

Justice Without Justiciability: A Doctrinal Critique of the Right to Justice in International Law

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Abstract: *International law often speaks of a right to justice, yet victims of violations still struggle to obtain effective, meaningful remedies. This article explains the gap as a problem of legal design, not only of politics or state capacity. It shows that the supposed right is usually derivative, since it depends on proof of a primary breach and on domestic enforcement. It then traces how standing rules, admissibility filters, and fragmented forums favour individual complaints and leave collective harm poorly addressed. The article analyses how attribution tests and standards of due diligence, illustrated by the cases of Velásquez Rodríguez, Osman, and Nicaragua, raise demanding factual thresholds and preserve wide discretion for States. It also examines why treaty bodies and review mechanisms rely on monitoring and persuasion, which weakens follow-up and enforcement. The article concludes that, in international law, the right to justice is best understood not as an autonomous and fully justiciable right, but as a mediated remedial entitlement whose enforcement remains structurally weak.*

Keywords: *Right to justice in international law; Effective remedy; Justiciability; State responsibility; Standing and admissibility.*

1. Introduction

The phrase *right to justice* has become a staple of international legal discourse. It appears in foundational instruments, treaty provisions, and policy guidance that assert a duty to provide an effective remedy and accountability.¹ Yet this rhetorical ubiquity coexists with persistent deficits of access to remedy and enforceable redress for victims of serious rights violations.² The paradox is therefore jurisprudential, not merely empirical. International law often recognises remedial entitlements. Yet it does not

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¹ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) arts 8 and 10; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) arts 2(3) and 14; UN Human Rights Committee, ‘General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, paras 10–11.

² Dinah L. Shelton, *Remedies in International Human Rights Law* (3rd edn, OUP 2015) 1–4; Philip Alston, ‘The Effectiveness of International Human Rights Monitoring’ (1991) 15 *Human Rights Quarterly* 332, 335–338; UNGA, ‘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’ (21 March 2006) UN Doc A/RES/60/147.

clearly identify the doctrines and institutions through which individuals can enforce those entitlements in practice.³

The article asks a focused question. Why does international law recognise a right to justice but deny it full justiciability? Here, justiciability means clear standing, or *locus standi*, accessible forums, and enforceable remedies. This formulation rejects one-sided explanations of the gap. Some explanations treat the gap as the result of absent political will, cultural resistance, or administrative weakness alone. These factors do matter. Empirical studies also confirm their importance. Yet they do not fully explain the problem. They do not explain why the legal structure of international law repeatedly gives wide discretion to State actors. Nor do they explain why doctrine leaves the basic conditions for remedies unclear.⁴

Methodologically, the article advances a doctrinal and institutional enquiry. It scrutinises the content of substantive obligations that bear on access to remedy, including duties to prevent, investigate, and repair. It analyses doctrinal tests that determine State attribution and State responsibility, with particular attention to standards of control and to due diligence thresholds.⁵ It traces the procedural choices that shape access to forums, focusing on standing rules, admissibility doctrines, and the predominance of individual communications procedures in many treaty systems. This article compares the principal international and regional supervisory regimes. It also examines the most important recent developments in their jurisprudence.⁶

The contribution is threefold. First, it gives a clearer doctrinal explanation of why remedial entitlements often remain non-justiciable. It does not treat the problem as the result of one single cause. Instead, it examines how attribution rules, operational discretion, and procedural fragmentation interact with one another. Second, the article places these doctrinal problems within broader institutional choices. It shows that supervisory mechanisms often adopt a managerial approach. They usually prefer persuasion and capacity building to coercive orders. This approach, in turn, strengthens doctrinal thresholds that protect States from enforceable

³ Dinah L Shelton, *Remedies in International Human Rights Law* (2nd edn, OUP 2005) 1–6.

⁴ Oona A Hathaway, ‘Do Human Rights Treaties Make a Difference?’ (2002) 111 *Yale Law Journal* 1935, 1935–2042; Beth A Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (CUP 2009) 364–369; Malcolm Langford, ‘The Justiciability of Social Rights’ in Malcolm Langford (ed), *Social Rights Jurisprudence* (CUP 2008) 3, 9–13.

⁵ *Velásquez Rodríguez v Honduras (Merits)* (1988) IACtHR (Ser C) No 4, [166]–[174]; *Osman v United Kingdom* (2000) 29 EHRR 245, [115]–[116].

⁶ UN Human Rights Committee, ‘General Comment No 31’ (n 1) paras 15–16; African Commission on Human and Peoples’ Rights, ‘Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa’ (2003) Doc/OS(XXX)247.

responsibility.⁷ Third, it argues that the right to justice is best understood not as a self-standing guarantee of redress but as a derivative and institutionally mediated framework of legal responsibility whose justiciability remains limited.

The limitations of the study are deliberate. The enquiry does not attempt an exhaustive empirical evaluation of compliance across every treaty regime, nor does it offer an institutional blueprint that would subordinate sovereignty to centralised enforcement. The aim is narrower and doctrinal. It seeks to demonstrate that improvements in access to remedy require legal reconstruction as well as political mobilisation, and to specify the doctrinal moves that are most likely to be effective and feasible within existing constitutional constraints of the international legal order.⁸

Illustrations of the doctrinal problem appear in familiar authorities. The Inter-American Court in *Velásquez Rodríguez* framed State responsibility for omissions by reference to due diligence,⁹ the European Court in *Osman* conditioned preventive duties on a known, real, and immediate risk;¹⁰ and the International Court of Justice in *Nicaragua* articulated a demanding effective control test for attribution.¹¹ These decisions show a clear problem. Courts often apply established doctrinal tests together. In doing so, they create serious barriers to redress. This happens even when the underlying normative commitments are clear.

The article proceeds as follows. Section 2 maps doctrinal formulations of the right to justice and distinguishes entitlement language from aspirational rhetoric. Section 3 frames justiciability as a doctrinal problem and examines the procedural structures that favour individualised claims. Section 4 assesses attribution and discretion as barriers to responsibility. Section 5 explains how institutional design channels supervision into managerial modalities. Section 6 analyses the remedial architecture and its limits. Section 7 situates competing explanations within the doctrinal frame. Section 8 draws together the doctrinal implications of the analysis by reframing justice as legal responsibility. The conclusion synthesises implications for doctrine and institutional design.

⁷ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995) 22–28; Martti Koskeniemi, ‘The Effect of Rights on Political Culture’ in Philip Alston (ed), *The EU and Human Rights* (OUP 1999) 99, 106–110.

⁸ Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press 2008) 231–236.

⁹ *Velásquez Rodríguez v Honduras* (n 5) [172]–[174].

¹⁰ *Osman v United Kingdom* (n 5) [116].

¹¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, [109]–[115]; *Velásquez Rodríguez v Honduras* (n 5) [172]–[177]; *Osman v United Kingdom* (n 5) [116].

2. The Right to Justice in International Law: Sources and Formulations

2.1 Normative Articulation

The international legal order contains recurring formulations that identify access to justice and an effective remedy as obligations of States. The International Covenant on Civil and Political Rights, for example, requires that any person whose Covenant rights are violated shall have an effective remedy, including reparation, and that States adopt legislative, judicial, and other measures to give effect to the rights recognised in the Covenant.¹² The Human Rights Committee has emphasised that the obligation to provide an effective remedy is central to the Covenant and that, without reparation, the duty in Article 2(3) is not discharged.¹³ At the level of political organs, the General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations in 2005, which elaborate forms of redress including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.¹⁴

These instruments register two distinct registers of normativity. On one register, the language is one of entitlement. Individuals are said to have a right to a remedy; victims are said to be owed reparation. On another register, the language is programmatic. Declarations and soft law instruments elaborate principles, recommend procedures, and identify remedial forms without establishing a single, uniform mechanism for securing individual claims against States. Practitioners and scholars have long remarked that the international corpus therefore combines binding treaty obligations with elaborated but non-binding guidance on implementation and remedy.¹⁵

2.2 Justice as a Derivative Right

A careful doctrinal reading shows that the frequently invoked “right to justice” rarely exists in the form of an autonomous, self-standing right able to be invoked independent of other substantive entitlements. In most texts, the right to a remedy is parasitic upon violations of primary rights. The ICCPR, regional human rights instruments, and the major inter-state and

¹² ICCPR (n 1) art 2(3).

¹³ UNHRC, ‘General Comment No 31’ (n 6) para 16.

¹⁴ UNGA Res 60/147 (16 December 2005) annex, paras 18–23.

¹⁵ See generally Naomi Roht-Arriaza, ‘Reparations Decisions and Dilemmas’ (2004) 27 *Hastings International and Comparative Law Review* 157; Shelton, *Remedies in International Human Rights Law* (n 3) 7–12; Alston ‘The Effectiveness of International Human Rights Monitoring’ (n 2) 345–348.

individual complaint procedures frame remedies as responses to breaches of other obligations. Accordingly, the right to an effective remedy operates in practice as a remedial corollary to a primary right rather than as an independent source of legal entitlement.¹⁶

This parasitic structure has doctrinal consequences. First, the availability of a remedy depends on the prior determination that a primary obligation exists and has been breached. Procedural thresholds such as admissibility rules, exhaustion of domestic remedies, and *ratione materiae* limitations then operate to restrict the set of situations in which the remedial guarantee becomes operative.¹⁷ Second, the remedial text often presumes a domestic locus for enforcement. International instruments commonly exhort States to provide effective domestic remedies and only secondarily conceive of international bodies as backstop actors.¹⁸ The result is a layered architecture in which the “right to justice” is guaranteed in principle but depends in practice for its operability upon other, often fragile, doctrinal and institutional predicates.¹⁹

2.3 Conceptual Clarification: Justice, Remedy, Accountability, and Enforcement

Precision of terms matters because conflation of different normative ideas encourages inflated expectations about legal effect. For present purposes, the following distinctions are useful. A remedy is the set of legal, administrative, or equitable measures by which a damaged legal interest is vindicated or made whole. Accountability is the process by which the responsible actor is identified and held to account. Enforcement denotes the capacity to translate a finding of responsibility into measures that coerce compliance or effect redress. Justice in this jurisprudential frame denotes an orientation that may include all three elements but must be analytically separated if one is to evaluate legal institutions. Recognition of a right to

¹⁶ For discussion of the remedial character of art 2(3) see J G Merrills, *Human Rights and International Law* (3rd edn, CUP 2013) 214–217; ICCPR (n 1) art 2(3); European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 (ECHR) art 13; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS TS No 36 (ACHR) art 25.

¹⁷ Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 302 (First Optional Protocol) arts 2, 5(2)(a); *Akdivar and Others v Turkey* (1996) 23 EHRR 143, [65]–[69].

¹⁸ ICCPR (n 1) art 2(3)(a)–(b); UNHRC, ‘General Comment No 31’ (n 6) paras 15–16.

¹⁹ See International Commission of Jurists, *The Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: A Practical Guide* (International Commission of Jurists 2018) xi–xv; Shelton (n 3) 17–23; Malcolm N Shaw, *International Law* (9th edn, CUP 2021) 1052–1056.

justice, therefore, does not, on its own, supply the mechanisms of accountability or the instruments of enforcement.²⁰

The case law of regional courts illustrates the gap between recognition and justiciability. The European Court of Human Rights has developed the doctrine that States must secure access to courts in practice and not merely in formal terms, a principle manifested in *Airey v Ireland*, where the absence of legal aid rendered access to a substantive remedy ineffective for the applicant.²¹ The Inter-American Court, in *Velásquez Rodríguez v Honduras*, proceeded from recognition of grave violations to articulate the State obligation to investigate and, where appropriate, to provide compensation; yet the remedies available depended upon the Court's limited jurisdictional and remedial architecture and on the political willingness of the respondent State to implement awards.²²

Two linked inferences follow. First, recognition in treaty or soft law repeatedly outpaces a commensurate specification of standing, procedure and enforceable remedies. Second, where remedies are specified, the locus of enforcement often remains domestic or discretionary rather than international and compulsory. These features explain why a rhetorically robust "right to justice" can coexist with persistent barriers to justiciability in practice.²³

3. Justiciability as a Doctrinal Problem

Justiciability is best understood as a cluster of doctrinal predicates that determine whether a legal claim may be resolved by a judicial or quasi-judicial forum. These predicates include standing, or *locus standi*, jurisdiction, admissibility, and meaningful remedies.²⁴ Each predicate matters. A remedial rule has little practical value if no forum hears the claim. It also loses value if jurisdictional rules block access to that forum. Admissibility rules may further exclude systemic complaints. Even when a

²⁰ On conceptual distinctions between remedy, accountability and enforcement see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) ch 2; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989); Shelton (n 3) 7–13; André Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011) 298–302.

²¹ *Airey v Ireland* (1979) 2 EHRR 305, [24]–[26].

²² *Velásquez Rodríguez v Honduras* (n 5) [166]–[174], [189]–[191].

²³ For contemporary doctrinal surveys of access to justice under international law see Francesco Francioni, 'The Rights of Access to Justice under Customary International Law' in Francesco Francioni (ed), *Access to Justice as a Human Right* (OUP 2007); Ioannis Voulgaris, *Access to Justice and International Organisations* (CUP 2022); Alston (n 2) 345–348.

²⁴ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press 1994) 77–79.

claim survives these barriers, the remedy may remain discretionary or unenforceable.²⁵ The following inquiry examines each predicate in turn. It also considers how existing structures of international law affect the possibility of remedies for structurally vulnerable groups.

The first predicate is standing. International adjudicative fora differ sharply in who may sue. The International Court of Justice admits only States as parties, a restriction codified in Article 34 of the Court statute.²⁶ This rule places collective or individual claimants outside the Court's contentious jurisdiction and confines most interstate litigation to disputes that States are willing to bring. The consequence is doctrinal: injury to a minority community typically requires a sponsoring State prepared to litigate on behalf of the group, which is a political rather than a strictly legal threshold.²⁷ The existence of regional and treaty-based individual petition mechanisms mitigates this gap in part, but these mechanisms are uneven in scope, subject matter, and remedy. The European Convention on Human Rights, for example, permits individual applications under Article 34,²⁸ but other treaty systems lack equivalent standing rules or impose strict admissibility filters.²⁹

Jurisdiction and admissibility form the second predicate. Even when individuals can submit communications, procedural barriers often restrict access. Treaties and procedural rules set temporal limits. They also require applicants to exhaust domestic remedies. In addition, they may restrict claims on grounds of *ratione loci* or *ratione personae*.³⁰ The Human Rights Committee's practice under the Optional Protocol to the ICCPR shows both the promise and the limits of individual communications. The Committee has developed criteria for admitting and deciding complaints. Yet it does not issue binding judicial orders that municipal courts must enforce. It mainly exercises interpretive authority.³¹ Regional courts take different approaches to admissibility and victim status. The European Court of Human Rights has created a detailed admissibility regime. This regime helps the Court manage its caseload. It also protects limited judicial

²⁵ Shelton (n 3) 9–12.

²⁶ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI art 34(1).

²⁷ Shaw (n 19) 1045–1047.

²⁸ ECHR (n 16) art 34; *Ireland v United Kingdom* (1978) 2 EHRR 25, [239].

²⁹ ECHR (n 16) art 34; European Court of Human Rights, 'Practical Guide on Admissibility Criteria' (Council of Europe/European Court of Human Rights 2025) ch I.1.2.

³⁰ First Optional Protocol (n 17) arts 2, 5(2)(a); *Akdivar and Others v Turkey* (n 17) [65]–[69].

³¹ UNHRC, 'General Comment No 33: Obligations of States Parties under the Optional Protocol to the ICCPR' (25 June 2009) UN Doc CCPR/C/GC/33, paras 2, 11, 19–20.

resources.³² The doctrinal effect is a procedural architecture that privileges discrete, individuated claims of identifiable victims over diffuse, collective injuries.³³

A third, and closely related, problem is fragmentation. The international human rights regime is pluralistic and procedural forms of redress are scattered across a multiplicity of bodies: treaty committees, regional courts, special procedures, the Universal Periodic Review, and hybrid tribunals that is, mixed domestic-international adjudicative bodies.³⁴ This pluralism produces doctrinal incoherence. Different fora apply different tests for admissibility and different conceptions of victimhood. Interpretive practice, therefore, varies, and claimants face a patchwork of procedural paths that seldom converge into a single, reliable channel for remedy. Scholars have emphasised how this fragmentation privileges individual communications as the dominant procedural form while leaving collective claims in legal limbo.³⁵

The emphasis on individualised procedure has substantive consequences. Many minority harms are collective in nature: forced dispossession of a community, systematic erasure of language and culture, or repeated episodes of communal violence.

Translating these collective injuries into individual complaints creates several burdens. First, it raises the evidential burden. Claimants or their representatives must prove the harm suffered by each affected person. Alternatively, they must bring the case through representative litigation. Procedural rules, however, sometimes do not allow such litigation. Second, individual remedies do not adequately address collective harm. They often fail to secure collective restoration or institutional reform. A damages award to named applicants may compensate those individuals. But it does not, by itself, restore a culture or change an institution. Third, litigation is

³² *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25, [66]–[69]; European Court of Human Rights, ‘Practical Guide on Admissibility Criteria’ (n 29) 7–12.

³³ Laurence R Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’ (2008) 19 *European Journal of International Law* 125, 137–139.

³⁴ Cesare PR Romano, ‘Deciphering the Grammar of the International Jurisprudential Dialogue’ (2009) 41 *New York University Journal of International Law and Politics* 755, 762–768.

³⁵ Birgit Schlütter, ‘Aspects of human rights interpretation by the UN treaty bodies’ in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) ch 6; Rosanne van Alebeek and André Nollkaemper, ‘The legal status of decisions by human rights treaty bodies in national law’ in Keller and Ulfstein (eds), *UN Human Rights Treaty Bodies* (CUP 2012) ch 8; Malcolm Langford, ‘The Optional Protocol to the ICESCR: Perspectives on Corporate Accountability’ (2009) 27 *Nordic Journal of Human Rights* 51, 58–62.

costly and slow. International procedures often take a long time. These delays create serious difficulties for groups with limited resources. They are even more harmful when the affected groups continue to face insecurity. The accumulated effect is that collective harms are systematically channelled into procedural forms that attenuate both the possibility and the quality of redress. Empirical and doctrinal commentators have noted this mismatch and have urged serious consideration of procedural innovation to accommodate group-based claims.³⁶

A further dimension of the justiciability problem is normative. Domestic constitutional models often envisage broad conceptions of standing, remedial writs, and public law remedies that enable courts to address systemic wrongs and to order structural relief. International law, by contrast, has not developed an analogous, universal forum able to provide such remedies with general application. The International Court of Justice is not available to individuals. The reasons have already been noted. Regional human rights courts may order general measures. But these courts depend on state consent or treaty commitments. They also depend on compliance mechanisms. Those mechanisms do not operate evenly in practice. Treaty bodies have interpretive authority and may issue findings and recommendations, but they generally lack coercive powers to compel remedial implementation.³⁷ The normative consequence is doctrinal: international law provides for remedy in theory while leaving the mechanisms for vindication dispersed, discretionary and frequently ineffectual.

The cumulative effect of these doctrinal features is to produce a gap between entitlement and enforceability. Where justiciability is framed as a political accident, attention shifts to political mobilisation or institutional capacity-building. Such responses matter, but they do not address the structural doctrinal choices embedded in standing rules, admissibility tests and the organisation of international fora. A doctrinal diagnosis instead identifies the precise sites at which non-justiciability is produced: claimant status before international bodies, admissibility criteria that exclude representative or group claims, and remedial forms poorly adapted to collective injuries. These are not incidental procedural details. They are structural features of the existing architecture, and they materially shape

³⁶ Laurence R Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale Law Journal 273, 316–320; Shelton (n 3) 271–279; Kristin Henrard, *Minority Protection under International Law* (Brill Nijhoff 2013) 154–158; Shelton (n 2) 408–410.

³⁷ André Nollkaemper, 'The Duality of Direct Effect of International Law' (2014) 25 European Journal of International Law 105, 118–121.

access to remedies for groups that presently fall between procedural stools.³⁸

4. Attribution, Discretion, and the Insulation of State Responsibility

4.1 Acts, Omissions, and Due Diligence

The law of state responsibility operates on two complementary registers. One register addresses the attribution of specific conduct to the State. The other specifies the standards of conduct the State must observe once the relevant norm falls to be applied. The International Law Commission has synthesised these registers in the Draft Articles on Responsibility of States for Internationally Wrongful Acts, where attribution rules govern when conduct of organs, agents or organised groups can be treated as State conduct and where separate provisions address the consequences of omissions or failures to exercise due diligence.³⁹ The distinction matters for access to justice. If an injurious act can be shown to be State conduct, the pathway to remedy is relatively direct. If the same injury arises from private or non-state violence, the remedial question depends instead on whether the State failed to take reasonable measures to prevent, investigate or punish that violence.⁴⁰

The case law of regional and international tribunals illustrates how the omission branch functions in practice. The Inter-American Court of Human Rights in *Velásquez Rodríguez* made explicit that a State may incur international responsibility not only for acts of its agents but also for the failure to exercise due diligence to prevent, investigate and punish serious human rights violations.⁴¹ The Court emphasised that absence of proof that a violation was the product of an official policy does not absolve the State where it has tolerated or otherwise failed to confront patterns of clandestine violations; the duty to investigate and to ensure effective remedies is thus an independent obligation of conduct.⁴² That formulation has two consequences for justiciability. First, victims need not always establish direct State authorship of the injurious act. Second, the remedial enquiry necessarily turns on what counts as reasonable steps in the circumstances,

³⁸ Molly K Land, 'New Technologies and Public Fact-Finding' in Philip Alston and Sarah Knuckey (eds), *The Transformation of Human Rights Fact-Finding* (OUP 2016) 401–406.

³⁹ International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) II (2) Yearbook of the International Law Commission 31, arts 2, 4–11, 12–15, commentaries 34–36, 40–44.

⁴⁰ James Crawford, *State Responsibility: The General Part* (CUP 2013) 221–228.

⁴¹ *Velásquez Rodríguez v Honduras* (n 5) [166], [172]–[174], [176]–[177].

⁴² *ibid* [172]–[177].

which in turn recruits evidentiary modalities and standards that are often contested.⁴³

The evidentiary problem is acute. International courts often ask whether the State knew, or should have known, about a real and immediate risk before they find a positive obligation. The European Court of Human Rights set out this test in *Osman v United Kingdom*. The Court held that the authorities may have a positive duty to protect life when they know, or ought to know, of a real and immediate risk to an identified individual. The duty arises only if they then fail to take reasonable measures within their powers.⁴⁴ This requirement creates serious difficulties. A claimant must show that the risk was both real and immediate. This raises hard questions about foreseeability, gaps in information, and the practical capacity of public institutions. As a result, even when a remedial duty appears to exist in principle, the claim may fail in practice. It may fail because the facts remain contested. It may also fail because the court finds that the State could not reasonably have done more in the circumstances.⁴⁵

4.2 Control Tests and Indirect Harm

The issue of attribution creates similar difficulties. International courts do not apply a single test for attribution. The ICJ has traditionally used the stricter “effective control” standard. The ICTY, by contrast, adopted the broader “overall control” approach. This difference matters in practice. It affects which claims can be brought before an international forum and which claims may fail before they are even heard.⁴⁶ In *Nicaragua v United States* the Court required proof that the State exercised effective control over the operations in which the wrongful acts were committed if those acts were to be attributed to the State.⁴⁷ The Court assessed the evidence cautiously in that case. Its approach shows that substantial material support will not always establish effective control. This remains true even where the support includes financing and training.⁴⁸

By contrast, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia adopted a different approach in *Tadić*. It developed a distinct test of attribution for organised groups. Under this approach, a State may be held responsible for the activities of a group if it

⁴³ Shelton (n 3) 33–38.

⁴⁴ *Osman v United Kingdom* (n 5) [116].

⁴⁵ *Kiliç v Turkey* (2000) 33 EHRR 58, [62]–[63]; *Kontrová v Slovakia* (2007) 44 EHRR 29, [49]–[54].

⁴⁶ Crawford (n 40) 146–150.

⁴⁷ *Nicaragua v United States of America* (n 11) [111]–[116].

⁴⁸ *ibid* [171]–[176], [185]–[186].

exercises overall control over that group.⁴⁹ The Appeals Chamber treated overall control as a less demanding standard than the ICJ's effective control test. It may be enough that the State finances and equips the group. It may also be enough that the State takes part in planning or supervising its operations. The State need not issue specific orders for every unlawful act.⁵⁰ The doctrinal consequence is clear. A State may avoid attribution under the effective control test, but still incur responsibility under the overall control approach. This plurality of standards fragments the field of actionable claims. It also makes the justiciability of systemic or decentralised violence depend on the forum and on the standard that forum applies.⁵¹

The European Court's *Loizidou* jurisprudence also shows the territorial importance of control tests. The Court accepted that a State may control an area even outside its own territory. When it exercises effective overall control over that area, it may bear responsibility for acts committed there. This may be so even when local authorities, rather than the State's own officials, carry out the acts.⁵² Control tests therefore mark the line between private or local violence and wrongful conduct attributable to a State. When the law draws that line too high, as in *Nicaragua*, many victims struggle to obtain an international remedy. They may have to rely on domestic remedies. Alternatively, they may have to bring due diligence claims, which are often harder to prove. By contrast, when the law draws the line lower, as in *Tadić* and *Loizidou*, victims may find international forums more accessible. Yet States may still resist such claims. They may argue that the evidence is insufficient. They may also invoke political sovereignty to contest international responsibility.⁵³

4.3 Discretion as Doctrinal Design

The concept of discretion requires careful treatment. In domestic constitutional systems adjudicative doctrines such as margin of appreciation or reasonableness are often regarded as techniques to accommodate pluralism and institutional competence. In international law these doctrines perform an additional, structural function. The margin of

⁴⁹ *Prosecutor v Tadić* (Appeals Chamber Judgment) IT-94-1-A (15 July 1999) [121]–[123].

⁵⁰ *ibid* [146]–[150], [250]–[254].

⁵¹ André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 *Michigan Journal of International Law* 359, 381–385.

⁵² *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99, [52]–[56]; *Loizidou v Turkey* (Merits) (1996) 23 EHRR 513, [56]–[57].

⁵³ Marko Milanović, 'State Responsibility for Genocide: A Follow-Up' (2007) 18 *European Journal of International Law* 669.

appreciation, as developed by the European Court in *Handyside* and subsequent cases, recognises that national authorities are better placed to make certain initial assessments and that Strasbourg supervision must be calibrated to that reality.⁵⁴ That calibration has the effect of institutionalising a measure of deference which then operates to narrow the circumstances in which an international tribunal will find a breach of remedial obligations.⁵⁵

Discretion therefore is not merely a residual policy choice. It is woven into the doctrinal fabric that governs attribution and remedy. The *Osman* standard, for example, embeds a reasonableness test: even where knowledge of risk is established, the ultimate inquiry is what measures judged reasonably might have been expected to avoid the risk.⁵⁶ International tribunals thus convert what might be described as political or administrative choices into legal standards that routinely favour restraint.⁵⁷ The cumulative effect is to insulate States from responsibility in many of the circumstances in which victims experience injustice.⁵⁸

5. Institutional Justice and Its Managerial Containment

The international human rights architecture is both broad and restrained. Treaty bodies, charter-based mechanisms, and special procedures perform important normative work. They define standards. They examine State practice. They also create a record of claims, explanations, and responses. Yet these institutions follow a clear design. They usually favour monitoring, persuasion, and capacity-building. They do not normally rely on coercive orders. This design is not accidental. It is a deliberate institutional choice, and it carries doctrinal consequences. It affects what may count as an actionable obligation. It also shapes which remedies are realistically available. Most importantly, it determines how rights are translated into enforceable duties.⁵⁹

Treaty bodies show this pattern clearly. They draw their authority from the treaties they supervise. They also develop that authority through periodic reporting, concluding observations, and general comments. These instruments perform vital normative functions. They explain the content of rights. They identify gaps in implementation. They also set out what States

⁵⁴ *Handyside v United Kingdom* (1976) 1 EHRR 737, [48].

⁵⁵ George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 80–85.

⁵⁶ See *Osman v United Kingdom* (n 5) [116].

⁵⁷ Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing 2000) 15–20.

⁵⁸ Shelton (n 3) 163–168.

⁵⁹ Koskenniemi (n 7) 106–110.

should do by way of remedy. Yet treaty bodies rarely provide binding remedies in the manner of courts. They mainly use interpretation and recommendation. They do not usually issue enforceable orders. This has a predictable practical effect. Even when treaty bodies propose measures within a fixed time, follow-up depends on several factors. It depends on the capacity of the secretariat. It depends on State cooperation. It also depends on political will, both within Geneva and beyond. The General Assembly recognised these limits in its 2014 resolution on strengthening the treaty body system. It adopted a programme of administrative reforms. These reforms aimed to improve working methods, reduce backlogs, and strengthen follow-up.⁶⁰ The reforms were sensible. But they were also incremental. They did not change the basic managerial character of treaty supervision.⁶¹

Charter-based mechanisms under the Human Rights Council operate in much the same way. Special Procedures mandate holders act independently. They can draw attention to abuses through country visits, urgent appeals, and thematic reports. These outputs can be powerful. They expose violations. They impose reputational costs on States. They also provide useful material for advocacy. Yet their effectiveness remains limited. Mandate holders need State cooperation to gain access. They also depend on other actors to pursue follow-up action. When States refuse to cooperate, their influence weakens. When States retaliate against civil society, it becomes even harder to maintain pressure. Special Procedures also suffer from a further limitation. They have no remedial arm. They can recommend and publicise, but they cannot compel. The Universal Periodic Review amplifies the managerial tendency. Its peer review design encourages dialogue among States and can prompt technical or legislative change. Empirical studies of the first UPR cycles, however, show a preponderance of general recommendations and high rates of acceptance even when implementation is doubtful. The logic is inclusion and universality, not adjudicative finality.⁶²

The managerial model has defensible virtues. Monitoring and technical assistance are less intrusive than coercive measures, and they reduce the

⁶⁰ UNGA Res 68/268 (9 April 2014) paras 1–7.

⁶¹ *ibid* paras 11–14, 31–38.

⁶² UNGA Res 60/251 (15 March 2006) para 5(e); OHCHR, ‘Universal Periodic Review: How It Works’ <<https://www.ohchr.org/en/hr-bodies/upr/upr-home>> (UNHRC) accessed 1 January 2026; Edward McMahon and Marta Ascherio, ‘A Step Ahead in Promoting Human Rights? The Universal Periodic Review of the UN Human Rights Council’ (2012) 18 *Global Governance* 231, 241–245; Edward R McMahon, *The Universal Periodic Review: A Work in Progress* (Friedrich-Ebert-Stiftung 2013) 17–23; Surya Deva and Conor Gearty (eds), *The Universal Periodic Review of Human Rights: A Journey Begins* (CUP 2014) 45–49.

transactional costs of international supervision. They moreover allow expert engagement across a wide range of rights without requiring resort to force. Abram Chayes and Antonia Handler Chayes framed this approach as a response to the realities of regulatory governance: compliance regimes often work through advice, capacity building, and iterative persuasion rather than by threat of sanction.⁶³ That account explains why States and international organs prefer managerial tools. It does not, however, explain why doctrinal habit tends to accept wide margins of operational discretion for States as the default legal posture. Managerialism presupposes minimal good faith and institutional capacity. Where those prerequisites are absent, managerial instruments are blunt and sometimes counterproductive.⁶⁴

Resource constraints and working methods also reinforce managerial containment. Treaty bodies and special procedures work with limited secretariat support. They also have very little sessional time. Committees must manage large reporting cycles. They also face increasingly heavy backlogs of individual communications. For this reason, concluding observations are often concise. Follow-up is also episodic rather than sustained. This lack of capacity has predictable doctrinal consequences. Short and general recommendations leave considerable room for interpretation. They also allow States to respond with partial measures that do not address systemic problems. Civil society helps to fill gaps in evidence and advocacy. Yet access for non-governmental actors remains uneven. In many contexts, such actors also face intimidation, restriction, or repression. The institutional ecology thus produces a systematic bias toward generality and away from the detailed, technical engagement often required to secure structural reform.⁶⁵

Fragmentation compounds the effect. The human rights system is polycentric: treaty bodies, regional courts, special procedures, the UPR, and, where relevant, hybrid tribunals and international courts all contribute to the normative edifice.⁶⁶ This plurality has advantages. It allows specialised expertise and multiple venues of appeal. It also produces doctrinal incoherence. Different bodies use different interpretive methods, apply different admissibility rules, and favour different remedial

⁶³ Chayes and Chayes (n 7) 3–9.

⁶⁴ *ibid* 22–28; Shelton (n 2) 411–414; Geneva Academy of International Humanitarian Law and Human Rights, *Optimizing the UN Treaty Body System* (Geneva Academy of International Humanitarian Law and Human Rights 2020) 27–31.

⁶⁵ Philip Alston, ‘The Historical Origins of the Concept of General Comments in Human Rights Law’ in Ludovic Hennebel and Hélène Tigroudja (eds), *Treaty Bodies and the Interpretation of Human Rights* (Larcier 2019) 13, 27–30.

⁶⁶ UNOHCHR, ‘The United Nations Human Rights System: How It Works’ (OHCHR 2019) 5–18.

vocabularies.⁶⁷ For litigants and advocates, the multiplicity of forums is therefore a mixed blessing; it creates opportunities but also uncertainty about where a claim will find traction and what remedy, if any, is likely to follow. The result is a system in which normative clarity does not automatically translate into enforceable obligations.⁶⁸

The managerial choice is not neutral for doctrine. It shapes judicial and quasi-judicial reasoning by supplying an institutional context in which courts and committees are wary of imposing detailed, intrusive remedies that States may be unable or unwilling to implement.⁶⁹ Many adjudicative bodies show a degree of prudential restraint. This partly reflects the existing institutional arrangement. International bodies often have limited means of follow-up or enforcement. For that reason, they tend to express obligations in broad and flexible terms.⁷⁰ This doctrinal habit creates a serious problem when it operates alongside restrictive standing rules and demanding attribution thresholds. Together, these features produce the justice gap described earlier. They create remedial entitlements that appear strong on paper but remain difficult to enforce in practice.

6. Remedies Without Compulsion: The Remedial Gap

6.1 Judicial Remedies

International courts and tribunals perform the formal adjudicative function, but they encounter repeated limitations when asked to deliver effective remedies. The International Court of Justice (ICJ) determines State responsibility and may declare legal violations by States and, in appropriate circumstances, prescribe remedies in the abstract. The classic principle of reparation, articulated by the Permanent Court of International Justice in the *Factory at Chorzów*, requires that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, under normal circumstances, have existed had the act not been committed.⁷¹ That proposition supplies an exacting standard in theory. In practice, the ICJ's jurisdictional constraints, its inter-State configuration,

⁶⁷ ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682, paras 9–12, 492–495.

⁶⁸ Keller and Ulfstein (n 35) ch 6; Andreas von Staden, 'The Political Economy of the (Non-)Enforcement of International Human Rights Pronouncements by States' in Alberta Fabbriotti (ed), *The Political Economy of International Law: A European Perspective* (Edward Elgar 2016) 230–257; Shelton (n 3) 7–9, 288–290.

⁶⁹ Michael Barnett and Martha Finnemore, *Rules for the World: International Organizations in Global Politics* (Cornell University Press 2004) 162–168.

⁷⁰ UNHRC, 'General Comment No 33' (n 31) paras 11–15.

⁷¹ *Factory at Chorzów (Germany v Poland)* (Merits) (1928) PCIJ Rep Series A No 17, 47.

and the political cost of enforcement often narrow the range of outcomes that victims may obtain. Nicaragua illustrates this point. In that case, the Court adopted rigorous standards for attribution and admissibility. These standards narrowed the range of claims that could be brought. This remained so even where the underlying harms were grave.⁷²

Regional human rights courts are closer to individual complainants. They also have a broader remedial practice. Yet they still face important limits. The Inter-American Court has often issued detailed orders on reparations. These orders include restitution, compensation, and structural reforms. In many cases, the Court has therefore provided concrete remedies.⁷³ The European Court of Human Rights has also awarded monetary compensation. It has developed procedural tools to encourage States to implement its judgments. Even so, three recurring limits remain. First, States must cooperate before awards can be executed. Second, domestic political and institutional resistance may delay implementation or weaken its effect. Third, courts often choose remedies that appear feasible and allow for national ownership. They do not always pursue the fullest possible redress. The pilot judgment procedure in *Broniowski* illustrates this point. The European Court identified systemic violations. It required the State to adopt national measures. But it left the respondent State considerable discretion over the design and timing of those measures.⁷⁴ As a result, remedial practice often gives priority to systemic correction. It does not always secure immediate and individualised satisfaction for the complainant.

Cost and accessibility also limit judicial remedies. Claimants often find litigation before international or regional courts slow and expensive. Their lawyers face the same burden. Legal aid may reduce some of these difficulties, but it rarely removes them altogether. Courts also struggle to address many forms of systemic injustice through individual cases. Collective harms, widespread economic wrongs, and entrenched patterns of institutional discrimination do not fit easily within ordinary case-by-case adjudication. Courts that decide individual claims can therefore find it difficult to offer comprehensive remedies. These limits do not suggest judicial negligence. They arise from the structure of international adjudication itself. They also reflect the difficult balance courts must strike between legal principle and political feasibility.⁷⁵

⁷² *Nicaragua v United States of America* (n 11) [109]–[116].

⁷³ *Velásquez Rodríguez v Honduras* (n 5) [172]–[177]; *Velásquez Rodríguez v Honduras* (Reparations and Costs) (1989) IACtHR (Ser C) No 7, [25]–[36]; *Shelton* (n 3) 246–252.

⁷⁴ *Broniowski v Poland* (2004) 40 EHRR 21, [10]–[12].

⁷⁵ *Langford* (n 4) 27–30.

6.2 Quasi-Judicial Remedies

Beyond formal courts, treaty bodies, special procedures, and other quasi-judicial mechanisms generate pronouncements (orders, rulings, awards, concluding observations, determinations etc.) that authoritatively interpret norms and recommend remedial measures. The Human Rights Committee, the Committee against Torture, and other treaty bodies perform several important functions. They issue views, concluding observations, and outcomes in individual communications. Through these instruments, they clarify the obligations of States. They also identify the remedies that States should provide.⁷⁶ Special procedures mandate holders undertake investigations and issue communications that expose violations and recommend redress. The Universal Periodic Review subjects every State to peer scrutiny and produces a catalogue of recommendations for remedial action.⁷⁷

These outputs have normative force in the sense of persuasion, reporting and normative development, but they mostly lack direct mechanisms for compulsion. A treaty body's concluding observations may catalogue steps a State should take, but the committee cannot enforce those steps. The Human Rights Committee may find a communication admissible and issue views calling for specific remedial measures, yet implementation depends on State willingness and domestic processes. At an institutional level this produces a pattern of authority without enforceability. The international system thus accumulates a dense corpus of interpretive guidance and remedial recommendations while stopping short of instruments that compel compliance in the manner familiar in domestic legal orders. Scholarship has aptly described this as a gap between normative recognition and remedial effect.⁷⁸

Quasi-judicial mechanisms do, however, contribute to remedial practice in important ways. They create public records, mobilise domestic and international actors and may catalyse political pressure that results in implementation. They often supply technical guidance on reparations and institutional reform. The Basic Principles and Guidelines on the Right to a Remedy and Reparation, adopted by the General Assembly, exemplify

⁷⁶ See OHCHR, 'Treaty Body Database: Concluding Observations' <<https://tbinternet.ohchr.org/>> (*UN Treaty Body Database*) accessed 3 March 2026; UNHRC, 'General Comment No 31' (n 1) paras 15–18; UN Committee against Torture, 'General Comment No 3: Implementation of article 14 by States parties' (13 December 2012) UN Doc CAT/C/GC/3.

⁷⁷ See OHCHR, 'Basic Facts about the Universal Periodic Review' <<https://www.ohchr.org/en/hr-bodies/upr/basic-facts>> (*UNHRC*) accessed 3 March 2026.

⁷⁸ S B Starr, 'Remedial Deterrence in International Courts' (2008) 83 *New York University Law Review* 693; Alston (n 2) 345–348.

such guidance by elaborating the forms reparations may take and by urging States to adopt implementing measures.⁷⁹ Yet the reliance on persuasion and technical assistance means that remedy often becomes a matter of policy adjustment rather than of judicial obligation. The consequence is a remedial ecology that privileges compliance through reasoned engagement rather than compliance through enforcement.⁸⁰

6.3 The Mismatch: Authority, Access and Enforcement

The central pathology of the remedial gap is the mismatch between three elements that must coincide if justice is to be realised in practice. First, there must be authoritative determination of rights and responsibilities. Second, there must be access to a forum where those determinations can be sought. Third, the law must have a credible means of securing compliance with remedial orders.⁸¹ International law often satisfies the first requirement. It identifies the relevant duties through treaties, declarations and judicial decisions. Yet it does not always provide clear or accessible forums in which injured persons can enforce those duties. Those forums remain unevenly available. They are also limited by procedural thresholds.⁸² In practice, enforcement still depends largely on State consent, political pressure and reputational cost. It does not rest consistently on legal compulsion.

The normative consequences are serious. International law may affirm remedial entitlements, but it often fails to provide reliable routes to access and enforcement. In such cases, those entitlements become largely aspirational.⁸³ They may guide duties of good governance. They may also influence domestic law reform. Yet they do not give many victims a clear and effective legal remedy.⁸⁴ These institutional choices are not accidental. They reflect a deliberate balance between respect for State sovereignty, the politics of treaty-making, and a preference for managerial forms of compliance. One may defend these choices on prudential grounds. But they still require critical scrutiny when they concern severe and systematic injustices. Persuasion alone will not remedy such injustices. The following section examines the main explanations for this remedial gap. It argues that

⁷⁹ UNGA Res 60/147 (n 14).

⁸⁰ Chayes and Chayes (n 7) 3–9.

⁸¹ Shelton (n 3) 3–6.

⁸² First Optional Protocol (n 17) arts 2, 5(2)(a); European Court of Human Rights (n 29) 5–9.

⁸³ Philip Alston and Ryan Goodman, *International Human Rights* (OUP 2012) 1031–1034.

⁸⁴ Barnett and Finnemore (n 69) 161–168.

doctrinal design, rather than politics or institutional capacity alone, plays a central role.⁸⁵

7. Competing Explanations and Their Limits

Scholars and practitioners usually offer three explanations for the repeated failure to secure justice for victims of rights violations. These explanations point to political will, cultural relativism, and state capacity. Each of them captures part of the empirical reality. Yet none of them, taken alone, explains why international law so often leaves remedial mechanisms weak. This section examines these three familiar accounts. It then explains their analytical limits. It does so by placing them within the doctrinal and institutional framework developed earlier.⁸⁶

The political will account is immediate and intuitively persuasive. Governments sometimes choose to tolerate or to perpetrate exclusion and harm because electoral incentives, security doctrines or elite settlement strategies make exclusion politically advantageous. Treaty ratification and formal compliance may therefore mask deliberate non implementation or instrumental use of legal commitments for reputational advantage. Empirical literature supports the centrality of domestic politics. Beth Simmons has shown that treaty outcomes are mediated by domestic coalitions and mobilised constituencies, and that international law changes behaviour most reliably where domestic actors press for follow-through.⁸⁷ Complementary quantitative studies demonstrate that ratification without domestic pressure often yields weak implementation or even perverse effects in the short term.⁸⁸

Political will, however, is a proximate explanation. It explains variation in outcomes between otherwise similar States. It does not explain why doctrine and institutional design so frequently leave space for political avoidance. If the legal order provided clear, enforceable remedial routes that were institutionally resourced, the absence of political will would remain a problem, but one more amenable to legal challenge and to third-party enforcement. The crucial doctrinal point is that rules of attribution, standing, and remedial competence often vest wide operational discretion in State authorities. Those rules give political choice a decisive legal effect in practice. They do more than simply explain why a State acts or fails to act. Political will may explain why some States choose not to intervene.

⁸⁵ Higgins (n 24) 1–5, 77–79.

⁸⁶ Alston (n 2) 335–338.

⁸⁷ Simmons (n 4) chs 3–4, esp 125–130.

⁸⁸ Emilie M Hafner-Burton, *Forced to Be Good: Why Trade Agreements Boost Human Rights* (Cornell University Press 2009) 52–56; Hathaway (n 4) 2002–2008.

But doctrine explains why that refusal rarely becomes an internationally enforceable responsibility.⁸⁹

Cultural relativism is a distinct argument with both descriptive and normative components. Critics contend that universalist human rights rhetoric sometimes collides with local traditions and that resistance is therefore rooted in legitimate cultural difference. Makau Mutua famously criticised human rights discourse for reproducing a saviour mentality that alienates non-Western societies.⁹⁰ Such a critique matters for understanding the hostile reception of international pressure and for the politics of compliance.

Yet cultural relativism is analytically porous as a general explanation for remedial failure. Much resistance framed as cultural defence is in practice an elite instrumentalisation of identity or a rhetorical device to justify exclusionary political projects.⁹¹ Moreover, cultural differences do not account for the doctrinal mechanisms that convert resistance into legal non-accountability. The law often treats contested practices as matters for domestic margin of appreciation or public order exceptions rather than as subjects for enforceable review.⁹² That tendency reflects doctrinal choice rather than essential cultural incompatibility. In other words, culture may explain some forms of resistance to international intervention; it does not explain why international doctrinal defaults so readily absorb such resistance as legally permissible.⁹³

Capacity-focused explanations are more technical. They emphasise resource constraints, institutional weakness, and limited administrative reach. Where police, courts, and bureaucracies are dysfunctional, duties of prevention and remedy are difficult to operationalise. Empirical studies identify links between bureaucratic capacity and compliance with human rights obligations, and they show that transnational civil society effects are stronger where domestic institutions can absorb pressure.⁹⁴ Capacity is therefore a genuine constraint on the realisation of remedial entitlements.

⁸⁹ André Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 *American Journal of International Law* 760, 783–786.

⁹⁰ Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201, 204–210.

⁹¹ Abdullahi A An-Na'im, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, 1992) 3–8.

⁹² *Handyside* (n 54) [48]–[50]; *Leyla Şahin v Turkey* (2005) 41 EHRR 8, [109]–[110].

⁹³ Jack Donnelly, *Universal Human Rights in Theory and Practice* (3rd edn, Cornell University Press 2013) 107–112.

⁹⁴ Emilie M Hafner-Burton and Kiyoteru Tsutsui, 'Human Rights in a Globalizing World: The Paradox of Empty Promises' (2005) 110 *American Journal of Sociology* 1373, 1385–1390; Simmons (n 4) 18–24, 127–133.

The capacity account reaches its analytic limit when scholars treat capacity as the only problem that needs to be solved. International law often prescribes remedies and procedures that assume the existence of functioning domestic institutions. Many treaties depend on domestic incorporation, judicial enforcement, and administrative implementation. In doing so, they place the burden of enforcement on legal systems that may already be weak.⁹⁵ The managerial model of supervision makes this difficulty worse. The international system often gives priority to dialogue, technical assistance, and persuasion rather than adjudication. It therefore shifts remedial responsibility to domestic institutions.⁹⁶ This approach makes sense where states have both institutional capacity and political will. It fails where both are missing.

A further point deserves attention. The three explanations often operate together. Weak institutions can make elite capture easier. Political elites can then invoke culture to justify exclusion. Doctrinal minimalism then deepens the harm caused by both problems. Empirical studies on treaty ratification and implementation show this interaction. Some studies suggest that states may ratify treaties mainly as a symbolic gesture. Ratification may produce little practical change where domestic checks are weak or absent. Other studies, however, show a different result. Ratification can bring real progress where domestic mobilisation is strong and supportive institutions exist.⁹⁷ The point is clear. These immediate explanations show why states comply in some contexts but fail to comply in others. Yet they do not answer the deeper question. They do not explain why international law itself leaves so many enforcement mechanisms deliberately weak.⁹⁸

This diagnosis has both normative and doctrinal implications. Political will, culture, and institutional capacity explain only part of the problem. The deeper question is different. We need to ask how the structure of law turns these immediate conditions into lasting non-justiciability. The analysis developed here shows that positive duties, claimant access, attribution doctrine, and follow-up mechanisms are the principal hinges on which that conversion occurs.⁹⁹ The point is not to deny the importance of politics or

⁹⁵ I CCPR (n 1) art 2(2)–(3).

⁹⁶ Barnett and Finnemore (n 69) 161–168.

⁹⁷ See generally Simmons (n 4) ch 9; Hathaway (n 4); Beth A Simmons and Daniel J Hopkins, 'The Constraining Power of International Treaties' (2005) 99 *American Political Science Review* 623, 631–634.

⁹⁸ Laurence R Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes' (2002) 102 *Columbia Law Review* 1832, 1838–1845.

⁹⁹ Nollkaemper (n 37) 118–121.

capacity, but to show that they acquire legal force through doctrinal choices that remain compatible with, and shaped by, the principle of State consent.

8. Reframing Justice as Legal Responsibility

8.1 Doctrinal Implications

A clearer analytical starting point is to reconceive the right to justice not as an aspirational statement but as a cluster of enforceable duties that can be subjected to legal adjudication. The Draft Articles on State Responsibility provide a clear doctrinal template for this move by distinguishing attribution rules, the elements of internationally wrongful acts, and the consequences that follow.¹⁰⁰ This reframing has three analytical implications. First, remedial duties are best stated in granular terms that identify the content of prevention, investigation, and reparation obligations. Second, the language of remedies determines whether international and regional organs have a defined competence to evaluate compliance with those duties. Third, remedial standards require criteria of proportionality and feasibility if courts are to fashion measures that are both lawful and practicable. The Draft Articles, therefore, offer the baseline vocabulary necessary to convert rhetorical commitments into adjudicable obligations.¹⁰¹

The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation already articulate many of the substantive elements that a doctrinally robust remedial regime would require.¹⁰² They specify categories of reparative measures, identify duties of States to ensure effective mechanisms, and emphasise victims' orientation. These materials are more than hortatory guidance. They specify categories of reparative measures, identify duties of States to ensure effective mechanisms, and foreground the position of victims. Read in that way, they provide normative content from which more precise treaty commitments may be inferred. The Handbook of Reparations collects international practice and normative argumentation that can assist in specifying minimum standards in ways that respect differing domestic capacities while preserving legal effect.¹⁰³ Understanding these standards as part of the primary obligation helps to explain why present remedial law too often functions as a catalogue of options rather than as a set of binding duties.¹⁰⁴

¹⁰⁰ International Law Commission, 'Draft Articles' (n 39) arts 1–3.

¹⁰¹ *ibid* arts 2, 16–18; Crawford (n 40) 43–50, 215–224.

¹⁰² UNGA Res 60/147 (n 14) paras 15–23.

¹⁰³ Pablo de Greiff (ed), *The Handbook of Reparations* (OUP 2006) 1–4.

¹⁰⁴ Shelton (n 3) 286–292.

8.2 Attribution and the Structure of Remedial Responsibility

Attribution rules determine the universe of claims that are capable of legal relief. The effective control test and related formulations are indispensable, but they have the consequence of excluding many harms that arise in contexts of decentralised or hybrid violence. The doctrinal significance of this tension is clear. Responsibility becomes narrower precisely when violence is carried out through proxy actors, fragmented chains of command, or sustained State tolerance. Two features are especially important.¹⁰⁵

The first device is to treat serious failures of due diligence as breaches. These breaches should be actionable even where the evidentiary threshold for attribution is lower. The reparations jurisprudence of the Inter-American Court already points in this direction. The Court has treated a state's failure to investigate, or to prevent serious violations, as a basis of responsibility. It does not always require proof that the State directly committed each harmful act.¹⁰⁶ This approach is important. It shows that the law already offers victims of decentralised violence a viable route to justice. They may frame their claim around the State's own conduct. They need not rely solely on proving direct orders or detailed relationships of control between the State and the immediate perpetrators.

Second, the law of aid, assistance, and direction shows that responsibility is not exhausted by direct command. The Draft Articles contemplate forms of contribution that generate responsibility.¹⁰⁷ Read alongside broader debates on shared responsibility, these categories show that material assistance, territorial facilitation, financing, or sustained tolerance may carry remedial significance even where overall effective control is not established. The analytical point is not that attribution thresholds disappear, but that the present architecture allocates responsibility unevenly across different patterns of organised harm.¹⁰⁸

8.3 Collective Harm and Procedural Design

The preceding analysis also shows that individualised procedure is poorly suited to collective harms and group-oriented claims. Existing models within European practice are instructive. The collective complaints system

¹⁰⁵ Crawford (n 40) 146–155.

¹⁰⁶ *Velásquez Rodríguez v Honduras* (n 5); Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (hereinafter “Collective Complaints Protocol”) (adopted 9 November 1995, entered into force 1 July 1998) ETS No 158.

¹⁰⁷ International Law Commission (n 39) arts 16–18.

¹⁰⁸ Nollkaemper and Jacobs (n 51) 381–387.

under the European Social Charter demonstrates that a mechanism designed to address systemic breaches can operate without transgressing State consent.¹⁰⁹ It permits designated organisations to bring claims that address law and practice and to require remedial follow-up.¹¹⁰ The pilot-judgment procedure of the European Court of Human Rights is another instructive model. In *Broniowski*, the Court identified a systemic violation affecting a group and required the respondent State to adopt remedial legislative and administrative measures.¹¹¹ Both models reveal that adjudicative bodies can combine individual redress with structural directions aimed at systemic wrongs.¹¹²

These models underscore the extent to which a human rights architecture centred on individual communications leaves collective harms under-addressed. They show that collective communications, public-interest petitions, and calibrated remedial orders are doctrinally conceivable within a consent-based system. The point is not to displace individual adjudication, but to show that the present dominance of individual procedure is a design choice rather than an unavoidable feature of international legality.

8.4 Institutional Consequences

Procedural design must also be assessed alongside follow-up. Recommendations and declaratory findings are valuable, but their legal significance depends on institutional arrangements for monitoring, technical assistance, and calibrated consequences. Three conditions are especially important.

First, follow-up and monitoring are important. Treaty bodies and regional courts can make their findings more effective when they ask states to submit implementation plans. They can also hold remedial dialogues and publish regular assessments of obligations that remain unfulfilled. These steps give a clearer path from legal declaration to practical enforcement. The European Court's pilot-judgment mechanism provides one example of this institutional approach.¹¹³

¹⁰⁹ European Social Charter (Revised) (adopted 3 May 1996, entered into force 1 July 1999) ETS No 163; Collective Complaints Protocol (n 106) arts 1–4; *Velásquez Rodríguez v Honduras* (n 5) [172]–[177].

¹¹⁰ European Committee of Social Rights, 'Digest of the Case Law of the European Committee of Social Rights' (Council of Europe 2022) 19–24.

¹¹¹ *Broniowski v Poland* (n 74).

¹¹² European Court of Human Rights, 'The Pilot-Judgment Procedure' (European Court of Human Rights 2023) 3–6.

¹¹³ *Broniowski v Poland* (n 74) [189]–[194]; European Court of Human Rights, 'The Pilot-Judgment Procedure' (n 112) 3–7.

Second, resourcing and technical assistance shape whether remedial findings can be translated into practice. The Handbook of Reparations and UN practitioners' guides show that the design of reparations programmes, and the integration of symbolic and material measures, often require administrative capacities that cannot be assumed.¹¹⁴

Third, calibrated consequences for persistent non-compliance affect the practical weight of international findings. Reporting escalations, conditional assistance, targeted restrictions, and other graded responses help explain when a remedial order remains merely exhortatory and when it becomes meaningfully consequential. The institutional question, therefore, is not whether sovereignty disappears, but how a consent-based order structures the seriousness of remedial obligations once a breach has been found.¹¹⁵

8.5 Limits Acknowledged

Any such reframing remains subject to important limits. Sovereignty and consent remain central features of the international legal system. The argument here is therefore not for centralised command, but for greater doctrinal clarity about when victims have credible, legally grounded pathways to remedy.¹¹⁶ Equally, a focus on responsibility rather than aspiration does not call for unlimited judicial activism. Courts should not create remedies without a legal foundation. The real task is to reshape the legal framework. Victims should have credible and legally grounded routes to a remedy when the evidence and the law support their claim.¹¹⁷ Doing so will not eliminate all implementation deficits, but it will transform justice from a rhetorical claim into a legal entitlement that is more than the sum of exhortations and recommendations. The central imperative is doctrinal clarity anchored, so far as possible, in institutional capacity.¹¹⁸

9. Conclusion

This article has sought to diagnose a persistent puzzle. International legal instruments routinely assert a right to justice, while the doctrinal and institutional means to secure that right remain weak.¹¹⁹ The diagnosis is doctrinal and structural rather than merely political. Rules of attribution,

¹¹⁴ Greiff (n 105); *Germany v Poland* (n 71) 47; Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes* (OHCHR 2008) 9–15.

¹¹⁵ Barnett and Finnemore (n 69) 161–168.

¹¹⁶ Higgins (n 24) 1–5, 77–79.

¹¹⁷ Crawford (n 40) 215–224.

¹¹⁸ Shelton (n 3) 286–292.

¹¹⁹ *ibid* 1.

standing, and admissibility combine with an institutional preference for managerial supervision to produce an equilibrium in which remedial entitlements are often rhetorical rather than operative.¹²⁰

Three related conclusions follow. First, the right to justice lacks sufficient doctrinal clarity. Key courts and adjudicative bodies have recognised duties to prevent harm, investigate violations, and provide reparation. Yet they have also placed strict limits on when those duties create enforceable legal responsibility. They often rely on standards such as control, imminence, and reasonableness. These standards can make judicial remedies difficult to obtain. The decisions in Velásquez Rodríguez, Osman, and Nicaragua illustrate this problem. Each case sets thresholds that may exclude many collective or diffuse harms from judicial redress. Second, institutional design strengthens this doctrinal caution. Treaty committees, special procedures, and the Universal Periodic Review play important roles. They develop norms, monitor State conduct, and encourage compliance. But they usually work through dialogue, capacity building, and persuasion. They do not generally provide compulsory remedies.¹²¹ This institutional choice also affects doctrine. It encourages interpretive approaches that leave States with wide margins of discretion.¹²² Third, more immediate explanations remain important but incomplete. Lack of political will, cultural resistance, and limited capacity all affect compliance. But these factors do not operate in isolation. They interact with the structure of international law itself. As a result, political choice often becomes decisive in practice. It is not merely one cause among others. For this reason, the right to justice is most fragile where political resistance, weak State capacity, and restrictive doctrine come together.¹²³

These findings also indicate where the gap between entitlement and justiciability is most acute. It lies in the under-specification of minimum standards of prevention, investigation, and reparation; in weak follow-up and institutional capacity; in procedural architectures that remain inhospitable to collective claims; and in the absence of credible consequences for persistent non-compliance.

The article, therefore, concludes that the right to justice in international law is neither empty rhetoric nor a fully justiciable guarantee. It is not a free-standing entitlement. It depends on legal institutions and procedures. Its practical force comes from the way several elements work together: the

¹²⁰ Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (reissue edn, CUP 2005) 566–570; Higgins (n 24) 77–79.

¹²¹ UNHRC (n 1) paras 15–16.

¹²² Chayes and Chayes (n 7) 22–28; Barnett and Finnemore (n 69) 161–168.

¹²³ Simmons (n 4) 364–369; Hathaway (n 4) 2002–2007; Helfer (n 98).

adjudication of primary rights, access for claimants, rules of attribution, and mechanisms for follow-up. For victims of international human rights violations, this combination often fails to deliver meaningful justice. The problem is even sharper where the harm is collective. In such cases, international law may recognise a claim to justice, but it does not always provide a clear and effective route to enforce it. The central challenge is therefore both doctrinal and political. International law affirms justice in principle. Yet it still organises the enforcement of that justice too weakly to secure an effective remedy in practice.