

INTERNATIONAL LAW ASSOCIATION
RIO DE JANEIRO CONFERENCE (2008)

COMPENSATION FOR VICTIMS OF WAR

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REPORT

INTRODUCTION

by Dr Luke T Lee (USA) (Chair)

At the ILA's 72ND Conference in Toronto in 2006, the Committee on Compensation for Victims of War reaffirmed the division of labour between the Co-Rapporteurs, with Professor Rainer Hofmann focusing on the substantive aspects of the compensation issue, and Professor Shuichi Furuya the procedural. Both would circulate their drafts in 2007 to all members of the Committee for comments and suggestions, which would be further discussed and consolidated at the 2008 Conference in Rio.

In addition to working on the present drafts, the Committee has engaged in activities aimed at promoting the widest possible dissemination of information on the subject of compensation for victims of war, both within and without the ILA. On 15 February 2007, for example, Co-Rapporteur Hofmann spoke in London, at the invitation of the ILA's UK Branch, on the progress made by the Committee. He also addressed on 28 August 2007 the regional ILA Conference, hosted by the South African Branch in Pretoria, on the role of non-state actors in the context of armed conflicts in sub-Saharan Africa. Elsewhere, exploratory discussions were made with like-minded non-governmental organizations concerning possible areas of collaboration.

My inability to attend the Conference in Rio necessitates the designation of an acting Chair for the duration of the Conference. With the Director of Studies' concurrence, Professor Hofmann has been so designated. I am pleased that Professor Hofmann has agreed to act in my place during my absence.

To the Co-Rapporteurs, Research Assistants at the Wilhelm Merton Centre (Andrea Friedrich and Friedrich Rosenfeld), and those Committee members who have responded so helpfully to the calls for critical and invaluable comments, we owe them our sincere gratitude.

COMPENSATION FOR VICTIMS OF WAR
(SUBSTANTIVE ISSUES)

PRELIMINARY REMARKS

by Professor Rainer Hofmann

In line with the decisions taken by the Committee at the Berlin workshop in August 2004 and the results of the discussion at the Frankfurt intersessional meeting in September 2005, the Co-Rapporteurs prepared, for the Toronto conference in June 2006, interim reports on substantive issues (*Rainer Hofmann*) and procedural issues (*Shuichi Furuya*) and presented a preliminary analysis of issues to be addressed in drafting a model statute for an *ad hoc* Compensation Commission (*Shuichi Furuya*) (see ILA, Report of the 72nd Conference, Toronto 2006, pp. 766 ff., 783 ff. and 794 ff.). In light of the discussion at Toronto, a first Draft Declaration of International Law Principles on Compensation for Victims of War (Substantive Issues) was finalized in September 2007 and circulated among Committee members for comments. Many such comments were received and taken into due account in the drafting of the below Draft Declaration to be submitted for general discussion at the Rio de Janeiro conference in August 2008. Particular thanks for their helpful comments go to *Cordula Droege, Dieter Fleck, Lady Hazel Fox, Shuichi Furuya, Jann Kleffner, Edda Kristjansdóttir, Suzannah Linton, James Nafziger, Natalino Ronzitti, David Ruzié, Ben Saul* and *Elke Schwager*. I should also like to express my special gratitude to *Andrea Friedrich* and *Friedrich Rosenfeld* for their most valuable support in drafting the below Draft Declaration.

This Draft Declaration should be read taking into account the following introductory remarks: In view of the relevant state practice and taking note of a strong majority among scholars, I have come to the conclusion that, until most recently, international law did not provide for any right to reparation, including monetary compensation, for victims of violations of the rules of armed conflict; this applies, in particular, as concerns war crimes etc. committed during World War II. I submit, however, that the situation is changing: There are increasing examples of international bodies proposing the existence of, or the need to establish, such a right, although I think that there is still not sufficient state practice to allow for such a right to be considered as constituting customary international law. I also think that this Committee has, as yet, not come to any final conclusion on this most fundamental issue of its work. In order to focus its future discussion, I have opted to draft a Declaration which is based on the assumption that such a right already exists. Notwithstanding many written comments on this issue, I propose that it should figure at the centre of our work in, and possibly also after, Rio de Janeiro.

Taking into account the comments received and without wishing to exclude any other issues from being addressed, I should like to propose to have an in-depth discussion on the following fundamental issues:

- Should the right to reparation be limited to situations of violations of *core* norms (see comment 3 on article 3)?
- Should the right to reparation be limited to situations of *serious* harm (see comment 4 on article 4)?
- Should *collateral damages* trigger the right to reparation (see comment 3 on article 4)? If so, to what extent?
- What is the situation of non-state actors (see comment 2 on article 5)?
- Do terrorist acts and measures performed in response to such terrorist acts – that is measures in the so-called war on terror – give rise to a right to reparation (see comments 2 and 3 on article 2)? If so, to what extent?
- Is there any hierarchy between the various forms of reparations?
- What measures can be taken “to give teeth” to the right to reparation?

Since the subsequent Draft Declaration deals not only with (monetary) compensation and not only with victims of war, it is proposed that the Committee should approach the ILA Executive Committee with a view to adopt a decision enabling it to continue its work on a draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (and not only on Compensation for Victims of War).

DRAFT DECLARATION OF INTERNATIONAL LAW PRINCIPLES ON COMPENSATION FOR VICTIMS OF WAR (SUBSTANTIVE ISSUES)

INTERNATIONAL COMMITTEE ON COMPENSATION FOR VICTIMS OF WAR
INTERNATIONAL LAW ASSOCIATION

Prepared by

Professor Rainer Hofmann (Co-Rapporteur)*

SECTION I
Definitions

ARTICLE 1
Reparation

1. For the purposes of the present Declaration, the term “reparation” is meant to cover measures that seek to eliminate all the harmful consequences of a violation of international law and to re-establish the situation, which would have existed, if it had not occurred.
2. Reparation encompasses different forms, including restitution, compensation and satisfaction. In accordance with the provisions of section 2, these forms of reparation can be granted singly or in combination in order to guarantee full reparation [to the extent possible].

Commentary

- (1) This provision introduces the term reparation, which represents the basic remedy laid down in the present Declaration. Article 1 (1) contains a general definition; details on different types of reparation are specified in article 1 (2).
- (2) The definition in article 1 (1) is well established in international law. Its origins can be traced back to the Chorzów Factory Case, where it was held:

“Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation, which would, in all probability, have existed if that act had not been committed.”¹

Two elements of this definition merit special attention. Above all, the encompassing nature of reparation has to be emphasized. The adjective “all” expresses that every type of harm, be it material or immaterial, is addressed by reparation. Since it is often impossible to undo the violation of international law, article 1 (1) is formulated as an obligation of means. Besides, article 1 (1) makes clear that two situations have to be compared when making reparation: the current situation and the hypothetical situation, which would exist, if the violation of international law had not occurred. The gap between the two situations is bridged by reparation.

- (3) Article 1 (2) takes account of the fact that a violation of international law might result in different types of harm. Accordingly, different forms of reparation are set out in this provision. Article 1 (2) mentions restitution, compensation and satisfaction, which are presented in a hierarchical order. From a legal perspective, restitution represents the primary form of reparation. In practice, however, compensation plays a more important role. This is due to the difficulties that arise in making restitution.
- (4) In its final part, article 1 clarifies that different forms of reparation may be awarded simultaneously. This might prove necessary in order to provide full reparation. Details are specified in section 2.

ARTICLE 2 *Armed Conflict*

For the purposes of the present Declaration, a situation shall be deemed an “armed conflict”, if there is

- a) a confrontation between States, which is carried out by armed force, (international armed conflict) *or*
- b) protracted armed violence within a State between governmental authorities and organized armed groups *or* between such groups (non-international armed conflict).

Commentary

- (1) The term “armed conflict” delineates the temporal and geographical frame within which claims of victims may arise. The present Declaration covers international armed conflicts, defined in article 2 lit. a), as well as those of a non-international character, which are defined in article 2 lit. b)
- (2) The essential element of the term “armed conflict” is the occurrence of hostilities. However, the exact content of the definition varies depending on whether a non-international or an international conflict is at issue. The definition of the latter is self-evident. An international conflict exists whenever transboundary armed force is used between two or more States. Thus, measures in the so-called “war on terror” could possibly qualify as international armed conflict.

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¹ *Factory at Chorzów*, Merits, PCIJ, Series A, No.17 (1928), p. 47.

For a non-international conflict to fall under the present definition, two conditions have to be met. First, the groups involved in the conflict have to feature an organized structure. Second, the violence committed must be qualified as “protracted”. Thus, the hostilities must meet a certain threshold of intensity and duration. Armed conflict does not include situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

- (3) It has to be noted that the contours of the term “non-international armed conflict”, as referred to in common article 3 of the 1949 Geneva Conventions, have been clarified and supplemented by three important developments.² Apart from article 1 of the 1977 Additional Protocol II to the 1949 Geneva Conventions, which sets the threshold of application to certain non-international armed conflicts, it is especially the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) which merits special attention. In *Prosecutor v. Tadic*, the tribunal held that

*“an armed conflict exists, whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.*³

This formula has been adopted in article 8 (2) (f) of the Rome Statute of the International Criminal Court (ICC). Under the modern approach, the threshold for characterizing hostilities as non-international armed conflict is lower than the one contained in article 1 para. 1 of the 1977 Additional Protocol II to the 1949 Geneva Conventions, which requires sustained and concerted military operations and the control of the dissident armed forces or organized armed groups over a part of the territory.⁴ This Declaration follows the broader modern approach without requiring additional conditions.

Nevertheless, even today, isolated acts of terrorism committed during peacetime would still not suffice to be characterized as non-international armed conflict.⁵ This interpretation is buttressed by the drafting history of common article 3 of the 1949 Geneva Conventions, where the delegations explicitly rejected proposals that would comprise any type of hostility committed by force of arms regardless of a minimum threshold of continuity and level of violence.⁶ At the same time, it has to be emphasized again that armed force carried out by State authorities in reaction to terrorist acts – the so-called “war on terror” – could fall within the scope of this Declaration.

- (4) Under the modern formula, armed conflict can exist between organized armed groups.⁷ In this situation, different actors may be held liable. On the one hand, the non-state armed groups themselves might be obliged to make reparation. In this regard, reference is made to the commentary to article 5. On the other hand, the responsibility of a State or International Organization for an omission to protect people against the unlawful acts of organized armed groups might be triggered.⁸
- (5) As has been laid down in the *Tadic* ruling, the temporal and geographical scope of armed conflicts is not strictly confined to the exact time and place of hostilities.⁹ As regards the temporal scope of application, this is consistent with the

² For details see A. Cullen, *The Parameters of Internal Armed Conflict in International Humanitarian Law*, 12 U. Miami Int'l & Comp. L. Rev. (2004), 189 – 229.

³ *Prosecutor v. Tadic*, Case No. IZ 94-1, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, P 70 (Oct. 2, 1995), para. 70.

⁴ See A. Zimmermann, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers Notes - Article by Article* (Baden - Baden 1999), 285.

⁵ See also M. P. Fischer, *Applicability of the Geneva Conventions to „Armed Conflict“ in the War on Terror*, 30 Fordham Int'l L. J. (2007), 509 (514) on the question of whether terrorists fall under the protocols additional to the 1949 Geneva Conventions. For a different view see D. Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. (2003), 1 (38). As regards reparation for terrorist acts, see the *Guidelines on the Protection of Victims of Terrorist Acts*, adopted by the Committee of Ministers of the Council of Europe on March 2, 2005 at the 917th meeting of the Ministers' Deputies. For further information see E. Roucouas, *Compensation for Victims of Terrorism: The Council of Europe's Guidelines on the Protection of Victims of Terrorist Acts*, in: International Bureau of the Permanent Court of Arbitration (ed.), *Redressing Injustices through mass claims processes – Innovative Responses to Unique Challenges* (Oxford et al. 2006), 267 ff. See also Resolution S/RES/1566 (2004), adopted by the Security Council at its 5053rd meeting, on October 8, 2004, para. 10, as well as *Human Rights and Terrorism*, Commission on Human Rights resolution 2002/35, para. 11.

⁶ See J. Pictet, *The Geneva Conventions of 12 August 1949, Commentary*, Volume IV, International Committee of the Red Cross (Geneva 1952), 36 ff.

⁷ On this issue see T. Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 Am. J. Int'l L. (1998), 236 (237).

⁸ See for example ECtHR, *Case of Ilascu and Others v. Moldova and Russia*, Application No. 48787/99, Judgement of July 8, 2004, where the responsibility for acts of the authorities of the Moldavian Republic of Transdniestria (MRT) was at issue. The MRT is a region of Moldova which proclaimed its independence in 1991 but is not recognised by the international community. One of the countries which support the MRT is Russia. In its judgements, the ECtHR held that both Russia and Moldova were responsible for human rights violations committed in the MRT; J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, (Cambridge 2005), 80 (para. 8), 82 (para. 4)

⁹ See for example *Prosecutor v. Tadic*, supra note 3, para. 67, where it was held: *The definition of armed conflict varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.*

four 1949 Geneva Conventions, which contain provisions applying beyond the cessation of hostilities.¹⁰ However, taking note of an emerging special regime for the post-conflict phase, the application of the present Declaration should as a general rule be confined to acts committed whilst hostilities are still taking place. At the same time, it has to be stressed that the breach of an international obligation by an act not having a continuing character occurs at the moment when the act is performed.¹¹ The right to reparation is not affected, if the harming effect occurs at a later moment.

ARTICLE 3 *Violation of International Law*

1. For the purposes of the present Declaration, the expression “violation of international law” is meant to cover conduct which is in contradiction to [core] norms of international humanitarian law or [core] norms of international human rights law.
2. A violation can be committed through acts or omissions.

Commentary

- (1) The right to reparation – in whatever form – presupposes a violation of international law¹², the definition of which is presented in article 3. This provision contains three elements: First, there must be conduct, which can consist in acts or omissions. Second, this conduct must be attributable to the wrongdoer. In this regard, reference is made to general principles of attribution, as laid down in Chapter II of the ILC Articles on State Responsibility. Finally, and most importantly, the conduct must be in contradiction to international law.
- (2) As regards this third element, the violation of [primary] norms belonging to two different regimes might give rise to the rights and obligations set out in the present Declaration.
 - a. Above all, rules of humanitarian law are mentioned. Considering the temporal scope of the present Declaration, which refers to the time of armed conflict, their relevance is self-explanatory.
 - b. International human rights law also comes into the purview of the present Declaration. The general applicability of international human rights norms in armed conflicts is a development which is increasingly gaining support in international law. The ICJ elaborated on this concept for the first time in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. Here it ruled that the protection of human rights norms does not cease in armed conflict.¹³ This was confirmed in the advisory opinion on the *Wall on the Palestinian Territory*¹⁴ as well as in the judgement in *Congo v. Uganda*¹⁵. The latter indicate that there is no general rule as to which regime prevails in case of collision. Thus, the court ruled:

*“As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”¹⁶*

Consistent with this jurisprudence, the applicable norms have to be determined in each particular case. Both regimes complement one another in ensuring the broadest protection possible for victims.¹⁷

¹⁰ See article 5 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 970, article 5 *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 972, article 6 *Convention relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 973.

¹¹ This is consistent with article 14 of the *International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. A/56/40(Vol.I)/Corr.4 (hereinafter ILC Articles on State Responsibility).

¹² W. Heintschel von Heinegg, *Entschädigungen für Verletzungen des humanitären Völkerrechts*, in: Deutsche Gesellschaft für Völkerrecht (ed.), *Entschädigung nach bewaffneten Konflikten/Die Konstitutionalisierung der Welthandelsordnung* (Heidelberg 2003), 1 – 20, with further references.

¹³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ 240, para. 25; *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ 178, para. 106.

¹⁴ *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory*, supra note 13, 178, para. 106.

¹⁵ *Case Concerning Armed Activities on the Territory of the Congo*, (Dem. Rep. Congo v. Uganda), December 19, 2005, para. 216

¹⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra note 13, para. 106.

¹⁷ See also United Nations Human Rights Committee, General Comment No. 31 (2004), U.N. Doc. CCPR/C/21/Rev.1/Add.13 para. 11; A. M. Gross, *Human Proportions: Are Human Rights the Emperor’s New Clothes of Occupation?*, 18 Eur. J. Int’l L. (2007), 1 ff.; O. Ben-Naftali / Y. Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 Isr. L. Rev. (2003-2004), 17 (50); J. A. Frowein, *The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation*, 28 Israel Yearbook on Human

- c. Article 3 does not mention the *ius ad bellum*. As these rules merely protect the territorial integrity of States, individual claims to reparation cannot be based on their violation, unless explicitly stipulated otherwise in international instruments.¹⁸ [It has to be noted, however, that collateral damages may be in violation of humanitarian law, if they are the result of indiscriminate¹⁹ or disproportionate²⁰ attacks.]

- (3) [The adjective “core” in Article 3 qualifies the norms, a violation of which might give rise to the rights and obligations laid down in this Declaration. It refers to the quality and importance of the legally protected interest at issue. As an example, one might adduce the right to life, liberty and security as well as the right not to be subjected to torture or cruel, inhuman or degrading treatment.²¹ The norms need not necessarily qualify as *ius cogens* nor must their violation constitute international crimes.]

ARTICLE 4

Victim

1. For the purposes of the present Declaration, the term “victim” is meant to designate natural or legal persons, who suffer [serious] harm as a result of a violation of international law. The harm suffered may include physical or mental injury, emotional suffering or economic loss.
2. This provision is without prejudice to the right of other persons – in particular those in a family or civil law relationship – to submit a claim on behalf of victims provided that there is a legal interest therein.

Commentary

- (1) Article 4 specifies the conditions required to establish the existence of a victim. Four elements are identified. First, the group of possible victims is specified as comprising natural and legal persons. Second, a violation of international law must have occurred. Third, natural or legal persons must have suffered harm. Finally, a link between the violation of international law and the harm suffered has to be established.
- (2) As to the first of these elements, it is important to note that the present Declaration is not confined to delineating rights of natural persons. Consistent with international State practice²², account is also taken of legal persons to the extent the nature of rights laid down in this Declaration permits. Legal persons include corporations or other entities that, on the date on which the claim arose [harm occurred], were incorporated or organized under the law of a State. No restrictions are made as regards the nationality of victims. As a consequence, situations are conceivable, where victims have claims against their State of origin.²³
- (3) The scope of the present Declaration is confined to persons who are adversely affected as a result of a violation of international law. In this regard, reference is made to the definition in article 3. It is still unclear, in how far collateral damages may give rise to an individual claim to reparation. [As laid down in the commentary to article 3, collateral damages

Rights (1998), 1 (9); W. Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 *Eur. J. Int'l L.* (2005), 741 (743 f.).

¹⁸ UN Security Council Resolution 687 (April 8, 1991) serves as a prominent example for a situation where claims to reparation have been based on a violation of the *ius ad bellum*. The resolution established Iraq’s liability under international law for any direct loss, damage [...] or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait. For a wider definition of victims including every person adversely affected by war, see L. Zegveld, *Remedies for victims of violations of international humanitarian law*, 85 No. 851 *IRRC* (2003), 497 (501). See also Eritrea-Ethiopia Claims Commission, Decision Number 7, Guidance Regarding Jus ad Bellum Liability, available at www.pca-cpa.org.

¹⁹ See article 51 (4) (c) AP I, article 85 (3) (b) I AP I, article 3 (3) (c) of the 1990 Protocol II to the CCW, article 3 (8) (c) of the 1996 Amended Protocol II to the CCW. For further reference see J.M. Henckaerts / L. Doswald – Beck, *Customary International Humanitarian Law*, Volume II – Practice (Cambridge et al. 2005), 247 ff.

²⁰ See article 51 (5) (b) AP I, article 85 (3) (b) AP I, article 3 (3) (c) of the 1990 Protocol II to the CCW, article 3 (8) (c) of the 1996 Amended Protocol II to the CCW, article 24 (4) of the 1923 Hague Rules of Air Warfare. For further reference see J.M. Henckaerts / Doswald – Beck, *supra* note 19, 297 ff.

See L. Doswald-Beck / S. Vité, *International humanitarian law and human rights law*, 293 *ICCR* (1993), 94 (94 ff.); article 3 common to the four 1949 Geneva Conventions; Rules 89, 90, 99 of Customary International Humanitarian Law, in: J.M. Henckaerts / L. Doswald – Beck, *Customary International Humanitarian Law*, Volume I – Rules (Geneva 1952), 311 – 319, 344 – 352.

²² For the practice of the *United Nations Compensation Commission*, see Decision S/AC.26/1991/4 of 23 October 1991. See also Art. 5 (8) of the *Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea* and Art. VII of the *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran*.

²³ For a different view see A. Steinkamm, *War damages*, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume IV (Amsterdam et al. 2000), 1354 (1356 f.).

may be the result of a violation of international humanitarian law. In this case, victims have a right to reparation.^{24]} Considering the large amount of collateral damage caused by lawful conduct of hostilities in armed conflict and the importance a sound reparation policy has for post-conflict peace building, pragmatic solutions should be encouraged.

- (4) Harm can be described as the negative outcome resulting from the comparison of two conditions of one person.²⁵ It encompasses the different forms including physical and moral harm, which are enumerated in a non-exhaustive manner in sentence 2.
[The infringement necessary to come within the purview of the present Declaration is specified by the adjective “serious”. The threshold of gravity to be passed can be measured by the quality and quantity of the harm suffered.²⁶ As of now, there is no sufficient State practice indicating that every violation triggers individual rights to reparation. The “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law”²⁷, adopted by the United Nations General Assembly on 16 December 2005, are likewise restricted to violations of a certain gravity. However, it has to be emphasized, that the present Declaration constitutes only a first step, albeit an important one, in the larger process of strengthening the rights of persons adversely affected by armed conflict.]
- (5) Finally, a link between the violation of international law and the harm suffered has to be established. Apart from mere causation, there must be a sufficiently direct and proximate link between these two elements.²⁸ As a general rule, only persons directly affected will be considered as victims. This does not preclude that in the future persons linked by special bonds, such as strong emotional or family ties to the person directly harmed, might be considered as victims. Under human rights regimes, even today, indirect victims of human rights violations have successfully claimed reparation. Thus, in the *Aloeboetoe* Case, the Inter-American Court of Human Rights held that the obligation to make reparation for damages might extend to cover persons who, though not successors of the victims, have suffered some consequence of the unlawful act. In accordance with these principles, dependents suffering morally were considered to be entitled to reparation.²⁹ The “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law” do likewise contain a broad definition of the term “victim” including persons only indirectly affected. As regards violations of law committed during armed conflict, these broad definitions, albeit desirable, do not yet reflect State practice. Only after the death of victims are their families entitled to submit a claim. This is confirmed by the practice of the UNCC³⁰ and has been expressed in various principles³¹. Conceptually, it can either be argued that the claim of the direct victim succeeds to his or her heirs or that a new claim of close family members is triggered.³²
- (6) The disclaimer in article 4 (2) allows taking due account of situations where victims are in no position to claim themselves. In these cases – for example when the victim is incapacitated or a minor child – third persons might be considered legally entitled to claim on behalf of the victim, provided that there is a sufficient link between the two. However, reparation has to be awarded to the victim him- or herself.³³

²⁴ See also D. Fleck, *Individual and State Responsibility for Violations of the Ius in Bello. An Imperfect Balance*, in: W. Heintschel von Heinegg / V. Epping (ed.), *International Humanitarian Law Facing New Challenges* (Heidelberg et al. 2007), 171 (180), who calls for an even wider definition of the notion ‘victim’. According to Fleck, victims of armed conflict include persons suffering from collateral damages and reparation should not be limited to a violation of international humanitarian law.

²⁵ See H. Rombouts / S. Vandegiste, *Reparation for Victims of Gross and Systematic Human Rights Violations: the Notion of Victim*, Third World Legal Studies (2000 – 2003), 89 (97).

²⁶ See M. Stohl / D. Carelton / G. Lopez / S. Samuels, *State Violation of Human Rights: Issues and Problems of Measurement*, 8 Hum. Rts. Q. (1996), 592 (600 f.).

²⁷ UN Doc. A/Res/60/147, March 21, 2006.

²⁸ See B. Graefrath, *Responsibility and Damages Caused*, 185 RdC (1984 II), 9 (95). It has to be noted, however, that in mass claims processes, lowered standards of proof might be adopted. See H.M. Holtzmann / E. Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, (Oxford 2007), 210 ff.

²⁹ *Aloeboetoe et al. v. Suriname, Reparations* (Art. 63 (1) American Convention on Human Rights), Judgement of September 10, 1993, Inter-AmCtHR (Ser.C) No.15 (1994), paras 67, 76. See also *Loayza Tamayo v. Peru*, Judgement of November 27, 1998, Inter-AmCtHR (Ser.C) No.42 and *Blake v. Guatemala*, Judgement of January 22, 1999, Inter-AmCtHR (Ser.C) No.48. As an example for the jurisprudence of the European Court of Human Rights see *Velikova v. Bulgaria*, Application no. 41488/98, Judgement of May 18, 2000.

³⁰ According to decision S/AC.26/1991/3, Nr. 3 (c) of the Governing Council of the United Nations Compensation Commission, October 18, 1991, a spouse, child or parent of the individual suffered death may claim compensation for pecuniary losses resulting from mental pain and anguish. See also H.M. Holtzmann / E. Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, supra note 28, 59 f.

³¹ See for example article XVII *Guidelines on human rights and the fight against terrorism*, adopted by the Committee of Ministers of the Council of Europe on July 11, 2002, at the 804th meeting of the Ministers’ Deputies, as well as the *Basic Principles* referred to above.

³² See also J. Schönsteiner, *Dissuasive Measures and the ‘Society as Whole’: A Working Theory of Reparations in the Inter-American Court of Human Rights*, 23 Am. U. Int’l L. Rev. (2007), 127 (133 ff.) on granting reparation to the “next of kin”.

³³ For the consistent practice of the UNCC, see for example the *Recommendations made by the Panel of Commissioners concerning Individual Claims for Serious Personal Injury or Death*, S/AC.26/1994/1, p. 19. See also Art. 13 *CRPC Book of Regulations on the Conditions and Decision Making Procedure for Claims for Return of Real Property of Displaced Persons* on the possibility of filing a claim for someone else.

ARTICLE 5
Wrongdoers

For the purposes of the present Declaration, the term “wrongdoer” is meant to designate States and International Organizations responsible for a violation of international law.

Commentary

- (1) Article 5 introduces the term “wrongdoer” to designate those subjects of international law, who are responsible for a violation thereof. Consistent with general principles of international responsibility, the group of potential wrongdoers comprises States and International Organizations. With the inclusion of International Organizations, the present Declaration takes due account of the growing importance of these subjects of international law. It has to be noted that the responsibility of International Organizations has recently been confirmed by studies of the International Law Association³⁴ and the International Law Commission³⁵. At the same time, there is not yet consensus on the question whether, and if so to what extent, States members of International Organizations are liable for acts of the latter. This issue is beyond the scope of the present Declaration.
- (2) As regards responsibility of other non-State actors as for example organized armed groups referred to in article 2 (2) of this Declaration, relevant State practice is still scarce. However, article 75 of the Rome Statute can be considered as an expression of the emerging regime of responsibility of individuals.³⁶

SECTION II
Rights of Victims of Armed Conflict

ARTICLE 6
Right to Reparation

Victims of armed conflict have a right to full and prompt reparation.

Commentary

- (1) By granting an individual right to reparation, article 6 states the most fundamental principle of the present Declaration. Two elements are identified in this provision. Above all, article 6 lays down who is the holder of a right to reparation. The content of this right is specified by the adjectives “full” and “prompt”.
- (2) As regards the holder of the right to reparation, it is important to note that article 6 grants a right to the individual victim.
 - a. Under international law, the existence of an individual right is not dependent on the international procedural capacity to assert this right.³⁷ This dissociation of rights and enforcement mechanisms has already been recognized

³⁴ International Law Association, Berlin Conference 2004, Accountability of International Organizations, Final Report 2004, available under: http://www.ila-hq.org/html/layout_committee.htm.

³⁵ International Law Commission, Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006) Chapter VII, Responsibility of International Organizations, p. 246 ff.

³⁶ See also the encompassing analysis of L. Zegveld, *Accountability of armed opposition groups in international law* (Cambridge 2002). See also D. Fleck, *Humanitarian Protection against Non-State Actors*, in: J.Abr. Frowein / K. Scharioth / I. Winkelmann / R. Wolfrum, *Verhandeln für den Frieden/Negotiating for Peace – Liber Amicorum Tono Eitel*, Berlin 2003, 69 ff.; A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford 2006.

³⁷ S. Kadelbach, *Staatenverantwortlichkeit für Angriffskriege und Verbrechen gegen die Menschlichkeit*, in: Deutsche Gesellschaft für Völkerrecht (ed.), *Entschädigung nach bewaffneten Konflikten, Die Konstitutionalisierung der Welthandelsordnung*, supra note 12, 63 (83 f.); B. Heß, *Kriegsentschädigung aus kollisionsrechtlicher und rechtsvergleichender Sicht*, in: Deutsche Gesellschaft für Völkerrecht (ed.), *Entschädigung nach bewaffneten Konflikten, Die Konstitutionalisierung der Welthandelsordnung*, supra note 12, 107 (116); L. Zegveld, *Remedies for victims of violations of international humanitarian law*, supra note 18, 507; R. Pisillo Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: an Overview*, 1 J. Int'l Crim. Just. (2003), 339 (343); E. Roucouas, *Facteurs privés et droit international public*, 299 RdC (2002), 9 (48); A. Randelzhofer, *The Legal Position of the Individual under Present International Law*, in: A. Randelzhofer / C. Tomuschat (ed.), *State Responsibility and the individual: reparation in instances of grave violations of human rights* (The Hague et al. 1999), 231 (233); R. Provost, *International Human Rights and Humanitarian Law* (Cambridge 2002), 16; A. Fischer-Lescano, *Subjektivierung völkerrechtlicher Sekundärregeln. Die Individualrechte auf Entschädigung und effektiven Rechtsschutz bei Verletzungen des Völkerrechts*, 45 Archiv des Völkerrechts (2007), 299 (331). For the opposite view see V. Epping, *Völkerrechtssubjekte*, in: K. Ipsen (ed.), *Völkerrecht* (München 2005), 55 (98); H. Mosler, *The International Society as a Legal Community*, 140 RdC (1974), 70; I. Brownlie, *Principles of Public International Law* (Oxford 2003), 57; H. Kelsen, *Principles of International Law* (New Jersey 2004) (reprint), 143 ff.

in the jurisprudence of the Permanent Court of International Justice.³⁸ Recently, the International Court of Justice has confirmed it in the *LaGrand Case*.³⁹ As a consequence, individual rights may even be recognized in instances, in which claims are submitted through the respective governments.⁴⁰

- b. The obligation to make reparation has its roots in general principles of State responsibility as expressed in the *Chorzów Factory Case*⁴¹, article 3 of the 1907 Hague Convention IV, article 91 of the 1977 Additional Protocol I to the 1949 Geneva Conventions as well as in human rights instruments.⁴² The existence of an individual right as a corollary of this obligation has however been disputed for a long time. Consistent with the concept of intertemporal law⁴³, the relevant State practice has to a large degree been influenced by the changing view on the legal position of the individual under international law. Whilst traditionally claims of the individual have been denied, modern State practice increasingly endorses an individual right to reparation.⁴⁴
- c. The history of granting reparation has its roots as early as 1794, when the Jay Treaty was signed.⁴⁵ Article 7 of this treaty stipulated the obligation of Great Britain to make full compensation to American merchants who had sustained losses as a consequence of a capture of their vessels. Conversely, the treaty also contained an obligation of the United States to compensate British merchants.⁴⁶
- d. Following World War I, an elaborate reparation regime was laid down in articles 231 ff. of the Treaty of Versailles. The treaty was founded on the premise that the settlement of war claims belongs to the exclusive sphere of States. To the extent individual claims were allowed, which was the case under article 297 creating the U.S.-German Mixed Claims Commission, these were simultaneously put at the disposal of the individuals' home States.⁴⁷
- e. The reparation practice in the immediate aftermath of World War II does not reflect significant changes.⁴⁸ The agreements with Germany and Japan contained waivers of individual claims.⁴⁹ Claims to reparation for atrocities committed during World War II were equally denied by national courts. As an example, one might adduce the

³⁸ *Jurisdiction of the Courts of Danzig, Advisory Opinion*, PCIJ, Series B, No.15 (1928), 17 f. See also *Appeal from a Judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (The Peter Pázmány University v The State of Czechoslovakia), PCIJ Series A/B, No. 61 (1933), 231, where it was held that the 'capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself'. This statement, which has been made with regard to civil rights, holds true for any legal order.

³⁹ *LaGrand* (Germany v. United States of America), ICJ 2001, 466 (494), para. 77.

⁴⁰ The compensation process under the UNCC may serve as a prominent example. On this issue see N. Wühler, *The United Nations Compensation Commission*, in: A. Randelzhofer / C. Tomuschat (ed.), *State Responsibility and the individual: reparation in instances of grave violations of human rights*, supra note 37, 213 (216).

⁴¹ *Factory at Chorzów, Merits*, supra note 1, p. 47.

⁴² See E. Schwager, *Ius bello durante et bello confecto*, 173 *Schriften zum Völkerrecht* (2008), 103 – 111; R. Bank / E. Schwager, *Is there a Substantive Right to Compensation for Individual Victims of Armed Conflict against a State under International Law?*, 49 *GYIL* (2006), 367 (398 ff.).

⁴³ See T.O. Elias, *The Doctrine of Intertemporal Law*, 74 *Am. J. Int'l L.* (1980), 285 (285 ff.).

⁴⁴ L. Lee, *The Right of Victims of War to Compensation*, in: R. St. J. Macdonald (ed.), *Essay in honour of Wang Tieya*, 1993, 489 ff.; E.C. Gillard, *Reparation for violations of international humanitarian law*, 85 No. 851 *IRRC* (2003), 529 (536); F. Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of the Hague Convention IV of 1907 to Article 91 of Additional Protocol I and Beyond*, 40 *Int'l & Comp. L. Q.* (1991), 827 – 839; L. Zegveld, *Remedies for victims of violations of international humanitarian law*, supra note 18, 506; R. Pisillo Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview*, supra note 37, 342 f.; M. Sassoli, *State Responsibility for Violations of International Humanitarian Law*, 84 *IRRC* (2002), 401 (419); R. Bank / E. Schwager, supra note 42, 367 (367 ff.); E. Schwager, supra note 42, 146 – 163; R. Hofmann, *Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation against States under International Law*, in: P.-M. Dupuy/B. Fassbender/M. N. Shaw/K.-P. Sommermann (ed.), *Common Values in International Law – Essays in Honour of Christian Tomuschat* (Kehl et al. 2006), 341 (357); J. de Preux, *Art. 91*, in: Y. Sandoz, et al. (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva 1987), 1053 (1056), para. 3656; see also *Victims' Compensation and Participation, Appendix to UN Doc. S/2000/1063, Judges' Report of 13 September 2000*. For the opposite view see: C. Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 *Tul. J. Intl & Comp. L.* (2002), 157 (183); J. Long, *What remedy for abused Iraqi detainees?*, 187 *Mil. L. Rev.* (2006), 43 (78); D. Fleck, *Individual and State Responsibility for Violations of the Ius in Bello. An Imperfect Balance*, supra note 24, 190 – 193; A. Steinkamm, *War damages*, supra note 23, 1357; A. Randelzhofer/ O. Dörr, *Entschädigung für Zwangsarbeit – Zum Problem individueller Entschädigungsansprüche von ausländischen Zwangsarbeitern während des Zweiten Weltkrieges gegen die Bundesrepublik Deutschland* (Berlin 1994), 34.

⁴⁵ The „Treaty of Amity Commerce and Navigation, between His Britannick Majesty; and the United States of America“ (Jay Treaty) of November 19, 1794, is available at:

<http://www.yale.edu/lawweb/avalon/diplomacy/britain/jay.htm>.

⁴⁶ Article 6 Jay Treaty.

⁴⁷ See B. Heß, *Kriegsentschädigung aus kollisionsrechtlicher und rechtsvergleichender Sicht*, supra note 37, 134 and R. Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945*, 20 *Berkeley J. Int'l L.* (2002), 296 (310).

⁴⁸ B. Heß, supra note 37, 142.

⁴⁹ As an example for the agreements with Germany see article 2 (A) Paris Agreement of 1946. For further information on the agreements, in particular the 1951 San Francisco Peace Treaty, with Japan see L. Hein, *War Compensation: Claims against the Japanese Corporations for War Crimes*, in: J. Torpey (ed.), *Politics and the Past: On Repairing Historical Injustices* (Maryland 2003), 127 (132).

case of the *Japanese Comfort Women*⁵⁰ or the victims of the massacre of *Distomo*⁵¹ who were not successful in receiving reparation for harm suffered.

- f. Under modern international law, things have changed. A foreshadowing of the contemporary view can already be found as early as 1952, when the Higher Regional Court of Münster accepted an individual right to reparation under international law. The court did not explicitly mention the legal basis for this right. However, it referred among others to article 3 of the 1907 Hague Convention.⁵²
- g. Other national courts have for a long time hesitated to grant an individual right to reparation for harm suffered during World War II. In recent years, several lower courts have approved such claims.

Thus, some Japanese District Courts awarded compensation or at least implicitly recognized a right to reparation in the cases *Korean Comfort Women*⁵³ and *Forced Transportation and Forced Labour of Chinese People*⁵⁴.

In a judgment of July 2000, the Amsterdam District Court implicitly recognized the notion of individual humanitarian rights. The appellants sought to invoke alleged violations of article 52 of the 1977 Additional Protocol I to the 1949 Geneva Conventions, which sets forth rules on the protection of civilian objects, during NATO's bombing against the former Yugoslavia, as basis for compensatory claims against members of the Dutch Government. The court rejected this claim because, in its view, such violations had not occurred (5.3.22.). It also clarified that rules of IHL do not protect persons against stress and tensions that are consequences of the air strikes as such and do not protect persons with regard to whom the rules and norms have not been violated in concreto (5.3.23.) While confining the right to invoke the rules to those who personally were the victims of violations of IHL (direct victims), the court recognized the possibility of deriving individual rights from IHL rules.⁵⁵

As regards the victims of the massacre of *Distomo*, lower Greek courts – in contrast to the subsequent judgements by German courts⁵⁶ – recognized an individual right to compensation for the atrocities committed by the German occupation forces in 1944.⁵⁷ In the end, however, the claimants were not successful, because the Greek Minister of Justice and the Higher Supreme Court refused the execution of the judgement for reasons of State immunity.⁵⁸

Mention should also be made of the judgement in *Bici & Bici v. Ministry of Defense*. Here, the British High Court of Justice ruled that soldiers of the British army are responsible for injurious acts committed during a peacekeeping operation in Kosovo.⁵⁹

Finally, the ruling of the Italian Court of Cassation in *Ferrini*⁶⁰ has been interpreted as implicitly granting an individual right to reparation.⁶¹

⁵⁰ M. Frulli, *When are States Liable towards Individuals for Serious Violations of Humanitarian Law? The Markovich Case*, 1 J. Int'l Crim. Just. (2003), 406 (417 f.). For general information on the Japanese jurisprudence on compensation see S.H. Bong, *The Right of War Crime Victims to Compensation before National Court – Compensation for Victims of Wartime Atrocities – Recent Developments in Japan's Case Law*, 3 J. Int'l Crim. Just. (2005), 187 ff.; H.N. Scheiber, *Taking Responsibility: Moral and Historical Perspectives on Japanese War-Reparations Issues*, 20 Berkeley J. Int'l L. (2002), 233 (235 – 238); C. P. Meade, *From Shanghai to Globocourt: An Analysis of the 'Comfort Women's' Defeat in Hwang v. Japan*, 35 Vanderbilt J. Transnat'l L. (2002), 211 (225 – 231).

⁵¹ Federal Court of Justice, III ZR 245/98, Judgement of June 26, 2003, NJW 2003, 3488 (3491): the court refused to acknowledge a Greek judgement granting compensation to individuals against Germany by reasoning that, at the time of the incident in 1944, a private right to reparation had not existed; Federal Constitutional Court, 2 BvR 1476/03, NJW 2006, 2542; Kalogeropoulos and others v. Greece and Germany, ECHR, Application No. 59021/00, Decision on the Admissibility of 12 December 2002; Lechouritou and others, Application No. C-292/05, ECJ, Judgement of 15 February 2007.

⁵² Higher Administrative Court Münster, III A 1279/51, NJW 1952, 1030. In this case, an individual claim for reparation was based on law no. 47 of the Allied High Commission which relates to compensation for damages resulting from the occupation.

⁵³ *Korean Comfort Women v. Japan*, Shimonoseki Branch, Yamaguchi District Court, April 27, 1998 in: S.H. Bong, supra note 50, 195.

⁵⁴ *Chinese victims of forced labour v. Japan and Mitsui Mining Inc.*, Fukuoka District Court, April 26, 2002, *Chinese victims of forced labour v. Japan and the company A*, Kyoto District Court, January 15, 2003 and *Chinese victims of forced labour v. Japan and Hazamagumi Inc et al.*, Tokyo District Court, March 11, 2003, *Chinese victims of forced labour v. Japan and Rinko Corporation*, Niigata District Court, March 26, 2004, all in: S.H. Bong, supra note 50, 196-198.

⁵⁵ Gerechtshof te Amsterdam, Vierde meervoudige burgerlijke kamer, *Dedovic v. Kok et al*, Judgment of 6 July 2000.

⁵⁶ See comments under lit. e.

⁵⁷ *Prefecture of Voitia v. Federal Republic of Germany*, Court of First Instance of Leivadia Case No.137/1997, Judgement of October 30, 1997; for lack of official publication of this judgment reference is made here to I. Bantekas, *Prefecture of Voitia v. Federal Republic of Germany*, Case No.137/1997, Court of First Instance of Leivadia, Greece, October 30, 1997, 92 Am. J. Int'l L. (1998), 765-768. *Prefecture of Voitia v. Federal Republic of Germany*, Hellenic Supreme Court Case No.11/2000, Judgement of May 4, 2000; for lack of official publication of this judgment reference is made here to M. Gavouneli / I. Bantekas, *Prefecture of Voitia v. Federal Republic of Germany*, *Areios Pagos (Hellenic Supreme Court)*, Case No.11/2000, May 4, 2000, 95 Am. J. Int'l L. (2001), 198 – 204.

⁵⁸ See *Margellos v Germany*, Anotato Eidiko Dikastirio (Special Supreme Court) Judgement of September 17, 2002, in: M. Panezi, *Sovereign Immunity and Violation of Jus Cogens Norms*, 56 RHDJ (2003), 199 – 204.

⁵⁹ *Mohamet Bici and Skender Bici v. Ministry of Defence*, High Court of Justice, 2004 EWHC 786 (QB), Case No: LS 290157.

In sum, it is remarkable that these judgements have strongly been influenced by the modern view on a right to reparation. This, however, is inconsistent with the concept of intertemporal law. There is no doubt that during World War II, an individual right to reparation was not recognised.

- h. As regards international jurisprudence, mention should be made of the advisory opinion on the *Wall on the Palestinian Territory*, where it was held

“that Israel has the obligation to make reparation for the damage caused to all the natural and legal persons concerned.⁶² [...] The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.”⁶³

Thus, the court no longer maintains the view that reparation is to be made to States with the individuals as ultimate beneficiaries. Rather, it is incumbent upon wrongdoers to grant reparation to the individuals themselves.

A further example of international jurisprudence approving a change towards the recognition of an individual right to reparation can be found in the case law of the European Court of Human Rights. In *Markovic and others*⁶⁴, the court did not exclude that

“as a result of changes in case-law, it has been possible to claim such a right since 2004.”⁶⁵

- i. It should be pointed out that in most of the recent judgements where individual claims have been rejected, the tribunals – be they national or international – merely relied on procedural aspects, such as State immunity⁶⁶ or the missing procedural capacity of the individual⁶⁷. The material question of an individual right to reparation has rarely been addressed.⁶⁸
- j. Ad – hoc claims commissions, established in the aftermath of conflicts, have also contributed to the development of an individual right to reparation.

Above all, mention should be made of the United Nations Compensation Commission (UNCC), which was established by the Security Council in 1991⁶⁹ to process claims and pay compensation for losses resulting from Iraq's invasion and occupation of Kuwait. In its Provisional Rules for Claims procedure it is laid down that

“a government may submit claims on behalf of its nationals”⁷⁰.

Thus, individuals were granted a right to compensation, which was to be exercised by their home State. In exceptional cases, private legal persons could even directly submit claims to the commission.⁷¹

Though not established pursuant to a resolution of the United Nations Security Council, the regime of the Ethiopia Eritrea Claims Commission (EECC) contains similar rules. The EECC was set up by the Agreement of 12th December 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia (December Agreement)

⁶⁰ *Ferrini v. Federal Republic of Germany*, Corte Suprema di Cassazione, Decision of March 11, 2004, no. 5044/2004, para. 9, 2006 ILR 658 f.

⁶¹ R. Bank / E. Schwager, supra note 42, 380.

⁶² *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory*, supra note 13, 198, para. 152.

⁶³ Ibid, 198 para. 153.

⁶⁴ *Markovic and others v. Italy*, ECHR Judgement of December 14, 2006, Application no. 1398/03.

⁶⁵ Ibid, para. 111.

⁶⁶ See for example *Bankovic and others v. Belgium and others*, Decision of December 12, 2001, no. 52207/99, ECHR 2001-XII, p. 333 para. 54 – 82; *President of the Council v. Markovic*, Corte di Cassazione, Decision of June 5, 2002, no. 8157/2002, 2006 ILR 652 (655 f.); *Margellos and others v. Federal Republic of Germany*, Anotato Eidiko Dikastirio (Special Supreme Court), Judgement of September 17, 2002, supra note 58, para. 14.

⁶⁷ See for example *President of the Council v. Marcovic*, Corte Suprema di Cassazione, Decision of March 11, 2004, no. 8157/2002, 2006 ILR 652 (656); *Chinese victims of sexual violence v. Japan*, Tokyo District Court, April 24, 2003, in: *S.H. Bong*, supra note 50, 200 f.

⁶⁸ See for example Federal Court of Justice, III ZR 245/98, Judgement of June 26, 2003, supra note 51; Federal Constitutional Court, BvR 1379/01, Decision of June 28, 2004, NJW 2004, 3257 (3258) and Federal Constitutional Court, 2 BvR 1476/03, Decision of February 15, 2006, NJW 2006, 2542 (2453). In both instances, the court held that article 3 of the 1907 Hague Convention applies only between States and denied an individual right to reparation based on this provision.

⁶⁹ UN Security Council Resolution 678 (1991), para. 18; UN Security Council Resolution 692 (1991), para. 3.

⁷⁰ See article 5 (1) lit. a) of the Provisional Rules for Claims Procedure, UN Doc. S/AC.26/1992/10, available under: <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G92/712/76/img/G9271276.pdf?OpenElement>.

⁷¹ Article 5 (3) UNCC Provisional Rules for Claims Procedure.

*“to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals [...] of one party against the Government of the other party or entities owned or controlled by the other party.”*⁷²

Again, claims could be submitted by each of the parties on its own behalf or on behalf of its nationals, including both natural and juridical persons.⁷³

- k. An ad-hoc compensation commission yet to be established has been proposed to the Security Council by the International Commission of Inquiry on Darfur.⁷⁴ In its report, the commission pointed out that

*“there has now emerged in international law a right of victims of serious human rights abuses (in particular war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses.”*⁷⁵

- l. Codification efforts of UN bodies also show a remarkable trend towards recognizing an individual right to reparation.

As early as 1985, the “Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power”⁷⁶ required that

*“States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.”*⁷⁷

The “Principles to Combat Impunity” are even more definite. Principle 31 states:

*“Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.”*⁷⁸

Finally, mention has to be made of the “Basic Principles and Guidelines on a right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and serious Violations of International Humanitarian Law”. One of their most fundamental principles states:

*“Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law: [...] adequate, effective and prompt reparation for harm suffered.”*⁷⁹

- m. An individual right to reparation has also emerged in the field of international criminal law.⁸⁰ Article 75 of the Rome Statute provides that the court may award reparation while taking into account the scope and extent of any damage, injury and loss occurred.⁸¹ Such an order can be requested by the victim him- or herself who is in so far entitled to apply to the court.⁸²

⁷² See Article 5 (1) of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, December 12, 2000, 40 International Legal Materials (2001), 260 (262). For further details on the EECC see W. Kidane, *Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in the Hague*, 25 Wis. Int’l L. J. (2007), 23 ff.

⁷³ Ibid., article 5 (8).

⁷⁴ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, para. 590-603, available under: http://www.un.org/News/dh/sudan/com_inq_darfur.pdf, the Compensation Commission is also mentioned in the Darfur Peace Agreement, Art. 8 lit. (e) para. 66.

⁷⁵ Ibid., para. 597.

⁷⁶ Adopted by General Assembly Resolution 40/34 of November 29, 1985, available under: http://www.unhcr.ch/html/menu3/b/h_comp49.htm. It has to be emphasized that these principles are not explicitly dealing with victims of violations of human rights or humanitarian law. Nevertheless, they stress the need to strengthen the position of persons who have been adversely affected by abuses of power by granting them an individual right to reparation.

⁷⁷ Ibid., para. 19.

⁷⁸ Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Commission on Human Rights, 61st. Session, February 8, 2005, E/CN.4/2005/102/Add.1.

⁷⁹ UN Doc. A/Res/60/147, March 21, 2006.

⁸⁰ See C. Ferstmann, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15 LJIL (2002), 667 ff.

⁸¹ See Article 75 of the Rome Statute, available under: <http://www.un.org/law/icc/statute/rome.htm>; article 24 (3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and article 23 (3) of the Statute of the International Criminal Tribunal for Rwanda (ICTR) contain similar rules. For further information on Article 75 Rome Statute see G. Bitti / G. González Rivas, *The Reparations Provisions for Victims Under the*

- n. Taken together, the proliferation of State practice shows that modern international law recognizes the entitlement of the individual to reparation for the violation of international law during armed conflict from the beginning of the 1990s onwards.⁸³ Consistent with the concept of intertemporal law, an individual right to reparation has not been recognised for violations of international law committed prior to that time. In particular, it is not recognized for violations of international law committed during World War II.
- (3) As regards the content of the right to reparation, the standard adopted is more general than the *Hull-Formula*.⁸⁴ This is due to the fact that reparation also covers other forms than compensation. The adjective “full” refers to the scope of reparation. Consistent with the holding in *Chorzów Factory*, it means that harm must be completely wiped out by reparation. The adjective “prompt” refers to the temporal dimension of reparation. It requires that reparation be made without delay.

ARTICLE 7
Restitution

1. Restitution encompasses measures that seek to re-establish the status of the victim’s legal interests [rights, legally protected goods] that would have existed, if the violation of international law had not taken place.
2. Restitution shall be granted provided and to the extent that it is
 - a) neither impossible nor
 - b) gravely disproportionate to the benefit deriving from restitution instead of compensation.

Commentary

- (1) Article 7 introduces restitution, which represents – from a legal point of view – the primary form of reparation.⁸⁵ This provision is sub-divided into two paragraphs. Article 7 (1) sets out a definition of restitution. Its limits are laid down in article 7 (2).
- (2) The definition in article 7 (1) is consistent with the general principles of reparation as laid down in article 1. It also requires the comparison of the current situation and the hypothetical situation that would exist if the violation of international law had not taken place. However, as regards the benchmark, article 7 (1) is more concrete. It focuses on the status of the victim’s individual legal interests [rights], which include among others life, liberty or property. This is necessary in order to emphasize that it is not only the victim’s economic situation, but the integrity of its individual legal interests, which enjoys protection. Thus, unlike compensation, restitution does generally not consist in monetary payment. Rather, it encompasses measures such as the return of territory, persons and property⁸⁶ or the modification of a legal norm.
In practice restitution will in most cases result in restoring the situation prior to the violation of international law. This might not meet the standard of article 1 which requires that reparation establish the situation, which would exist, if the violation of international law had not occurred. As regards for example loss of profits, recourse to other forms of reparation, especially compensation, has to be made in order to guarantee full reparation.
- (3) Despite its primary character, the right to restitution is not unlimited. Article 7 (2) stipulates that restitution can only be sought provided and to the extent it is neither impossible nor gravely disproportionate.
 - a. The first of these alternatives, impossibility, has been recognized in international practice as a limit to restitution. Thus, in the *Chorzów Case*, reparation has been described as:

Rome Statute of the International Criminal Court, in: International Bureau of the Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes – Innovative Responses to Unique Challenges* (Oxford et al. 2006), 299 ff.

⁸² See Rule 94 of the Rules of Procedure and Evidence of the ICC.

⁸³ See supra note 44.

⁸⁴ The Hull-Formula emerged from expropriation cases. According to this doctrine, compensation has to be prompt, adequate and effective. Its inappropriateness as a general concept of reparation has been confirmed by P. Malanczuk, *Discussion (Part I)*, in: A. Randelzhofer / C. Tomuschat (ed.), *State Responsibility and the Individual – Reparation in Instances of Grave Violations of Human Rights*, supra note 37, 51 (52).

⁸⁵ The primacy of restitution has been stressed in the Swiss Banks Settlement. See H.M. Holtzmann / E. Kristjánisdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, supra note 28, 76 -77.

⁸⁶ In particular, mention should be made of the (residential) property commissions in Bosnia and Herzegovina, and Kosovo.

“Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution would bear”.⁸⁷

Various tribunals have confirmed this ruling.⁸⁸ Impossibility refers to situations, where the wrongdoer is prevented from making restitution. As an example, one might adduce cases, where seized property has been lost, destroyed or fundamentally changed in character⁸⁹. Mere difficulties, which the wrongdoer faces when making restitution, do not fall under this alternative. They might constitute a case of grave disproportionality.

- b. As regards the second alternative, grave disproportionality, mention should be made of article 35 (b) ILC Articles on State Responsibility. Here, the obligation to make restitution is put under the restriction that it does “not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”.⁹⁰ The expression adopted in the present Declaration is more general. Hereby, it intends to cover two situations:

On the one hand, the wrongdoer can invoke the principle of proportionality. In cases, where the burden imposed on the wrongdoer is out of proportion to the benefit gained by the victim, compensation can be granted instead of restitution. The adverb “gravely” seeks to emphasize that wrongdoers should not invoke mere disproportionality as a reason to avoid their duties. As a general rule, the higher the material or immaterial value of restitution for the victim, the higher the efforts of the wrongdoer have to be.

On the other hand, situations are conceivable, where restitution is of no benefit for the victim harmed. This might be possible in the case of refugees who have no interest in returning to a location, where emotionally painful and traumatic events have taken place. *Hans van Houtte*, Chairman for Legal Issues of the Property Claims Commission in Bosnia-Herzegovina, has expressed this in the following terms:

“Whenever refugees or displaced persons could not envisage returning home, inter alia because they continued to fear ethnic animosity, they should be entitled to just compensation.”⁹¹

Thus, there are circumstances, under which the victim can invoke the principle of proportionality. At the same time, it has to be stressed that the victims do not have a right of free choice.⁹²

- c. The phrase “provided and to the extent” makes clear that situations are covered, where restitution is only partially impossible or disproportionate. In this case, two forms of reparation will be granted simultaneously.

ARTICLE 8 Compensation

1. Compensation shall be provided for any financially assessable damage to the extent restitution is impossible, gravely disproportionate or not sufficient to repair the harm.
2. Compensation shall consist of a monetary payment commensurate with the harm suffered. Interest may be awarded to ensure full compensation.

Commentary

- (1) Article 8 deals with compensation as the form of reparation most commonly awarded in practice. This provision is subdivided into two paragraphs: By delineating in which situations compensation may be awarded, article 8 (1) specifies its scope of application. Details on the content of compensation are given in article 8 (2).

⁸⁷ *Factory at Chorzów, Merits*, supra note 1, p. 47.

See for example *British Claims in the Spanish Zone of Morocco*, 1925 UNRIIAA, vol. II, 615 (621-625, 651-742); *Religious Property Expropriated by Portugal*, 1920 UNRIIAA, vol. I, 7 (11-16); *Walter Fletcher Smith*, 1927 UNRIIAA, vol. II, 913 (918); *Heirs of Lebas de Courmont*, 1957 UNRIIAA, vol. XIII, 761 (764).

⁸⁹ See for example *Forests of Central Rhodope*, 1933 UNRIIAA, vol. III, 1405 (1432).

⁹⁰ Art. 35 (b) ILC Articles on State Responsibility.

⁹¹ H. van Houtte, *The Property Claims Commission in Bosnia-Herzegovina – A New Path to Restore Real Estate Rights in Post-War Societies*, in: K. Wellens, *International Law: Theory and Practice – Essays in Honor of Eric Suy* (The Hague 1998), 549 (550).

⁹² Such a right to choose freely between compensation and restitution has been formally acknowledged in Annex 7 Article I of the Dayton Peace Agreement. In practice, however, this provision has not been implemented. Annex 7 Article I met with strong criticism by international donors who made every effort to assist refugees in returning home instead of funding provisions permitting compensation for those who did not wish to return. See R. C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Politics and the Past: On Repairing Historical Injustices Herzegovina: Implications for International Standard – Setting and Practice*, 37 N.Y.U. J. Int'l L. & Pol. (2006), 441 (454); E. Rosand, *The Right to Compensation in Bosnia: An Unfulfilled Promise and a Challenge to International Law*, 33 Cornell Int'l L. J. (2000), 113 (130 ff.); M. Cox, *The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina*, 47 Int'l Comp. & L. Q. (1998), 599 (611 ff.); H. Das, *Restoring Property Rights in the Aftermath of War*, 53 Int'l Comp. & L. Q. (2004), 429 (433, 441 – 442).

- (2) As regards article 8 (1), this provision expresses the complementary function of compensation. Here it is stipulated that compensation can only be sought to the extent restitution is impossible, gravely disproportionate or not sufficient to repair the harm.
- a. The first two of these variants, impossibility and grave disproportionality, are only of a declaratory nature. They repeat what is laid down in article 7.
 - b. The third variant seeks to cover situations, where restitution is not sufficient to repair the harm. As an example, one might conceive of a situation, where the temporal deprivation of a certain asset causes economic damage. In this case, restitution would not suffice to meet the objective of full reparation.
- (3) The requirement of an economically assessable damage, laid down in article 8 (1), is self-explanatory when considering the content of compensation. As specified in article 8 (2), compensation shall consist in monetary payment.⁹³ Being the most common medium of exchange, monetary payment serves as a highly effective form of compensation. Such a payment may only be awarded, if the damage can be quantified in financial terms. As regards this assessment, specific parameters have to be determined in each particular case.⁹⁴
- (4) Article 8 (2) specifies the standard for determining the amount of money due. Here it is stipulated that compensation should be commensurate with the harm suffered. This principle has found wide recognition in international law. As an example, one might adduce the statement made in the *Lusitania* case:

“The fundamental concept of ‘damages’ is [...] reparation for a loss suffered; judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.”⁹⁵

The principle of commensurability expresses the basic tenet of compensation. This form of reparation intends to fill the gap created as a consequence of the violation of international law. Thus, compensation is victim – centered. Its function is not to penalise the wrongdoer.⁹⁶

- (5) Finally, article 8 (2) lays down that interest may be awarded as a proper element of compensation. The obligation to pay interest is well established in international law. As an example, one might adduce the jurisprudence of the Iran-United States Tribunal, which ruled that

“claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant.”⁹⁷

Likewise, Decision 16 of the Governing Council of the United Nations Compensation Commission provides that

“[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.”⁹⁸

There are no internationally recognized standards as regards the exact determination of interest due.⁹⁹

⁹³ See E.C. Gillard, *Reparation for violations of international humanitarian law*, supra note 44, 531. For a different view see J. de Preux, *Art. 91 – Responsibility*, supra note 44, 1056, para. 3655, who suggests that compensation may also be awarded in the form of services.

⁹⁴ F.H. Paolillo, *On unfulfilled duties: the obligation to make reparation in cases of violation of human rights*, in: V. Götz, et al. (ed.), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag* (Berlin et al. 1998), 291 (306). For examples see J. Crawford, *The International Law Commission’s Articles on State Responsibility, Introduction, Text and Commentaries*, supra note 8, 220 f. See also B. Graefrath, *Responsibility and Damages Caused*, supra note 28, 98 f.

⁹⁵ *Lusitania Case*, 1923 UNRIAA, vol. VII, 32 (39).

⁹⁶ See Velásquez Rodríguez (*Compensation*), Inter-AmCtHR, Series C, No. 7 (1989), p. 52. See also W. Heintschel von Heinegg, *Entschädigung für Verletzungen des humanitären Völkerrechts*, supra note 12, 32, and B. Graefrath, *Responsibility and Damages Caused*, supra note 28, 101 f. For a different view see S. Rosenne, *War Crimes and State Responsibility*, in: Y. Dinstein / M. Tabory (ed.), *War Crimes in International Law* (The Hague et al. 1996), 66 (101). For a general reappraisal of punitive damages in international law see N. Jörgensen, *A Reappraisal of Punitive Damages in International Law*, 68 BYIL (1997), 247 ff.

⁹⁷ 1987 Iran-U.S. Claims Tribunal Rep. 285 (289).

⁹⁸ *Decision 16*, Awards of Interest, January 4, 1993, S/AC.26/1992/16.

⁹⁹ See 1987 Iran-U.S. Claims Tribunal Rep. 285 (290). See also B. Graefrath, *Responsibility and Damages Caused*, supra note 28, 98, and J. Crawford, *The International Law Commission’s Articles on State Responsibility, Introduction, Text and Commentaries*, supra note 8, 238 f. See also H.M. Holtzmann / E. Kristjánssdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, supra note 28, 281 ff.

ARTICLE 9
Satisfaction

1. Satisfaction shall seek to redress harm, which cannot be economically assessed. It may include a public apology, in particular with acknowledgment of the facts and acceptance of responsibility, due inquiry and guarantees of non-repetition.
2. Measures of satisfaction shall be proportionate.

Commentary

- (1) Article 9 introduces satisfaction as the third form of reparation. The provision is subdivided into two paragraphs. Article 9 (1) contains a general definition specified by an example. Article 9 (2) makes reference to the principle of proportionality.
- (2) The definition adopted in article 9 (1) is considerably broad. Two elements characterize every form of satisfaction. First, there must be harm, which cannot be expressed in financial terms. This condition shapes the auxiliary and exceptional nature of satisfaction. Second, the measure taken must contribute to the alleviation of this harm. A wide range of measures falls under this definition. Article 9 (1) mentions public apologies as an example of satisfaction. The recognition of public apologies as a formal remedy is a distinctive feature of international law.¹⁰⁰ This has recently been confirmed by the International Commission of Inquiry of Darfur, which stressed that

„[d]epending on the specific circumstances of each case, reparation may take the form of [...] satisfaction including a public apology with acknowledgment of the facts and acceptance of responsibility“¹⁰¹

Likewise, the UN Sub-Commission on the Promotion and Protection of Human Rights has stressed the importance of accepting responsibility.¹⁰² Apart from apologies satisfaction may also include measures such as due inquiry.¹⁰³ It has to be noted that public knowledge of the suffering and the truth about perpetrators have been recognized as an essential step towards rehabilitation and reconciliation.¹⁰⁴ Some authors go as far as to recognize an individual right to truth.¹⁰⁵ Finally, satisfaction may comprise disciplinary or penal action against individual wrongdoers, the award of symbolic damages or guarantees of non-repetition.¹⁰⁶

The proportionality principle, laid down in article 9 (2), takes due account of the detrimental effects, satisfaction can have for the wrongdoer. This caveat seeks to impose limits on the use of this remedy. In particular, satisfaction should be neither humiliating nor punitive.¹⁰⁷

SECTION III
Limitations

ARTICLE 10
Limitation of the Amount of Compensation

1. The amount of compensation due may not be limited unless

¹⁰⁰ See Resolution S/2004/616 para. 54 and R. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 Va. J. Int'l L. (2006), 433 (449). See also E. Roxstrom / M. Gibney, *The Status of State Apologies*, 23 Hum. Rts. Q. (2001), 911 ff. For the opposite view see S.M. Sullivan, *Changing the Premise of International Legal Remedies: The Unfounded Adoption of Assurances and Guarantees of Non-Repetition*, 7 UCLA J. Int'l L. & Foreign Aff. (2002-2003), 265 (271).

¹⁰¹ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, supra note 74, para. 599.

¹⁰² UNSubCHR Res. 2002/5, August 12, 2002, E/CN.4/SUB.2/RES/2002/5, para. 3.

¹⁰³ See *Velásquez Rodríguez*, Inter-Am.Ct.H.R., Judgement of July 29, 1988, Series C, No. 7 (1989), para. 177, 181; *Barrios Altos*, Inter-Am.Ct.H.R., Judgement of May 14, 2001, Series C, No. 75 (2001), decision para. 5; *Laureano v. Peru*, Communication No. 540/1993, *Hum. Rts. Com*, 56th Session, para 8.3; UN Doc. CCPR/C/56/D/540/1993 (1996).

¹⁰⁴ UNCHR Res. 2001/70, April 25, 2001, E/CN.4/RES/2001/70, para. 8; UNCHR Res. 2002/79, April 25, 2002, E/CN.4/RES/2002/79, para. 9; UNCHR Res. 2003/72, April 25, 2003, E/CN.4/RES/2003/72, para. 8; see also C. Bassiouni, *International Recognition of Victims' Rights*, 6 Hum. Rts. L. Rev. (2006), 203 (275 f.).

¹⁰⁵ On truth as a right in international human rights regimes, see T. Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, 23 Mich. J. Int'l L. (2002), 977 (981 ff.) and E. Lutz, *International Obligations to Respect and Ensure Human Rights*, 19 Whittier L. Rev. (1997), 345 (348).

¹⁰⁶ See also *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*, A/RES/60/147, Principle 22; E.C. Gillard, *Reparations for violations of international humanitarian law*, supra note 44, 531 f.; A. Gattini, *To What Extent Are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages?*, 1 J. Int'l Crim. Just. (2003), 348 (367); N. Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 Hastings Int'l & Comp. L. Rev. (2004), 157 (159); UNCHR Res E/CN.4/RES/2001/70, 2002/79, 2003/72; *Cesti Hurtado v. Peru*, Inter-AmCtHR, Series C No. 78 (2001), para 51; *Trujillo Oroza v. Bolivia*, Inter-AmCtHR, Series C No. 92 (2002), para. 92, 93 lit.d), 118, 119.

¹⁰⁷ See also Art. 37 ILC Articles on State Responsibility.

- a) this is the only means for the wrongdoer to safeguard its own means of subsistence and
- b) the victims are not severely disadvantaged by the failure to make full compensation.

2. Limitations of the amount of compensation have to be consistent with the principle of non-discrimination.

Commentary

- (1) It is a basic premise of article 10 that every victim has a claim to full compensation. At the same time, article 10 takes due account of the impediments which might hinder the enforcement of claims. Problems typically arise, if compensation has to be awarded to a large number of victims. On the one hand, full compensation to every victim might surpass the economic capacities of the wrongdoer.¹⁰⁸ This might have destabilizing effects in the post-conflict phase. On the other hand, an individualized reparation process might lead to enormous delays caused by the time needed for the individual assessment of each claim.¹⁰⁹ This delay would be incompatible with the principle of prompt compensation. By permitting a limitation of the obligation to make compensation, article 10 strikes a balance between the conflicting interests at issue. The provision lays the legal foundation for a collective settlement of claims.¹¹⁰
- (2) Traditionally, lump sum agreements concluded in the aftermath of conflicts served as precedents for awarding less than full compensation. In various instances, account has been taken of the economic capacities of the State responsible. As an example, one might adduce the San Francisco Treaty of Peace with Japan of 20 January 1951. Here, the parties recognized

*“that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations”.*¹¹¹

In spite of the considerable number of lump sum agreements¹¹², two reasons militate against attributing too much weight to them. First, they have been concluded on the underlying premise that only States are entitled to compensation which can therefore dispose of their claims¹¹³. It is highly questionable, whether under contemporary international law a State still has treaty making power with regard to claims of individuals.¹¹⁴ Secondly, in *Barcelona Traction*, the court hesitated to qualify lump sum agreements as a source of law.¹¹⁵ Likewise, the Iran-United States Tribunal ruled in *INA Corp. v. Iran* that such agreements

*“are not motivated by opinio iuris, but rather are generally products of the particular prevailing social, economic, and political constraints bearing on the parties.”*¹¹⁶

- (3) Under the modern approach, where the individual victim is considered as holder of a right to reparation, the economic capacity of the wrongdoer has not ceased to play a pivotal role. This was confirmed by Resolution 687 establishing the United Nations Claims Commission. The Resolution requested the Secretary General to present

¹⁰⁸ M. Eichhorst, *Rechtsprobleme der United Nations Claims Commission* (Berlin 2002), 108; C. Tomuschat, in: A. Randelzhofer / C. Tomuschat (ed.), *State responsibility and the individual: reparation in instances of grave violations of human rights*, supra note 37, 1 (21); M. Reisman, *Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas*, in: A. Randelzhofer / C. Tomuschat (ed.), *State responsibility and the individual: reparation in instances of grave violations of human rights*, supra note 37, 63 (67).

¹⁰⁹ J. Hagelberg, *Die völkerrechtliche Verfügungsbefugnis des Staates über Rechtsansprüche von Privatpersonen* (Baden - Baden 2006), 136; H. Das, *The Concept of Mass Claims*, in: International Bureau of the Permanent Court of Arbitration (ed.), *Redressing Injustices through Mass Claims Processes – Innovative Responses to Unique Challenges* (Oxford et al. 2006), 3 (5).

¹¹⁰ On the importance of collective claims settlement see C. Tomuschat, *Darfur – Compensation for the Victims*, 3 J. Int'l Crim. Just. (2005), 579 (586) and idem, *Reparation in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law*, in: M. Cohen, *Promoting Justice, Human Rights and Conflict Resolution through International Law - Liber Amicorum Lucius Caflisch* (Leiden 2007), 569 (590).

¹¹¹ Article 14 (a) Treaty of Peace with Japan. UNTS 1952 (reg. No. 1832), vol. 136, 45 – 164.

¹¹² J. Hagelberg, *Die völkerrechtliche Verfügungsbefugnis des Staates über Rechtsansprüche von Privatpersonen*, supra note 109, 103 ff. See also R. Lillich / B. Weston / H. Burns, *International Claims: Their Settlement by Lump Sum Agreements*, Part II: *The Agreements* (Charlottesville, 1975).

¹¹³ On the treaty making power of States under traditional international law, see H. Kelsen, *Principles of International Law*, supra note 37, 145 f.

¹¹⁴ A. Gattini, *To What Extent Are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages?*, supra note 106, 350.

¹¹⁵ *Case Concerning the Barcelona Traction, Light and Power Company Limited*, ICJ, Judgement of February 5, 1970, para. 61. For a critique see R. Lillich / B. Weston / H. Burns, *International Claims: Their Settlement by Lump Sum Agreements*, supra note 112, 12 ff. See also B.W. Eichhorn, *Reparation als völkerrechtliche Deliktshaftung, Rechtliche und praktische Probleme unter besonderer Berücksichtigung Deutschlands (1918 – 1990)* (Baden-Baden 1992), 112.

¹¹⁶ 1985 Iran-U.S. Claims Tribunal Rep. 399.

“mechanisms for determining the appropriate level of Iraq’s contribution to the Fund [...] taking into account the requirements of the people of Iraq, Iraq’s payment capacity [...] and the needs of the Iraqi economy”.¹¹⁷

- (4) The International Law Commission has also dealt with the problem of limited economic resources. Article 42 (3) of a prior draft on State responsibility stipulated:

“In no case shall reparation result in depriving the population of a State of its own means of subsistence.”¹¹⁸

Using the language of article 1 (2) common to the ICCPR and ICESPR, this draft intended to take due account of the dangers full reparation might imply for a social system in the aftermath of a conflict. However, the draft was finally rejected. Members pointed out that the population of the injured State would be similarly disadvantaged by a failure to make full reparation.¹¹⁹

- (5) Influenced by the discussion led by the ILC, the present article endeavours to strike a balance between the interests of victims and wrongdoers.¹²⁰ The balancing approach adopted is consistent with the general principle of necessity as laid down in ILC Article 25. Two interests have to be weighed:

On the one hand, the position of the victims has to be taken into consideration. The wording of article 10 indicates that in general, the victim’s interest in full compensation prevails. Even more weight is to be attributed to the position of the victim, if the violated primary norm is part of the *ius cogens*.¹²¹

On the other hand, attention has to be paid to the interest of the State in maintaining a viable economy. This interest has received legal recognition in international jurisprudence. In *Société Commerciale de Belgique*, the Permanent Court of International Justice implicitly accepted Greece’s serious budgetary and monetary situation as an excuse for non-fulfilment of international obligations.¹²² Likewise, the arbitral tribunal in the *Russian Indemnity Case* accepted that in principle, an extremely difficult financial situation could justify a delay in payment.¹²³

In sum, the strict balancing guarantees that article 10 does not give leeway to undue limitations of the right to compensation.

- (6) The disclaimer in article 10 (2) functions as an appeal to comply with the principle of non-discrimination. As a general rule, considerations of international human rights law as well as the principle of non-discrimination as laid down in common article 3 para. 1 of the 1949 Geneva Conventions and in article 12 of the 1949 Geneva Convention I should guide the application of this provision.

SECTION IV *Obligations of Wrongdoers*

ARTICLE 11 *Obligation to Strengthen the Rights of Victims*

1. Wrongdoers shall make every effort to give effect to the rights of victims.
2. They shall establish programmes and maintain institutions, which facilitate access to reparation.

Commentary

- (1) Stated in broad terms, article 11 (1) contains a general obligation to give effect to the rights of victims. Taking account of the dissociation of rights and enforcement mechanisms in international law, this provision represents a necessary complement to the victims’ rights as laid down in article 6.¹²⁴

¹¹⁷ S/Res/687 of April 3, 1991, para. 19; see also J. Crook, *The UN Compensation Commission: What Now?*, 5 Int’l L. FORUM 2003, 276 (277, 278).

¹¹⁸ Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996, UN Doc. A/51/10, 66.

¹¹⁹ Third report on State responsibility, International Law Commission, 52nd session, A/CN.4/507, p. 19, para. 38 ff. The Special Rapporteur finally recommended that the general principles precluding wrongfulness should equally apply to secondary obligations arising under the draft articles.

¹²⁰ See also R. Bank / E. Schwager, *supra* note 42, 410.

¹²¹ J. Hagelberg, *Die völkerrechtliche Verfügungsbefugnis des Staates über Rechtsansprüche von Privatpersonen*, *supra* note 109, 273.

¹²² *Société Commerciale de Belgique*, PCIJ, Series A/B, No. 78 (1939), 160.

¹²³ *Russian Indemnity*, 1912 UNRIAA, vol. XI, 431 (443).

¹²⁴ See also C. Bassiouni, *International Recognition of Victims’ Rights*, *supra* note 104104, 232.

- (2) Article 11 (2) clarifies that programmes and institutions have to be established in order to provide prompt reparation.¹²⁵ The importance of reparation programmes has recently been emphasized by the Secretary-General to the United Nations in his report “The rule of law and transitional justice in conflict and post-conflict societies”. Here, he stated:

*“Programmes to provide reparations to victims for harm suffered can be effective and expeditious complements to the contributions of tribunals and truth commissions, by providing concrete remedies, promoting reconciliation and restoring victims’ confidence in the State.”*¹²⁶

Likewise, principle 32 of the “Updated Set of principles for the protection and promotion of human rights through action to combat impunity”¹²⁷ stipulates:

“Reparations may also be provided through programmes, based upon legislative or administrative measures, funded by national or international sources, addressed to individuals and communities.”

- (3) To the extent reparation programmes presuppose a limitation of the victims’ right to compensation, it has to be stressed that this is only permissible under the strict conditions laid down in article 10.

SECTION V

The Role of the International Community

ARTICLE 12

Promotion of Justice, Peace and Reconciliation

1. The international community is called upon to provide assistance in the larger process of promoting justice, peace and reconciliation.
2. To this end, it shall in particular foster a culture of rule of law, including respect for victims’ rights and trust in government institutions.

Commentary

- (1) Article 12 places the question of reparation in the wider context of transitional justice. It is divided into two subparagraphs: article 12 (1) lays down an end to be pursued by the international community. The means to fulfil this obligation are specified in article 12 (2) in a non-exhaustive manner.
- (2) Stated in broad terms, article 12 (1) appeals to the international community to provide assistance during and in the wake of conflicts. This provision is based on the premise that the protection of justice, peace and reconciliation is a concern of the entire international community. This idea is enshrined in common article 1 of the 1949 Geneva Conventions. At the same time, it takes due account of the factual impediments to transitional justice. Fragile post-conflict societies struggling with lacking resources or a power-vacuum will often depend on the assistance of the international community.
- (3) Article 12 (2) gives an example by which means this end shall be pursued. Fostering a culture of rule of law serves two distinct, but equally important functions. On the one hand, it is a backward - looking measure in the sense that it helps victims once a violation of international law has taken place. On the other hand, it has a forward-looking dimension, because it seeks to prevent future violations of international law.
- (4) The pivotal role of the rule of law has constantly been stressed in international instruments. As a prominent example, one might adduce principle 32 of the “Updated Set of principles for the protection and promotion of human rights through action to combat impunity”¹²⁸, which provides:

“States shall ensure that victims do not again have to endure violations of their rights. To this end, States must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, fos-

¹²⁵ See S. Furuya, *Draft Model Statute of an Ad Hoc International Compensation Commission* for details on how to grant compensation in practice. See also M. Rau, *State Liability for Violations of International Law Humanitarian Law – The Distomo Case Before the German Federal Constitutional Court*, 7 No. 7 German Law Journal (2006), 701 (720) who stresses the need of establishing compensation commissions.

¹²⁶ Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, August 23, 2004, S/2004/616, para. 54.

¹²⁷ Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Commission on Human Rights, 61st. Session, February 8, 2005, E/CN.4/2005/102/Add.1.

¹²⁸ Ibid.

ter and sustain a culture of respect for human rights, and restore or establish trust in government institutions.”

Likewise, the Secretary - General to the United Nations has stated:

“While the international community is obliged to act directly for the protection of human rights and human security where conflict has eroded or frustrated the domestic rule of law, in the long term, no ad hoc, temporary or external measures can ever replace a functioning national justice system.”¹²⁹

SECTION VI Final Clauses

ARTICLE 13 *Interpretation and Progressive Development*

1. Nothing in the present Declaration may be construed as limiting any rights of victims of armed conflict arising under domestic or international law.
2. States are encouraged to confirm, supplement, extend and amplify the principles contained in the present Declaration.
3. Any international agreement dealing with the topics covered by the present Declaration shall be interpreted in accordance with the purpose and spirit of this Declaration.

Commentary

- (1) Containing the final clauses, article 13 expresses in unambiguous terms that the present Declaration is to be understood as a step towards strengthening the rights of victims.
- (2) Paragraph 1 emphasizes that the Declaration applies only to the extent that rights of victims are not limited.
- (3) Paragraph 2 encourages States to progressively develop a protective regime for victims of armed conflict within the larger framework of international agreements.
- (4) Paragraph 3 establishes that the best interests of victims of armed conflict, as the guiding spirit and purpose of the Declaration, will govern pertinent interpretations of international law.

Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Procedural aspects)

Prepared by Shuichi Furuya

Preliminary remarks

To the Toronto Conference of 2006, this Rapporteur submitted the Interim Report titled “State Immunity: An Impediment to Compensation Litigation Assessment of Current International Law”. On the basis of the discussion in the Toronto Conference, he made a draft Article on the non-immunity from jurisdiction and its commentary in March 2008, and requested the Committee members their comments and opinions. After having received valuable comments from the members, he had an informal meeting with Professor Hofmann, Co-Rapporteur, at Frankfurt on 13 March, and discussed his draft. As the result of this discussion, Co-Rapporteurs agreed to propose a revised Article which has a little more limited scope of non-immunity than the original draft.

In drafting the present Article, this Rapporteur intends to make out a steadily developing rule though still as *lex ferenda*. For the purpose of this, the Article has more limited a scope (subparagraph (a)) than the notions of “violation” and “victim” which fall within the object of the present Declaration (*See* Articles 3 and 4 of Professor Hofmann’s draft Declaration). This is also intended to facilitate reaching consensus among Committee members on this issue. However, it is undeniable that inserting the stricter limitation to some Articles on state immunity would impair the integrity of the Declaration. As this point relates to the general issue of in what situation the Declaration would admit victim’s right to reparation, further discussion among the members will be necessary during/after the Rio Conference.

¹²⁹ Report of the Secretary-General, *supra* note 126, para. 34.

As to the future works on other procedural aspects, this Rapporteur will draft further Articles on the following issues after the Rio Conference:

- (a) Possible institutions/States before which/where individuals can file their claims (*ad hoc* compensation commission, tribunal of the responsible State, tribunal of the victim's nation State, tribunal of the State where the violation had been committed / harm occurred, or even tribunal of any other State);
- (b) Question of denunciation of the individual right to reparation by States;
- (c) Non-immunity from execution.

At the present stage, it is supposed that the Principles on procedural aspects will eventually consist of 4 Articles (Art.1 “regarding the possible forums where claims for reparation might be submitted”; Art.2 “denunciation of the individual right to reparation by States”, Art.3 “non-immunity from jurisdiction”, Art.4 “non-immunity from execution”). The Co-Rapporteurs agreed that these Articles will be included as a section of its own in the draft Declaration on substantive issues to be prepared by Professor Hofmann (tentatively before Section III “Limitations”). This should be done after the Rio Conference taking into account the results of the discussion there.

Article PS-1* Non-Immunity from Jurisdiction

A State cannot invoke immunity from the jurisdiction of a court of another State, when a victim files a suit to claim compensation for his or her serious harm as the result of an act or omission attributable to the former State, if

- (a) that act or omission constitutes a violation of the core norms of international humanitarian law and/or international human rights law which have the character of *jus cogens* or of which violation is supposed to generate criminal responsibility under international law of its individual violator; and
- (b) that act or omission occurred in whole or in part in the latter State, or had a direct effect in the latter State.

Commentary

(1) It is a generally accepted rule that those who suffer death or personal injuries, or damage or loss of tangible property caused by a foreign State's tortious act or omission may sue that foreign State for monetary compensation (tort exception). The laws of many States and some conventions on the state immunity admit it.¹³⁰ This exception was originally assumed to cover the problem of traffic accident by diplomats of a foreign State.¹³¹ In practice, however, the exception has been applied to a much wider range of tort situations including assault and battery, malicious damage to property, arson or homicide.¹³² Though the commentaries of the ECSI and UN Convention suggest that these conventions exclude the tort exception in the situation involving armed conflicts,¹³³ they do not illustrate a detailed ground for this. At least, from the ordinary meaning given to the terms of relevant provisions of both conventions, we can interpret them as admitting the tort exception to be applied to all tortious acts or omissions including those occurred in the situation of armed conflict. Besides, no national law explicitly provides for the non-application of the exception to armed conflicts.

In addition to the tort exception, there is an increasing argument that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*, particularly the prohibition of torture.¹³⁴ In some cases, national and international courts have supported this argument, or at least shown some sympathy for it.¹³⁵

* Article number is provisionally added for this Part. For the purpose of distinguishing from the Draft Declaration prepared by Professor Hofmann, every session and article has “PS” (Procedural Aspects) before its number.

¹³⁰ See, e.g., Foreign Sovereign Immunities Act of 1976 (US), section 1605 (a) (5) [US FSIA]; State Immunity Act (1978) (UK), section 5 [UK SIA]; European Convention on State Immunity (1972), Article 11 [ECSI]; UN Convention on Jurisdictional Immunities of States and Their Property (Adopted Dec. 2, 2004), Article 12 [UN Convention].

¹³¹ See, e.g., Explanatory Report on the European Convention on State Immunity, para. 49, available at <<http://conventions.coe.int/Treaty/en/Reports/Html/074.htm>>.

¹³² For the US FSIA, US Congress, House of Representatives, Report No. 94-1487, reprinted in 15 ILM 1398 (1976), at 1409; For the UN Convention, Report of the International Law Commission on the Work of Its Forty-Third Session, Supplement No. 10 (A/46/10), 1991, p. 103.

¹³³ ECSI, “[t]he Convention is not intended to govern situations which may arise in the event of armed conflict.”, Explanatory Report on the European Convention on State Immunity, *supra* note 2, para. 116; UN Convention, Article 12 does not “apply to situations involving armed conflicts”, Report of the International Law Commission, *supra* note 3, p. 106.

¹³⁴ Report of the Working Group on Jurisdictional Immunities of States and Their Property, 6 July 1999, UN.Doc. A/CN.4/L.576, Annex, p.56.

¹³⁵ Court of First Instance of Leviaia, *Prefecture of Voiotia v. Federal republic of Germany*, Case No. 137/1997, Judgment of 30 October 1997, excerpts reprinted in *Revue Hellenique de Droit International*, vol. 50 (1997), p. 599; This approach was followed by the Areios Pagos (Hellenic Supreme Court), See Maria gavouneli and Illas Bantekas, Case Report: Prefecture of Voiotia v. Federal Republic of Germany, Case No. 11/2000, Areios Pagos (Hellenic Supreme Court), May 4, 2000, *American Journal of International Law* vol. 95 (2001), p. 200; See also the dissenting opinion of Judge Wald in *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1178; European

In light of the practice of tort exception and the recent trend concerning the norms of *jus cogens*, a State can no longer invoke immunity from the jurisdiction of a court of another State in the case concerning the violations of core norms of international humanitarian law or international human rights law.

(2) The practices and arguments that have supported the exception to state immunity show that it should be limited to the norms of particular importance. In his draft Declaration, Professor Hofmann defines a victim in the Declaration as a natural or legal person suffering serious harm as a result of violation of international humanitarian law or international human rights law. This means that the Declaration takes an approach of limiting the scope of victim by the nature of the harm suffered, rather than the nature of the norm violated. However, the present Article adopts the latter approach in addition to the former so as to limit the cases of the non-immunity from jurisdiction more than the cases in which a victim can enjoy a right to compensation.

This Article suggests two types of norms of which violation constitutes the exception to state immunity. One is those having the nature of *jus cogens*. At present, it is difficult to enumerate all the norms that can be qualified as *jus cogens*, but we can safely say that at least the prohibition of genocide, slavery and torture has such nature.¹³⁶ In the opinion of this Rapporteur, limiting the non-immunity to the violations of *jus cogens* norms is too restrictive for victims to make use of a national court of his own State or other. For example, though it is not still established that the prohibition of attacking civilian population has the nature of *jus cogens*,¹³⁷ the victims of such attack should not be deprived of their opportunity to claim compensation before a national court just because that prohibition have not become *jus cogens* yet. This consideration introduces the second criterion to the present Article in parallel: the norms of which violation is supposed to generate criminal responsibility under international law of its individual violator. In attempting to determine what act or omission constitute an international crime, the jurisprudence of the *ad hoc* international criminal tribunals and the Rome Statute of International Criminal Court would serve as a useful reference. However, it is to be noted that not all the violations constituting an international crime may fall within the scope of exception to state immunity. Among them, only those causing serious harm to victims may do. Although the present Article relates to the notion of international crimes in this respect, it is without prejudice to any question of criminal jurisdiction over any person who violated relevant international law by acting on behalf of a State.

(3) If an act or omission constitutes a violation of core norms of international humanitarian law or international human rights law, it is irrelevant whether that act or omission has the nature *de jure imperii* or *de jure gestionis*. Most of the national laws on state immunity provide for the tort exception irrespective of the nature or purpose of the act or omission in question.¹³⁸ All these provisions found jurisdiction on the actual death, injury, damage or loss, while none contains any indication that those acts or omissions must be performed *de jure gestionis*. The ECSI and the UN Convention adopt the same approach.¹³⁹

The present Article follows this approach, and contains no clause intended to confine the exception to an act or omission *de jure gestionis*. Thus a State cannot enjoy immunity from jurisdiction merely by making the plea that the violation in question was committed in the midst of or adjunct to the operation of its armed forces and that therefore it is classified as *acta jure imperii*.

(4) For the purpose of applying the exception to state immunity under this Article, the act or omissions in question must have occurred in whole or in part or had a direct effect in the forum State. Common to most of the national laws and the treaties is the requirement that an act or omissions, or the injury or damage must be connected with the territory of the forum State, though difference exists as to how and to what extent that requirement should be satisfied. While UK SIA and Australia FSIA require that the personal injury or damage of property is to be caused by an act or omission occurred in the forum State,¹⁴⁰ the Canada SIA admits the exception so long as the injurious consequences are suffered in the territory of the forum State, wherever a act or omission occurs.¹⁴¹ According to the case law of the United States, it is required that both an act or omission and its injurious consequence occur in the territory of the United States¹⁴².

Court of Human Rights. Joint dissenting opinion of Judge Rozakis and Caflisch joint by Judges Wildhaber, Costa, Cabral Barreto and Vakić, *Al-Adsani v. The United Kingdom*, Application No. 35763/97, 21 November 2001, para. 3.

¹³⁶ See e.g., *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, 10 December 1998, paras. 147-155. In regard to the identification of *jus cogens* norms in international human rights law and humanitarian law, see Alexander Orakhelashvili, *Peremptory Norms in International Law* (2006), pp. 53-64.

¹³⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 257.

¹³⁸ US FSIA, section 1605 (a)(5); UK SIA, section 5; State Immunity Act of 1985 (Canada), section 6 [Canada SIA]; Foreign Sovereign Immunities Act of 1985 (Australia), section 13 [Australia FSIA]. However, the European Court of Human Rights supported the *jure imperii* / *jure gestionis* dichotomy, as a matter of general international law, in *McElhinney v. Ireland* (Application 31253/96, Judgment of 21 November 2001, para. 38).

¹³⁹ The Commentary of the UN Convention points out that “the basis for the assumption and exercise of jurisdiction in cases covered by this exception is territoriality. The *locus delicti commissi* offers a substantial territorial connection regardless of the motivation of the act or omission, whether intentional or even malicious, or whether accidental, negligent, inadvertent, reckless or careless, and indeed irrespective of the nature of the activities involved, whether *jure imperii* or *jure gestionis*.” Report of the International Law Commission, *supra* note 3, p. 105.

¹⁴⁰ Section 5 of UK SIA; Section 13 of Australia FSIA.

¹⁴¹ Section 6 reads: “A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to (a) any death or personal or bodily injury, or (b) any damage to or loss of property that occurs in Canada.”

¹⁴² Section 1605 (a)(5) of US FSIA; See Xiaodong Yang, “State Immunity in the European Court of Human Rights: Reaffirmations and Misconceptions”, *British Yearbook of International Law*, vol. 74 (2003), p. 379, note 159.

The relevant conventions and documents take a slightly different approach to the territorial connection. Article 12 of the UN Convention requires two conditions: an act or omission occurred in whole or in part in the territory of the forum State *and* the presence of the author of the act or omission was present in that territory at the time of the act or omission. Therefore, the cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict are excluded from the area covered by Article 12.¹⁴³ The ECSI takes the same position.¹⁴⁴ On the contrary, the Revised Draft Article for a Convention on State Immunity drawn up by the ILA Committee on State Immunity in 1994 grants jurisdiction if “injury or damage occurred wholly or partly in the forum State or if that act or omission had a direct effect in the forum State.”¹⁴⁵ This provision suggests that trans-boundary tort comes within the range of the tort exception.¹⁴⁶

Considering actual military operations in an international armed conflict, we may envisage that military forces of a State would shell individual civilians or civilian objects in the territory of another State and thereby violate core norms of international humanitarian law.¹⁴⁷ Strict conditions concerning the territorial connection, as the UN Convention requires, would exclude the application of the exception in such a situation. The present Article, therefore, follows the achievements of ILA predecessors and adopts more flexible requirements of territorial connection. According to this, a State cannot invoke immunity if (a) the whole of the act or omission in question occurred in a forum State, (b) any part of the act or omission in question occurred in a forum State, or (c) any consequences of the act or omission in question were suffered in a forum State.

Draft Model Statute of an *Ad Hoc* International Compensation Commission

Prepared by Shuichi Furuya

Preliminary remarks

To the Toronto Conference of 2006, this Rapporteur submitted the Interim Report titled “A Model Statute of An Ad Hoc Compensation Commission: Preliminary Analysis of Some Issues to be Addressed”. On the basis of the reaction by the members to the Interim Report and the discussion in the Toronto Conference, he made a Draft Model Statute and the commentaries to each Article in March 2008, and requested the Committee members their comments and opinions. After having received their valuable comments, he had an informal meeting with Professor Hofmann, Co-Rapporteur, at Frankfurt on 13 March, and discussed this draft.

The Committee members have so far made comments on the following points:

(1) *The preamble of the Draft Statute, on one hand, recognizes victims’ right to “full and prompt” reparation, Article 4 on the other provides for the payment of a fixed amount. In this regard, these provisions might be contradictory with each other.* This Rapporteur attempted to bring the Draft Statute into line with the Draft Declaration on substantial aspects as much as possible. This policy made him to mention “full and prompt” reparation in the preamble (See Article 6 of Professor Hofmann’s draft Declaration). In fact, he believes that victims should be given “full and prompt” reparation as their right. From the procedural point of view, however, he considered that the payment of a fix amount is to be inserted in the Draft Statute. The deletion of the phrase “full and prompt” from the Draft Statute might be the easiest way to resolve this contradiction. However, it seems to this Rapporteur that this matter relates to a fundamental issue of if and to what extent a treaty between States (like this Statute of Compensation Commission) can regulate individual victims’ right to reparation. This should be discussed in the Draft Declaration on procedural aspects in relation with the question of denunciation of the individual right to reparation through peace agreement between the States Parties involving in the armed conflict (See Preliminary remarks of the Draft Declaration on procedural aspects prepared by this Rapporteur). For this reason, the phrase “full and prompt” is still in the preamble, of which treatment will be considered again after the Rio Conference.

(2) *The meaning of “family” and “parent” is not clear in the Draft Statute.* This issue was discussed at the meeting of Co-Rapporteurs at Frankfurt. In view of the fact that in the different countries and cultures there are different concepts/understandings of the terms family/parent, the Co-Rapporteurs agreed to propose to Committee members not include a definition of these terms but to leave it to the *Ad Hoc* Compensation Commission to decide, on a case by case approach, if there is a family member or a parent who can file a claim on behalf of the dead victim or on its own behalf.

(3) *Why does Article 2 limit the jurisdiction of the Commission to a case of “serious violations of international humanitarian law and/or gross violations of international human rights law”?* In the Draft Statute, this Rapporteur follows the Basic Principles and Guidelines adopted by the UN General Assembly rather than the Draft Declaration on substantial aspects, because the scope of the latter appears too wide for the Compensation Commission to process the claims efficiently and effectively. This again relates to the (in)consistency with the Draft Declaration on substantial aspects. This issue may also be reconsidered in response to the discussion at the Rio Conference.

¹⁴³ Report of the International Law Commission, *supra* note 3, p. 104.

¹⁴⁴ Article 11 of ECSI.

¹⁴⁵ Revised Draft Articles for a Convention on State Immunity, Article II (F), in ILA, *Report of the Sixty-Sixth Conference held at Buenos Aires, 1994*, p. 491.

¹⁴⁶ Section-by-section Analysis of the Revised Draft Convention on State Immunity, Final Report on Developments in the Field of State Immunity and Proposal for a Revised Draft Convention on State Immunity, *ibid.*, p. 495.

¹⁴⁷ See Articles 51 and 52 of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978.

As to the future works on the Draft Statute, this Rapporteur will draft further Articles on the following issues after the Rio Conference:

- (a) Structure and composition of the Commission;
- (b) Concurrent claims before another institution and/or a national court;
- (c) Trust fund.

Preamble

[The Government of State A and the Government of State B],

Affirming the importance of addressing the reparation for victims of violations of international humanitarian law and human rights law occurred during the recent armed conflict between [State A and State B] [and the non-international armed conflict in State A <and State B>],

Noting the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the General Assembly of the United Nations on 16 December 2005,

Considering also the Declaration of International Law Principles on Reparation for Victims of Armed Conflict adopted by the International Law Association on [...],

Recognizing that the victims of armed conflict have a right to full and prompt reparation under international law,

Affirming that the victims of the armed conflict [between State A and State B] [in State A <and State B>] should have an international procedure available for realizing their right to reparation, particularly their right to compensation, under international law,

Have agreed as follows:

Commentary

(1) The legal basis on which a compensation commission is established is dependent on some factors: the nature of an armed conflict (international, non-international, or mixed armed conflict), the process of ending that conflict (voluntary ending by the parties, or forced ending by military enforcement measures taken by multi-national forces under the authority of the Security Council), and the involvement of the UN or other international organizations in the peace-building process (whether interim administration by the UN over the State concerned is established or not).

In fact, the legal basis varies among recently established or proposed commissions according to these factors; the UNCC* was established and guided by resolutions of the Security Council (Resolutions 689 (1991), 692 (1991), 986 (1995) and 1483 (2003)), and the CCD¹⁴⁸ was anticipated to follow the UNCC. On the other hand, the HPCC was established by a regulation promulgated by the Special Representative of the UN Secretary-General within the mandate of the UN Interim Administration Mission in Kosovo.¹⁴⁹ The IPCC is also based on a regulation promulgated by the Coalition Provisional Authority which came into effect as Iraqi law on July 2004.¹⁵⁰ In contrast to these commissions, the EECC was established pursuant to the Agreement on 12 December 2000 between Eritrea and Ethiopia¹⁵¹ following the Agreement on Cessation of Hostilities on 18 June 2000. In this respect, the EECC is characterized as a product of traditional inter-State agreement between belligerent powers, though the Organization of African Unity and the United Nations were politically involved in the peace process. Its inter-State character is also indicated by the fact that the EECC works in the framework of the Permanent Court of Arbitration in The Hague. The CRPC lies in the same line of the EECC in the sense that it was also established by the Agreement on Refugees and Displaced

* List of abbreviations:

CCD: proposed compensation commission for international crimes perpetrated in Darfur, Sudan.

CRPC: Commission for Real Property Claims in Bosnia and Herzegovina.

EECC: Eritrea-Ethiopia Claims Commission.

HPCC: Housing and Property Claims Commission in Kosovo.

IPCC: Iraq Property Claims Commission.

UNCC: United Nations Compensation Commission.

¹⁴⁸ Report of the International Commission of Inquiry on Darfur to the Secretary-General, UN Doc. S/2005/60 (1 February 2005), paras. 590-603.

¹⁴⁹ Regulation No. 1999/23 on the Establishment of the Housing and Property Directorate and the Housing and property Claims Commission, UNMIK/REG/1999/23 (15 November 1999), available at < <http://www.hpdkosovo.org/index.htm>>.

¹⁵⁰ Coalition Provisional Authority Regulation Number 12, Iraq Property Claims Commission, Annex A: the Statute Establishing of the Iraq Property Claims Commission (24 June 2004), available at < http://ipcciraq.org/08_legal.htm>.

¹⁵¹ Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea (12 December 2000), available at < <http://www.pca-cpa.org/ENGLISH/RPC/EEBC/E-E%20Agreement.html> >.

Persons annexed to the Dayton Peace Agreement,¹⁵² though the parties of this agreement include non-State entities which were involved in the internal armed conflicts in Bosnia and Herzegovina.

This Model Statute is a rather flexible instrument so that it can be used readily as a guideline for actual establishment of a necessary compensation commission, irrespective of whether it is established by an agreement of the State parties of the armed conflict, or a resolution or regulation adopted by an international organization or organ. The preamble is based on the premise that an agreement between two States establishes a commission, but this is merely an example. The basic contents in this preamble can be applied to other types of legal instruments.

(2) The preamble should explicitly recognize the existence of the right of individual victims to full and prompt reparation under international law. This right is completely independent of the establishment of an international procedure.¹⁵³ Rather, the preamble emphasizes that an international procedure will be established by this instrument to realize an existing right of victims as one of the available ways for their remedies. For the purpose of underlining the victims' right, the preamble also refers to the Basic Principles and Guidelines adopted by the UN General Assembly¹⁵⁴ and the Declaration of International Law Principles which will be adopted by the International Law Association with this Draft Statute.

(3) The international procedure should cover not only an inter-State armed conflict, but also an armed conflict between a State and non-State entities and/or among non-State entities. A non-State entity in this Model Statute is basically defined as an organized armed group which, under responsible command, exercises such control over a part of its territory as to enable it to carry out sustained and concerted military operations and to implement relevant norms of international humanitarian law,¹⁵⁵ including common Article 3 of the Geneva Conventions of 12 August 1949. The international procedure should be invoked as far as that entity's act is attributable to a State under the law of state responsibility. This is not only the case where an entity is acting on the instruction of, or under the direction or control of a State in carrying out the conduct,¹⁵⁶ but also where a State has failed to suppress the rebellion without delay.

Article 1 The Commission

A Compensation Commission for the Victims of the Armed Conflict [between State A and State B] ("the Commission") is hereby established. Its mandate is to decide the claims to compensation for injury, death or loss submitted by victims and their family against States and other entities having involved in the armed conflict [and agreed to this Statute].

Commentary

(1) The mandate of the Commission is to "decide" the claims to compensation submitted by victims and their families. The commissions recently established for compensation can be classified into two types in terms of their function. One takes the form of arbitral tribunals which decide legal responsibility of the Party against which the claims are made, before determining claimants' eligibility for payment and the value of the claims. The EECC is an example of this type. The other has merely the mandate to perform the function of verification and valuation after another organ had determined the responsibility.¹⁵⁷ For example, the UNCC works on the premise that the Security Council has affirmed that Iraq is liable for any direct loss, damage or injury as a result of its unlawful invasion and occupation of Kuwait.¹⁵⁸

It is not unlikely that the Security Council or another organ would determine the responsibility of the State Parties of an armed conflict before or in establishing a possible international procedure. However, in most cases where the Commission is necessary to be established according to this Model Statute, it seems quite likely that the Commission will be expected to work

¹⁵² Agreement on Refugees and Displaced Persons, Annex 7 to the General Framework Agreement for Peace in Bosnia and Herzegovina, available at < <http://www.nato.int/ifor/gfa/gfa-an7.htm> >.

¹⁵³ Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict, prepared by Rainer Hofmann, Andrea Friedrich and Friedrich Rosenfeld, Article 6, Commentary (2) a. [[Hofmann's Report]

¹⁵⁴ 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, General Assembly Resolution 60/147 (adopted 16 December 2005), Annex, U.N. Doc. A/RES/60/147, p. 5.

¹⁵⁵ See Article 1(1) of Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts.

¹⁵⁶ Article 8 of the Articles on Responsibility of States for Internationally Wrongful Acts. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United State of America)*, Merits, I.C.J. Reports 1986, pp. 64-65, para. 115; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (26 February 2007), paras. 396-407.

¹⁵⁷ Howard M. Holtzmann and Edda Kristjansdottir eds., *International Mass Claims Processes: Legal and Practical Perspectives* (2007), p. 53.

¹⁵⁸ The Secretary-General explained the character of the UNCC by observing that "[t]he Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims." (Report of the Secretary-General Pursuant to Paragraph 19 of Security Council resolution 687 (1991), S/22559 (2 May 1991), para. 20.)

as a judge. Thus the present Article gives to the Commission a mandate to decide the responsibility of the Parties concerned as well as the claimants' eligibility for payment and the value of the claims.

(2) Before the Commission, the victims can claim their compensation against not only a State but also a non-State entity having involved in the armed conflict. As mentioned in the commentary to Preamble, the entity should be so organized that it may exercise such control over a part of territory as to enable it to carry out sustained and concerted military operations and to implement relevant norms of international humanitarian law. Since such entity assumes an obligation to comply with those norms, any person who suffered serious harm as a result of that entity's violations, may exercise his or her right to claim compensation against it. However, it is another matter whether he or she can receive compensation through the process of the Commission. This is dependent on whether that entity is legally subject to the decisions of the Commission. If the Commission is established by a decision of the Security Council or a regulation promulgated by its subsidiary organ, any particular consent of the entity would be unnecessary. On the other hand, if it is established by an agreement between States, the entity's consent to the jurisdiction of the Commission would be needed. Hence in the present Article the term "and agreed to this Statute" is inserted in brackets.

Practically it is possible that a non-State entity could not have enough financial resources to pay compensation to victims. Nevertheless, its legal responsibility to do so never disappears. In particular, if it later becomes the new government of a State or establishes a new State in part of the territory of a pre-existing State, the conduct of that entity is considered as an act of that State or of the new State, which then has responsibility to pay compensation to the victims.¹⁵⁹ Even if the entity which caused serious harms did not become a new government or a new State and dissolved at the time that the Commission is established, the victims' right to compensation still remains. In such a case, one of possible solutions may be to establish a trust fund,¹⁶⁰ from which the victims may receive their compensation when the Commission acknowledges their claims and evaluates the amount.

Article 2 Jurisdiction

The Commission has the power to decide claims to compensation submitted by victims who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss and substantial impairment of their fundamental rights, through acts or omissions that related to the armed conflict having taken place in [Place] from [Date] to [Date], and constituted serious violations of international humanitarian law and/or gross violations of international human rights law to be applied in the situation of armed conflict.

Commentary

(1) The Commission has jurisdiction on the claims to compensation for harms including physical or mental injury, emotional suffering, economic loss and substantial impairment of fundamental rights that a victim suffered. The phrase "physical or mental injury, emotional suffering, economic loss and substantial impairment of their fundamental rights" is used for defining the victims in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power¹⁶¹ and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law¹⁶². The Draft Declaration also relies on this definition.¹⁶³

(2) The term "victim" in the Statute includes an immediate family, if the direct victim suffered death. The family can file a claim to compensation for the death of the direct victim. This extended notion of "victim" is confirmed by the UNCC¹⁶⁴ and EECC as well as in the Basic Principles and Guidelines.¹⁶⁵

(3) The victims of those harms encompass legal persons as well as natural persons. However, the term of "legal person" in the present Article do not include any States, irrespective of whether those involving the armed conflict in question. In other words, the Commission cannot deal with the claims for the loss and damage that a State suffered. In this regard, the predecessors are also classified into two groups: one deals with both State claims and individual claims (including legal persons other than States), and the other relates only to the latter. The EECC has, for example, jurisdiction on the claims for loss and damage suffered by Eritrea and Ethiopia as well as those of their nationals. This type of procedure might have the advantage of enabling the States concerned to save time and material and human resources by dealing with both claims at the same time. However, this mixed process would delay the processing of individual claims, and eventually bring out a disadvantage for individual victims. In addition, this process would work to blur the existence of individual rights to compensation as being independent of a State's right.

¹⁵⁹ See Article 10 of the Articles on Responsibility of States for Internationally Wrongful Acts.

¹⁶⁰ See Report of the International Commission of Inquiry on Darfur to the Secretary-General, *supra* note 1, para. 603.

¹⁶¹ General Assembly Resolution 40/34 (adopted 29 November 1985), Annex, U.N. GAOR, 40th Sess. Supplement No. 53, U.N. Doc. A/40/53 (1985), p. 214.

¹⁶² Basic Principles and Guidelines, *supra* note 7, p. 5, para. 8.

¹⁶³ Hofmann's Report, *supra* note 6, Article 4 (1).

¹⁶⁴ Personal injury and Mental Pain and Anguish, Decision taken by the Governing Council of the United Nations Compensation Commission during its second session, at the 15th meeting, held on 18 October 1991, S/AC.26/1991/3 (23 October 1991), para. 3.

¹⁶⁵ Basic Principles and Guidelines, *supra* note 7, para. 8.

(4) The harms must be caused by the acts or omissions “relate to” an armed conflict. For this term, any harm, having happened to take place during an armed conflict but not substantially involved in it, is excluded from the jurisdiction of the Commission. However, it is not necessary for the harm to have been caused directly by the military operations of States or other entities involving in the armed conflict. If such harm was caused by the acts or omissions conducted in the context of or in association with specific military operations or occupation, it is within the jurisdiction of the Commission. Be that as it may, it is the Commission that determines whether the harm in question actually related to the armed conflict. In addition, for the purpose of clarifying the jurisdiction of the Commission, the armed conflict must be defined geographically and temporarily in the Statute.

(5) The acts or omissions having caused injury or loss must constitute serious violations of international humanitarian law and/or gross violations of international human rights law to be applied in the situation of armed conflict. The violations of international humanitarian law in the present Article are to have the nature of certain seriousness. However, those violations do not necessarily constitute crimes under international law, of which perpetrators are individually responsible and liable for punishment. While the International Commission of Inquiry on Darfur suggested to confining the jurisdiction of the CCD to the injury and loss caused as a result of international crimes,¹⁶⁶ other existing procedures have not had such a limited scope. The international humanitarian law here includes the norms of customary international law as well as the treaties to which relevant States are parties.

The present Article refers to gross violations of international human rights law as well. The protection offered by the norms of international human right law does not cease to work in case of armed conflict.¹⁶⁷ Thus, if harm is caused by the violations of international human rights law which can be applied to the situation of the armed conflict in question, the Commission may also deal with it. In this case again, international human rights law contains both the norms of customary international law and the treaties to which relevant States are parties.

(6) Any natural and legal persons, who once suffered the harm satisfying the requirements mentioned in (3) and (4), have a right to file their claims to the Commission, irrespective of their nationality, in accordance with the procedure provided for in the following Articles. This right is to be guaranteed equally to all the persons independently of whether their home State violated a norm of *jus ad bellum*. In the UNCC, Iraqi nationals are not entitled to submit claims.¹⁶⁸ However, since the Commission is established for the victims of violations of international humanitarian law and human rights law, it is irrelevant to distinguish between nationals of the State having opened a military attack in violation of *jus ad bellum* and those of State legally having responded to that attack. The commission must impartially deal with any harm whichever State caused them. Besides, a person may file a claim against the State of his or her nationality, as far as an act or omission of that State caused the harm defined in this Article. This type of claim is likely to be submitted in the case of a non-international armed conflict.

Article 3

Submission of Claims

1. Each victim shall submit his or her claim to the States of which nationality he or she has. That State shall forward whole of the claims received to the Commission after having categorized them in accordance with the criteria provide for in Article 5.
2. In spite of the previous paragraph, victims who are not in a position to have their claims forwarded by the State of their nationality may submit their claims to an appropriate person, State or international organization designated by the Commission.

Commentary

(1) In the CRPC, the HPCC and the IPCC, victims have a capacity to submit their claims directly to each commission.¹⁶⁹ The UNCC and the EECC, on the contrary, adopt the system of consolidated claims under which only States are entitled to submit claims on behalf of their nationals and corporations.¹⁷⁰ However, even in the latter, the submission by States for their nationals is not based on the traditional rule of diplomatic protection. Rather those States merely assume a role of collection and transmission of individual claims for the purpose of processing a huge number of individual claims efficiently and effectively.¹⁷¹ As to the question of which system, direct or indirect, is appropriate, it depends on the situation where the establishment of the Commission is necessary. If anticipated claims are limited in number, the direct submission system would be more convenient

¹⁶⁶ Report of the International Commission of Inquiry on Darfur, *supra* note 1, paras. 591 and 602.

¹⁶⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 178, para. 106.

¹⁶⁸ “Claims will not be considered on behalf of Iraqi nationals who do not have bona fide nationality of any other State”, Criteria for Expedited Processing of Urgent Claims, S/AC.26/1991/1 (2 August 1991), para. 17.

¹⁶⁹ In the HPCC, an individual claim is first submitted to the Housing and Property Directorate, and then the Directorate refers the claim to the HPCC. Section 1.2 of the Regulation No. 1999/23, *supra* note 2.

¹⁷⁰ Criteria for Expedited Processing of Urgent Claims, *supra* note 21, para. 19; Article 5 (1) of the Provisional Rules for Claims Procedure, annexed to the Decision taken by the Governing Council of the United Nations Compensation Commission at the 27th meeting, Sixth session held on 26 June 1992, S/AC.26/1992/10 (26 June 1992); Article 5 (8) of the Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, *supra* note 4.

¹⁷¹ See Report of the Secretary-General Pursuant to Paragraph 19 of Security Council resolution 687, *supra* note 11, para. 21.

for victims. On the other hand, the indirect system would be eventually beneficial for victims in that it can serve to prompt compensation by saving time to process the claims. With the prospect that the Commission will be more required in the face of a vast number of victims, this Model Statute adopts the indirect and consolidated system for responding to such claims. Even so, the present Article uses the term “forward” instead of “submit” for describing the State’s delivery of claims to the Commission, because “submit” may provide misleading information that a State, not individual victims, has a right to compensation.

(2) As a general rule, a State forwards claims on behalf of its nationals. Paragraph 2, however, provides for the exception under which an appropriate person, State or international organization designated by the Commission may forward claims on behalf of victims “who are not in a position to have their claims submitted by the State of their nationality.” There may be two groups of victims who fall into this exception: One is refugees and stateless persons, and the other is victims who want to submit their claims against the State of their nationality. Though the UNCC admits the submission (forwarding) by a person, authority or body appointed by its Governing Council for the former group of persons,¹⁷² there is no precedent for the latter group. Nevertheless, we can envisage the case where, in a non-international armed conflict, the armed forces of legitimate government would cause death or personal injury or loss of property against its nationals living in the territory controlled by dissident armed forces or other organized armed groups. In such a case, forwarding by other organ than that government is absolutely necessary to implement victims’ right to compensation.

Article 4 Categories of Claims

1. For the purpose of efficient and effective processing, all the claims submitted to the Commission shall be classified into four categories:

- (a) Category A: claims of those who suffered personal injuries or whose spouse, child or parent died, and for whom the fixed amount of \$[X] is to be paid;
- (b) Category B: claims of those who suffered losses of their properties, and for whom the fixed amount of \$[X] is to be paid;
- (c) Category C: claims of those who suffered personal injuries, whose spouse, child or parent died or who suffered losses of their properties, and the amount of their claims is larger than \$[X]; and
- (d) Category D: claims of legal persons.

2. The Commission shall give priority to the processing and payment of claims in the order of paragraph 1.

Commentary

(1) With a view of processing claims promptly, the UNCC and the EECC adopt a policy to divide the claims into some categories and give expedited priority to some of them. In the UNCC, all the claims are classified into six categories on the basis of the type of claimants, nature of their loss and the claimed amount of loss: the claims of individuals who were forced to leave Iraq or Kuwait (category A); the claims of those who suffered serious personal injuries or whose spouse, child or parent died (category B); the claims of those who suffered personal losses of up to US \$100,000 (category C); the individual claims of more than US \$100,000 (category D); the claims by corporations (category E); and the claims by governments and international organizations (category F).

In the EECC, claims are divided into six categories on the basis of the type of claimants: the claims of natural persons for unlawful expulsion from the country of their residence (category 1); the claims of natural persons for unlawful displacement from the country of their residence (category 2); the claims of prisoners of war for injuries suffered from unlawful treatment (category 3); the claims of civilians for unlawful detention and for injuries suffered from unlawful treatment during detention (category 4); the claims of persons for loss, damage or injury other than those covered by other categories (category 5); and the claims of governments for loss, damage or injury (category 6).¹⁷³

The present Article basically follows the way adopted in the UNCC. However, the difference lies in the point that this Article takes a fixed amount of compensation into account in categorizing the claims. As will be described in the commentary of the next Article, the UNCC as well as the EECC have a mass claims procedure in which victims can receive a fixed amount of compensation with bearing relatively a less burden of proof. In this Article, the categorization is explicitly linked with the claims which are subject to the mass claims procedure provided for in Article 5.

(2) The fixed amount in Categories A and B may vary from State to State. It is \$2,500 in the UNCC¹⁷⁴, but \$500 in the EECC¹⁷⁵. Thus the amount of \$[X] should be determined by the founders of the Commission in light of a standard amount of

¹⁷² See Guideline relating to paragraph 19 of the Criteria for Expedited Processing of Urgent Claims, Decision taken by the Governing Council of the United Nations Compensation Commission during its second session, at the 15th meeting, held on 18 October 1991, S/AC.26/1991/5 (23 October 1991), para. 3.

¹⁷³ Decision No. 2: Claims Categories, Forms and Procedures, para. A, available at <<http://www.pca-cpa.org/ENGLISH/RPC/EECC/Decisions%201-5.htm>>. After the Decision had been made, Eritrea and Epiopia agreed that they would not proceed with a mass claims procedure and have resorted to inter-State claims. In this respect, the descriptions on the mass claims procedure of the EECC in Articles 4, 5 and 6 are not based on its actual practice but on the documents the EECC has adopted. However, even if the mass claims procedure of the EECC is a “paper” procedure, it is still worth while to take it into account in considering an effective procedure in the model Statute of Ad Hoc Compensation Commission.

¹⁷⁴ Criteria for Expedited Processing of Urgent Claims, *supra* note 21, paras. 11-12.

compensation payouts in the States concerned and average earnings of their nationals. As the practical matter, whole the amount of money which the fund of the Commission is anticipated to receive from the responsible States and other entities is also quite relevant in determining the fixed and minimum amount of compensation.

(3) As it is quite likely that a huge number of claims will be submitted to the Commission, setting up the priority order among them is essential for efficient and effective processing. Besides, the clear rules on the priority serve to enhance the fairness and transparency that the Commission's procedure should have. Paragraph 2 requires the Commission to process preferentially the claims by individual victims of smaller amount. This also follows the rule of the UNCC according to which the claims of categories A-C are given priority in both the processing and payment¹⁷⁶.

Article 5

Mass Claims Procedure

1. The claims under Categories A and B are processed in accordance with the mass claims procedure provided for in the following paragraphs.
2. A victim is required to submit with his or her claim the documents on fact and date of the injury, death or loss and, in the case of death, family relationship. Documentation of the actual amount of loss resulting from the death, injury or loss of property is not required.
3. The Commission shall group the claims under each Category into sub-categories in such a manner that each sub-category contains claims alleged to arise from a particular violation of international law.
4. Following consideration of the evidence and pleadings submitted by the States concerned or other entities having involved in the armed conflict and of the information from the third States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that the Commission deems appropriate, the Commission shall determine:
 - (i) That the alleged acts or omissions in each sub-category have actually occurred in relation to the armed conflict in question;
 - (ii) That those acts or omissions were attributable to the States or other entities having involved in that armed conflict; and
 - (iii) That those acts or omissions constituted serious violations of international humanitarian law and gross violations of international human rights law.
5. If the Commission finds that one or more of these determinations cannot be made for lack of proof, it shall dismiss all the claims in that sub-category.
6. If the Commission makes all of the determinations in paragraph 4, it shall decide whether each claim of that sub-category is related to those acts or omission.
7. If the Commission so decides, it shall acknowledge the claim.

Commentary

(1) The present Article adopts the mass claims procedure under which the evidential burden of the victims who submitted the claims under Categories A and B is reduced. For the victims who claimed small amount of compensation, it must be too burdensome to be obliged to submit full evidence for their claims. In addition, it is not so practical that the Commission will take a long time to examine all the relevant evidence before deciding the claims. These considerations bring the present Article to follow the approach taken by the UNCC in regard to the evidential burden. According to the way of the UNCC, \$2,500 will be provided to a claimant under the category A, if there is simple documentation of the fact and date of departure from Iraq or Kuwait. Similarly, a claimant of the category B will receive \$2,500, if there is simple documentation of the fact and date of injury or death (and, in the case of death, documentation of family relationship). Documentation of the actual amount of loss resulting from the death or injury is not required.¹⁷⁷

(2) However, the Commission is different from the UNCC in its function. As mentioned before, the UNCC works on the premise that Iraq is liable for any direct loss, damage or injury as a result of its unlawful invasion and occupation of Kuwait. In other words, the UNCC need not to determine whether there was a violation of international law in evaluating the amount of compensation. The Commission, on the contrary, has to decide the responsibility of the State concerned or other entities for their violations of international law. In this respect, the present Article draws up the experience of the EECC.

Pursuant to the Rules of Procedure of the EECC, each parties, Eritrea and Ethiopia, shall group its claims of each category in sub-categories that it selects in such a manner that each sub-category contains all of the claims alleged to arise from a particular violation of international law. The EECC considers the evidence and pleadings submitted by each party, and then de-

¹⁷⁵ Decision No. 5: Multi Claims in the Mass Claims Process, Fixed-Sum Compensation at the \$500 and \$1500 Levels, Multiplier for Household Claims, para B, *available at* <<http://www.pca-cpa.org/ENGLISH/RPC/EECC/Decisions%201-5.htm>>.

¹⁷⁶ Priority of Payment and Payment Mechanism: Guiding Principles, Decision taken by the Governing Council of the United Nations Compensation Commission at its 41st meeting, held in Geneva on 23 March 1994, S/AC.26/Dec.17 (1994) (24 March 1994), para. 1.B.

¹⁷⁷ Criteria for Expedited Processing of Urgent Claims, *supra* note 21, paras 11-12; *See also* Article 35 (2) of the Provisional Rules for Claims Procedure, *supra* note 23.

termine whether the acts or omissions alleged to have been in violation of international law have been proved to have occurred, to be attributable to the other party and to have constituted a violation of international law. If the EECC finds that one or more of these determinations cannot be made for lack of proof, it will issue an award dismissing all claims in that sub-category. If the EECC, on the contrary, makes all of these determinations, the claims in that sub-category will be subject to random sampling of their evidence to ascertain the percentage of such claims for which the evidence is inadequate to establish the claim. The compensation for all claims in that sub-category is automatically reduced by that percentage, and the EECC will issue an award of such compensation for all claims in that sub-category¹⁷⁸.

Paragraphs 3-5 of the present Article basically follow the above procedure of the EECC. According to this, the claims under Category A are grouped into some sub-categories on the basis of relevant incidents in which a particular violation of international law occurred. For example, all the claims relating to the shelling of Town Y by the army of State B, which is alleged to constitute the violations of international humanitarian law concerning the protection of civilians, is classified as the sub-category A-1. After examining the evidence and pleadings submitted by the relevant States and other entities against the claims on one hand, and the information mostly supporting the claims communicated from the third States, organs of the United Nations, intergovernmental or non-governmental organizations on the other hand, the Commission determines whether the acts of shelling satisfies the requirements in paragraph 4.

Paragraph 6 does not follow the way of random sampling as the EECC intended to use. Instead, once the Commission finds that these requirements are satisfied, it continues to examine whether each claim of the sub-category A-1 is “related to” the acts of shelling against Town Y. The term “relating to” suggests that it is not necessary for the Commission to be persuaded that one of those acts of shelling certainly caused the injury, death or loss of property for which a victim is claiming compensation. The finding that the injury, death or loss of property took place *in the context of* those acts of shelling is enough for the Commission to acknowledge the claim.

Article 6 **Ordinary Procedure**

1. The claims under Categories C and D are processed in accordance with the procedure provided for in the following paragraphs.
2. A victim is required to submit appropriate evidence concerning:
 - (i) Alleged acts or omissions in his or her claim have occurred in relation to the armed conflict in question;
 - (ii) Those acts or omissions were attributable to the States and other entities having involved in that armed conflict;
 - (iii) Those acts or omissions constituted serious violations of international humanitarian law and gross violations of international human rights law;
 - (iv) The injury, death or loss of property in the claim was caused by those acts or omissions; and
 - (v) The amount of the claimed loss
3. Following consideration of those evidence, the evidence and pleadings submitted by the States concerned, other entities having involved in the armed conflict, and the information from third States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that the Commission deems appropriate, the Commission shall acknowledge or dismiss the claim and, if acknowledge it, determine the amount of compensation.

Commentary

The claims under the Categories C and D are subject to the procedure in the present Article. The victim whose claim is subject to this procedure has the burden of proof like a plaintiff in a domestic civil lawsuit, and must submit appropriate evidence demonstrating the points enumerated in paragraph 2. In this procedure, the amount of compensation is not fixed in advance, and is determined by the Commission in light of the harm that each victim suffered.

Article 7 **Effect of Decisions**

1. Decisions of the Commission shall be binding upon the States Parties [all the States] [and other entities] [that have made consent to this Statute].
2. Decisions of the Commission shall be final and not subject to appeal or review on procedural, substantive, or other grounds.

Commentary

(1) The decisions that the Commission makes concerning the claims are binding on the parties which are bound by the Statute establishing the Commission. If the Statute is based on an agreement between two States, it is axiomatic that the decision of the Commission binds those States Parties. As mentioned in the commentary to Article 1, however, the position of other non-State entities is different from those States. The decision of the Commission is binding upon those entities, as far as they have consented to be subject to the jurisdiction of the Commission. If the Statute is based on the Security Council resolution under chapter VII, the binding effect extends to all the members of the United Nations and other non-State entities. Taking these

¹⁷⁸ Articles 31 and 32 of the Rules of Procedure of the EECC available at < <http://www.pca-cpa.org/ENGLISH/RPC/#Eritrea-Ethiopia%20Claims%20Commission>>.

various cases into account, paragraph 1 includes the phrases “all the State”, “and other entities” and “that have made consent to this Statute” with brackets.

(2) The decisions that the Commission makes are final and not subject to appeal or review. Looking at the predecessors, the decisions by the EECC and HPCC are also final. In the UNCC, the reports and recommendations of the panels become final only after they are approved by the Governing Council.¹⁷⁹ In contrast, the CRPC had introduced the possibility of request a reconsideration of the decisions issued, although the Dayton agreements had indicated that it would render final decisions¹⁸⁰. For the purpose of guaranteeing victims’ right to compensation as fairly as possible, the mechanism for appeal seems desirable. On the other hand, the appeal procedure would make the processing of claims too complicated and too time-consuming. This would eventually disturb victims’ right to prompt compensation. The present Article attaches importance to the latter aspect.

Article 8 Distribution of Payments

1. A State having received the claims of its nationals shall establish its own mechanism under national law to distribute compensation paid to them in a fair, effective and timely manner.

2. A person, State or international organization designated by the Commission to forward the claims on behalf of the victims under Article 3 (2) shall, in accordance with the decision of and under the supervision of the Commission, distribute compensation paid to them in a fair, effective and timely manner.

Commentary

(1) In contrast to the exercise of diplomatic protection, a State which forwarded the claims to the Commission on behalf of its nationals has a duty to distribute compensation to them. For performing the duty, the present Article requires the State to establish its own mechanism under national law. This is basically in line with the rule adopted by the UNCC.¹⁸¹

The UNCC also has detailed rules for supervising the payments by the State concerned. According to them, a government of that State, basically prior to the receipt of the first payment, shall provide information in writing to the Governing Council on the arrangements that it has made for the distribution of funds to claimants, and within three months after the expiration of the time limit for the distribution of each payment, the government shall provide information on the amounts of payment distributed. If the government fails to distribute funds within six months of their receipt, the Governing Council may decide to ask the government for an explanation or further information. In the absence of a response satisfactory to the Council, it may decide not to distribute further funds to that particular government.¹⁸²

It is preferable that the Commission could have a strong power of supervision like the UNCC, but at the same time we cannot deny the fact that the high-powered supervision by the UNCC comes from the competence of the Security Council under Chapter VII of UN Charter. In fact the EECC, as having been established by an agreement between the States concerned, anti-thetically does not have any supervising mechanism for distribution of compensation. Thus this Model Statute does not provide for the detailed supervising mechanism, and leaves it to the future decisions by the founders of the Commission in their specific situation.

(2) A person, State or international organization designated by the Commission to forward the claims on behalf of the victims also bears responsibility to distribute compensation among victim. Unlike the case of a State under paragraph 1, the Commission should determine the method and conditions of distribution by itself, and the designated person, State or international organization should enforce them rigorously. As the person, State or international organization is in a sense an agent for the Commission, it shall also be subject to the supervision of the Commission.

(3) Compensation is to be distributed in “a fair, effective and timely manner”. While the present Article follows the wording of the Decision by the Governing Council of the UNCC, almost the same conditions are acknowledged in the Basic Principles and Guidelines.¹⁸³ The term “fair” requires that the distribution should be decided by the process without any discrimination and with a reasonable degree of credibility and transparency. The term “effective” suggests that the amount of compensation should be commensurate with the injury or loss that victims suffered. The term “timely” means that the victims should receive compensation as prompt as practically possible.

¹⁷⁹ Holtzmann and Kristjansdottir, *supra* note 10, p. 119.

¹⁸⁰ CRPC, Statistical Summary (1996-2003) (December 2003), p. 13, available at <http://www.law.kuleuven.ac.be/ipr/eng/CRPC_Bosnia/EOM%20-%20Annex%20A%20-%20Final%20CRPC%20Statistical%20Summary.pdf>.

¹⁸¹ Distribution of Payments and Transparency, Decision taken by the Governing Council of the United Nations Compensation Commission at its 41st meeting, held in Geneva on 23 March 1994, S/AC.26/Dec.18 (24 March 1994), para. I.

¹⁸² *Ibid.*, paras. 2-5.

¹⁸³ “Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to ... (b) Adequate, effective and prompt reparation for harm suffered.” Basic Principles and Guidelines, *supra* note 7, p. 6, para. 11.