

## Reparation for violations of international humanitarian law

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The latter half of the twentieth century witnessed unprecedented development and codification of international legal standards for the protection of individuals. These include numerous universal and regional human rights instruments, the 1949 Geneva Conventions and their Additional Protocols of 1977 and the various instruments of refugee law.

Despite this indispensable step forward in the protection of the individual, the reality today is that individuals continue to suffer at the hands of abusive governments and in situations of armed conflict.

There is general agreement that the challenge today lies in ensuring respect for these rights and laws. In response, a number of significant initiatives have been undertaken in recent years to improve compliance with human rights law and international humanitarian law. In addition to the creation of various international human rights tribunals, we have seen the establishment of two *ad hoc* tribunals to try persons accused of serious violations of international humanitarian law in the former Yugoslavia and in Rwanda, as well as the permanent International Criminal Court. Alongside these developments at the international level, there has been a marked increase of activity by national courts in prosecuting persons accused of serious violations of human rights and international humanitarian law.

Against this background a review of current law and practice relating to reparation for violations of international humanitarian law is timely. At first sight, it may legitimately be asked why reparations which,

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by definition, become relevant only once a violation of the law has occurred, can enhance compliance with a body of law.

While in each individual case reparation can only address the consequences of a violation, at a more general level a body of law is strengthened if a breach thereof gives rise to an entitlement to reparation. Reparation is an important part of enforcement and can play a significant role in deterring future violations.

Of course, the making of reparation is also extremely important *per se* for very practical reasons, particularly for individuals who have been victims of violations of international humanitarian law. Even once the immediate consequences of the violation have been dealt with, such persons remain extremely vulnerable. They may need long-term medical care, may no longer be able to earn an income and are likely to have lost home and belongings. It would be callous and naive to think that an award of compensation, for example, would restore victims to the situation they were in prior to the violation — re-establish the *status quo ante* as required by international law. Nevertheless, the receipt of timely and adequate compensation is an important element in enabling victims to try to rebuild their lives.

Between States the principle that every violation of international obligations gives rise to a duty to make reparation is well established in law and functions reasonably well in practice. However, with regard to individual victims of violations of human rights law and international humanitarian law the position remains more uncertain.

The present article briefly sets out the rules of public international law on reparation and outlines their application to international humanitarian law. It then reviews current law and practice relating to compensation, focusing more specifically on the position of individual victims. Though relevant, the practice of human rights tribunals is not addressed, as many violations of human rights take place in situations of non-international armed conflict and may therefore also constitute violations of international humanitarian law. Similarly, the question of claims valuation is also beyond the scope of this review. The final section of the article raises a number of broader policy questions on the subject.

### **General principles**

It is a general principle of public international law that any wrongful act — i.e. any violation of an obligation under international law — gives

rise to an obligation to make reparation.<sup>1</sup> The aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed.

Reparation can take various forms, including restitution, compensation or satisfaction. These remedies can be applied either singly or in combination in response to a particular violation.<sup>2</sup>

The aim of restitution is to restore the situation that existed before the wrongful act was committed. Examples include the release of wrongly detained persons, the return of wrongly seized property and the revocation of an unlawful judicial measure.<sup>3</sup> There may obviously be circumstances in which restitution is materially impossible, for example, if the property in question has been destroyed. Restitution may also not be an appropriate remedy if the benefit to be gained from it by the victim is wholly disproportionate to its cost to the violator.

Compensation is a monetary payment for financially assessable damage arising from the violation. It covers material and moral injury.<sup>4</sup>

Satisfaction covers non-material injury that amounts to an affront to the injured State or person. Examples include an acknowledgement of the breach, an expression of regret or an official apology or assurances of non-repetition of the violation. Satisfaction can also include the undertaking of

<sup>1</sup> Permanent Court of International Justice, *Factory at Chorzow (Claim for Indemnity) case, (Germany v. Poland), (Merits)*, PCIJ (ser. A) No. 17, 1928, p. 29. See also Article 1 of the Articles on the Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission in 2001: "Every internationally wrongful act of a State entails the international responsibility of that State." UN Doc. A/CN.4/L.602/Rev.1, 26 July 2001 (hereinafter "ILC Articles on State Responsibility").

<sup>2</sup> See Articles 31 to 34 ILC Articles on State Responsibility, *op. cit.* (note 1). See also the 2000 draft of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Doc. E/CN.4/2000/62, 18 January 2001, (hereinafter "draft Basic Principles and Guidelines"). These draft principles, elaborated by two independent experts pursuant to a request by the Commission on Human Rights, have not yet been finalized or adopted.

<sup>3</sup> See Article 35, ILC Articles on State Responsibility, *op. cit.* (note 1). Principle 22 of the draft Basic Principles and Guidelines (*op. cit.*, note 2) gives the following examples of restitution: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property.

<sup>4</sup> See Article 36, ILC Articles on State Responsibility, *op. cit.* (note 1). Principle 23 of the draft Basic Principles and Guidelines (*op. cit.*, note 2) states that compensation should be provided for any economically assessable damage and gives the following examples of such damage: physical or mental harm, including pain, suffering and emotional distress; lost opportunities, including education; material damages and loss of earnings, including loss of earning potential; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

disciplinary or penal action against the persons whose acts caused the wrongful act.<sup>5</sup>

### Reparation for violations of international humanitarian law

These same general principles apply to violations of international humanitarian law.<sup>6</sup> This was expressly laid down as long ago as 1907 in the Hague Convention (IV) respecting the Laws and Customs of War on Land, Article 3 of which stipulates that:

“[a] belligerent Party which violates the provisions of the (...) Regulations [respecting the Laws and Customs of War on Land] shall, if the case demands, be liable to pay compensation...”

A similar requirement to pay compensation for violations of international humanitarian law is expressly reiterated in Article 91 of Additional Protocol I.<sup>7</sup>

Despite this explicit language, it should be noted that the obligation to make reparation arises *automatically* as a consequence of the unlawful act, without the need for the obligation to be spelled out in conventions.

<sup>5</sup> See Article 37, ILC Articles on State Responsibility, *op. cit.* (note 1). Principle 25 of the draft Basic Principles and Guidelines (*op. cit.*, note 2) sets out an extensive list of possible forms of satisfaction and guarantees of non-repetition. These include the cessation of continuing violations; the verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others; the search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities; an official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim; an apology, including public acknowledgement of the facts and acceptance of responsibility; judicial or administrative sanctions against persons responsible for the violations; commemorations and tributes to the victims; the inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels; as well as measures for the prevention of the recurrence of violations.

The draft Basic Principles and Guidelines (*op. cit.* note 2) include an additional form of reparation: rehabilitation. Principle 24 provides that rehabilitation should include medical and psychological care as well as legal and social services.

<sup>6</sup> For an excellent and exhaustive study of law and practice on violations of international humanitarian law, and indeed on “war reparation” more generally, see P. d’Argent, *Les réparations de guerre en droit international public: la responsabilité internationale des Etats à l’épreuve de la guerre*, Bruylant, Brussels, 2002 and references therein.

<sup>7</sup> Other instruments also expressly refer to an obligation to make reparation. For example, Article 19 of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearances provides that the victims of acts of enforced disappearance and their family have the right to adequate compensation, including the means for as complete a rehabilitation as possible. It further stipulates that “in the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation”, UN Doc. A/47/49, 18 December 1992.

Although the Hague Convention and Additional Protocol I speak only of compensation, reparation for violations of international humanitarian law can take various forms. The most relevant are restitution, such as the return of unlawfully taken property, as envisaged by the Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>8</sup> and, more commonly, compensation, including instances when restitution is impossible or inappropriate.

Acceptance of a duty to make reparation is also often found in treaties concluded between belligerents at the end of hostilities.<sup>9</sup> However, this obligation is frequently not expressly related to violations of international humanitarian law but rather to violations of the prohibition of the use of force, or treaties merely speak even more vaguely of “claims arising out of the

**8** See, for example Article 3 of the Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, which provides that:

“each Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the [prohibition on exporting cultural property from occupied territory during an armed conflict].”

Similarly, the peace treaty concluded in 1955 between Austria and France, the Soviet Union, the UK and the US contains extensive provisions on restitution of property, (Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, France and Austria: State Treaty for the Re-establishment of an Independent and Democratic Austria (with Annexes and Maps), 15 May 1955, *United Nations Treaty Series*, Vol. 217, No. 2949).

**9** By way of example, see the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation between the United Kingdom of Great Britain and Northern Ireland, France, the United States of America and Germany in which, *inter alia*, Germany acknowledged:

“the obligation to assure ... adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions or economic prospects (excluding identifiable property subject to restitution). Furthermore, persons persecuted by reason of nationality, in disregard of human rights, who are now political refugees and no longer enjoy the protection of their former home country shall receive adequate compensation where permanent injury has been inflicted on their health.”

(Article 1(1), Chapter Four) (*United Nations Treaty Series*, Vol. 219, No. 4762)

See also the 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria (with Annexes and Maps), between France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Austria, and acceded to by Australia, Brazil, Canada, Czechoslovakia, Mexico, New Zealand, Poland and Yugoslavia, Article 26(1) of which provides that:

“1. In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13 March 1938, been subject of forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories. Where return or restoration is impossible, compensation shall be

war”.<sup>10</sup> While many of the losses and claims may, in practice, arise from violations of international humanitarian law, there is no need for a determination of a violation to be made.

One recent and notable exception in this respect is the peace agreement of December 2000 between Ethiopia and Eritrea.<sup>11</sup> *Inter alia*, this establishes a neutral Claims Commission charged with deciding, through binding arbitration, all claims between the two governments and between private entities for loss, damage or injury related to the conflict and resulting from violations of international humanitarian law or other violations of international law. This Commission is an exception inasmuch as it is expressly tasked with awarding compensation for violations of international humanitarian law.

It should be noted that violations of *all* rules of international humanitarian law give rise to an obligation to make reparation, and not only violations of the grave breaches provisions for which there is individual criminal responsibility.<sup>12</sup>

Finally, it should also be pointed out that the law and practice referred to above relate to international armed conflicts. Neither common Article 3 of the Geneva Conventions nor their Additional Protocol II mention compensation or any other form of reparation, and there have been virtually no instances where organized armed groups have undertaken to make

granted for losses incurred by reason of such measures to the same extent as is, or may be, given to Austrian nationals generally in respect of war damage.”

(*United Nations Treaty Series*, Vol. 217, No. 2949)

In the 1959 Agreement concerning Payments on behalf of Norwegian Nationals Victimized by National Socialist Persecution between the Federal Republic of Germany and Norway, the Federal Republic of Germany agreed to:

“pay the Kingdom of Norway 60 million Deutsche Mark on behalf of Norwegian nationals who were victimized by National Socialist persecution because of their race, beliefs or opinions and whose freedom or health was in consequence impaired, and also on behalf of the survivors of persons who died as a result of such persecution.”

(Article 1(1)) (*United Nations Treaty Series*, Vol. 222, No. 5136)

<sup>10</sup> See, for example, Article 14(a) of the 1951 Treaty of Peace between the Allied Powers and Japan, San Francisco, 8 September 1951, in which Japan undertook to “pay reparations to the Allied Powers for the damage and suffering caused by it during the war” (*American Journal of International Law, Supplement: Official Documents*, Vol. 46, 1952, p. 71).

<sup>11</sup> Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, Article 5, *International Legal Materials*, Vol. 40, 2001, p. 260.

<sup>12</sup> Investigation of alleged violations and access to justice for the victims are remedies for the violations. According to Principle 11 of the draft Basic Principles and Guidelines (*op. cit.*, note 2) remedies for violations of international human rights and humanitarian law include the victim’s right to access justice; reparation for harm suffered; and access to factual information concerning the violations.

reparations for violations of international humanitarian law or have made such reparations in practice.<sup>13</sup> Although a responsibility to make reparation would be a natural consequence of the fact that organized armed groups are bound by international humanitarian law, to date such responsibility has taken the form of individual criminal responsibility of violators, for example before the International Criminal Tribunal for Rwanda.

### **Do individuals have a right to reparation for violations of international humanitarian law? Can it be enforced before national courts?**

While the obligation to make reparation for violations of international humanitarian law is well established, the challenge lies in determining, first, *who* is entitled to the reparation — only States or also individual victims? — and secondly, the mechanisms for its award: can individuals claim reparation for violations of international humanitarian law directly before national courts or must they have recourse to special international fora and mechanisms?

The principles discussed so far relate to the obligation of one State to make reparation to another State for violations of international humanitarian law committed by that State and its agents. The payment received can cover both the losses suffered by the State itself and those of its nationals. This is the approach traditionally adopted by peace treaties, which often include, for individuals who have suffered losses, lump-sum payments that the recipient State is responsible for distributing.

For example, at the end of the Second World War, Japan concluded a peace treaty with the Allies in which it made funds available to “indemnify members of the armed forces of the Allied Powers who suffered undue hardships

<sup>13</sup> Organized armed groups have undertaken to make reparations for violations of international humanitarian law in very few cases. One example is the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines, concluded in 1998 between the government of the Philippines and the National Democratic Front of the Philippines, which expressly provides for indemnification of the victims of violations of international humanitarian law by both parties to the conflict. Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines of 16 March 1998 available at [www.incore.ulst.ac.uk/cds/agreements/pdf/phil8.pdf](http://www.incore.ulst.ac.uk/cds/agreements/pdf/phil8.pdf)

Also, although it did not actually pay any compensation, in 2001 a provincial arm of the *Ejército de Liberación Nacional* (ELN) in Colombia publicly apologized for the death of three children and the destruction of civilian houses as a result of an armed attack. The ELN expressed its deep and sincere condolences to all those who had been affected by the explosion and expressed its willingness to collaborate in the recuperation of the remaining objects. (ELN, Head Office, Area Industrial, Communiqué relative to the events of 9 August 2001).

while prisoners of war in Japan". Under the terms of the treaty this was intended to be a full and final settlement precluding claims from individual victims.<sup>14</sup>

International humanitarian law instruments are silent as to who are the beneficiaries of reparation for violations of international humanitarian law. They only address the *responsibility* to compensate.

There is increasing acceptance that individuals do have a right to reparation for violations of international law of which they are victims.<sup>15</sup> This is particularly well established with regard to human rights law. Not only do many of the specialized human rights tribunals have the right to award "just satisfaction" or "fair compensation",<sup>16</sup> but a number of human rights treaties also expressly require States to establish a remedy for violations before national courts.<sup>17</sup>

The position of individual victims of violations of international humanitarian law is more problematic. While there is general consensus that there is no reason for limiting the right to compensation referred to in the Hague Convention and Additional Protocol I to States and that individual victims should also benefit, problems have arisen when such persons have attempted to enforce this right to reparations — usually compensation — directly before national courts.<sup>18</sup>

These difficulties are principally due to the fact that the traditional position under international law is that only States are subjects of international law with full rights and obligations. Individuals are merely

<sup>14</sup> Article 16 of the 1951 Treaty of Peace between the Allied Powers and Japan, San Francisco, *op. cit.* (note 8). The same approach was adopted in the Yoshido-Stikker Accord of 1956 between Japan and the Netherlands in respect of the former's occupation of Dutch East India.

<sup>15</sup> See, also Principle 15, draft Basic Principles and Guidelines, *op. cit.* (note 2).

<sup>16</sup> See, for example, Article 41 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol 11 and Article 63(1) of the American Convention on Human Rights. Such awards have included material losses (e.g. loss of earnings and medical expenses) and non-material damage (e.g. pain, suffering and humiliation). See, generally, D. Shelton, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 1999.

<sup>17</sup> See, for example, Article 2(3) of the International Covenant on Civil and Political Rights and more specifically Articles 9(5) and 14(6), which expressly provide that anyone unlawfully arrested, detained or convicted shall have an enforceable right to compensation, Article 14 of the Convention against Torture and Article 6 of the Convention on the Elimination of Racial Discrimination.

<sup>18</sup> See, for example, Expert Opinion by Professor Frits Kalshoven, "Article 3 of the Convention (IV) respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907", Expert Opinion by Professor Eric David, "The direct effect of Article 3 of the Fourth Hague Convention of 18th October 1907 respecting the Laws and Customs of War on Land" and Expert Opinion by Professor Christopher Greenwood, "Rights to compensation of former prisoners of war and civilian internees under Article 3 of the Hague Convention No. IV, 1907", all in H. Fujita, I. Suzuki and K. Nagano (eds.), *War and the Rights of Individuals: Renaissance of Individual Compensation*, Nippon Hyoron-sha, Tokyo, 1999.

beneficiaries and must claim their rights via their State of nationality. While it is now accepted that individuals have rights under international law, this traditional view is still at the base of many of the hurdles faced by individuals when attempting to directly enforce their rights under international law.

The courts of various States have considered claims by individual victims of violations of international humanitarian law on a number of occasions and the results of such cases have been far from uniform. Although a small number of claims have been successful, most have failed on one or more of the following three grounds: the fact that individual claims were precluded by a peace settlement; sovereign immunity; or the non-self-executing nature of the right to reparations under international law.

For instance, on a number of occasions in recent years, claims by individuals for compensation from Japan for violations of international humanitarian law have been rejected by the courts of Japan on the ground that the lump-sum payments made under the above-mentioned 1951 peace treaty absolved Japan from any further responsibility.<sup>19</sup>

Similarly, certain States, most notably Japan and the US, have rejected claims brought against States, either on the ground that sovereign immunity protected the respondent State from scrutiny by national courts<sup>20</sup> or that the relevant provisions of international humanitarian law instruments did not give individuals the necessary standing to pursue their claims directly before domestic courts — i.e. were not self-executing.<sup>21</sup>

<sup>19</sup> *International Herald Tribune*, November 1998, p. 4. In debates in the parliaments of the Netherlands and the UK, government officials have upheld Japan's position.

<sup>20</sup> Since hierarchically all States are equal, the courts of one State cannot stand in judgment on the actions of another State and traditionally national courts have been reluctant to deviate from this principle, which is the basis of sovereign immunity, even in cases relating to serious violations of human rights and international humanitarian law. The position of international tribunals is different, as States have either agreed to their jurisdiction or it has been imposed upon them by a Security Council resolution.

<sup>21</sup> *Shimoda et al. v. The State*, District Court of Tokyo, Judgment of 7 December 1963, *International Law Reports*, Vol. 32, 1964, p.626.

For a recent application of this approach see *X et al. v. the State of Japan*, Tokyo High Court, Judgment of 7 August 1996, *Japanese Annual of International Law*, Vol. 40, 1996, pp. 117 and 188 (claims by former civilian internees from the Netherlands and the UK and by Filipino "comfort women"). See also *Goldstar (Panama) SA v. United States*, US Court of Appeals, Fourth Circuit, 16 June 1992, *International Law Reports*, Vol. 96, 1992, p. 55, where the court held that Article 3 of the 1907 Hague Convention does not explicitly provide for a privately enforceable cause of action for victims of violations of international humanitarian law) and *Princz v. Federal Republic of Germany*, US District Court for the District of Columbia, 813, F. Supp. 22 (1992) and US Court of Appeals for the District of Columbia, 307 US App DC 102, 26 F.3d 1166 (1994).

A case in point is the 1963 decision of the District Court of Tokyo in *Shimoda et al. v. The State*. Here the District Court ruled that, even though there had been a violation of international humanitarian law, individuals could be considered the subjects of rights under international law only insofar as they had been recognized as such in specific instances, for example in cases of mixed arbitral tribunals. In view of this, the court concluded that there was no way open to an individual who suffered injuries from an act of hostilities contrary to international law to claim damages at the level of international law. It was also of the opinion that considerations of sovereign immunity prevented the claimants from seeking compensation before the municipal courts of either the US or Japan.

It is important to note, however, that none of the courts denied the underlying right to compensation.

This restrictive approach to direct enforcement of the right to compensation before national courts should be contrasted with that adopted by a German Court of Appeal in 1952 and by the Greek courts in a case in 2000 against Germany in which jurisdiction was upheld and the claims of individuals considered.<sup>22</sup>

Subsequent developments in the latter case, however, highlight the further difficulties that may be encountered by victims when they try to

<sup>22</sup> *Personal Injuries (Occupied Germany) case*, Administrative Court of Appeal of Münster, 9 April 1952, *International Law Reports*, Vol. 20, 1952, p. 632; *Prefecture of Voiotia v. Federal Republic of Germany*, Case No. 137/1997; Court of First Instance of Leivadia, 30 October 1997, *American Journal of International Law*, Vol. 92, 1997, p. 765; Case No.11/2000, Hellenic Supreme Court, 4 May 2000.

Subsequent developments in the latter case highlight the further difficulties that may be encountered by victims when they try to enforce a successful claim. The Greek Supreme Court rendered a default judgment against Germany and awarded damages. However, according to Greek law, the authorization of the government is required for such a judgment to be enforced by the seizure of the assets of a foreign State and in this instance the Greek government refused to give the necessary authorization.

The plaintiffs then tried to enforce their judgment before the German courts on the basis of a bilateral agreement for the enforcement and recognition of judgments. In June 2003 the German Supreme Court refused to recognize the Greek judgment on the ground that the Greek courts did not have jurisdiction, as the acts in question – reprisals against civilians during the Nazi occupation of Greece – were sovereign acts and were thus covered by sovereign immunity.

The Supreme Court went on to consider an agreement concluded between Greece and Germany in September 1990. While this constituted a final settlement of reparations claims arising from the Second World War the Court ruled that it did not preclude legal claims by individual citizens. However, it then held that in reviewing any such claims it had to apply international law as it was in 1944. In view of this, the Court concluded that the plaintiffs did not have a cause of action for damage resulting from Nazi Germany's violation of the laws of war because in 1944 international law did not provide individuals with a cause of action but conferred it exclusively upon States by means of the right of diplomatic protection.

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In addition to these more legal challenges, the numerous hurdles of a more procedural and practical nature that victims must overcome should not be forgotten or under-estimated: the fact that victims — and often lawyers — are unlikely to be aware of the existence of the relevant rights and procedures; problems of time limitations for bringing claims and of enforcement of judgments; and the very real risk, particularly in the immediate post-conflict period, that victims may be reluctant to bring proceedings for fear of reprisals.

### **Individuals' claims for compensation before international fora**

Individuals have been more successful in asserting and enforcing their rights against States for violations of international law before international fora. Until recently these commonly took the form of "mixed claims commissions". These are special arbitral tribunals established by treaty — usually bilateral — where individuals and corporations are "exceptionally" given the opportunity to claim against governments.

<sup>23</sup> German Supreme Court, *Distomo Massacre case*, BGH – III ZR 245/98, 26 June 2003.

Numerous mixed claims commissions have been established since the end of the nineteenth century, often after revolutions and other disturbances of public order marked by the destruction and taking — including expropriation — of private property. They have different bases for jurisdiction and compensation, i.e. the grounds on which losses can be claimed.<sup>24</sup> None refer expressly to violations of international humanitarian law. These commissions are nonetheless relevant to the question of compensation of individual victims of such violations. Some of the situations to which they relate amounted to non-international armed conflict and some of the losses for which compensation was claimed and awarded could constitute violations of international humanitarian law. For example, claims for personal injury losses could have resulted from wrongful death or deprivation of liberty in violation of international humanitarian law, and claims for real or personal property losses, could have resulted from pillage or unlawful destruction of civilian property.

In recent years a number of quasi-judicial bodies have been set up — either by the Security Council or by peace treaty or unilaterally by States or corporations — to review the claims of victims and to award, usually but not exclusively, compensation.<sup>25</sup>

The novelty is that individuals and, in some cases, corporations have been given extensive procedural rights before these bodies: they can file claims directly, participate to varying degrees in the claims review process and receive compensation directly.

The precise basis on which these bodies award compensation varies. Some, like the Eritrea-Ethiopia Claims Commission, are required to make a finding of violation of international humanitarian law, while others adopt a

<sup>24</sup> One recent example of a mixed claims commission is the Iran-US Claims Tribunal established as part of a series of treaties – the so-called Algiers Accords – concluded by Iran and the US in 1981. The tribunal has jurisdiction over the claims of US nationals against Iran and of Iranian nationals against the US outstanding at the date of the accords and arising out of debts, contracts, expropriations or other measures affecting property rights. It also has jurisdiction over the claims of the two governments against each other arising out of contractual agreements for the purchase and sale of goods and services. (Article II(1) and (2), Claims Settlement Declaration, 19 January 1981.)

<sup>25</sup> No mechanisms have been established to deal specifically with the restitution of property taken in violation of international humanitarian law. The issue has been addressed, however, mainly with regard to art confiscated by the Nazi regime and States have recognized the need to reach a fair and just solution. See, for example, the principles adopted by the 44 States participating in the Washington Conference on Holocaust-Era Assets of December 1998, available at <[www.lootedartcommission.com/lootedart\\_washingtonprinciples.htm](http://www.lootedartcommission.com/lootedart_washingtonprinciples.htm)>.

more flexible test, like the United Nations Compensation Commission (UNCC)<sup>26</sup> which compensates losses arising as a direct result of Iraq's invasion and occupation of Kuwait, regardless of whether or not they were caused by a violation of this law.

The UNCC is perhaps the first example of these new mechanisms. Established by the Security Council in 1991, it is a quasi-judicial body entrusted with adjudicating claims against Iraq for "any direct loss, damage — including environmental damage and the depletion of natural resources — or injury to foreign governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait."<sup>27</sup> In addition to governments and international organizations, individuals and corporations could file claims directly and receive compensation without the construct of diplomatic protection by their State of nationality.<sup>28</sup>

Decision 1 of the UNCC's Governing Council in August 1991 stressed Iraq's responsibility for five particular causes for loss:

"(a) military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991; (b) departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period; (c) actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation; (d) the breakdown of civil order in Kuwait or Iraq during that period; and (e) hostage-taking or other illegal detention."<sup>29</sup>

The criterion for compensation is that the loss must arise as a direct result of Iraq's invasion and occupation of Kuwait — i.e. although this is not expressly spelled out it means losses arising out of Iraq's violation of *jus ad bellum*. The UNCC therefore does not look at whether a loss was caused by a violation of international humanitarian law. It is probable, however, given

<sup>26</sup> For an account of the UNCC's work see elsewhere in this Review: F. Wooldridge and O. Elias, "Humanitarian considerations in the work of the United Nations Compensation Commission". See also: Heiskanen, V. "The United Nations Compensation Commission" in *The Hague Academy of International Law, Collected Courses*, Vol.296, 2002, pp.259 ff.

<sup>27</sup> UN Security Council resolution 687, 3 April 1991, para. 16.

<sup>28</sup> Strictly speaking, individuals do not file their claims directly with the UNCC but are required to submit them to their State of nationality, which then files them with the Commission. Unlike in cases of diplomatic protection, however, States do not espouse the claims of their nationals. Instead, the role of the State is purely administrative.

<sup>29</sup> UNCC, UN Doc. S/AC.26/1991/1, Governing Council Decision 1, Criteria for expedited processing of urgent claims, 2 August 1991, para. 18.

the circumstances of the invasion and occupation, that many of the claims for which compensation is awarded, such as death, torture, personal injury, mental pain and anguish, hostage-taking, and loss and damage to real and personal property, are factually based on violations of international humanitarian law.

Although the claims of members of the Allied Coalition armed forces are expressly excluded from the UNCC's jurisdiction, an exception is made for the claims of persons who were held prisoner of war as a consequence of their involvement in the operations against Iraq and whose loss or injury resulted from mistreatment in violation of international humanitarian law.<sup>30</sup>

Specific mention should also be made of the Eritrea-Ethiopia Claims Commission. As stated above, this was established by the Peace Treaty of December 2000 and has jurisdiction to award compensation for the claims of individuals, corporations and the governments of Eritrea and Ethiopia for loss, damage or injury between the two governments and between private entities that are related to the conflict and result from violations of international humanitarian law or other violations of international law. To date, the Claims Commission has issued two partial awards, relating to the treatment of prisoners of war by the two governments.<sup>31</sup>

In terms of forms of reparation, the December 2000 peace treaty only expressly authorized the Commission to award compensation and Commission Decision No. 3 of 24 July 2001 established that the appropriate remedy for claims was in principle monetary compensation. However, the decision expressly did not foreclose the possibility of other forms of reparation, if the particular remedy can be shown to be in accordance with international practice and would be reasonable and appropriate in the circumstances.<sup>32</sup> In its claim on behalf of prisoners of war Eritrea requested the Claims Commission to order the return of the prisoners' unlawfully seized

<sup>30</sup> UNCC, UN Doc. S/AC.26/1992/11, Governing Council Decision 11, "Eligibility for Compensation of Members of the Allied Coalition Armed Forces", 26 June 1992. In view of this decision, in its second report the "category B" panel of commissioners awarded compensation *inter alia* to members of the Allied Coalition Forces who had been taken prisoner of war by Iraq and who had been subjected to beatings to obtain information, in violation of the Third Geneva Convention (Report and Recommendations made by the Panel of Commissioners concerning Part One of the Second Instalment of Claims for Serious Personal Injury or Death (Category "B" Claims), 15 December 1994, UN Doc S/AC.26/1999/4, para. 14.

<sup>31</sup> Eritrea-Ethiopia Claims Commission, Partial Award, *Prisoners of War, Eritrea's Claim 17*, 1 July 2003 and Partial Award, *Prisoners of War, Ethiopia's Claim 4*, 1 July 2003.

<sup>32</sup> Eritrea-Ethiopia Claims Commission, Decision Number 3: Remedies, 24 July 2001.

and retained personal property. The Commission referred to Decision No. 3 but held that in the circumstances no evidence had been put before it that such an order would have been in accordance with international practice or appropriate or likely to be effective.<sup>33</sup>

Since the end of the Second World War, Germany has passed several laws and concluded numerous treaties to indemnify victims of the war and the Holocaust.<sup>34</sup> In recent years a number of governments and groups of private corporations have voluntarily established funds and claims review mechanisms to compensate victims of violations of international humanitarian law committed during the Second World War. For example, in December 1999, the German government and a group of 65 German corporations agreed to commit DM 10 billion to a fund to compensate individuals who had been compelled to work for those corporations as forced and slave labourers during the Nazi era. In July 2000, the German Bundesrat (Upper House of Parliament) adopted a law establishing a foundation to provide financial compensation to these former forced and slave labourers and certain other victims of Nazi injustice.<sup>35</sup>

In addition to these more traditional judicial and quasi-judicial mechanisms for compensation, mention should also be made of recent initiatives for addressing the problem of title to real property, which is often associated with the mass displacement of civilians caused by conflicts. The General

<sup>33</sup> Eritrea-Ethiopia Claims Commission, Partial Award, *Prisoners of War, Eritrea's Claim 17*, *op. cit.* (note 32), para. 78.

<sup>34</sup> See, for example, the 1952 Law on the Equalization of Burdens as amended; the 1953 Law for the Compensation of the Victims of National Socialist Persecution as amended; the 1957 Federal Restitution Law as amended; the 1969 Law on the Reparation of Losses as amended; the 1990 Law on the Settlement of Open Property Matters as amended; and the 1994 Law on Indemnification of Victims of Nazism as amended.

<sup>35</sup> *The Law on the Creation of a Foundation "Remembrance, Responsibility and Future"*, Germany, 2 August 2000. Other examples include the programme established in Canada in 1988 to compensate Canadian nationals of Japanese descent for their forced removal and internment during the Second World War. As "symbolic redress" the Canadian government offered CAN\$ 21,000 for each person of Japanese ancestry who was subjected to internment, relocation, deportation, loss of property or otherwise deprived of full enjoyment of fundamental rights and freedom solely on the basis of his/her Japanese ancestry. (Agreement between the Government of Canada and National Association of Japanese Canadians, Japanese Canadian Redress Agreement, 22 September 1988.) In the same year, the US passed a law with the similar aim of acknowledging the fundamental injustice of the evacuation, relocation and internment of US citizens and permanent resident aliens of Japanese ancestry during the Second World War; of officially apologizing for such treatment and of making restitution to the internees. Under the Act each eligible individual was entitled to US\$20,000; the restitution of any position, status, or entitlement lost because of any discriminatory act by the government and the review of any conviction based on wartime legislation (Civil Liberties Act (1988), 10 August 1988, Public Law 100-383, [H.R.442], paras 1, 102-104, 108).

Framework Agreement for Peace in Bosnia and Herzegovina concluded between Croatia, Bosnia-Herzegovina and the FRY in Dayton in November 1995 expressly addressed the plight of civilians who, as a result of hostilities and wartime legislation, suffered widespread loss of property rights. Article I of Annex 7 to the agreement provided that:

“all refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.”<sup>36</sup>

The agreement established an innovative mechanism for the return of real property. It is very wide in scope, focusing on the fact of dispossession rather than only on property taken pursuant to a violation of international humanitarian law. Article VII of the agreement set up a commission entrusted with receiving and deciding the claims in respect of real property rights to property in Bosnia and Herzegovina by displaced persons and refugees. Claimants who did not enjoy possession of the property in question could file claims for the restitution of the property or for just compensation in lieu of return. The Commission for Real Property Claims of Displaced Persons and Refugees has the authority to make final and legally binding decisions on claims for real property and occupancy rights which must be respected by both entities in Bosnia and Herzegovina. It is important to note that the Commission does not actually award compensation but merely makes findings as to the ownership of property. Among the decisions it can take is the setting aside of contracts for transfer of property concluded under duress during the hostilities.<sup>37</sup>

A similar impartial and independent mechanism for resolving property claims was established in Kosovo. In 1999, UNMIK adopted Regulation 1999/23 setting up the Housing and Property Directorate and the Housing and Property Claims Commission to regularize housing and property rights

<sup>36</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina, Dayton, initialled on 21 November 1995 and Paris, signed on 14 December 1995, Annex 7, Agreement on Refugees and Displaced Persons, Article 1.

<sup>37</sup> H. van Houtte, “Mass property claim resolution in a post-war society: the Commission for Real Property Claims in Bosnia and Herzegovina”, *International and Comparative Law Quarterly*, Vol. 48, 1999, p. 632. In the period from the beginning of its operations in March 1996 to the end of February 1999 the commission had registered over 126,000 claims relating to almost 160,000 properties. It is expected that up to 500,000 claims may be submitted.

in Kosovo and to resolve disputes over residential property. To date some 30,000 claims have been filed and some 7,000 have been resolved.<sup>38</sup>

### **Are individuals under a duty to make reparation to victims of their violations of international humanitarian law?**

Increasingly, the question of *who* is responsible for making reparation has also been raised. The principle of individual criminal responsibility for violations of international humanitarian law has long been established, but traditionally it was only States that made reparation. However, in recent years there have been instances in which *individual* violators have also made reparation.

None of the international humanitarian law instruments specifically address the question of individuals' responsibility to make reparation to their victims. This obligation can, however, be inferred from the provisions on individual responsibility for violations of international humanitarian law more generally.<sup>39</sup>

The question of individuals' duty to make reparation has been addressed in the statutes of the three international criminal tribunals. Although the provisions of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) on penalties only refer to restitution, the Rules of Procedure address the question of reparations more generally. Thus, Article 24(3) of the Statute provides that "in addition to imprisonment, the Trial

<sup>38</sup> A. Dodson & A. Heiskanen, "Housing and Property Restitution in Kosovo" in S. Leckie (ed.), *Returning Home: Housing and Property Restitution Rights and Internally Displaced Persons*, Transnational Publishers, New York, 2003. Further information and statistics are available on the website of the Housing and Property Directorate: <<http://www.hpdkosovo.org>>.

<sup>39</sup> The four Geneva Conventions and Additional Protocol I establish a system of individual *criminal* responsibility for persons suspected of war crimes (GC I, Article 50; GC II, Article 51; GC III, Article 130; GC IV, Article 147; and PI, Article 85). The focus is on persecution by national courts. States are required to criminalize, under national law, certain violations of international humanitarian law and to prosecute or extradite persons suspected of these crimes. Although the treaties are silent about the possibility of requiring violators to make reparation to their victims, in the context of these national prosecutions there is nothing to prevent the ordinary national law procedures and rights – such as the concept of *partie civile* discussed below – from applying. While ordinarily an obligation to make reparation would require a finding of criminal responsibility, there may be other mechanisms at national law under which victims may obtain redress from violators, such as, for example, the US Alien Tort Claims Act, which is a civil remedy. As discussed below, at the international level the Statute of the International Criminal Court expressly foresees the possibility of violators being ordered to pay compensation.

See also Principle 17 of the draft Basic Principles and Guidelines, *op. cit.* (note 2), which envisages the possibility of compensation being paid by a party other than a State.

Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.” Rule 105 of the Tribunal’s Rules of Procedure and Evidence establishes procedures for the restitution of property, according to which the ICTY and national courts will cooperate in determining the rightful owners of the property. To date, however, no such orders have been made and no fines have been imposed.

More interesting is Rule 106, which deals with compensation to victims. Although the Statute is silent on the question of compensation, this Rule establishes a system of cooperation between the Tribunal and national authorities whereby a finding of guilt by the ICTY can enable a victim to institute proceedings under national law.<sup>40</sup> The ICTY itself does not recommend the award of compensation and the existence of such a remedy is still entirely dependent on the provisions of the relevant national laws.

The relevant provisions of the Statute of the International Criminal Tribunal for Rwanda (ICTR) and of its Rules of Procedure and evidence mirror those of the ICTY.<sup>41</sup>

The Statute of the Special Court for Sierra Leone adopts the Rules of Procedure and Evidence of the ICTR.<sup>42</sup> Furthermore, the provision on penalties specifically points out that, in addition to imprisonment, the Court may also order the forfeiture of any property, proceeds and assets acquired unlawfully and order their return to their rightful owner or the State of Sierra Leone.<sup>43</sup>

The Statute of the International Criminal Court (ICC) adopts a fundamentally different approach, granting the Court itself the power to make awards of compensation. Thus, Article 75 of the Statute, which deals with reparations to victims, provides that:

“1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

<sup>40</sup> Rule 105B of the ICTY Rules of Procedure and Evidence provides that “pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation”.

<sup>41</sup> Article 23(3) of the Statute of the ICTR repeats verbatim the provisions of Article 24 of the Statute of the ICTY, and Rules 105 and 106 of its Rules and Procedure and Evidence.

<sup>42</sup> Statute of the Special Court for Sierra Leone (2002), Article 14.

<sup>43</sup> *Ibid.*, Article 19.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
3. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.”

The Trust Fund referred to is to be established by a decision of the Assembly of States Parties for the benefit of victims of crimes within the Court’s jurisdiction and will be financed, *inter alia*, by money or other property collected through fines or forfeiture, which the Court may order to be transferred to the fund.<sup>44</sup>

The ICC’s Rules of Procedure and Evidence deal with the issue of reparation in detail. *Inter alia*, the Rules provide that victims of violations can lodge requests for compensation directly before the Court;<sup>45</sup> they grant the Court the power to proceed with regard to the award of compensation on its own motion;<sup>46</sup> and provide that reparation can be awarded on an individualized or collective basis, taking into account the scope and extent of any damage, loss and injury.<sup>47</sup>

At the national level there are two principal ways in which victims of violations of international humanitarian law can receive compensation from national courts. First, in civil law systems, they can become parties to the criminal proceedings (*partie civile*) and claim compensation in them. A disadvantage of this process is that their claim for compensation is dependent on a conviction, thus subject to the higher standards of criminal law as well as to any defences and other general limitations under criminal law.

Secondly, in States that have adopted appropriate legislation, victims may bring civil actions for compensation based on violations of the relevant norms of international law. A notable example of such legislation is the US 1789 Alien Tort Claims Act and the more recent 1991 Torture Victim Protection Act.<sup>48</sup>

The 1789 Alien Tort Claims Act gives US courts jurisdiction over civil claims brought by non-US nationals in respect of torts committed in viola-

<sup>44</sup> ICC Statute (1998), Article 75.

<sup>45</sup> UN, Report of the Preparatory Commission for the International Criminal Court, Addendum, finalized draft text of the Rules of Procedure and Evidence, PCNICC/2000/INF/3/Add.1, (hereinafter “Rules of Procedure”) Rule 94.

<sup>46</sup> Rules of Procedure, Rule 95.

<sup>47</sup> Rules of Procedure, Rule 97.

<sup>48</sup> US, 1789 Alien Tort Claims Act; 1991 Torture Victim Protection Act.

tion of international law or treaties to which the US is a party and entitles them to award compensation for losses suffered.<sup>49</sup> The 1991 Torture Victim Protection Act is more specific and is limited to claims of torture or extrajudicial killing. These acts have been the basis for numerous cases linked with armed conflict.

For example, both Acts were invoked in proceedings brought by a group of Bosnian nationals who sought redress from Radovan Karadzic for violations committed during the conflict in the former Yugoslavia, including genocide, rape, forced prostitution, torture and other cruel, inhuman and degrading treatment, summary executions and disappearances.<sup>50</sup>

In a decision of 1995 the US Court of Appeal, which at that stage was only ruling over the question of jurisdiction, concluded that the 1789 Alien Tort Claims Act gave the US courts jurisdiction over claims based on genocide, war crimes — which it considered included violations of Article 3 common to the Geneva Conventions — and torture and summary execution.<sup>51</sup> In August 2001 the court ordered Karadzic to pay US\$ 745 million to the victims of his atrocities as compensatory and punitive damages.

The Alien Torts Claim Act is an important tool for establishing the responsibility of violators to compensate their victims and for fighting impunity. In practice, however, very few of the awards based upon it have ever actually been enforced — leaving victims with a Pyrrhic victory. For such procedures to actually benefit victims in a tangible manner, in addition to the significant psychological benefit of a finding of violation and responsibility, mechanisms for the recognition and, more importantly, for the enforcement of such judgments must be improved.<sup>52</sup>

<sup>49</sup> Proceedings brought under this act include the 1980 landmark case of *Filartiga v. Peña-Irala* (630 F.2d 876 (2d Cir. 1980)) in which the family of a Paraguayan national who had been tortured to death brought a successful civil action against the alleged perpetrator while he was physically present in the US.

<sup>50</sup> *Kadic v. Karadzic*, 70 F.3d 232 (1995), *International Legal Materials*, Vol. 34, 1995, p. 1592.

<sup>51</sup> *Kadic v. Karadzic*, 70 F.3d 232, at 240 (2nd Cir. 1995), *International Legal Materials*, Vol. 34, 1995, pp. 1602-1606.

<sup>52</sup> There have also been cases in the US in which victims have attempted to obtain compensation from the perpetrators of violations of international humanitarian law on other legal bases, but these were thwarted by findings by the courts that the rules of international law which had been violated were not self-executing. See, for example, the *Handel et al. v. Artukovic* case, where the US District Court for the Central District of California held that it lacked subject-matter jurisdiction under Section 1331 of 28 U.S.C. to consider violations of the 1907 Hague Regulations and the 1929 Prisoner of War Convention, as these treaties were not self-executing. The court also held that customary international law did not grant individuals a right to bring proceedings before national courts. (*Handel v. Artukovic*, US District Court, Central District, California, 601 F Supp. 1421 (1985)).

## Outlook

Progress has been made in recent years via a multitude of different avenues. There appears to be a greater acceptance by States of the idea of individual victims' right to reparation and some willingness to make awards. However, while some victims of violations of international humanitarian law have actually received compensation, the reality remains that the majority remain without redress.

The position could have been different if, at the time the Geneva Conventions or the Additional Protocols were drafted, specific mechanisms had been adopted enabling victims of violations of these instruments to obtain reparation. However, no such proposals were on the negotiating table and the same complex practical considerations that belie the question today would have had to be addressed. For example, would it be possible to make reparation to *all* victims of violations? Where would the funding come from? It is difficult to imagine that these issues could have been resolved in a satisfactory manner without any prior practical experience to build upon.

In the absence of such a universal treaty-based mechanism, progress has been made in a piecemeal fashion on many different fronts: diplomatic protection, mixed claims tribunals, proceedings before national courts, *ad hoc* international quasi-judicial mechanisms and claims against individual violators.

The various approaches that have been developed are valuable contributions. None, however, appears to be a perfect model for the future. The absence of such a perfect solution may be due to the different, and sometimes conflicting, policy issues and practical considerations underlying this subject.

For example, even if it were generally accepted that individuals have a directly enforceable right to reparation before national courts, it is not realistic to believe that this would mean that *all* victims would receive compensation. In conflicts marked by serious and widespread violations of international humanitarian law, victims are too numerous for such a system to work.<sup>53</sup> National courts are likely to award very large sums of money to a

<sup>53</sup> This issue was specifically addressed by the US District Court for the Central District of California in the *Handel v. Artukovic* case in its reasoning as to why it did not consider the 1907 Hague Convention and the 1929 Prisoner of War Convention to be self-executing. According to the court, recognition of a private remedy under these instruments would create insurmountable problems for the legal system that attempted to use it

very small number of victims — usually the most educated and well informed.

This problem has been addressed to some extent in the US, where a large number of the claims for compensation have been made by means of class actions. Litigation has resulted in a number of settlements that have given a wide group of victims the opportunity to obtain redress.<sup>54</sup>

With regard to international mechanisms, the UNCC has been a major experiment with an impressive record. Since its establishment in 1991 it has reviewed nearly 2.6 million claims and awarded some US\$46 billion in compensation, over US\$17.5 billion of which has been paid out to claimants. It is expected to finish reviewing claims by the end of 2004.

This being said, it is important to realize that the UNCC model will probably not be repeated. It is unlikely that there will be the necessary consensus within the Security Council to establish such a body again. Even if

as a source of rights enforceable by individual litigants in domestic courts and would pose serious problems of fairness in enforcement. It held that

“[t]he code of behaviour the Conventions set out could create perhaps hundreds of thousands or millions of lawsuits by many individuals, including prisoners of war, who may think their rights under the Hague Convention violated in the course of any large-scale war. Those lawsuits might be far beyond the capacity of any legal system to resolve at all, much less accurately and fairly ...”

District Court, Central District, California, *Handel v. Artukovic*, Judgement of 31 January 1985, Case No. 84-1411, *International Law Reports*, Vol. 79, 1989, p. 397.

**54** In July 1999, Barclays Bank, having been sued before a US District Court along with various other banks with branches, operations or predecessors in France during the Second World War by families of Jewish customers in France who had lost their assets during the Nazi occupation, agreed to the “Barclays French Bank Settlement” which provided for the establishment of a US\$3,612,500 fund to compensate the victims. (District Court, Eastern District, New York, *Barclays French Bank Settlement case*, Settlement Agreement, 8 July 1999).

In 2000, J. P. Morgan agreed to settle compensation claims by the establishment of a settlement fund of US\$2,750,000 to compensate Jewish victims of the Holocaust whose bank accounts had been seized in France during the Second World War (District Court, Eastern District, New York, *J. P. Morgan French Bank Settlement case*, Settlement Agreement, 29 September 2000).

While the previous settlements related to unlawful and discriminatory seizures of private property during the conflict, the settlement in the *Holocaust Victims Assets case* in 2000 concerned the “dormant” bank accounts of persons who had become the victims of violations of international humanitarian law and genocide. There was no allegation that the banks had committed a violation of international humanitarian law; instead it was a question of “re-establishment” of title to the accounts. In this case a US District Court approved a class-action Settlement Agreement between Holocaust victims and Swiss banks. The Agreement set up a US\$1.25 billion fund for victims and released, subject to a few exceptions, the Swiss Confederation, the Swiss National Bank, all other Swiss banks, and “other members of Swiss industry” from any further claims. (District Court, Eastern District, New York, *Holocaust Victims Assets case*, Memorandum and Order, 26 July 2000; Final Order and Judgement approving the Settlement Agreement, 9 August 2000.)

this were to happen, the exceptional circumstances of the UNCC's funding (one third of the revenue of the Oil-for-Food Programme — the mechanism established by the Security Council to enable Iraq to sell some oil to purchase humanitarian goods — is used to fund the awards and the costs of running the Commission) are unlikely to recur.

The Eritrea-Ethiopia Claims Commission, for example, is funded by the two States and is thus dependent on their goodwill to continue to operate and make awards.

Continuing on the subject of reparation funding, the Trust Fund of the ICC is an innovative approach and it will be interesting to see how it will operate.

Another issue, among many others that could be highlighted, relates to who is entitled to reparation. The mere use of the terms "reparation" and "compensation" presupposes a violation of international law. While in strict legal terms an obligation to make reparation only arises once there has been a violation of the law, applying such a legalistic approach may give rise to injustices in practice. Insistence on the need for a violation would mean that a civilian whose house was targeted would be compensated, but that his neighbour, whose dwelling was destroyed as the result of permissible collateral damage, would not. This is hardly a satisfactory outcome from the point of view of the victims, who are equally in need.

Such problems may be avoided by having recourse to a wide definition of victims so as to include all persons adversely affected by a conflict, or applying a wide or different test for entitlement to compensation. This is the approach adopted by the UNCC which, by compensating for all losses arising as a direct result of Iraq's invasion and occupation of Kuwait, focuses on the initial violation of *jus ad bellum* or Article VII of the Dayton Accord, which deals with restoration of title to real property lost in the course of hostilities. The national legislation of some States also operates in this manner, and entitles persons who have suffered losses as a result of hostilities to *ex gratia* payments.<sup>55</sup> On the other hand, as mentioned earlier, the Eritrea-Ethiopia Claims Commission takes a different approach and requires a violation of international humanitarian law.

<sup>55</sup> See, for example, Israel's 1961 Property Tax and Compensation Fund Law. This establishes a programme and fund for payment of real and personal property damage to persons and property in Israel arising from *inter alia* war damage, which it defines as "damage caused (...) as a result of warlike operations by the regular armies of the enemy or as a result of other hostile acts against Israel or as a result of warlike operations by the Israel Defence Forces". The system is funded by annual property taxes levied on real property owners.

Finally, while claims against individual violators are also a possibility — especially in situations of non-international armed conflict where, until now, it has not been possible to hold organized armed groups accountable — they do have significant limitations and in many cases are unlikely to be a satisfactory solution. As already pointed out, there are problems in enforcing judgments, and not all violators are likely to have the resources to pay the awards. Also, from a wider policy point of view responsibility to pay damages must go hand in hand with, if not indeed follow, investigation and prosecution of violators. Otherwise, as Professor Philip Allot pointed out at the University of Cambridge's Lauterpacht Research Centre for International Law at a seminar in 1999 on torture, torturers could merely take out professional insurance and continue to commit atrocities.

In the foreseeable future it is likely that reparation to individual victims of violations of international humanitarian law will continue to be made in an *ad hoc* manner, conflict by conflict and even possibly issue by issue — e.g. by dealing with real property claims only. Probably at the present stage this is not a bad approach provided that each new mechanism builds upon the experience of the past and reparation is made in a timely manner.

## Résumé

### **Réparations pour violations du droit international humanitaire**

*Emanuela-Chiara Gillard*

*La dernière moitié du XX<sup>e</sup> siècle a été marquée par une augmentation et une codification sans précédent des normes du droit international ayant pour objet la protection de la personne humaine. Il s'agit aujourd'hui de veiller au respect de ces règles. Les réparations pour violations du droit international humanitaire peuvent largement contribuer à mieux le faire respecter et à prévenir toute violation future.*

*Une branche du droit est renforcée si, en cas d'infraction, des réparations peuvent être obtenues ; celles-ci constituent un aspect important de l'application du droit et peuvent avoir un important effet dissuasif. À un niveau plus personnel, les victimes de violations du droit international humanitaire sont extrêmement vulnérables. Des réparations adéquates et reçues au moment opportun peuvent jouer un rôle important pour aider les victimes à reconstruire leur vie. Cet article examine le droit en vigueur et la pratique actuelle en matière de réparations pour violations du droit international humanitaire, en insistant plus particulièrement sur la situation juridique des victimes.*

*Cet examen des lois et des mécanismes nationaux et internationaux révèle que, si le droit aux réparations est universellement reconnu, en l'absence de mécanismes spécifiques – qui existent généralement au niveau international – les victimes sont incapables de faire valoir leurs droits sur le plan individuel et, en conséquence, n'obtiennent aucune réparation. L'article conclut par des questions plus politiques que posent les différents mécanismes existants et la façon dont les compensations à accorder aux victimes de violations du droit international humanitaires sont envisagées.*