on Missing Persons and the Immovable Property Commission. However, the piecemeal nature of the ECHR's consideration of the totality

[62] In Kosovo, tensions remain between different ethnic groups and there continue to be different approaches to recognition with a minority of Council of Europe member States, including Serbia, still not recognising Kosovo. United Nations Security Council, CS/15268, 27 April 2023; PACE, The situation in Kosovo and the role of the Council of Europe, Council of Europe, Resolution 2094, January 28, 2016, §1; MIJATOVIĆ Dunja, Council of Europe Commissioner for Human Rights, "Confronting the past and delivering justice are the only ways forward to reconciliation in the former Yugoslavia".

[63] *Sejdic and Finci v Bosnia and Herzegovina*.

[64] *Đokić v Bosnia and Herzegovina* (*2010) and Mago v Bosnia and Herzegovina* (2012).

[65] *Ilaşcu and Others v Moldova and Russia* (2004), *Catan and Others v Moldova and Russia* (2012), *Pisari v Moldova and Russia* (2015), *Mozer v. Moldova and the Russian Federation* (2016), *Sandu and Others v. Moldova and Russia* (2018), and *Iovcev and Others v. Moldova and Russia* (2019).

[66] *Varnava and Others v. Turkey* (2009).

[67] *Loizidou v Turkey* (1996), *Xenides-Arestis v Turkey* (2005 and 2007); *Sofi v. Cyprus* (friendly settlement) (2010).

[68] *Güzelyurtlu and others v. Cyprus and Turkey* (2019), which related to parallel investigations into murders from 2005; *Aziz v Cyprus* (2004) concerning electoral rights.

[69] *Isaak v. Turkey and Solomou v Turkey* (2008).

[70] A number of human rights abuses against the Turkish minority in the 1960s and 1970s led to tensions between the two communities. However, litigation brought before the ECHR in respect of human rights abuses by Cyprus against the Turkish minority before 1974 has been ruled inadmissible. Despite numerous efforts to find a durable solution using the good offices of the UN, this has, as yet, been unsuccessful (See, for example, the 2004 Annan Plan which was rejected by the Greek Cypriot side, or the 2017 Crans-Montana negotiations.)

of the issues involved means that it is but a partial tool in considering what an overall package might look like for addressing the situation.

36. In the *Georgia v Russia I* inter-state case concerning Georgian nationals arrested, detained and expelled from Russia as part of a centralised policy in 2006-2007, the ECHR found a violation in a judgment of 2014 and in 2019 awarded just satisfaction of 10,000,000 euros for the damage suffered by at least 1,500 Georgian nationals. The implementation of that judgment has proved very problematic and the just satisfaction has still not been paid.

37. Both *Cyprus v Turkey* and *Georgia v Russia I* concern an inter-state case in which the Court first found violations in a merits judgment, and only many years later awarded just satisfaction in the form of a just satisfaction judgment. It could be useful to explore whether, following a merits judgment in inter-State cases, a more mediated or friendly settlement approach might be a useful tool in addressing reparations or just satisfaction in such future cases. Such a friendly settlement approach might yield a more enforceable settlement, with recourse to a wider range of potential reparation tools that might better address the real needs of the victims.

38. The *Georgia v Russian II* inter-state case relates to the 2008 conflict concerning the break-away regions of South Ossetia and Abkhazia in Georgia.[71] The ECHR considered that Russia had effective control after 12/8/2008 (ceasefire agreement) given its participation in the conflict, and for the ensuing period given the dependence of the administrations of South Ossetia and Abkhazia on the Russian Federation. The Court found violations of the right to life (summary executions and a lack of investigation for killings), mistreatment of prisoners of war, the displacement of civilians and the destruction of property. In its just satisfaction judgment of 2023, the Court awarded just satisfaction sums for the different violations found, that in the future will have to be distributed by the Georgian State to the individual victims concerned. However, as for the previous inter-State case relating to Russia, implementation will be difficult, even more so following Russia's expulsion from the Council of Europe. There are also a number of individual cases pending before the Court relating to this conflict, as well as to similar conflicts in the early 1990s, as well as a fourth inter-state case, *Georgia v Russia IV*, concerning the administrative borders between these territories.

39. Friendly settlement, combined with monitoring visits, can be a useful means of resolving a potential inter-State ECHR case even before a merits judgment. For example, the *Georgia v Russia III* inter-state case concerned the detention of four Georgian children by the de facto authorities of South Ossetia. Following a visit by the Commissioner of Human Rights to the region, the children were released and the case was struck out of the list at the request of the Georgian Government. More might be done to explore how best to resolve inter-State issues through friendly settlement and/or the use of other Council of Europe mechanisms.

40. The number of inter-State cases pending before the ECHR has been growing significantly in recent years and is now occupying a significant amount of Court time, not least given the complexity of the issues. One of the most obvious examples relates to successive violations by Russia, of human rights of people in Ukraine. Since Russia's illegal annexation of Crimea in 2014, there have been numerous human rights violations such as a crack-down on free speech, illegal kidnappings, displaced persons and the persecutions of Crimean Tatars.[72] This was shortly followed by the outbreak of violence in the Donbass and Luhansk regions between Russian-backed separatists and the Ukrainian forces. Despite the involvement of the OSCE and the Minsk Agreements, conflict continued leading to thousands of dead and wounded as well as millions of displaced persons. The downing of Malaysian Airlines flight MH17 by Russian-backed separatists is but one of many atrocities and human rights violations committed, including arbitrary arrests, ill-treatment, torture, and summary executions[73]. In February 2022 Russia's full-scale military invasion of Ukraine led to vast numbers of casualties, millions of refugees, destruction of the environment, war crimes, possible genocide and the devastation of civilian infrastructure. Russia was consequently expelled from the Council of Europe. The devastation is vast and growing, as is the human loss. A register of damages is being established, but significant tools will be required to provide remedies and reparations in due course.[74] Many Ukraine-Russia inter-State cases as well as thousands of individual applications are pending before the ECHR dealing with

[71] Following the armed conflicts between the Georgian authorities and Russian-backed separatists in South Ossetia (1990-1993) and Abkhazia (1992-1994), tensions remained, with issues of reparations, displaced persons, and autonomy proving contentious. Further conflict ensued in 2008, when Russia intervened militarily in Georgia, to support forces in South Ossetia against the Georgian military. See, Tracey C. German, Benjamin Bloch, Le conflit en Ossétie du Sud: la Géorgie contre la Russie, Politique Étrangère, 2006/1 (Printemps), 2006.

[72] These events are the subject of a number of joined *Ukraine v Russia* inter-State applications before the ECHR.

[73] These events are also the subject to a number of joined Ukraine v Russia inter-State applications before the ECHR.

[74] Committee of Ministers of the Council of Europe, Resolution CM/Res(2023)3 establishing an enlarged partial Agreement on the Register of Damages caused by the aggression of the Russian Federation against Ukraine, 12 May 2023.

various aspects of the conflict and tensions over the last nine years. As this is the subject of a specific number of Reports of the Assembly already underway, I will not focus on this here. However, the scale of the damage is so considerable that bespoke mechanisms will almost inevitably be required, in addition to Court judgments.

3.2. Other CoE Mechanisms – the role of the political organs

41. Member States of the Council of Europe are committed to "the pursuit of peace based upon justice and international co-operation".[75] Democratic security is one way that the Council of Europe contributes to the pursuit of peace and this has long been a theme of Council of Europe work. Democratic security rests to a great extent on compliance with democratic processes, human rights and the rule of law as a means of guaranteeing security in the region.[76]

42. Council of Europe monitoring mechanisms constitute a set of tools to improve these safeguards within member States and thus to provide a level of guarantee for States and citizens that human rights will be respected and that mechanisms exist to enforce those rights, including through seeking reparations and remedies where necessary. There are many such monitoring mechanisms including the Venice Commission for democracy through Law, the Group of States Against Corruption (GRECO), the Group of Experts Against the Trafficking in Human Beings (GRETA). The reports of these bodies can constitute helpful indicators for respect for democracy, the rule of law and human rights and can help to promote durable solutions to protect citizens' rights. The reports of the Parliamentary Assembly, and in particular of the Monitoring Committee, can also be useful in highlighting concerns and in encouraging States to respect their obligations. The Commissioner for Human rights similarly performs a crucial role as watchdog for the Organisation and can help to promote solutions to complex post-conflict challenges.

43. The Secretary General of the Council of Europe can also perform a vital role in seeking to resolve disputes and differences between States to encourage a peaceful solution, deploying a range of measures to facilitate dialogue. Groups of Ambassadors of the Committee of Ministers can also be established to promote dialogue on particularly challenging issues and member States can engage in high-level dialogue. More specifically, the Organisation has taken specific action to support work towards compensation and reparations in specific instances. For example, recent discussions in relation to the Russian aggression against Ukraine have focussed on how to enforce the duty of an aggressor State to provide reparation for their internationally wrongful acts, including the setting up of a Register of damage. Current discussions are centring around the financing of reparations, including the confiscation of Russian assets and countermeasures.

44. I should also mention the existence of others tools encouraging the peaceful settlement of disputes, such as the European Convention for the Peaceful Settlement of Disputes.[77] Whilst the remit of this Convention is limited to situations occurring after the entry into force of the Convention in respect of the relevant States, and despite the limited number of ratifications, it nonetheless provides a mechanism for the settlement of disputes, whether through recourse to the ICJ, the use of conciliation, or recourse to arbitration. A revision of this Convention to enable it to be used in a broader set of circumstances and to make it more appealing to States could perhaps be pursued.

45. A number of tools thus exist to promote dialogue and the finding of solutions. However, as set out in a recent Report of the Parliamentary Assembly, a more developed common democratic security policy is needed, which should include elements for enhancing accountability and for enforcing the duty to make reparations.[78] A more structured approach to promoting and supporting reconciliation and reparations within the Council of Europe framework could bring great value to the Organisation, its member States and peace in Europe.

3.3. Other mechanisms available to Council of Europe States

46. There are both legal and political tools available to member States at the international level. The avenues available in a given case may vary depending on the type of issue. Recourse to the International Court of Justice (ICJ) can be possible, depending on the nature of the dispute and whether or not both States accept the jurisdiction of that Court (whether on an individual basis or due to a jurisdictional clause in a given

[75] Preamble to the Statute of the Council of Europe.
[76] See, paragraph 4 of the draft Report of the Parliamentary Assembly of the Council of Europe, "The role of the Council of Europe in preventing conflicts, restoring credibility of international institutions and promoting global peace", Rapporteur Lesia Vasylenko (Ukraine, ALDE).
[77] Ratified by Austria, Belgium, Denmark, Germany, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Slovakia, Sweden, Switzerland and the United Kingdom.
[78] *Ibid* e.g. paragraph 21.

treaty). The Genocide Convention[79] is one such example as is the UN Convention for the Elimination of All forms of Racial Discrimination.[80] Member States have also brought cases relating to maritime delimitation[81].

47. For example, in 2021 both Armenia and Azerbaijan brought cases against each other before the ICJ alleging breaches of the UN Convention for the Elimination of All forms of Racial Discrimination. In particular, there are accusations of ethnic cleansing, glorification of racist acts, hate speech, destruction of cultural property and history, as well as discrimination. These cases are pending. In February 2023 the ICJ issued provisional measures requiring Azerbaijan to "take all measures at its disposal to ensure unimpeded movement of persons, vehicles and cargo along the Lachin Corridor in both directions."[82] Notwithstanding the clear international legal obligation to comply with provisional measures of the ICJ, the Lachin road has remained substantially blocked. In light of this, there are obvious concerns that such tools are not effective without respect by member States for the rule of law or means to seek to enforce these orders.

48. In Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*)[83], the ICJ found that whilst most acts committed by Serbian forces were not accompanied by genocidal intent, the Srebrenica massacre, committed by the army of Republika Srpska, was a genocide and that Serbia and Montenegro had violated its obligation to prevent the genocide of Srebrenica. Moreover, in failing to adequately cooperate with the ICTY (e.g. relating to the transfer of Ratko Mladić), Serbia and Montenegro was failing in its obligation to punish those responsible for genocide. In the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), whilst certain material elements of the crime of genocide were found, the ICJ concluded that the genocidal intent was lacking given that the crimes committed by the Serbs against the Croats were aimed at the forced displacement of the population rather than its physical or biological destruction. A genocidal intent on the part of Croats against Serbs was also not found.[84]

49. Specific courts and tribunals can also be of assistance in seeking justice for past wrongs. For example, the International Criminal Court can have jurisdiction to prosecute war crimes and other international crimes where the host State is unable or unwilling to do so.[85] The International Criminal Tribunal for ex-Yugoslavia (ICTY) is another obvious example of a situation where the gravity of the crimes was such that an international tribunal was considered to be necessary to ensure that a certain level of justice was done and war crimes and other crimes prosecuted in order to address the wrongs of the past and for the communities and countries concerned to reconcile. The ICTY was established by the UN Security Council, to investigate and prosecute war crimes and other international crimes. The ICTY recognised certain acts as genocide, notably against the Muslims of Srebrenica,[86] and determined the existence of a number of war crimes, including systematic massacres of the civilian population, summary executions, extermination, ethnic cleansing, collective and systematic rape, torture, forced labour, inhuman treatment in concentration camps and detention centres, blocking humanitarian aid, sieges, indiscriminate bombardments of towns and villages and hostage-taking of UN soldiers.

50. Recourse to international courts or tribunals can thus be a useful tool in seeking to determine contentious issues from the past to enable states to address the past and to work towards reconciliation. However, recent ICJ preliminary measures, which are binding as a matter of international law, have not been respected by Russia or by Azerbaijan, questioning the adherence to the rule of law and to the peaceful resolution of disputes by certain States in the region.

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[79] For example, the Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (*Ukraine v. Russian Federation*) application pending before the ICJ in which Ukraine asks the Court to rule that Russia's allegations of genocide in Luhansk and Donetsk are unfounded. Notwithstanding the clear preliminary measures ordered by the ICJ requiring Russia to suspend its military operations in the territory of Ukraine, Russia has failed to comply with these legally binding obligations.

[80] See, for example, the *Ukraine v Russia* application pending before the ICJ concerning alleged violations by Russia of the Convention against terrorist financing and the UN Convention for the Elimination of All forms of Racial Discrimination, relating to the situation in Crimea and in Eastern Ukraine.

[81] For example, recourse was made to the ICJ to help in resolving the territorial disputes between Romania and Ukraine relating to islands in the Black Sea. *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*

[82] Order of the ICJ of 22 February 2023.

[83] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), judgment of 26 February 2006.

[84] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment of 3 February, 2015.

[85] For example, the International Criminal Court issued arrest warrants in December 2022 for three men from South Ossetia allegedly responsible for war crimes during the 2008 conflict.

[86] ICTY, The ICTY remembers: the Srebrenica genocide, 1995-2015.

51. In terms of political tools, the OSCE and the UN are the two principal organisations engaged in conflict prevention in the region and have developed tools related to reconciliation and reparations. States themselves also engage directly, as does the EU. The OSCE is the principal regional international organisation focussing on conflict resolution and dispute management. It has several mechanisms for conflict resolution, including OSCE monitoring missions for collecting impartial data on conflicts[87] and conflict resolution mechanisms such as the Trilateral Contact Group on Ukraine, mediation mechanisms in Georgia and Moldova, as well as the Minsk Group in relation to Armenia and Azerbaijan.[88] Other potential OSCE conflict resolution tools include the Valletta Mechanism[89] and the OSCE Conciliation Commission.[90] There is no prescribed OSCE-mechanism for conflict resolution *per se* as the OSCE tends to react to each crisis individually, responding to the political will of the parties to the conflict and other countries involved. However, these political tools tend to focus on immediate resolution of disputes rather than on longer term plans for reconciliation and reparations. Thus, whilst the OSCE has particular expertise on conflict resolution, the Council of Europe's expertise lies in justice, human rights and the rule of law – and it is with an eye to this expertise that we might consider whether the Council of Europe could, or indeed should, be doing more in relation to reconciliation and reparations, once the immediate need for conflict resolution has been addressed.

52. The United Nations obviously has a number of tools for conflict resolution, and in specific examples has developed particular tools aiming at reparation mechanisms. Resolutions of the UN Security Council, or the UN General Assembly, are usually required for the establishment of any such a mechanism. One well-developed example is the United Nations Compensation Commission (UNCC) which was established by UN Security Council Resolutions to consider and administer compensation claims following Iraq's invasion of Kuwait 1990-1991 and Iraq's consequent liability under international law for any direct losses, damage or injury "as a result of its unlawful invasion and occupation of Kuwait"[91]. The UNCC was wound up in 2022 having completed its functions. The United Nations Register of Damage caused by the construction of the wall in the occupied Palestinian territory (UNRoD) is a subsidiary organ of the UN General Assembly, created by an UNGA Resolution. UNRoD records the damage caused to all natural and legal persons by the building of the wall. This follows the obligation for Israel to compensate natural and legal persons, as set out in the Advisory Opinion of the ICJ.[92] Individual resolutions of UN bodies can also support the right of victims to compensation.[93]

53. Other bespoke tools have been developed in respect of specific States, such as those in the Balkans, in order to address reconciliation, truth, and justice and were supported by regional initiatives, with participation of the UN, the OSCE and the EU. However, civil society has highlighted that many of these initiatives lacked a focus on psychological support for victims; memorials and symbolic monuments; the inclusion of women, minority groups and victims in the decision-making processes developing reconciliation and reparation programmes; and domestic indemnity mechanisms for victims.[94]

54. Finally, the possibility of bilaterally negotiated solutions should not be ignored. For example the UK and the US negotiated with Libya to obtain compensation for victims of the Lockerbie bombing. However other efforts have been less successful in obtaining compensation for Libyan-sponsored terrorism.[95]

4. Preliminary conclusions: The case for a new mechanism under the auspices of the Council of Europe to assist in resolving past conflicts and building a common peaceful future

55. The topic of reconciliation and reparations in post-conflict situations can be a highly sensitive matter requiring careful political as well as legal expertise, in order to find solutions that are fair, respect the principles of the rule of law, justice and human rights, promote reconciliation, and safeguard peace.

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[87] OSCE Special Monitoring Mission to Ukraine.

[88] OSCE Minsk Group: Lessons from the Past and Tasks for the Future, Philip Remler, Richard Giragosian, Marina Lorenzini, Sergei Rastoltsev.

[89] The Valletta mechanisms entails one or more individuals being selected by the OSCE Secretariat's Conflict Prevention Centre (CPC), and an OSCE body being set up for the peaceful settlement of a conflict.

[90] The OSCE Conciliation Commission envisages a register of conciliators who could seek to bring about a resolution on mutually agreeable terms. See, Christina Stenner, Understanding the Mediator: Taking Stock of the OSCE's Mechanisms and Instruments for Conflict Resolution.

[91] Resolution 687 (1991), at paragraphs 16 and 18.

[92] *Legal consequences of the construction of a wall in the occupied Palestinian territory*, International Court of Justice, Advisory opinion of 9 July 2004 paragraph 152.

[93] For example, in 2015, the UN General Assembly adopted a resolution concerning respect for the rights of the 400,000 persons displaced following the conflicts relating to South Ossetia and Abkhazia, in Georgia, and the need to preserve their property rights.

[94] Commissioner for Human Rights of the Council of Europe, Report, Post-War Justice and Durable Peace in the Former Yugoslavia, Round-Table with human rights defenders, Sarajevo, 18 March 2012.

[95] See, for example, House of Commons Library Paper, Compensation for Victims of Libyan-sponsored IRA terrorism.

56. The Council of Europe has some tools to facilitate finding solutions to post-conflict disputes – including through political discourse within the Parliamentary Assembly and within the Committee of Ministers, and through the jurisdiction of the European Court of Human Rights. A significant amount of time can be spent, including within the Council of Europe, on conflict or post-conflict matters that can sometimes seem to be intractable. However a failure to adequately address such matters can hinder peace and prosperity in Europe and thus negatively affect all of us. The situation in Nagorno-Karabakh is perhaps one of the best examples of a need for improved tools to address reconciliation, reparations and redress following conflicts. Whilst the 1990s conflict arose before either State was a member of the Council of Europe, the continued tensions since then have arisen since both States are members of this Organisation, and could perhaps have been avoided by improved mechanisms for resolving disputes by peaceful means. Indeed, Azerbaijan has indicated that the military action in 2020 followed the lack of a satisfactory peaceful resolution in the intervening decades. The current situation has led to renewed violations of human rights and concerns being raised that ethnic cleansing or genocide are a real risk for the local population.[96]

57. There are genuine tensions between the imperative of peace and reconciliation; the legal obligations on States to pay reparations for internationally wrongful acts for which they are responsible; the duty on States to provide victims of human rights violations with an effective remedy; the practical challenges of agreeing to a package of reconciliation and reparation measures; and the difficulties in delivering effective remedies to individual claimants. Collecting data on the extent of civilian damage is important to ensuring individual reparations for human rights violations caused by a conflict. However, especially where such damage is very significant, creative solutions may be needed to ensure that victims receive remedies, that reparations are realisable, and that solutions are not likely to be a catalyst or pretext for further conflict.

58. Whilst respect for the rule of law necessarily needs to be maintained, the principle of the effectiveness of the law is crucial and the enforcement of remedies or of settlements needs to be ensured. Awarding victims remedies that are unenforceable merely serves to revictimize these individuals. It might therefore be useful to explore whether better solutions can be found that respond to the needs of the victims, respect the rule of law, promote reconciliation and redress, and which are also achievable and enforceable. Reparations therefore may need to be accompanied by other measures, including community-level projects, truth and reconciliation projects, projects aimed at mutual economic cooperation and prosperity, and an adequate communications element to explain the consequences of war and the justification for any reparations.

4.1. The case for a mediated process under the auspices of the Council of Europe

59. There is a strong case for an improved process under the auspices of the Council of Europe, to promote reconciliation and reparations in relation to conflicts between Council of Europe member States. It is only by addressing these issues that we can move forward towards peaceful cooperation for the future. Improved tools for achieving reconciliation and resolving reparations for past conflicts would complement the current drive for an improved democratic security policy, with a particular focus on accountability, respect for international law, and reparations. Such a mechanism could, for example, be engaged where a State has committed an internationally wrongful act, such as an act of aggression, State-sponsored terrorism, or widespread human rights violations against a particular population.

60. Whilst Courts can play a vital role in finding just solutions, often a court with jurisdiction is not available (e.g. due to State immunity) or is unable to fully address the overall complexity of the problem (for example due to its remit or limits of the available remedies). In addition there are often challenges with enforcing Court judgments. Whilst efforts should be pursued to encourage States to accept the compulsory jurisdiction of relevant international tribunals such as the International Court of Justice or the International Criminal Court, it is additionally worth pursuing alternative mechanisms for improving the peaceful resolution of disputes.

61. The European Court of Human Rights can be a useful tool in addressing specific complaints and in providing remedies for human rights violations occurring during conflicts between Council of Europe member States. However, it is a limited tool in achieving reconciliation and reparation following a conflict. Firstly, it does not allow for an overall or holistic approach to reconciliation and reparations assessment (being restricted to specific human rights violations, with a particular focus on the responsibility being attributable to State actors). Secondly, it has a restrictive array of remedies available to it, – it does not, for example, propose performance

[96] Ocampo Opinion; Professor Mendez preliminary report.

of specific acts designed to improve reconciliation or to promote transitional justice.[97] Thirdly, its just satisfaction awards in complex inter-State cases are notoriously difficult to enforce. There is thus a strong case for a more effective and more adaptive mechanism for resolving inter-State disputes following a conflict between Council of Europe member States, and for improving the enforcement of any awards.

62. Such a mechanism could be independent of any inter-State judgments of the ECtHR, in order to find a solution to issues of reconciliation and reparations, and could involve a mediator, appointed by the Council of Europe. The somewhat more creative solutions available in a mediation scenario can lend themselves to finding a workable and just solution, compared to the more restrictive, monetised tools that are available to Courts. I would propose that such a mechanism should automatically apply to matters within the geographic and temporal limits of the Council of Europe – i.e. where the relevant States were members of the Council of Europe at the relevant time. Whilst the Assembly necessarily needs to be aware of the history of its member States, an acceptable mechanism would probably need to relate to matters falling within the geographic and temporal scope of the Council of Europe. However, we need not necessarily exclude any mechanism established being used in respect of a situation that pre-dates one or both States' membership of the Council of Europe, in a situation where the use of the mechanism could promote peace and justice and could foster improved relations between Council of Europe member States. In such circumstances any eventual mechanism could potentially be used with the express consent of the parties concerned.

63. There is also scope to consider how a structured mediated process might support the role of the Court in inter-State cases by assisting in promoting friendly settlements, and finding reparations solutions that will be more readily enforced. Such tools could be used to facilitate a friendly settlement in an inter-state case. For example, it could be a prior requirement for States to attempt mediation before resorting to bringing a post-conflict inter-State case before the ECtHR. Additionally or alternatively, mediation could follow a merits ruling of the ECtHR in an inter-State case in order to find a mutually agreeable settlement as to reparations and remedies following the finding of a violation of Convention rights. Additionally, such tools could be used to facilitate the implementation of inter-State judgments where significant challenges remained following an ECtHR judgment.

64. I should note that I have not sought to focus on the current situation in Ukraine in this work. This is the focus of other reports under preparation in the Assembly, and specific mechanisms are being established to address this issue, such as the Register of damage. Moreover, that case is further complicated due to the exit of the aggressor, the Russian Federation, from the Council of Europe. As a result, tools to enforce any reparations would also necessarily need to consider the specific status of Russia as a third State. For these reasons, whilst this experience is highly interesting and instructive, it is perhaps not the principal focus of new tools for use between member States.

65. A mediated solution could help to resolve highly complex matters between States. A neutral third party may facilitate finding solutions and by looking holistically at a set of complex issues. A mediator could be chosen from a panel of international mediators or conciliators, perhaps from former Secretary Generals of the United Nations or the Council of Europe, or judges of international renown. The mediation could remain private for consideration by the parties for a certain period of time, to enable progress to be made before any efforts at making the findings public and trying to push forward a solution.

66. In order to facilitate such mediation work, it may be necessary to develop a set of standards for reparations, reconciliation and remedies. This could be a set of soft law standards. A one-size fits all approach is unlikely to be fruitful, but it could be useful to develop a selection of tools and good practices to be deployed in finding durable solutions for reconciliation and reparations. This could involve a broad, flexible framework within which a range of options and solutions might be possible. This should have the requisite flexibility and creativity to propose a just, workable solution for redress, reconciliation and reparations that could also be achievable and deliverable.

67. The real challenge for promoting a just and equitable settlement following a conflict lies in the enforceability and impact of any tools that are to be deployed. For example, there could be a greater or lesser obligation to submit to, and to cooperate with, such a mechanism. There are also important questions to consider as to the enforceability of the results of such a mechanism. Would the process be voluntary as between the States concerned, or should it be kick-started by either the Parliamentary Assembly or the Committee of Ministers? Should there be a duty to cooperate sincerely with the results of such a mechanism?

[97] Such as the broader approach taken by the Inter-American Court of Human Rights that has, for example, ordered the creation of a scholarship for transgender people (*Vicky Harnandez v Honduras*), or the erection of monuments and commemorative plaques to publicly recognise and better acknowledge the victims.

Or would the enforcement tools be more diplomatic and political? Should a stark failure to engage constitute a serious violation of the principles of the Organisation such as to potentially lead to suspension from the Organisation under Article 8 of the Statute of the Council of Europe? These are matters that would require careful reflection and consideration.

68. During this work I would like to explore six ideas (1) whether the European Court of Human Rights could benefit from a broader tool kit in proposing remedies and reparations that are better adapted to addressing the complexities of post-conflict situations and in particular inter-State cases; (2) whether the Council of Europe should develop an improved tool-kit and standards for reparations and reconciliation; (3) whether the Convention system could benefit from a more structured intervention of a mediator to help resolve complex cases as part of a facilitated friendly settlement process; (4) whether the Convention system could benefit from the intervention of a mediation after a merits judgment, perhaps using a broader tool kit, for finding the remedies and reparations that are best adapted to addressing the complexities of a given post-conflict situation (whether to help in reaching a just satisfaction judgment or simply as a tool for executing such judgments); (5) whether a more mediated or negotiated means of reaching a political settlement might help in addressing post-conflict situations and in securing greater buy-in from States and thus greater chance of enforcement; and (6) whether such a mediated or negotiated settlement could benefit from some teeth, in the form of political or other implications where a State were unreasonably to refuse to cooperate sincerely with the process and the proposed settlement.