

INTERNATIONAL LAW ASSOCIATION
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COMPENSATION FOR VICTIMS OF WAR

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INTRODUCTION
by Dr Luke T Lee (USA) (Chair)

That civilian casualties during armed conflicts often exceed those of the military is evident in the following statistics: As of March 11, 2006, for example, U.S. military fatalities in Iraq reached 2,308. By contrast, Iraqi civilian fatalities ranged from a minimum of 33,489 to a maximum of 37,569 (Washington Post, March 11, 2006, A16)—a difference of more than 14 times. While the families of American soldiers killed are well compensated by the U.S. Government, those of Iraqi civilian casualties are not. But are the latter entitled to compensation under international law? I raised this question at the International Symposium on Teaching and Research in international law, held in Beijing, August 1992. It was subsequently addressed in my article, “The Rights of Victims of War to Compensation,” in Essays in Honour of Wang Tieya (R St J MacDonald, ed., 1993). Thanks to the support of Professor Alfred H A Soons, then Director of Studies, the International Committee on Compensation for Victims of War was established by ILA in May 2003., with the goal of adopting a Declaration of International Law Principles on Compensation for Victims of War by 2010 at The Hague.

At the Berlin workshop in August 2004, the Committee agreed on a broad division of labour between the Co-Rapporteurs: Professor Hofmann would focus on the substantive aspects of the compensation issue and Professor Furuya on its procedural aspects. At the same time, it was recognized that this division is not meant to be rigid or mutually exclusive since many issues are inter-related and interdependent. The Committee also agreed that its work should include the drafting of a model statute for ad-hoc compensation commissions.

At the invitation of the University of Frankfurt, the Committee held an intersessional meeting in Frankfurt in September 2005, whose purpose was to assist the Co-Rapporteurs in undertaking their research through exchange of views among Committee members.

At this meeting, the Committee members greatly benefited from papers prepared by Professor Hofmann and Dr Frank Riemann of Harvard University on “Background Report” (stock-taking of theories and practice); by Dr Roland Bank and Elke Schwager on “An Individual Right to Compensation for Victims of Armed Conflicts?”; by Dr Dieter Fleck on “Individual and International Responsibility for Violations of the Jus in Bello: An Imperfect Balance”; by Professor Furuya on “Procedural Aspects of Compensation for Victims of War”, and on “Preliminary Analysis for a Model Statute of Ad Hoc Compensation Commission”; as well as by Professor James Nafziger’s written commentary on Professor Furuya’s papers. All of these papers have been circulated

among Committee members for comments and will be available at the ILA website. Along with the Interim Report that follows, they will form the bases for discussion at the Committee's first Working Session in Toronto in June 2006.

In writing this Introduction, I am reminded of the wise counsel given me by the late Judge Nagendra Singh, then President of the International Court of Justice and a stalwart member of the ILA. Although his advice pertained to compensation for refugees, it is equally relevant to our current subject of compensation for victims of war. He cautioned against basing all principles in ILA declarations entirely on existing "hard" law. For the ILA, he stressed, is a nongovernmental organization, aiming at progressively developing as well as codifying international law. Accordingly, the principles contained in ILA declarations should be based also on rules already adopted or recommended by official United Nations bodies, including the General Assembly and its subsidiary organs. After all, as Judge Singh stressed, if an official or semi-official body of the United Nations can adopt or recommend rules not based strictly on the so-called "hard" law, it follows a fortiori that a nongovernmental organization like the ILA can and should do so.

It is time to review systematically international law and human rights on the rights of victims of war to compensation—both to serve the end of justice and to minimize civilian casualties and loss of property during armed conflicts.

Information on the preliminary results of the work of the Committee

During its meetings in Berlin (2004) and Frankfurt (2005), the Committee discussed several issues in order to define the scope of its future work since many Committee Members felt that the mandate given to the Committee was in need of further clarification. Although no final decisions have yet been taken, the following tendencies could be identified, both as regards substantive and procedural issues.

With respect to substantive issues:

1. Most Committee Members agreed that the term '*war*' was too narrow and did not reflect the present state of international law. There seemed to be (wide) consensus to understand the mandate as to refer to any *armed conflict* including, in particular, also non-international armed conflicts (in the sense of Art. 3 common to the 1949 Geneva Conventions).
2. Again, most Committee Members agreed that the term '*compensation*' was too narrow. In view of the present state of international law relating to the consequences of internationally wrongful acts, there seemed to be (wide) consensus to understand the mandate as to include all forms of reparation, namely restitution, compensation *stricto sensu*, rehabilitation, satisfaction, and guarantees of non-repetition.
3. As to the primary norms the violation of which, during an armed conflict, might result in an (individual) claim for "compensation", there was consensus that the (core) norms of international humanitarian law protecting civilians would belong to that category. There was also a strong tendency to include (core) human rights – if and to the extent they remain applicable during an armed conflict.
4. As to the notion of '*victim*', there was consensus that it would include natural and legal persons. As yet, there was no consensus whether this term would also include individuals who are victims of acts not constituting any violation of the applicable law (the issue of *collateral damages*).
5. As to the addressees of any claim for "compensation", there was consensus that States are clearly responsible/accountable for such acts which are attributable to them under the present law of state responsibility. There was also wide consensus that the same conclusion should, *mutatis mutandis*, apply to international organizations. There was also consensus that it was necessary carefully to examine the situation, both *de lege lata* and *de lege ferenda*, with respect to such non-state actors which are (partial) subjects of public international law.
6. As to the issue of responsibility for terrorist acts, Committee Members agreed that the issue of claims for compensation by victims of terrorist acts which are not attributable, under international law, to any state or non-state actor with international legal personality, was in need of a particularly careful and thorough examination.
7. Finally, there was no consensus as to whether the present state of international law, as it results from applicable treaty and customary law, allows for any final conclusion as to the existence of a right to compensation, held and being enforceable by the individual victims of such violations of international law, as

distinct from the universally accepted existence of the right of States to claim – in their own right - “compensation” for violations of international law norms the victims of which were their nationals.

With respect to procedural issues:

8. As to the issue of judicial enforcement of individual claims for “compensation”, there was consensus that one should distinguish among claims filed in the courts of the State to whom the relevant violations of international law are attributable, claims filed in the courts of the State in the territory of which such violations had been committed without that State being legally responsible for them, claims filed before the courts of the State the nationals of which had been the victims of such violations, and claims filed before the courts of another State.

9. As to procedural obstacles for entering such claims before the courts of a State to whom such violations are not attributable, it was recognized that the traditional concept of state immunity which had previously effectively barred the jurisdiction of such courts, had recently been challenged: On the one hand, one could identify a growing tendency to admit the existence of the tort exception irrespective of the nature or purpose of the act or omission in question, i.e. also with respect to *acta jure imperii*. However, it was also stressed that many States still apply this criterion in order to bar any action against foreign States before their courts; moreover, it was felt that further analysis was needed in order to determine whether States could indeed apply the tort exception also to violations of international humanitarian law. On the other hand, it was stressed that a number of recent court decisions had denied applying the principle of state immunity with respect to acts violating norms having the status of *jus cogens*. However, it was stressed again that further analysis was needed in order to determine whether this exception already forms part of the *lex lata*.

10. As to claims before the courts of a State which had no direct (personal or territorial) link with the violation of international law in question, it was felt that – in addition to the above-mentioned issue of state immunity - further analysis was needed in order to determine whether the acceptance of such (universal) jurisdiction of States was indeed advisable since it might result in unwelcome forum-shopping.

11. Finally, with respect to claims filed before the courts of the State to whom such violations of international law were attributable, it was mentioned that several national legal systems excluded the applicability of national tort law to acts committed during an armed conflict. In this context, it was also stressed that the issue should be addressed as to whether States were under an international law obligation either to accept claims for “compensation” by victims of violations of international law, if the applicable rules of international law provide for such an individual right, or to discontinue their practice of excluding the applicability of their domestic tort law for acts committed during an armed conflict.

With respect to a model statute for compensation commissions:

12. As to the scope of its work on this issue, there was consensus that the Committee should aim at drafting model rules for compensation commissions. In doing so, it would take due account of the lessons to be learned from the past and future practice of relevant institutions such as, for example, the United Nations Compensation Commission, the Eritrea-Ethiopia Claims Commission, the Commission for Real Property Claims in Bosnia and Herzegovina, the Housing and Property Claims Commission in Kosovo, and the Iraq Property Claims Commission.

13. It was also felt that it would not be feasible to favour the future establishment of a single, permanent compensation commission but rather to support the concept of *ad hoc* compensation commissions. It was, however, proposed to explore the advantages (and disadvantages) of the creation of a permanent body (a kind of permanent secretariat) the experienced members of which could assist in the process of establishing future *ad hoc* compensation commissions empowered to deal with claims resulting from violations of international law committed during specific armed conflicts.

14. Finally, there was consensus that the Committee should pursue its pertinent work by addressing the relevant issues identified in the background paper by Professor Furuya.

With respect to its work until the Toronto Conference:

15. There was consensus, that the Co-Rapporteurs should prepare draft papers, each one for his area of work, to be circulated among, and commented upon by, all Committee Members with a view to serving as a basis for the Committee’s Interim Report to be discussed at its Working Session during the Toronto Conference in June 2006.

16. Finally, it was agreed that the Committee should envisage the presentation of a first draft of International Law Principles on Compensation for Victims of War, including a Model Statute for *ad hoc* Compensation Commissions (Articles and Commentaries) for the Brazil Conference in 2008.

**Compensation for Victims of War
Substantive Issues
Do Victims of Armed Conflicts Have an Individual Right to Reparation?**

By Professor Rainer Hofmann (Germany) (Co-Rapporteur)

I. Preliminary Remarks

The following paper is based on the discussions of the ILA Committee on Compensation for Victims of War during the Berlin Conference in August 2004 and its Intersessional Meeting in September 2005 in Frankfurt. It does not attempt to address all issues identified during these meetings and referred to in the above information on the preliminary results of the work of the Committee. In particular, it does not deal with the issues of potential claims resulting from violations of international law committed by non-state actors or terrorists since it is felt that, in view of the discussion held so far, it would be premature to examine these most problematic questions. Since it is felt that the current concern of the international legal community is primarily focussed on the question as to whether victims of violations of international humanitarian law are holders of an individually enforceable individual right to reparation, in particular restitution and compensation, this paper is also primarily concerned with this issue. It is structured into two major parts: In the first one, it seeks to identify the *lex lata* by taking into account Article 3 of the 1907 Hague Convention IV, the pertinent provisions of Peace Treaties concluded after World War I and World War II as well as of the 1949 Geneva Conventions and the 1977 Additional Protocol I, the Legal Bases and Practices of International *Ad Hoc* Claims Commissions, the Recent Practice of Domestic Courts and, finally, Article 75 of the Rome Statute of the International Criminal Court. The second part consists of a number of considerations *de lege ferenda*.

II. Introduction

On 13 April 2005, the United Nations Commission on Human Rights (UNCHR) adopted its *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*.¹ Hereby, it finalized its efforts to contribute to the development of the right to reparation of victims of gross violations of human rights and humanitarian law which had been initiated, in 1993, when the then Special Rapporteur of the then Sub-Committee on Prevention of Discrimination and Protection of National Minorities, *Theo van Boven*, presented his study on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. It included a set of *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law*² which later came to be generally referred to as the *Van Boven Principles*. Thereafter, the UNCHR continued its work on this issue and in 2000 the then Special Rapporteur, *Cherif Bassiouni*, submitted his final report which included revised *Basic Principles and Guidelines on the right to a remedy and reparation for victims of violations of International Human Rights and Humanitarian Law*.³ In the above-mentioned *Basic principles and guidelines*, the UNCHR states, *inter alia*, that the obligation to respect, ensure respect for and implement international humanitarian law includes, *inter alia*, the duty to provide effective remedies to victims, including reparation;⁴ such “remedies for ... serious violations of international humanitarian law include the victim’s right to the following as provided for under international law: ... (b) adequate, effective and prompt reparation for harm suffered;...”⁵ So, notwithstanding the fact that the language of these *basic principles and guidelines* is in many aspects “weaker” than the one used by *Van Boven*

¹ UN Doc. E/CN.4/2005/L.48, 13 April 2005. It might be added that a number of governments had abstained from voting, including the German government. Its representative stated that the text was an inaccurate reflection of customary international law and that it erroneously sought to apply the principles of state responsibility to relationships between States and individuals and failed to differentiate adequately between human rights law and international humanitarian law. While the absence of a legal basis for individual reparation claims for violations of international humanitarian law might be regrettable, it must be taken into account; see UN Doc. E/CN.4/2005/SR.57, 29 April 2005, para. 39.

² UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993; for a detailed discussion of the principles see F.H.Paolillo, *On Unfulfilled Duties: The Obligation to Make Reparation in Cases of Violations of Human Rights*, in: V. Götz/ P. Selmer/ R. Wolfrum (Hrsg.), *Liber Amicorum Günther Jaenicke* (Berlin 1998) 291.

³ UN Doc. E/CN.4/2000/62, 18 January 2000.

⁴ UN Doc. E/CN.4/2005/L.48, 13 April 2005, at p. 6 (II. Scope of the Obligation).

⁵ *Ibid.*, at p. 8 (VII. Victim’s Right to Remedies) (emphasis added by the author).

and *Bassiouni*, the UNCHR clearly recognizes a victim's right to reparation and it does so in such a way that it must be understood as an individual right of the victim - a right which, in principle, might be claimed by the individual him/herself and not a right which might only be exercised by the State the nationality of which the individual victim possesses; even more so, the *basic principles and guidelines* do not deal with the traditional concept of international law according to which violations of the rights of individuals under international law were understood as violations of the rights of the State of the nationality of the victims only which was, therefore, alone entitled to claim reparation for such violations..

On 28 July 2005, the *Oberlandesgericht* Köln handed down its judgment in the *Bridge of Varvarin Case*⁶ in which the civilian victims – or their heirs – of a NATO air-raid against the bridge of Varvarin claimed financial compensation, from the Federal Republic of Germany as a NATO member State, for the harm suffered. This air-raid had been conducted, on 30 May 1999, in the context of the NATO armed intervention against the then Federal Republic of Yugoslavia by which NATO sought to end the “humanitarian crisis” in Kosovo. In its judgment, the *Oberlandesgericht* upheld the previous judgment of the *Landgericht* Bonn of 10 December 2003.⁷ For the purpose of this paper, it is important to note that the *Oberlandesgericht* confirmed the view that international humanitarian law does not provide for direct individual claims by the victims of an act constituting a violation of norms of international humanitarian law and attributable to a State.

The adoption of the *Basic principles and guidelines* as well the judgment of the *Oberlandesgericht* Köln add to a discussion⁸ which gained considerable momentum since the early 1990s.

Notwithstanding that, in current armed conflicts, violations of international humanitarian law are no longer mostly committed by persons the acts of whom are, under the rules of the law on state responsibility, attributable to States, but to a greatly increasing degree by non-state actors and, albeit to a significantly lesser degree, by persons who act under the command of international organisations in the context of peace-enforcing or peace-keeping operations and which, thus, might establish the accountability of the international organisation concerned, this discussion is still mainly focussed on the question as to whether victims of such violations of international humanitarian law have, under present international law, a legally enforceable individual right to reparation, including monetary compensation, against the State responsible for such acts. And, indeed, it might well be argued that, if present international law provides for such a right against States, it is difficult to maintain that the situation should be different as concerns international organisations and non-state actors: If they are subjects of international law and engage in acts which could have been committed, under traditional international law, only by States and, thus, behave like or as States, then they should, in principle, be held accountable in the same way as States; admittedly, there will have to be some modifications⁹ in the applicable law taking into

⁶ Neue Juristische Wochenschrift 58 (2005), 2860; for a summary of the judgment see <http://www.koeln-olg.de>

⁷ See Neue Juristische Wochenschrift 57 (2004), 525.

⁸ Among the abundant literature see, for example, P. d'Argent, *Les réparations de guerre en droit international public* (Bruxelles 2002); H.S. Bong, *Compensation for Victims of Wartime Atrocities*, Journal of International Criminal Justice 3 (2005), 187; D. Fleck, *Individual and International Responsibility for Violations of the Jus in Bello: An Imperfect Balance*, in: V. Epping/ W. Heintschel von Heinegg (eds.), *International Humanitarian Law Facing New Challenges* (Berlin 2006) (forthcoming); E.C. Gillard, *Reparations for violations of international humanitarian law*, International Review of the Red Cross 85 (2003), 529; W. Heintschel von Heinegg, *Entschädigung für Verletzungen des humanitären Völkerrechts*, in: W. Heintschel von Heinegg/S. Kadelbach/B. Heß/M. Hilf/W. Benedek/W.H. Roth (Hrsg.), *Entschädigung nach bewaffneten Konflikten. Die Konstitutionalisierung der Welthandelsordnung* (Berichte der Deutschen Gesellschaft für Völkerrecht Bd. 40), (Heidelberg 2003), 1; B. Heß, *Kriegsentschädigungen aus kollisionsrechtlicher und rechtsvergleichender Sicht*, *ibid.*, 107; S. Kadelbach, *Staatenverantwortlichkeit für Angriffskriege und Verbrechen gegen die Menschlichkeit*, *ibid.*, 63.; M. Igarashi, *Post-war Compensation Cases, Japanese Courts and International Law*, Japanese Annual of International Law 43 (2000), 45; J.K. Kleffner/ L. Zegveld, *Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law*, Yearbook of International Humanitarian Law Vol. 3 (2000), 384 ; L. Lee, *The Right of Victims of War to Compensation*, in: R.St.J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht 1993), 489; R.P. Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview*, Journal of International Criminal Justice 1 (2003), 339; C. Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law*, in: A. Randelzhofer/ C. Tomuschat (eds.), *State Responsibility and the Individual* (The Hague 1999), 1; *id.*, *Reparation for Victims of Grave Human Rights Violations*, Tulane Journal of International and Comparative Law 10 (2002), 157; and L. Zegveld, *Remedies for victims of violations of international humanitarian law*, International Review of the Red Cross 85 (2003), 497. See also the contributions in A. Randelzhofer/C. Tomuschat (eds.), *State Responsibility and the Individual* (The Hague 1999); and in H. Fujita/ I. Suzuki/ K. Nagano (eds.), *War and the Right of Individuals. Renaissance of Individual Compensation* (Tokyo 1999). See also the papers, prepared for the ILA Committee on Compensation for Victims of War, by R. Hofmann/ F. Riemann, *Compensation for Victims of War. A Background Report* (2004); and E. Schwager/ R. Bank, *An Individual Right to Compensation for Victims of Armed Conflicts?* (2005), both available at http://www.ila-hq.org/html/layout_committee.htm.

⁹ Such modifications would apply, for example, with respect to the question in which *fora* and by whom claims for reparation could be raised.

account the obvious differences between these three categories of subjects of international law – the general principle of accountability should, however, apply. Therefore, this paper deals only with the question as to whether there is such a right against States – and it is suggested that, if it does, then such a right exists, in principle, also against international organisations and non-state actors.

The above-mentioned judgment of the *Oberlandesgericht Köln*¹⁰ did not only deal with the question as to whether the civilian victims of the NATO air-raid against the bridge of *Varvarin* had, under present international law, an individual right to financial compensation against the Federal Republic of Germany, but also with the question as to whether such a claim could be based on German torts law (state liability) (*Amtshaftungsrecht*). In this context, it is important to note that the court, for the first time in German legal history, accepted such a right of individuals to claim compensation for war damages: It held that, whereas such claims under the laws of state liability were excluded at the time of World War II as being superseded by the laws of war, this approach could no longer be upheld and ruled that the German norms on state liability remain, in principle, applicable in present situations of armed conflicts.¹¹ It remains to be seen, however, whether this position will be shared by the *Bundesgerichtshof* which – in the well-known *Distomo* case – held that the domestic rules of state liability were suspended in times of war and that, therefore, the Greek civilian victims – and their heirs – of a war crime committed during World War II by German forces had no right to claim compensation under domestic German law. It should be noted that this ruling is qualified insofar as it was held that such was the situation as to the law applicable during World War II.¹² However, since this paper deals with the question as to whether individuals have an individual right to reparation under *international* law, the issue as to whether such a right might be based upon the pertinent provisions of *national* law or – even more interesting – whether present international law encompasses a legal – and not only moral¹³ – obligation incumbent upon States to provide for such claims in their domestic legislation, will not be addressed.¹⁴

III. The situation under the *lex lata*

At the outset, it should be recalled that in the field of international humanitarian law there are, in contrast to the international human rights law, no treaty norms which explicitly and unambiguously provide for an individual right to reparation, including monetary compensation. Under international human rights law such norms are to be found in the relevant human rights instruments applicable on the regional level, namely Article 41 of the European Convention on Human Rights (ECHR),¹⁵ Article 63 of the Inter-American Convention on Human Rights (IACHR)¹⁶ and Article 27 of the 1998 Protocol to the African Charter on Human and Peoples Rights (AfrChHPR) which entered into force on 25 January 2005.¹⁷ Since under present international law, the applicability of human rights treaties during armed conflicts is generally accepted,¹⁸ such provisions might, in principle, play an important role as concerns potential claims by victims of violations of such human rights treaties committed during armed conflicts. According to the pertinent jurisprudence of the European Court of Human Rights (ECtHR), the ECHR remains, in principle, applicable in such situations even outside the territory

¹⁰ See *supra* note 6.

¹¹ It should be stressed, however, that the court also held that, in the present case, such claims were not justified as the Federal Government had no responsibility for the attack against the bridge of *Varvarin* since it could have fully trusted in NATO targeting decisions as being in conformity with international law.

¹² See *Neue Juristische Wochenschrift* 56 (2003), 3488.

¹³ German governments have consistently argued that the enactment of various laws providing for individual claims for compensation by victims of Nazi injustices as well as the establishment of the Foundation *Remembrance, Responsibility and Future* which was tasked to provide for compensation to persons who had been subjected to forced labour during World War II were effected in order to comply with a moral and not a legal obligation; on this issue see, for example, R. Bank, *The New Programs for Payments to Victims of National Socialist Injustice*, *German Yearbook of International Law* 44 (2001), 306.

¹⁴ But see on this issue, for example, J.A. Kämmerer, *Kriegsrepressalie oder Kriegsverbrechen*, *Archiv des Völkerrechts* 37 (1999), 283 (310); and *Schwager/Bank* (*supra* note 8), text accompanying notes 161.

¹⁵ Under this provision, the European Court of Human Rights “shall, if necessary, afford just satisfaction to the injured party.”

¹⁶ Under this provision, the Inter-American Court of Human Rights shall “rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

¹⁷ This Protocol which establishes an African Court of Human Rights is available at <http://www.achpr.org>; Article 27 reads: “If the Court finds that there has been violation of a human or peoples’ rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.”

¹⁸ See only International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 ICJ reports, para. 25; International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ reports, para. 106; see also J.-M. Henckaerts/L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, Vol. I Rules (Cambridge 2005), 313.

of the State Party concerned as long as this state exercises “effective control”.¹⁹ This has been explicitly recognised by the European Court of Human Rights as concerns situations of belligerent occupation²⁰; the ECHR remains also, again in principle, applicable if such effective control over parts of the territory of the State Party concerned is, in fact, exercised by a secessionist movement.²¹ Also, as concerns the IACHR, the jurisprudence of the Inter-American Court of Human Rights (IACtHR) shows that human rights treaty law may be successfully used as a tool for better implementation of international humanitarian law and the implementation of claims for monetary compensation by victims of violations of the provisions of that treaty.²²

In order to determine the *lex lata* as concerns an individual right to compensation under international law, a survey of the historical developments seems to be called for. It will address the pertinent provisions of the applicable general treaties in the field of humanitarian law, but also present the contents of the peace treaties concluded after World War I and World War II, the legal bases and practices of some of the recently established international Claims Commissions and conclude with a report on recent attempts to bring claims for compensation by victims of violations of the rules of war during World War II before domestic courts.

1. Article 3 of the 1907 Hague Convention IV

Well before the development of modern international humanitarian law, Article 3 of the 1907 Hague Convention IV stated that “a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation.” While this obligation to pay compensation is certainly partly aimed at ultimately benefiting the victims of unlawful conduct²³, it was for a long period of time understood as not empowering individuals to claim such compensation themselves, but as restating the traditional rule that claims for compensation may only be made by States against another State.²⁴ This understanding has been – and still is – shared by a large number of courts in different countries²⁵ and many scholars.²⁶ So far, only the Greek court dealing in the first instance with the *Distomo* case found that the victims of the massacre had a right to claim compensation under Article 3 of the 1907 Hague Convention IV²⁷ whereas the ruling of the *Areios Pagos* in the same matter did not deal with this provision.²⁸ In recent times, a number of scholars have argued that Article 3 of the 1907 Hague Convention IV can be understood as establishing an individual right to claim compensation.²⁹

¹⁹ ECtHR, *Bankovic et al v. Belgium*, Decision on the Admissibility of 12 December 2001, RJD-VII, paras. 59 et seq.; see, in this context, also the judgment of 14 December 2004 by the High Court of Justice QB, *Al Skeini v. The Secretary of State for Defence* (2004) EWHC 2911, available at <http://www.bailii.org/ew/cases/EWHC/Admin/2004/2911.html>; this judgment has been confirmed by the Court of Appeals for England and Wales by its decision of 21 December 2005, see *The Queen (on the application of Al Skeini and Others) v The Secretary of State for Defence*, BLD 221205584 [2005]EWCA Civ 1609, available at http://www.hmccourts-service.gov.uk/judgmentsfiles/j3670/al_skeini_v_state_1205.htm.

²⁰ ECtHR, *Loizidou v. Turkey* (merits), Judgment of 18 December 1996, RJD 1996-VI, para. 52; and *Cyprus v. Turkey*, Judgment of 10 May 2001, RJD 2001-IV, para. 76.

²¹ ECtHR, *Assanidze v. Georgia*, Judgment of 8 April 2004, RJD 2004-II, paras. 137 et seq.; and *Ilascu et al. v. Moldova and Russian Federation*, Judgment of 8 July 2004, RJD 2004-VII, paras. 311 et seq.

²² See, in particular, IACtHR, *Las Palmeras v. Colombia*, Judgment of 26 November 2002 (Reparations), paras. 37 with an extensive survey of the applicable jurisprudence, available at <http://www.corteidh.or.cr/>.

²³ See, for example, Gillard (*supra* note 8), 536; and 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*, *International and Comparative Law Quarterly* 40 (1991), 827 (830).

²⁴ See, for example, K. Strupp, *Das internationale Landkriegsrecht* (Berlin 1914, 29); and R. Provost, *International Human Rights and Humanitarian Law* (Cambridge 2002), 45, both with further references.

²⁵ As concerns courts in the USA, see, for example, *Tel Oren v. Libyan Arab Republic*, 726 F.2d 774, 816 (D.C.Cir.1984); *Leo Handel v. Artukovic*, 601 F.Supp.1421 (D.D.C., 1985); and *Goldstar (Panama) S.A. v. United States*, 967 F.2d, 965, 968-969 (4th Cir. 1972); for German courts, see, for example, the *Forced Labour* decision of the Federal Constitutional Court of 13 May 1996, BVerfGE (Official Collection of Decisions) Vol. 94, 315, reprinted in *Neue Juristische Wochenschrift* 48 (1996), 2717; the *Distomo* judgment of the *Bundesgerichtshof* of 26 June 2003 (*supra* note 12), confirmed by the *Bundesverfassungsgericht* in a most recent decision of 15 February 2006 (see http://www.bverfg.de/entscheidungen/rk20060215_2bvr147603.html); and the recent *Varvarin* decision of the *Oberlandesgericht* Köln of 28 July 2005 (*supra* note 6); and for Japanese courts see, for example, the decisions of the Tokyo High Court of 8 February 2001 and 11 October 2001, reported in *Japanese Annual of International Law* 45 (2002), pp. 142 and 145, respectively.

²⁶ See, for example, d’Argent (*supra* note 8); Gillard (*supra* note 8), 534; Heintschel von Heinegg (*supra* note 8), 25; and C. Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford 2003), 294.

²⁷ For an analysis of the decision of the Court of First Instance of Leivadia of 30 October 1997 see I. Bantekas, *International Decisions: Prefecture of Voiotia v. Federal Republic of Germany*, *American Journal of International Law* 92 (1998), 765.

²⁸ For an analysis of this decision of 4 May 2000 see M. Gavounelli/ I. Bantekas, *International Decisions: Prefecture of Voiotia v. Federal Republic of Germany*, *American Journal of International Law* 95 (2001), 198.

²⁹ See, for example, C. Greenwood, *International Humanitarian Law (Law of War)*, in: F. Kalshoven (ed.), *The Centennial of the First International Peace Conference* (Boston 2000), 161 (250); Kalshoven (*supra* note 23), 836; and Zegveld (*supra* note 8), 506.

It should also be mentioned that the UNCHR, in its above-mentioned *Basic principles and guidelines*³⁰ identified this provision as providing for a right to a remedy for victims of violations of international humanitarian law. Finally, the *International Commission of Inquiry into Darfur* stated that, even if Article 3 of the 1907 Hague Convention IV was initially not intended to provide for a right to compensation for individuals, it did so meanwhile as the emergence of human rights in international law had changed the concept of state responsibility.³¹

This means that it is still difficult to argue that there is sufficient state practice to hold that Article 3 of the 1907 Hague Convention IV, as it was to be interpreted at the time of World War II, did provide for an individual right to reparation, including monetary compensation. However, in view of the subsequent development of international law, in particular the recognition of the individual as a legal subject under international law, it might indeed be possible to argue that this provision, as interpreted in the light of present international law, does now provide for such a right. However, it must be admitted that there is still no pertinent state practice which would allow for the conclusion that such an interpretation might be considered as constituting customary international law.

2. Peace Treaties after World War I and World War II

All the Peace Treaties concluded at the end of World War I obliged the defeated States to pay reparations – and not only war indemnities. Corresponding to then prevailing general understanding of international law, it was clear that, in principle, this regime only entitled the victorious States and not individual claimants to seek compensation for individual losses.³² This was so notwithstanding that, pursuant to Article 297 (e) of the 1919 Versailles Peace Treaty, U.S. citizens were entitled to bring claims against Germany for violations of the laws of war to the U.S.-German Mixed Claims Commission.

Whereas the immediate aftermath of World War II saw the establishment of structures of individual criminal responsibility, nothing changed as concerns the traditional position of individuals with respect to an individual right to compensation: Approximately 95% of all claims were regulated by lump-sum agreements with the respective home State of the victims which received money to be distributed at its own discretion without there being the intent to provide full coverage for every individual damage incurred.³³

Within the framework of this paper, it is not possible to present the most complex structure of the various post-War settlements imposed upon Germany, or concluded with the Federal Republic of Germany and the German Democratic Republic, respectively, concerning reparations.³⁴ It should be stressed, however, that all governments of the Federal Republic of Germany have consistently been of the opinion that international law, as applicable during World War II, did not provide for any legally enforceable right of individual victims to compensation for violations of the laws of war, as applicable during that time. Any legal obligation to pay such compensation to individual victims of such acts attributable to Germany is, according to this opinion, the result of either an international treaty or domestic legislation providing for such a right. In this context, it must be emphasized that, again according to the consistent position of all German governments, there was – and is – no obligation under international law to enact such domestic legislation nor to conclude such treaties; however, German governments have – equally consistently – held that there is a moral obligation incumbent on the Federal Republic of Germany to conclude such treaties or to adopt such legislation in order to make good – although admittedly to a limited degree – some of the losses incurred by foreign nationals through acts attributable to Germany before and after World War II. This position has been shared consistently by the competent German courts.

The key difference between Germany and Japan as regards the settlement of post-war reparations lies in the fact that the peace process with Germany occurred in several steps while Japan concluded, in 1951, a formal peace

³⁰ *Supra* note 1.

³¹ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General pursuant to Security Council Resolution 1564, 25 January 2005, paras. 593 et seq., available at http://www.un.org/News/dh/Sudan/com_inq_darfur.pdf.

³² See, for example, R. Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons After 1945*, Berkeley Journal of International Law 20 (2002), 296 (310); Gillard (*supra* note 8), 533; and Heintschel von Heinegg (*supra* note 8), 23.

³³ See R.B. Lillich/B. Weston, *International Claims: Their Settlement by Lump-Sum Agreements, Part I: The Commentary* (Charlottesville 1975), 11.

³⁴ For an overview see I. Seidl-Hohenveldern, *Reparations after World War II*, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV (Amsterdam et al. 2000) 180; and Dolzer (*supra* note 32), 313.; for a detailed study see B. Eichhorn, *Reparation als völkerrechtliche Deliktshaftung* (Baden-Baden 1992), 121. On recent developments see Bank (*supra* note 13), 307.

treaty in San Francisco.³⁵ This treaty contained provisions on all issues traditionally addressed in a modern peace treaty such as territorial issues, political matters, financial and economic elements. It also recognized Japan's obligation in principle to pay reparations to the governments of those States which Japan had invaded during the war. The treaty did not, however, provide for any detailed regulations but left the determination of the exact amount of reparations to subsequent bi-lateral agreements. The United States waived their right to reparations and so did the People's Republic of China. Bilateral agreements with other states fixed relatively small reparation sums. Most of these agreements disallowed claims by individuals against Japan. Overall, the post-war reparation agreements with Japan show clear characteristics of traditional inter-state settlements with lump-sum payments which the receiving state would distribute, according to its own laws, among the victims while, at the same time, excluding individual claims.

This means that the reparation settlements after World War I and World War II did not provide for any legally enforceable right to compensation for individual victims of violations of then applicable laws of war.

3. The Geneva Conventions of 1949 and the 1977 Additional Protocol I

In view of the cruelties committed during World War II, the law of international armed conflict was placed on an entirely new basis: the protection of the human victim – hence, international humanitarian law. With regard to the question of reparations, however, the four 1949 Geneva Conventions brought nothing new. They contain no explicit provision on compensation.³⁶ Such a provision came only in 1977 when the First Additional Protocol was adopted. In its Article 91, it contains an almost literal reproduction of Article 3 of the 1907 Hague Convention IV.

Additional Protocol I entered into force in 1979. However, it has been convincingly stated that the application of the principle enshrined in its Article 91 does not depend on ratification since it only restates existing international customary law.³⁷ While some have argued that the purpose of Article 91 was to strengthen individual rights, this can only be understood as an effort to reinforce the position of individual victims as the ultimate beneficiaries of compensation. There is no indication that Article 91 was intended to confer a procedural capacity on individuals to claim compensation directly from the violating state.³⁸ The very fact that Article 91 was accepted by the Conference in 1977 without much discussion as a mere restatement of international customary law supports the view that there was no intention to venture onto new legal grounds. Instead, Article 91 should be understood along the same lines as Article 3 of the 1907 Hague Convention IV, i.e. as not supporting individuals claims for compensation³⁹ – at least if interpreted and applied in the light of international law as applicable in the 1970s.

Thus, although it is true that the system of international humanitarian law as established by the 1949 Geneva Conventions and the 1977 Additional Protocols aims beyond the inter-state level at the protection of individuals, it is probably equally true that this development as concerns primary rights of the individual has not fully been reflected by a corresponding development of secondary, i.e. procedural rights. As *Liesbeth Zegveld* recently stated: “The IHL regime focuses solely on persons to be protected against the dangers of war, leaving open the question of action when protection fails”.⁴⁰

However, just as in the case of Article 3 of the 1907 Hague Convention IV, a fresh look at Article 91 of the 1977 Additional Protocol I, taking into account more recent developments in international law, might result in an interpretation according to which Article 91 provides for a right to a remedy for individual victims of violations of international law.⁴¹

4. The Legal Bases and Practices of International *Ad-Hoc* Claims Commissions

Claims Commissions have traditionally been a more successful way for individuals to assert their claims for compensation than other international *fora* or national courts. Recently, some International Claims Commissions

³⁵ For the following see, for example, Dolzer, *ibid.*, 311; and L. Hein, War compensation: claims against the Japanese Government and Japanese Corporations for War Crimes, in: J.Torpey (ed.), *Politics and the Past: On Repairing Historical Injustices* (Cambridge 2003), 127.

³⁶ There is only an implicit recognition of the duty to compensate, see Article 51 Convention I, Article 52 Convention II, Article 131 Convention III, and Article 148 Convention IV.

³⁷ See, for example, Heintschel von Heinegg (*supra* note 8), 59; Kalshoven (*supra* note 23), 844.; and Zegveld (*supra* note 8), 506, all with further references.

³⁸ See, for example, Tomuschat (*supra* note 8), 179; and Zegveld, *ibid.*, 507.

³⁹ See Tomuschat, *ibid.*, 178 et seq.

⁴⁰ Zegveld (*supra* note 8), 507.

⁴¹ See, in particular, see UNHCR *Basic principles and guidelines* (*supra* note 1).

have been established with a view also to settling individual claims arising out of situations of armed conflict. In view of their broad mandate, the United Nations Compensation Commission (UNCC) and the Eritrea-Ethiopia Claims Commission (EECC) deserve particular attention.⁴²

The UNCC, established pursuant to UN Security Council Resolution 687 (1991), is mandated to decide on claims for injuries resulting from Iraq's unlawful invasion and occupation of Kuwait. This means that the UNCC does not have to establish that the relevant injuries were caused by violations of the *ius in bello*; it suffices that they are a result of Iraq's violation of the *ius ad bellum* – or rather the *ius contra bellum*.⁴³ There is, however, one situation in which a payment can be made for a violation of international humanitarian law (*ius in bello*) even though the UNCC usually grants compensation for damages resulting from the violation of the prohibition of the use of force by Iraq: These cases concern claims by members of the Allied Coalition Armed Forces who are usually barred from submitting claims before the UNCC. However, if they were prisoners of war and have been subjected to treatment incompatible with the rules of international humanitarian law, they are entitled to obtain compensation from the UNCC.⁴⁴

Under Article 5 (1) (2) of the Agreement between Ethiopia and Eritrea of 12 December 2000⁴⁵, individuals are entitled to obtain reparation for their losses resulting from violations of international humanitarian law in the course of the armed conflict between the two states. Even though the individual has no standing before the EECC, the individual is the holder of the material right to reparation under the Agreement. According to the wording of Article 5 (8) of the Agreement, Articles 23 and 24 of the Rules of Procedure⁴⁶ and Decision N° 5⁴⁷, the State, when claiming for a loss incurred by an individual, is not invoking its own right, but is acting on behalf of the individual. In its Partial Award of 17 December 2004 on Eritrea's Claims 15, 16, 23&27 – 32 and Ethiopia's Claim 5⁴⁸, the EECC confirmed this by ruling that claims brought by Eritrea on its own behalf for non-nationals are outside the scope of jurisdiction of the EECC. Instead, such claims should have been made by the individuals themselves as “the claim remains the property of the individual and that any eventual recovery of damages should accrue to that person.”⁴⁹ The Agreement should, therefore, be understood as conferring on individuals a right to obtain reparation for a violation of the *ius in bello*.

The practice of both UNCC and EECC strengthen the position according to which victims of violations of international humanitarian law have an individual right to compensation. However, this does not mean that there would be a legally enforceable right to claim such compensation since such claims are still to be asserted by States, albeit not in their own name, but on behalf of the victims. It would seem, however, premature to deduce from such a situation the existence of such a legally enforceable right to compensation held by the victims of violations of international humanitarian law.

5. Recent Practice of Domestic Courts

The last two decades have seen a new dynamic to bring cases involving violations of the laws of war, committed during World War II, before domestic courts in order to claim compensation for the damages incurred.

a) The *Distomo* case is a prime example for such initiatives. This paper is surely not the appropriate place to describe in detail the rather protracted procedural issues involved. It seems sufficient to recall that, while the Greek court dealing with this case in the first instance, was of the opinion that Article 3 of the 1907 Hague Convention IV did provide for an individual right to claim compensation,⁵⁰ the pertinent ruling of the *Areios Pagos*⁵¹ did not deal with this provision but upheld the decision and added that it was an established principle of the international law on sovereign immunity that a State, here the Federal Republic of Germany, could not claim

⁴² In addition thereto, mention should be made of the (Residential) Property Commissions in Bosnia and Herzegovina and Kosovo, respectively; see, for example, H. van Houtte, *Mass property claim resolution in a post-war society: the Commission for Real Property Claims in Bosnia and Herzegovina (CRPC)*, International and Comparative Law Quarterly 48 (1999), 625; and A. Dodson/V. Heiskanen, *Housing and Property Restitution in Kosovo*, in: S. Leckie (ed.), *Returning Home: Housing and Property Restitution Rights and Internally Displaced Persons* (The Hague 2003).

⁴³ See, for example, M. Eichhorst, *Rechtsprobleme der United Nations Compensation Commission* (Berlin 2002), 89; Gillard (*supra* note 8), 541; and Heintschel von Heinegg (*supra* note 8), 24.

⁴⁴ Decision N° 11 of the Governing Council, UN Doc. S/AC.26/1992/11,

⁴⁵ Reprinted in International Legal Materials 40 (2001), 260.

⁴⁶ Available at <http://www.pca-cpa.org/ENGLISH/RPC/EECC/Rules%of%Procedure.pdf>.

⁴⁷ Available at <http://www.pca-cpa.org/ENGLISH/RPC/EECC/Decison%5.pdf>

⁴⁸ Reprinted in International Legal Materials 44 (2005), 601.

⁴⁹ See para 19 of the Award.

⁵⁰ See *supra* note 27.

⁵¹ See *supra* note 28.

immunity if the acts in question are torts committed in the forum state.⁵² Subsequently, the claimants sought execution of the awards against German institutions in Greece; the execution ultimately failed, however, as the Greek Minister of Justice denied the authorization required under Greek law. Lawsuits against this denial were unsuccessful even though they had been carried as far as up to the ECtHR.⁵³ In its judgment of 17 September 2002, the Greek Special Supreme Court decided in a parallel case that Greek courts did not have the authority to try cases on reparations for victims of the German occupation as in fact no State could be tried before the court of another State for reparation of any kind, both at times of war and peace.⁵⁴

Later on, the claimants failed to enforce their awards in German courts. The German Federal Supreme Court (*Bundesgerichtshof*)⁵⁵ ruled that the acts in question were acts *de iure imperii*⁵⁶ and, therefore, covered by sovereign immunity. The Court recognised various tendencies to restrict sovereign immunity, *inter alia*, for violations of *ius cogens* norms, but held that this position was not yet generally accepted. Hence, the Greek judgment did not have any legal effect in Germany. The Court went on to examine whether the Greek claimants could claim compensation from Germany under international or German law. The Court found that such individual claims, should they exist, were not *per se* excluded or subsumed by the various agreements on reparations after World War II. It held, however, that international law, including Article 3 of the 1907 Hague Convention IV, as applicable at the time when the war crime was committed, did not recognise individual claims for compensation in the case of violations of the laws of war. Rather, to demand such compensation fell within the exclusive domain of States and the mechanisms of diplomatic protection. Neither was there a basis for such claims under German national law since, according to the Court, the application of general torts law was, in wartime, suspended and replaced by the special regime of the laws of war.⁵⁷ This judgment has been confirmed by a most recent decision of the *Bundesverfassungsgericht*.⁵⁸

b) Another source for judicial claims is forced or slave labour. Former victims of such measures, imposed by Germany and Japan during World War II, sued both States in national as well as in U.S. courts.

German courts faced a number of cases with individuals claiming reparations for wartime forced labour both from the German government and private German corporations. The Federal Constitutional Court (*Bundesverfassungsgericht*), in its decision of 13 May 1996, held that “the traditional concept of international law as applying between States does not accord the role of a subject of international law to the individual but only provides for indirect international protection: In the case of violations of international law vis-à-vis foreign nationals, the claim does not pertain to the individual but to his home state ... This principle of an exclusive entitlement of the State also applied to violations of human rights in the years 1943 to 1945.”⁵⁹ However, the Court held that international law did not prohibit a state from enacting domestic legislation affording individuals a right to compensation for war-related damages.⁶⁰

In Japan, several actions brought by former prisoners of war claiming compensation for forced labour during World War II were dismissed because the courts held that the norms of international law on which the plaintiffs had relied, especially Article 3 of the 1907 Hague Convention IV, did not grant individuals a right to claim compensation directly from a foreign government.⁶¹

In the cases brought before U.S. courts, the class-action lawsuits were directed against Germany or Japanese companies which had used forced labour during World War II and are, thus, outside the scope of this contribution dealing with possible individual claims against states. It should be recalled, however, that the claims against German companies ultimately resulted in the adoption of the Act establishing the Foundation “Remembrance, Responsibility and Future” which, on an *ex gratia* basis, allowed for the payment of

⁵² On this argument see, for example, R. Dolzer, *Der Areopag im Abseits*, *Neue Juristische Wochenschrift* 54 (2001), 3525.

⁵³ ECtHR, *Kalogeropoulos v. Greece*, Judgment of 12 December 2002, RJD 2002-XII.

⁵⁴ On these decisions see also A. Gattini, *To what Extent are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages*, *Journal of International Criminal Justice* 1 (2003), 348 (360).

⁵⁵ *Bundesgerichtshof*, Judgment of 26 June 2003, reprinted in *Neue Juristische Wochenschrift* 56 (2003), 3488.

⁵⁶ This also excluded the applicability of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, see Article 1(1) of that Convention.

⁵⁷ But see on this issue the recent judgment of the *Oberlandesgericht Köln* in the *Bridge of Varvarin* case, *supra* note 6.

⁵⁸ Decision of 15 February 2006 (2 BVR 1476/03), available at

http://www.bverfg.de/entscheidungen/rk20060215_2bvr147603.html; on that decision see M. Rau, *State liability for Violations of International Law – The Distomo Case Before the German Federal Constitutional Court*, *German Law Journal* 7 (2006), 701.

⁵⁹ BVerfGE 94, 315.

⁶⁰ On such legislation see Bank (*supra* note 13), 306.

⁶¹ For a survey see Igarashi (*supra* note 8), 47.

compensation to former victims of forced labour.⁶² The U.S. government in turn issued a “Statement of Interest” in which it advised U.S. courts not to allow individual claims for reparations. The claims against Japanese companies had been bundled, eventually, into a class-action suit involving 25,000 claimants.⁶³ In September 2000, a U.S. District Court dismissed the claims on the grounds that the 1951 Peace Treaty with Japan subsumed all individual claims for mistreatment, including those against corporations.⁶⁴

c) The Japanese government was also confronted with legal actions initiated by former “comfort women” – women who, during World War II, had been forced to sexual slavery by Japanese forces.⁶⁵ All the claims based on customary international law and Article 3 of the 1907 Hague Convention IV have so far been rejected.⁶⁶ Moreover, in many cases claimants failed on the grounds that their countries and Japan had sought to improve their relationship by renouncing individual claims of citizens against the other State.

“Comfort women” also tried to sue Japan before U.S. courts. In *Hwang Geum Joo et al. v. Japan*, the District Court for the District of Columbia dismissed the action for reasons of state immunity;⁶⁷ the Court of Appeals affirmed this decision.⁶⁸

d) Finally, mention should also be made of claims for compensation by Chinese victims of Japanese germ warfare in China during World War II. In August 2002, the Tokyo District Court rejected these claims since it held that the responsibility of Japan had already been settled under international law and that individuals did not have the right to demand compensation from a state with which their state of nationality had been at war. This judgment was upheld by the Tokyo High Court by a judgment of 18 July 2005.⁶⁹

e) An analysis of the afore-mentioned jurisprudence shows that, with the sole exception of the Greek courts in the *Distomo* case, courts have consistently held that either individuals had no right to claim compensation, under international law as applicable during World War II, for violations of the laws of war, or, if such a right was held to exist, that pertinent claims had to be dismissed on grounds of state immunity. If one adds the recent judgment of the *Oberlandesgericht Köln* in the *Varvarin* case, it cannot be argued that the jurisprudence of domestic courts allows for the conclusion that there is, under international law, a right to compensation, held by individual victims of violations of international humanitarian law.

6. Article 75 of the Rome Statute of the International Criminal Court

Victims of grave violations of international humanitarian law can obtain compensation pursuant to Article 75 of the (Rome) Statute of the International Criminal Court whereas the *ad hoc* Tribunals for the former Yugoslavia and Rwanda carry out their work without prejudice to the right of victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law. This means that, under Rule 106 of the Rules of Procedure and Evidence of both tribunals, the victim must turn to a national court or other competent body to seek compensation.⁷⁰

Under Article 75 of the Rome Statute, the International Criminal Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation, and rehabilitation. On this basis, the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims. It is, in particular, important to note that, pursuant to Article 79 of the Statute, a trust for the benefit of the victims and their families shall be established. The fund shall be fed, *inter alia*, by money and other property collected by fines and forfeitures as ordered by the Court.⁷¹ Now, with the first cases being investigated by the Prosecutor, it will be interesting to see whether and to what extent the Court will eventually apply Article 75 and award compensation to victims.

⁶² For a thorough analysis of this Act see Bank (*supra* note 13), 306.

⁶³ See, for example, Hein (*supra* note 35) 138.

⁶⁴ *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2nd 939 (N.D.Cal. 2000).

⁶⁵ On this issue see A. Cairns, *Coming to Terms with the Past*, in: J. Torpey (*supra* note 35), 63.

⁶⁶ For details see Igarashi (*supra* note 8), 47 et seq.

⁶⁷ *Hwang Geum Joo et al. v. Japan*, 172 F Supp. 2d 52 (D.D.C. 2001); for an analysis of this case see C.P. Meade, *From Shanghai to Globocourt: An Analysis of the “Comfort Women’s” Defeat in Hwang v. Japan*, *Vanderbilt Journal of Transnational Law* 35 (2002), 211 (270).

⁶⁸ *Hwang Geum Joo et al. v. Japan*, 332 F.3d 679 (D.C.Cir.2003).

⁶⁹ See <http://news.bbc.co.uk/2/hi/asia-pacific/46951.stm>

⁷⁰ See S. Vandeginste, *Victims of Genocide, Crimes against Humanity, and War Crimes in Rwanda: The Legal and Institutional Framework of Their Right to Reparation*, in: J. Torpey (*supra* note 35), 249.

⁷¹ See, for example, C. Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations*, *Leiden Journal of International Law* 15 (2002), 66; and *id.*, *The International Criminal Court’s Trust Fund for Victims: Challenges and Opportunities*, *Yearbook of International Humanitarian Law* 6 (2006), 424.

7. Conclusion

The above analysis shows that it is indeed difficult to argue that there was, under international law as applicable during World War II, a right to compensation for violations of the laws of war, as they stood during World War II, held by the individual victims of such violations. Thus, applying the fundamental principle of intertemporal law, it may be argued that, since individual victims of such violations did not have such a right during World War II, they cannot claim compensation for these violations today either.

Somewhat different is the conclusion with respect to violations of present norms of international humanitarian law. While it is true that in the – so far – only court decision dealing with claims for compensation by the victims of a violation of presently applicable international humanitarian law, the *Oberlandesgericht Köln*, in its judgment of 28 July 2005 in the *Bridge of Varvarin* case, chose to hold that, notwithstanding the most significant developments of international law as regards the legal personality of the individual, international law would still not provide for a right to compensation for such violations held and to be exercised by the individual victims. It is also true that there are significant trends to the contrary: Suffice it to mention Article 75 of the Rome Statute, the practice of both UNCC and EECC, the position of the *Darfur* Inquiry Commission and an increasing number of scholars. Nonetheless, in the absence of a general provision explicitly conferring such a right on the individual victims concerned, there is no state practice which would allow for the conclusion that such an individual right might be considered as existing under customary international law. So, the *lex lata* does not provide for an individual right of the victims of violations of international humanitarian law to reparation, including compensation, against States.

IV. Considerations *de lege ferenda*

This result does not properly reflect the state of present international law with respect to the position of the individual. It is indeed difficult to accept that, while present international law recognises the, albeit limited, legal personality of individuals and provides for a system of rights, i.e. the human rights, the violation of which results, in principle, in a claim for reparation, by the individual victim, against the State responsible for the violations of such right, the situation should be different under international humanitarian law. In particular in a period of time when the traditional view as to the mutually exclusive applicability of human rights and humanitarian law has been abandoned, it is difficult to maintain that individual victims of a violation of a human rights norm, applicable under the specific conditions of the relevant armed conflict, should have an individual claim for compensation against the responsible State, whereas the individual victims of an international humanitarian law norm conferring rights on an individual should not have such a right to claim compensation. To give an example: Under the above-mentioned decision of the High Court of Justice in the *Al Skeini* case, a person tortured while held in a prison run by the British occupation forces might have a claim for compensation against the United Kingdom whereas persons who were injured in a situation of armed conflict solely governed by the rules of international humanitarian law, by an attack violating international humanitarian law, would not have such a claim for compensation against the responsible State. There might be reasons to continue to uphold such a difference, but they must be truly valid reasons. In this context, reference should be made to the statement of the International Court of Justice in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* where it stated that Israel had violated primary obligations under human rights and international humanitarian law and was, therefore, under an obligation to make reparations including compensation to individuals.⁷² This might be interpreted in such a way as if the Court had ruled in favour of the existence of a general principle to make reparations to individuals in case of violations of their rights under international law.⁷³ However, it remains debatable whether the Court actually will endorse the position that such individuals have an individual right to claim reparation including compensation.

This means that Article 3 of the 1907 Hague Convention IV and also Article 91 of the 1977 Additional Protocol I to the 1949 Geneva Conventions should, in principle, in the future be interpreted and applied in such a way as to accord an individual right to compensation for violations of humanitarian law against the State responsible for the violations. This would solve the problem that the mere existence of primary rights, such as human rights and rights of individuals under international humanitarian law, does not *per se* result in the existence of secondary rights, such as the right to a remedy and the right to reparation, including compensation.⁷⁴ Given that there is still

⁷² International Court of Justice, *Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 ICJ reports, paras. 152-3.

⁷³ See, for example, Schwager/Bank (supra note 8), 17.

⁷⁴ See, for example, Provost (supra note 24), 43; cf. also Tomuschat (supra note 8), 13.

little evidence in customary international law for an individual right to a remedy against, and reparation for, violations of international humanitarian law, it remains true that such a right must be explicitly provided for.⁷⁵ Applying the generally recognised methods of systematic and teleological or dynamic treaty interpretation, Article 3 of the 1907 Hague Convention IV as well as Article 91 of the 1977 Additional Protocol I could – if not: should – be interpreted in such a way as to confer, on the individual victims of violations of international humanitarian law, a right to claim compensation for such violations: From a systematic point of view, such an interpretation would resolve the problem of the – not only at first view, incomprehensible – difference between violations of human rights and violations of humanitarian law; from a teleological perspective, the conferral of such a procedural right would enhance the legal position of the individual and, thus, the extent of legal protection; also, such an interpretation would be fully in line with the approach of dynamic interpretation, which should not only be generally applied to human rights treaties, but also to international humanitarian law norms. To conclude this discussion, it should also be stressed that such an interpretation would not be incompatible with any other accepted rule of treaty interpretation.⁷⁶

This, however, is certainly not the end of the story: The recognition of such a right does not *per se* imply that victims might sue the responsible state in whatever *forum* they might wish to choose.⁷⁷ There are still strongly convincing arguments, both of a legal and a political nature, to continue to apply the rules of state immunity as concerns *acta iure imperii*⁷⁸ – also with regard to violations of *ius cogens* norms. In any case, notwithstanding recent developments,⁷⁹ there is still too little evidence to argue that, under customary international law, states might be sued before the courts of another state for violations of *ius cogens* norms without having the right to invoke their rights under the law on state immunity.⁸⁰ Therefore, such claims might – and should – only be made before the courts of the State responsible for the relevant violations of international humanitarian law, or competent international courts.

From a legal policy perspective, to allow for such claims before the national courts of the responsible State or international courts might, however, not be the best solution: Firstly, it must be questioned whether regular domestic courts or international human rights courts do have the necessary expertise to decide on presumably highly complex issues such as whether a specific conduct in an armed conflict does in fact amount to a violation of international humanitarian law or human rights law. Secondly, it must be borne in mind that armed conflicts will most frequently result in situations of mass violations of international law. In such situations, to award individual compensation is not only practically impossible; it is neither an appropriate way to achieve a balanced solution as a precondition for the establishment of a generally acceptable post-conflict settlement and lasting peace. One of the lessons to be learned from the wars and armed conflicts of the past century is that it is in fact impossible to bring about individual justice in each and every case of violations of international law. Therefore, it is essential to consider alternative methods of post-conflict settlements, at least in situations of mass violations of international law. And indeed, the establishment of *ad hoc* compensation commissions before which individual claimants would have standing seems to be a model to be further pursued.⁸¹

V. Concluding Remarks

The further improvement of compliance with the norms of international humanitarian law remains high on the current agenda of international lawyers and politicians. To accord the individual victims of such violations a legally enforceable right to claim reparation, including monetary compensation, against the responsible State is certainly one of the avenues available. Neither the adoption of the UNCHR *Basic principles and guidelines* nor the judgment of the *Oberlandesgericht Köln* in the *Bridge of Varvarin* case have brought the pertinent discussion to an end – quite to the contrary: There is considerable need for further exploring ways and means to bring

⁷⁵ See, for example, Kadelbach (supra note 8), 81; and Provost, *ibid.*, 44.

⁷⁶ See, for example, Kalshoven (supra note 23), 836; Greenwood (supra note 29), 250; and Zegveld (supra note 8), 506.

⁷⁷ As Christian Tomuschat rightly put it: “A world full of self-appointed human rights vigilantes is certainly more a trauma than a vision of paradise” (supra note 8), 18.

⁷⁸ The distinction between *acta iure imperii* and *acta iure gestionis* has been upheld by, *inter alia*, the ECtHR in its decision in *McElhinney v. Ireland*, Judgment of 21 November 2001, RJD 2001-XI, para. 38.

⁷⁹ See in particular the decisions of the Greek courts in the *Distomo* cases (supra note 52) and the decision of the Italian *Corte Suprema di Cassazione* of 11 March 2004 in the *Ferrini* case, *Rivista di diritto internazionale* 87 (2004), 540; see also J.Bröhmer, *State Immunity and the Violation of Human Rights* (The Hague 1997), 189; and J.F. Flauss, *Droit des immunités et protection internationale des droits de l’homme*, *Revue Suisse de droit international et de droit européen* 10 (2000), 299 (205).

⁸⁰ See, in particular, ECtHR, *Kalogeropoulos et al. v. Greece*, Admissibility decision of 12 December 2002, RJD -XII; see also the majority (and the minority) opinion in ECtHR, *Al-Adsani v. United Kingdom*, Judgment of 21 November 2001, RJD 2001-XII. See also Tomuschat (supra note 8), 15; and H. Fox, *The Law of State Immunity* (Oxford 2002), 316.

⁸¹ On this issue see, for example, J.K. Kleffner, *Improving Compliance with International Humanitarian Law through the Establishment of an Individual Complaints Procedure*, *Leiden Journal of International Law* 15 (2002), 237 (250).

justice to the individual victims; without such justice, it will be difficult to achieve lasting and peaceful post-conflict settlements. To empower such victims with a right to assert their claims to such justice constitutes certainly one possibility which would be better in line with the present state of international law under which individuals are recognized as legal persons in their own right and no longer as mere subjects of states. The recognition of such a right, however, is only a first step; it must be accompanied by a discussion on the precise procedural aspects of such a right. Insofar, a thorough assessment of the *pros* and *cons* of the various options is certainly called for.

Compensation for Victims of War - Procedural Issues

State Immunity: An Impediment to Compensation Litigation Assessment of Current International Law

By Professor Shuichi Furuya (Japan) (Co-Rapporteur)

I. Introduction

From the experience of compensation litigations brought by the victims of violations of international humanitarian law committed during the Second World War, we have learned some crucial procedural obstacles for victims – not only for those of past wars, but for those of future ones - to be awarded compensation. When, for example, they file claims for compensation to the courts of the State to which violations of international humanitarian law are attributable, they will first be confronted with the issue of whether an international law endowing a right to compensation with the victims is directly applicable within a national legal system. If, instead of international law, relying on national tort law of that State, they will then have to tackle the issue of applicability of that law to acts committed during an armed conflict. Further, if there is a peace treaty between the responsible State and the home State of victims, which contains a clause providing for the relinquishment of claims for compensation, another issue will rise: whether the clause implies the relinquishment not only of State's right, but of individual right of compensation. On the other hand, when the victims file the claims to the courts of their home State or a third State, a traditional rule of state immunity will, besides the effect of peace treaty, bar the jurisdiction of such courts.

Therefore, in examining the procedural issues, we need to distinguish some different forums, and to analyze different types of obstacles inherent in each of them. However, since it is difficult to address all the issues identified in each forum simultaneously, this paper adopts a piecemeal approach, and focuses on analyzing the rule of state immunity which has recently been challenged in the cases concerning human rights violations as well as compensation for victims of armed conflicts. Other procedural issues will be dealt with in the report to be submitted to the next international conference.

This paper is based on the "Discussion Paper: Procedural Aspects of Compensation for Victims of War" prepared for the Intersessional Meeting in Frankfurt held in September 2005 and on the discussion during that meeting. Its main aim is to assess, by examining briefly various national legislations and international conventions as well as jurisprudence of national and international courts, the current international law of state immunity in the context of compensation litigation.

II. Tort Exception

1. Nature of Act or Omission

It is a generally accepted rule of modern practice 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.⁸² This exception was originally assumed to cover the problem of traffic accident by a diplomat of foreign State. In fact, the Explanatory Report of the ECSI explains this exception by showing an example of traffic accident.⁸³

⁸² 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].

⁸³ "The author of the damage must have been on the territory of the State of the forum at the time the damage was caused; this requirement does not apply, however, to the person whose liability is in issue. For example, when a vehicle belonging to a State is involved in a traffic accident, then, provided the driver of the vehicle was present, the State as owner or possessor of the vehicle may be sued, even though the plaintiff does not seek to establish the personal liability of the driver."

In practice, however, the exception has been applied to a much wider range of tort situations. The legislative history of the US FSIA, for example, made clear that the tort exception “is directed primarily at the problem of traffic but is cast in general terms as applying to all tort actions for money damages”⁸⁴, and actually more extended claims have been brought in the US courts for intentional assaults and even State-organized acts of assassination occurring in the United States.⁸⁵ In drafting the UN Convention, the International Law Commission (ILC) also acknowledges that the torts covered by Article 12 of the Convention are not limited to such ordinary accidents. The Commentary on Article 12 says:

“[T]he physical injury to the person or the damage to tangible property, resulting in death or total loss or other lesser injury, appears to be confined principally to insurable risks. The area of damage envisaged in article 12 are mainly concerned with accidental death or physical injuries to persons or damage to tangible property involved in traffic accidents, such as moving vehicles, motor cycles, locomotives or speedboats. ... In addition, the scope of article 12 is wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination.”⁸⁶

Thus it is safe to say that violations of international humanitarian law are not to be excluded from the extent of tort exception merely because they are beyond “insurable risks”.

In relation to this issue, it may be disputable whether a tortious act must be committed *de jure gestionis* in order to fall within the tort exception. In other words, is the rule of state immunity still operative if an act by a foreign State causing death or personal injury is of nature *de jure imperii*? Most of the current national legislations on state immunity provide for the tort exception irrespective of the nature or purpose of the act or omission in question.⁸⁷ All these provisions found jurisdiction on the actual death, injury, damage or loss, while none contains any indication that the act or omission in question must be performed *de jure gestionis*. The ECSI also adopts the same approach. The Commentary of the UN Convention as well clearly denies the *jure imperii / jure gestionis* dichotomy in the tort exception by pointing 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*.”⁸⁸

On the other hand, it cannot be denied that the courts in some States without immunity legislation still adopt the distinction between an *acta jure imperii* and *acta jure gestionis* as the criterion that they apply virtually to any action against a foreign State.⁸⁹ In *McElhinney v. Ireland*, the European Court of Human Rights upheld this distinction asserted by the Irish Supreme Court in accepting the immunity of a foreign State in respect of British armed forces. The European Court observed:

“[T]here appears to be a trend in international and comparative law towards limiting State Immunity in respect of personal injury caused by an act or omission within the forum State, but that this practice is by no means universal. Further, it appears from the materials referred to above (see paragraph 19) that the trend may primarily refer to “insurable” personal injury, that is incidents arising out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security. Certainly, it cannot be said that Ireland is alone in holding that immunity attaches to suits in respect of such torts committed by *acta jure imperii* or that, in affording this immunity, Ireland falls outside any currently accepted international standards. The Court agrees with the Supreme Court in the present case (see

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

⁸⁴ US Congress, House of Representatives, Report No. 94-1487, reprinted in 15 ILM 1398 (1976), at 1409.

⁸⁵ Letelier v. Republic of Chile, 488 F Supp. 665 (DDC 1980); Liu v. Republic of China, 892 F 2nd 1419 (9th Cir. 1989).

⁸⁶ Report of the International Law Commission on the Work of Its Forty-Third Session, Supplement No. 10 (A/46/10), 1991, p. 103.

⁸⁷ 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].

⁸⁸ Report of the International Law Commission, *supra* note 5, p. 105.

⁸⁹ As to the case law of some States that have maintain the distinction, see *ibid*, note 165.

paragraph 15 above) that it is not possible, given the present state of the development of international law, to conclude that Irish law conflicts with its general principles.”⁹⁰

Therefore, it is not definitely accepted that any tortious acts or omissions, irrespective of *acta jure imperii* or *acta jure gestionis*, can fall within the tort exception independently of the provision of a particular national legislation or treaty. To put it the other way round, it is likely that, in a case concerning the compensation for victims of war, a foreign State could enjoy immunity before a court of the State that does not have any domestic law on state immunity and relies mainly on general international law for its decision, because violations of international humanitarian law are generally committed in the midst of or adjunct to the operation of armed forces which can be classified as *acta jure imperii*.

Even as to the States that have a national legislation or are a party to the ECSI and/or the UN Convention, further analysis is required to ascertain whether the tort exception is actually applicable to the violations of international humanitarian law by armed forces. In fact, some of the current instruments contain a provision that precludes their application to the immunity of a foreign State with regard to its armed forces in the territory of the forum State. Section 16 (2) of the UK SIA, for example, provides: “This Part of this Act does not apply to proceedings relating to anything done by or in relation to the armed forces of a State while present in the United Kingdom and, in particular, has effect subject to the Visiting Forces Act 1952.” Section 6 of the Australia FSIA also stipulates that “This Act does not affect an immunity or privilege that is conferred by or under the *Consular Privileges and Immunities Act 1972*, the *Defence (Visiting Forces) Act 1963*, the *Diplomatic Privileges and Immunities Act 1967* or any other Act.” In light of the literal interpretation of these provisions, the drafters of these legislations seem to have intended to exclude from the scope of their legislations armed forces stationed in the forum States in accordance with prior authorization or consent. In other words, these provisions do not presuppose a case where the armed forces of another State conduct military operations in the territory of the forum State or they occupy the territory of the latter State, *and* the forces cause death or personal injuries in violation of international humanitarian law.

Nevertheless, this interpretation is difficult to be sustained in terms of the ECSI and the UN Convention. Article 31 of the ECSI provides: “Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.” The wording of this provision is very similar to the counterpart of the UK SIA. However, the Explanatory Report explicitly points out that “[t]he Convention is not intended to govern situations which may arise in the event of armed conflict.”⁹¹ The UN Convention, on the other hand, does not contain any similar provision concerning armed forces, but the commentary states that Article 12 does not “apply to situations involving armed conflicts,”⁹² though there is no further comment added to explain the reason.

Therefore, there is the possibility that acts or omissions violating international humanitarian law, if committed in the course of armed conflicts, would be considered categorically beyond the scope of tort exception, even if national legislations and treaties on state immunity abandon the *jure imperii/jure gestionis* dichotomy.

2. Territorial Connection

Common to all the national legislations and treaties is the requirement that the tortious act or omissions, or the injury or damage must be to some extent connected with the territory of the forum State, though differences exist as to how and to what extent that requirement should be satisfied.

Section 5 of the UK SIA requires that the death or personal injury, or damage or loss of tangible property be “caused by an act or omission in the United Kingdom.” Section 13 of the Australia FSIA follows the UK SIA by setting forth that injurious consequences must be “caused by an act or omission done or omitted to be done in Australia.” Thus, acts which occurred outside the territory of the forum State are excluded even if the injuries caused by those acts are sustained and costs of medical treatment are incurred in the forum State. In *Al-Adsani v. Government of Kuwait and Others*, allegations of human rights violations committed against a British national in the prison of Kuwait were dismissed for the reason that no tortious act was committed within the territory of the United Kingdom.⁹³

⁹⁰ *McElhinney v. Ireland*, Application 31253/96, Judgment of 21 November 2001, para. 38.

⁹¹ Explanatory Report, *supra* note 2, para. 116.

⁹² Report of the International Law Commission, *supra* note 5, p. 106.

⁹³ 100 ILR 465, CA, 21 January 1994.

Interestingly, the Canada SIA allows Canadian courts to exercise jurisdiction so long as the injurious consequences are suffered in the territory of Canada, wherever the tortious act or omission occurs.⁹⁴ This formulation seems very advantageous to the plaintiff in the case of a tort that spans a period of time between the tortious act and the injurious consequences. However, if the act and the injury occur at the same time (this is mostly the case), this formulation may have almost the same effect as the one that requires the tortious act or omission to have occurred in the territory of the forum State. In contrast, the practices of the United States appear to hold stricter requirement. Section 1605 (a) (5) of the US FSIA provides that a court has jurisdiction when “money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment.” It is doubtless that the injury has to occur in the United States, but not so clear where the act or omission should take place. However, the case laws have definitely required *both* the tortious act or omission *and* the injurious consequences to occur in the territory of the United States.⁹⁵

In this respect, Article 12 of the UN Convention adopts slightly flexible requirement by providing that “if the act or omission occurred in whole or in part in the territory” of the forum State. According to this provision, only part of the tortious act taking place in the territory of the forum State is sufficient to bringing up the tort exception. However, this Article has a further limitation, namely “if the author of the act or omission was present in that territory at the time of the act or omission.” This second condition was intended to ensure the exclusion of transboundary injuries or trans-frontier torts or damage. Thus, according to the commentary, “cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict, which constitute clear violations of the territory of a neighbouring State under public international law, are excluded from the area covered by article 12.”⁹⁶ Article 11 of the ECSI also contains a similar limitation, namely “if the author of the injury or damage was present in that territory at the time when those facts occurred.”

From these provisions requiring territorial connection, a claim submitted to a court of the State, in which neither the tortious act nor the injurious consequences occur, is quite likely to be dismissed on the bases of state immunity. As far as the tort exception is concerned, it is rather difficult for the victims of violations of international humanitarian law to be awarded compensation successfully by a court of the State but that of *locus delicti commissi*.

However, it is worth while mentioning here two exceptional attempts. The first one is the Revised Draft Articles for a Convention on State Immunity drawn up by the ILA Committee on State Immunity in 1994. Article III (F) of the original Draft Articles adopted in the 1982 Montreal Conference grants jurisdiction if “injury or damage occurred wholly or partly in the forum State.”⁹⁷ However, the ILA Committee modified this provision in 1994 by adding “or if that act or omission had a direct effect in the forum State.”⁹⁸ This modification introduces more flexible position on the territorial connection, in which a direct effect in the territory of the forum State is sufficient to justify the tort exception, irrespective of where the tortious act or omission or the injurious consequence has occurred. The aim of inserting this new clause is, according to the section-by-section analysis of the Committee, to include transboundary tort in the tort exception.⁹⁹ In this respect, the basic policy of the Revised Draft Articles is counter to that of the UN Convention. It is to be noted, however, that the Revised Draft Articles still requires certain connection, even weaker than that in other instruments, between the territory of the forum State and the tortious act or omission. At any rate, the Revised Draft Articles does not intend to apply the tort exception to an entirely extraterritorial tortious act or omission.

The second attempt is the insertion of section 1605 (a) (7) into the US FSIA by the Antiterrorism and Effective Death Penalty Act of 1996. This provision provides that a foreign State shall not be immune from the jurisdiction of US courts in any case,

“in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking,

⁹⁴ 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.”

⁹⁵ See Xiaodong Yang, “State Immunity in the European Court of Human Rights: Reaffirmations and Misconceptions”, 74 *British Yearbook of International Law* (2003), p. 379, note 159.

⁹⁶ Report of the International Law Commission, *supra* note 5, p. 104.

⁹⁷ Draft Articles for a Convention on State Immunity, Article III (F), *in* ILA, Report of the Sixtieth Conference held at Montreal, 1982, p.8.

⁹⁸ 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.

⁹⁹ 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.

or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.”

According to this provision, immunity is denied for personal injury or death caused by torture or certain other acts committed outside the territory of the United States. A territorial connection, as required in Section 1605 (a) (5), is no longer necessary in the framework of this provision. However, this special type of tort exception is subject to an important qualification: namely, it shall only apply if the defendant foreign State has been designated as “a state sponsor of terrorism” under section 6 (j) of the Export Administration Act of 1979 or section 620A of the Foreign Assistance Act of 1961 at the time the act occurred.¹⁰⁰ At present, the US Department of State designates six States as within this category: Cuba, Iran, Libya, North Korea, Sudan and Syria.¹⁰¹ In terms of other States than these six, the territorial connection is still required when the tort exception can operate. Thus, while this provision is a quite interesting movement for our purpose, it seems unlikely that this would create a new rule of general international law to the effect that no territorial connection is needed in invoking the tort exception.

III. *Jus cogens* Exception

Besides the tort exception, a more radical view challenging the rule of state immunity maintains that a foreign State no longer enjoys immunity from civil suit in the courts of another State where the acts or omissions are contrary to human rights norms having the character of *jus cogens*. In fact, the Working Group of the ILC in its Report on Jurisdictional Immunities of States and Their Property of 1999 referred to “the argument increasingly put forward that immunity should be denied in the case of death or personal injury resulting from acts of a State in violation human rights norms having the character of *jus cogens*, particularly the prohibition of torture.”¹⁰² While the UN Convention eventually did not reflect this development, the Working Group had an opinion that the development “should not be ignored.”¹⁰³

The arguments of denying the immunity based on the *jus cogens* nature of norms are manifold in their reasoning. One may assert the non-immunity from the perspective of hierarchical order of two conflicting norms. A *jus cogens* norm, such as a norm protecting human rights, prevails over an ordinary norm, such as a rule granting state immunity. The consequence of this prevalence is that the conflicting ordinary rule is null and void, or in any event, does not produce any legal effects which are in contradiction with the content of the *jus cogens* norm. The most typical example of this approach can be found in the Joint Dissenting Opinion in *Al-Adsani v. The United Kingdom* before the European Court of Human Rights. The dissenting judges observed:

“The acceptance therefore of the *jus cogens* nature of the prohibition of torture entails that a State allegedly violating it cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions. In the circumstances of this case, Kuwait cannot validly hide behind the rules on State immunity to avoid proceedings for a serious claim of torture made before a foreign jurisdiction; and the courts of that jurisdiction (the United Kingdom) cannot accept a plea of immunity, or invoke it *ex officio*, to refuse an applicant adjudication of a torture case. Due to the interplay of the *jus cogens* rule on prohibition of torture and the rules on State immunity, the procedural bar of State immunity is automatically lifted, because those rules, as they conflict with a hierarchically higher rule, do not produce any legal effect. In the same vein, national law which is designed to give domestic effect to the international rules on State immunity cannot be invoked as creating a jurisdictional bar, but must be interpreted in accordance with and in the light of the imperative precepts of *jus cogens*.”¹⁰⁴

This approach, however, can be subject to the following criticisms. While the violation of a *jus cogens* norm cannot create favorable effect for the responsible State, this does not imply that the State is automatically deprived of its sovereign status because of that violation. The rule of state immunity is a corollary of the principle *par in parem non habet imperium*, which directly comes out of the fundamental structure of current international community composed of sovereign States. Thus, even though the State violating a norm of *jus*

¹⁰⁰ Section 1065 (a) (7) (A). In addition, the claimant or the victim must be a national of the United States when the act upon which the claim is based occurred (Section 1065 (a) (7) (B) (ii)).

¹⁰¹ The list is available at < <http://www.state.gov/s/ct/c14151.htm> >.

¹⁰² Report on Jurisdictional Immunities of States and Their Property, 6 July 1999, UN.Doc. A/CN.4/L.576, Annex, p.56.

¹⁰³ *Ibid.*, p. 58.

¹⁰⁴ 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.

cogens shall incur responsibility, there is no logical necessity for the loss of state immunity to ensue.¹⁰⁵ Furthermore, a *jus cogens* norm and the rule of state immunity concern two different perspectives. State immunity is a procedural rule relating to the jurisdiction of a national court. It does not relate to substantive rules; it does not contradict a prohibition contained in a *jus cogens* norm, but merely diverts any breach of it to a different method of settlement. Should the right to access to justice before national courts constitute itself a norm of *jus cogens*, the rule of state immunity would be null and void. It is, however, evidently not. In fact, there is no substantive content in the procedural plea of state immunity upon which the mandate of a *jus cogens* norm can bite.¹⁰⁶

Against the latter argument, there can be an objection stating that every *jus cogens* norm, from its peremptory character of the substantive rule, contains or presupposes a procedural rule which guarantees its judicial enforcement. In other words, the substantive *jus cogens* norm inherently contains a procedural *jus cogens* norm prohibiting certain limits to its enforcement. Accordingly, no State may rely on state immunity in cases concerning violations of *jus cogens* norms.¹⁰⁷ In fact, the International Criminal Tribunal for the Former Yugoslavia in the *Furundžija* Judgement held that, as an effect of violation of *jus cogens*, “proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or *the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act.*”¹⁰⁸ However, it is rather questionable whether a *jus cogens* norm imposes on States an obligation to provide procedures to secure its implementation in municipal law. At the stage of present international law, it is difficult to assume that a violation of *jus cogens* necessarily entails the right to civil redress before a national court. Actually, there are no state practices but the *Furundžija* Judgement that support such assumption.

Another approach denying immunity of a foreign State violating a *jus cogens* norm asserts that the State, by breaching the *jus cogens* norm, have tacitly waived the privilege of immunity. A Greek court in Leivadia, for example, held that “when a state is in breach of peremptory rules of international law, it cannot lawfully expect to be granted the right of immunity. Consequently, it is deemed to have tacitly waived such right (constructive waiver through the operation of international law).”¹⁰⁹ However, while it is generally accepted that a State may waive its immunity, an implied waiver must be clearly inferred from the State’s behavior. It would be far-fetched to assume that a State has implicitly waived its immunity only by violating the norms of important value.¹¹⁰

Finally, there is an argument which infers the denial of state immunity from a duty of non-recognition enshrined in Article 41 of the Draft Articles on State Responsibility. This provision imposes upon States a duty not to recognize as lawful a situation created by a serious breach by another State of an obligation arising under a peremptory norm of general international law.¹¹¹ It follows, according to this argument, that if the forum State grants immunity to that responsible State from the jurisdiction of its national courts, it would lead to the recognition by the forum State, whether it means or not, of a violation of *jus cogens* norms, and then conflict

¹⁰⁵ Andrea Gattini, “War Crimes and State Immunity in the Ferrini Decision”, 3 *Journal of International Criminal Justice* (2005), p. 236.

¹⁰⁶ Hazel Fox, *The Law of State Immunity* (2002), p. 525.

¹⁰⁷ Kerstin Bartsch and Björn Elberling, “*Jus cogens* vs. State Immunity, Round Two: The Decision of the European Court of Human Rights in the *Kalogeropoulou et al. v. Greece and Germany* Decision”, 4 *German Law Journal* (2003), pp. 486-487.

¹⁰⁸ *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, 10 December 1998, para. 155 (emphasis added).

¹⁰⁹ 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 50 *Revue Hellenique de Droit International* (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, 95 *AJIL* 198, 200 (2001); See also the dissenting opinion of Judge Wald in *Princz v. Federal Republic of Germany* (stating that “I believe that Germany's treatment of Princz violated *jus cogens* norms of the law of nations, and that by engaging in such conduct, Germany implicitly waived its immunity from suit within the meaning of section 1605(a)(1) of the FSIA.”) 26 *F.3d* 1166, 1178.

¹¹⁰ Judgment of *Princz v. Federal Republic of Germany* held “an implied waiver depends upon the foreign government's having at some point indicated its amenability to suit. Mr. Princz does not maintain, however, that either the present government of Germany or the predecessor government of the Third Reich actually indicated, even implicitly, a willingness to waive immunity for actions arising out of the Nazi atrocities. We have no warrant, therefore, for holding that the violation of *jus cogens* norms by the Third Reich constitutes an implied waiver of sovereign immunity under the FSIA.” *Ibid.*, at 1174; See also Italian Court of Cassation, *Ferrini v. Federal Republic of Germany*, 11 March 2004, Andrea Bianchi, Case Note, 99 *AJIL* 242, 243 (2005).

¹¹¹ Article 41, paragraphs 1 and 2 read respectively: “1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40 [a serious breach by a State of an obligation arising under a peremptory norm of general international law]. 2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.”

with the duty under Article 41. The argument has an advantage of coping with the opposing view above that there is technically no conflict between a *jus cogens* norm and the rule of state immunity because the former is substantive and the latter is procedural in character. In this argument, it is irrelevant whether there can be a *jus cogens* norm of procedural nature directly annulling the rule of state immunity.

In response to this, it is arguable that supporting state immunity is not definitely equivalent to condoning or tolerating a violation of *jus cogens* norm; the rule of state immunity merely suggests that a domestic court of a State is not the proper forum to deal with the case involving other sovereign State.¹¹² However, the Commentary on Article 41 of the Draft Articles states that the duty under this article “not only refers to the formal recognition of these situations, but also *prohibits acts which would imply such recognition.*”¹¹³ Therefore, if Article 41 is most broadly interpreted, it might be slightly possible to say that granting immunity to the responsible State violating a *jus cogens* norm runs counter to the forum State’s duty of non-recognition, at least in such a case that there is no international forum available to victims and any national courts of a responsible State did not accept their complaints for undue reasons.

In short, while the *jus cogens* exception is quite attractive for our purpose, it does not have fully established theoretical grounds. On the other hand, it is true that there are some symptoms in state practices supporting this exception, but those still cannot be said to constitute evidence of customary international law. In this sense, the following finding made by the European Court of Human Rights seems to be a reasonable assessment of current international law:

“[T]he applicants appeared to be asserting that international law on crimes against humanity was so fundamental that it amounted to a rule of *jus cogens* that took precedence over all other principles of international law, including the principle of sovereign immunity. The Court does not find it established, however, that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages brought against them in another State for crimes against humanity. The Greek Government cannot therefore be required to override the rule of State immunity against their will. This is true at least as regards the current rule of public international law, as the Court found in the aforementioned case of *Al-Adsani*, but does not preclude a development in customary international law in the future.”¹¹⁴

IV. Conclusion

The foregoing analysis demonstrates that it is just under some specific national legislation on state immunity *and* in special situations that a responsible State could no longer enjoy immunity from a civil suit concerning the violations of international human rights law as well as international humanitarian law. In other words, as a matter of the *lex lata* of general international law, we have to conclude that the rule of state immunity is still alive even in the compensation litigation.

At the same time, some national legislations and case laws, however, indicate notable tendency that restrict the plea of immunity by a responsible State of tortious acts or omissions. Therefore, it is probably a possible option for us to propose, as the *lex ferenda* (not as a perfect fantasy but as a steadily developing rule), to insert the clause of non-immunity of a responsible State into our future Draft Declaration of International Law Principles on Compensation for Victims of War. In drafting the non-immunity rule, however, we should also set some limits to it in terms of the categories of acts or omissions and their relation with a forum State. Among violations of international human right, the non-immunity rule should be applied only to a strong case of violations. For the purpose of defining this kind of violations, we may refer to the concept of “most serious crimes of international concern” provided for in article 1 of the Rome Statute of the International Criminal Court. Or, we may restrict them to much narrower scope of violations, such as murder, torture and rape. In terms of the relation between the acts or omissions in question and a forum State, we should require some territorial connections, but not so strict ones. As one of possible options, we may follow the way that the former ILA Committee on State Immunity took in the Revised Draft Articles for a Convention on State Immunity in 1994.

Therefore, as an example, we may draft the following provision concerning the state immunity:

¹¹² Gattini, *supra* note 26, p. 236.

¹¹³ James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (2002), p.250 (emphasis added).

¹¹⁴ *Kalogeropoulou et al. v. Greece and Germany*, Admissibility Decision of 12 December 2002, Application No. 59021/00, Part I. D. 1 (a).

“A State cannot invoke immunity from the jurisdiction of a court of another State, if a person files a suit to claim compensation for acts or omissions attributable to the former State which constitute most serious violations of international humanitarian law [including but not limited to murder, torture and rape], and that acts or omissions occurred or had a direct effect in the latter State.”

Finally, this paper does not deal with the issue of immunity from enforcement. However, if we stipulate the non-immunity from jurisdiction in the Draft Declaration, we will also need to examine whether and on what conditions the immunity of enforcement should be denied in the compensation cases.

A Model Statute of An *Ad Hoc* Compensation Commission: Preliminary Analysis of Some Issues to be Addressed

Shuichi Furuya

I. Introduction

In light of substantive and procedural obstacles for victims of armed conflicts to file claims before national courts, an action to establish a single and permanent international compensation commission might be a most idealistic option for us to take. However, we thought that such idea was too ambitious in view of present situation of international community. Rather, we believed that the Committee should take any action to help to establish an effective *ad hoc* compensation commission as promptly as possible after an armed conflict ends. This led us to propose to draft a model statute of *ad hoc* compensation commission in the framework of this Committee.

This proposal was generally welcomed by the participants of the Committee at the Berlin Conference in 2004, and then the members of the Committee discussed how we should deal with this issue at the meeting in Frankfurt in 2005. Everyone shared the view that, since how and on what basis such commission is established largely depends on the political and social situations of the war-torn States concerned, the model statute should be so flexible that it could be applied to any situations with some necessary modification. However, some argued that it would be wiser for us to prepare just a list of issues to be kept in mind when establishing an *ad hoc* compensation commission. Others maintained that to draft a model statute would be preferable even if it is more ambitious task. As the result of discussion, we reached the consensus that we would combine the two options: first we will make a list of issues to be addressed, and then draft a model statute in line with that list.

Thus this paper attempts to select and discuss some crucial issues to be addressed in a future model statute by making a comparative analysis of several recent mechanisms for compensation claims: the United Nations Compensation Commission (UNCC), the Eritrea-Ethiopia Claims Commission (EECC), the Commission for Real Property Claims in Bosnia and Herzegovina (CRPC), the Housing and Property Claims Commission in Kosovo (HPCC), the Iraq Property Claims Commission (IPCC) and the proposed compensation commission for international crimes perpetrated in Darfur, Sudan (CCD)¹¹⁵. Of course, the issues dealt with here are not yet comprehensive and the discussions thereof are rather preliminary.

II. Legal basis of an *ad hoc* compensation commission

On what legal basis an *ad hoc* compensation commission will be established is to a certain extent dependent on the situation of a State for which the commission is established. Particularly, the following elements may be relevant in drafting its statute: the character of armed conflicts in which violations of international humanitarian law took place (international or internal armed conflict, or mixed one), the process of ending the conflicts (voluntary ending by the parties, or forced ending by military enforcement measures, for example, 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 (interim administration by the UN of the State concerned).

In fact, the legal basis considerably varies in the recently established or proposed commissions; the UNCC was established and guided by the resolutions of the Security Council (Resolutions 689 (1991), 692 (1991), 986 (1995) and 1483 (2003)), and the CCD 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

¹¹⁵ Report of the International Commission of Inquiry on Darfur to the Secretary-General, UN Doc. S/2005/60 (1 February 2005), paras. 590-603. Unfortunately the Security Council has not, at least so far, followed this proposal, though other proposals by this Commission, particularly the referral of the situations to the ICC, came into operation. Thus, there is no official name of this commission, but this paper calls it “CCD” as a matter of convenience.

mandate of the UN Interim Administration Mission in Kosovo (UNMIK).¹¹⁶ The IPCC is also based on a regulation promulgated by the Coalition Provisional Authority which came into effect as Iraqi law on July 2004.¹¹⁷ In contrast to these commissions, the EECC was established and operates pursuant to the Agreement on 12 December 2000 between Eritrea and Ethiopia,¹¹⁸ which follows 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 then Organization of African Unity (OAU) and the United Nations were politically involved in the peace process. This inter-State character is also manifested in the fact that the EECC works in the framework of the Permanent Court of Arbitration in the Hague. The CRPC is on the same line of the EECC in the sense that it was also established by the Agreement on Refugees and Displaced Persons annexed to the Dayton Peace Agreement,¹¹⁹ though the parties of the former agreement includes non-State entities which involved in the internal armed conflicts in Bosnia and Herzegovina.

In light of these experiences, it is advisable for us to draft the model statute as a rather open-ended instrument so that it can be used readily as a guideline for the actual establishment of an *ad hoc* compensation commission, irrespective of whether it is established by an agreement of the parties concerned, or a resolution or regulation adopted by an international organ.

III. Nature of the commission

The nature of the commission depends on for what kind of damage compensation is awarded. In the case of the UNCC, the Security Council has affirmed in its Resolution 687 that Iraq is liable for any direct loss, damage or injury as a result of its unlawful invasion and occupation of Kuwait.¹²⁰ In other words, the UNCC started from the assumption that Iraqi responsibility was already established under international law, and that its legal basis was a violation of *jus ad bellum*, namely the violation of Article 2 (4) of the UN Charter, not that of *jus in bello*. Therefore, the UNCC need not involve in finding whether there was a violation of international law in each particular claim. 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.”¹²¹ In this particular respect, the UNCC cannot be a good guiding example for our purpose, because an *ad hoc* compensation commission of which statute we are considering is to be an organ to adjudicate the existence of violations of international humanitarian law in an armed conflict.¹²²

On the contrary, the EECC provides an interesting suggestion for us. The agreement between Ethiopia and Eritrea stipulates that the mandate of the EECC is “to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that ... result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.”¹²³ The EECC does not hear, on the other hand, claims arising from the cost of military operations or the use of force unless such claims involve violations of international humanitarian law.

However, in the Agreement and other documents concerned, there is no particular indication as to whether the violations must be confined to serious ones that would cause an individual criminal responsibility under international law. In fact, in regard to the armed conflicts between Ethiopia and Eritrea, no criminal mechanism,

¹¹⁶ 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>>.

¹¹⁷ 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>.

¹¹⁸ 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>>.

¹¹⁹ 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/for/gfa/gfa-an7.htm>>.

¹²⁰ Resolution 687 (1991), 3 April 1991, para. 16.

¹²¹ Report of the Secretary-General Pursuant to Paragraph 19 of Security Council resolution 687 (1991), S/22559 (2 May 1991), para. 20.

¹²² “As the mandate of the Committee is confined to ‘Compensation for *victims of war*’, this study will focus on those laws applicable in wartime, especially the international humanitarian law.” Rainer Hofmann and Frank Riemann, Background Report (17 March 2004), p. 7.

¹²³ Article 5 (1), *supra* note 37. In addition, Article 32 (2) of the Rules of Procedure of the EECC clearly provides that “Following consideration of the evidence and pleadings submitted by each party, the Commission shall determine whether the acts or omission 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.”, available at < <http://www.pca-cpa.org/ENGLISH/RPC/#Eritrea-Ethiopia%20Claims%20Commission>>.

whether international or hybrid, has been established in conjunction with the EECC. In contrast, the CCD was envisaged to work with the International Criminal Court (ICC), and accordingly to grant compensation for victims of “serious violations” or “crimes” which would be subject to the jurisdiction of the ICC. In this sense, the CCD would have had narrower jurisdiction than the EECC has.

Theoretically speaking, a State should bear responsibility to make compensation for victims if its acts or omissions are in conflict with a rule of international humanitarian law, whether they constitute serious violations or not. It would follow then that an *ad hoc* commission should deal with *any* violations irrespective of their seriousness or gravity. However, in light of its anticipated caseload, it might be realistic for the commission to confine its jurisdiction to certain serious violations equivalent to “international crimes under international law”. If we adopt this latter approach, Articles 6-8 of the Rome Statute and the Elements of Crimes will be quite useful to determine whether a violation is serious enough for a claim before the commission, though those articles do not perfectly indicate current customary international law and, in this sense, cannot be opposable to non-parties of the Rome Statute.

IV. Who can submit a claim?

In the CRPC, the HPCC and the IPCC, an individual has a standing to file his or her claim to each commission.¹²⁴ In the UNCC, on the contrary, only governments are entitled to submit claims on behalf of its nationals and corporations.¹²⁵ However, the submission by the government for its nationals is not based on the traditional rule of diplomatic protection, but rather the government only assumes a role of collection and transmission of individual claims. Thus the recipients of the compensation are not the government having submitted the claims (except the claim submitted on its own behalf), but its nationals as claimants. The reason for this consolidated submission by governments is explained by the Secretary-General as follows:

“It is recommended that the Commission should entertain, as a general rule, only consolidated claims filed by individual governments on their own behalf or on behalf of their nationals and corporations. The filing of individual claims would entail tens of thousands of claims to be processed by the Commission, a task which could take a decade or more and could lead to inequalities in the filing of claims disadvantaging small claimants.”¹²⁶

As this statement suggests, the submission by governments comes from technical necessity of expeditious resolution of claims. Actually, in some exceptional cases, the UNCC explicitly permits non-governmental submission. For example, Article 5 (2) of the Provisional Rules of Procedure provides that, in terms of persons who are not in position to have their claims submitted by a government, an appropriate person, authority or body appointed by the Governing Council can submit claims on behalf of them.¹²⁷ Article 5 (3) and Article 11 (2) (c) also establish that, in the case of a corporation or other private legal entity whose state of incorporation or organization fails to submit a claim falling with the applicable criteria, the corporation or entity can itself make the claim to the UNCC.

According to the Governing Council Decision No.18, governments have responsibility to establish their own mechanisms to distribute payments in a fair, efficient and timely manner.¹²⁸ Further, each government, 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, each government shall provide information on the amounts of payment distributed. If a 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

¹²⁴ In the HPCC, an individual claim is first filed 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 35.

¹²⁵ Criteria for Expedited Processing of Urgent Claims, S/AC.26/1991/1 (2 August 1991), 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);

¹²⁶ Report of the Secretary-General, *supra* note 40, para. 21.

¹²⁷ Among these persons, Palestinians represent the most numerous group. 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.

¹²⁸ 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 (1994), 24 March 1994, para. I.

absence of a response satisfactory to the Council, it may decide not to distribute further funds to that particular government.¹²⁹

The EECC also adopts the system of consolidated claims. Article 5 (8) of the Ethiopia-Eritrea Agreement provides that “Claims shall be submitted to the Commission by each of the parties on its own behalf and on behalf of its nationals, including both natural and juridical persons.”¹³⁰ In contrast to the UNCC, the EECC does not have any controlling mechanism for distribution of compensation among individual victims. Thus it is entirely, as it were, in the black-box of domestic system of each State whether the compensation awarded by the EECC would actually arrive at victims and, if so, whether in a fair and efficient way.

In light of the necessity of expeditious resolution of vast claims, the system of consolidated claims may be an advisable option for a future *ad hoc* compensation commission. If we introduce this approach into the model statute, we need to take into account the following points. First, a right to file a claim should be guaranteed equally to all victims irrespective of whether their home State violated a norm of *jus ad bellum*. In the UNCC, Iraqi nationals are not entitled to submit claims.¹³¹ However, since we intend to establish an *ad hoc* commission for victims of violations of international humanitarian law, it is irrelevant to distinguish between nationals of the State having started a military attack in violation of *jus ad bellum* and those of State having legally responded to that attack. The commission should impartially deal with any injuries and damages arising from violations of international humanitarian law, whichever State caused them. Second, as the UNCC does, the model statute should permit some exceptions to the consolidated submission by governments. In the case of internal armed conflicts, it is likely that armed forces of legitimate government could cause death or personal injury or loss of property against individuals living in the area controlled by a rebel. In such a case, a system in which, instead of the government, an appropriate authority appointed by the commission can submit claims on behalf of those individuals is absolutely necessary. Finally, the model statute needs to provide explicitly for an obligation of State to distribute payments among individual victims in a fair, efficient and timely manner, and endow the commission with a power to monitor and control the distribution by the state concerned.

V. Mechanism for expeditious resolution of claims

With a view of resolving claims promptly, the UNCC and the EECC adopt a policy to divide claims into some categories and give expedited priority to some of them. In the UNCC, there are six categories: 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). The Governing Council decided to give priority to individual claimants (categories A-C) in both the processing and the payment of claims. To deal with these claims on an urgent basis, the UNCC employs two measures: payment of fixed amounts and a less evidential burden on the claimants. For a claimant under the category A, \$ 2,500 will be provided 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.¹³² If the actual loss in question was greater than \$2,500, these payments will be treated as interim relief, and claims for additional amounts can also be submitted under category C. The claims under category C, in contrast, must be documented by appropriate evidence of the circumstances and the amount of the claimed loss. The evidence required is the reasonable minimum that is appropriate under circumstances involved, and a lesser degree of documentary evidence is ordinarily required for smaller claims, such as those below \$20,000.¹³³

In the EECC as well, claims are divided into six categories: 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

¹²⁹ *Ibid.*, paras. 2-5. However, there is not indication in the decision as to whether in this case the Governing Council can instead distribute the funds directly to the individuals.

¹³⁰ Article 5 (9) reads: “In appropriate cases, each party may file claims on behalf of persons of Ethiopian or Eritrean origin who may not be its nationals: Such claims shall be considered by the Commission on the same basis as claims submitted on behalf of that party’s nationals.”

¹³¹ “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, *supra* note 44, para. 17.

¹³² *Ibid.*, paras 11-12; See also Article 35 (2) of the Provisional Rules for Claims Procedure, *supra* note 44.

¹³³ *Ibid.*, para. 15.

by other categories (category 5); and the claims of governments for loss, damage or injury (category 6).¹³⁴ The EECC has a mass claims procedure under which claims of persons in categories 1-5 can be filed for fixed amount compensation. The fixed amount compensation is available in two tiers: the first tier is \$500 per person, and the second one is \$1500 per person.¹³⁵

Pursuant to the Rules of Procedure, the mass claims procedure operates in the following way: each parties 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 (Article 31). The EECC considers the evidence and pleadings submitted by each party, and then determine 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 for each of the two levels of compensation 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 level of 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-category (Article 31).

The mass claims procedure of the EECC appears somewhat effective in realizing expeditious resolution of vast claims which would be anticipated to be submitted by individual victims. However, unlike the UNCC, it is not clear whether the mass claims procedure requires a lesser degree of evidential proof. Unless a reduced burden of proof is provided, parties would not be motivated to make use of this procedure. In fact, neither Ethiopia nor Eritrea invoked this mass claims procedure by the filing deadline of 12 December 2001, though its reason is not known.

For our purpose, the categorization of claims and expedited priority given to individual claims are attractive. Joint treatment of claims arising from the same events may be available. As to the fixed amount compensation, however, we may need further inquiries into whether it can actually serve the purpose of an expeditious resolution of claims, and above all whether it can satisfy the real needs of victims of war.

VI. Relationship with other organs

The issue of relationship with other organs concerns two aspects. The first is whether the model statute will grant an *ad hoc* compensation commission *exclusive* competence to consider claims arising from a certain armed conflict; in other words, whether a victim can proceed with his or her claim in a domestic legal system in parallel with the proceedings before the commission. The second aspect is a possible conflict with international or domestic bodies having other purposes but granting monetary compensation to victims, such as the ICC and other international or hybrid criminal judiciaries, as well as a truth and reconciliation commission.

In regard to the first aspect, the HPCC and the IPCC are explicitly endowed with exclusive jurisdiction to settle the claims within the mandate of each commission.¹³⁶ In regard to the EECC and the CRPC, there are no relevant provisions answering directly to this issue. This holds true for the UNCC, but the Report of the Secretary-General unequivocally admitted parallel legal actions before domestic courts, which observed:

“Resolution 687 (1991) could not, and does not, establish the Commission as an organ with exclusive competence to consider claims arising from Iraq’s unlawful invasion and occupation of Kuwait. In other words, it is entirely possible, indeed probable, that individual claimants will proceed with claims against Iraq in their domestic legal systems. The likelihood of parallel actions taking place on the international level in the Commission and on the domestic level in national courts cannot be ignored. It is, therefore, recommended that the Governing Council establish guidelines regarding the non-exclusivity of claims and the appropriate mechanisms for coordination of actions at the international and domestic levels in order to ensure that the aggregate of compensation

¹³⁴ EECC, Decision No. 2: Claims Categories, Forms and Procedures, para. A, *available at* <<http://www.pca-cpa.org/ENGLISH/RPC/EECC/Decisions%201-5.htm>>.

¹³⁵ EECC, 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>>.

¹³⁶ Article 2.5 of Regulation No. 1999/23, *supra* note 35; Article 11 (C) of the Statute Establishing of the Iraq Property Claims Commission, *supra* note 36.

awarded by the Commission and a national court or commission does not exceed the amount of the loss.”¹³⁷

In response to this recommendation, the Governing Council made a decision requesting the government of Iraq and other governments to provide the UNCC with information about claims against Iraq in national courts for losses that would be eligible for compensation by the UNCC and compensation awarded for such losses. The Council also decided that when the UNCC learned claimant has received compensation elsewhere for the same loss, the amount already received would be deducted from the compensation to be paid from the Fund to that claimant, except the claimants belonging to categories A and B.¹³⁸

Whether an *ad hoc* compensation commission will have exclusive or non-exclusive jurisdiction is a matter to be decided in due consideration of which system would be convenient for victims. At any rate, if we adopt a non-exclusive system, the model statute will need a certain mechanism to avoid multiple recovery of compensation. In relation to this, it is to be noted that there would be a possible overlap with the reparations by individual perpetrators (if convicted) to the victims of their crimes within the framework of the ICC.¹³⁹

As to the second point, one of the problems that are anticipated is that an *ad hoc* compensation commission would make findings inconsistent with those of the ICC and other international criminal judiciaries. Similar problem has already emerged between the ICJ and the ICTY, and will possibly come out between the ICJ and the ICC in the near future. However, the inconsistency between the ICC and an *ad hoc* compensation commission would cause a much more serious result, since they are both probably involved in the very same events of the same armed conflict; as to which the former attempts to examine the existence of violations of international humanitarian law from the point of view of individual responsibility, and the latter does from that of state responsibility.

One possible option is to insert an escape clause, for example, ordering the commission to suspend its proceedings until the ICC completes its trial of the case in question. However, this would probably cause a serious delay in making compensation to victims. Another option is that the commission would automatically follow a finding made by the ICC; namely, if a person is declared guilty, the commission would admit claims and order the home State of that convicted person to pay compensation to the victims of his crimes. If, on the contrary, the ICC finds the person not-guilty, the commission would dismiss the claims. However, since the evidential threshold of criminal case is generally higher than that of civil case, a not-guilty judgment by the ICC to a person does not necessarily lead to the conclusion that his home State incurs no responsibility for his acts or omissions under rules of state responsibility.

At any rate, in light of limited personal and material resources, it is advisable for us to consider a certain mechanism for positive cooperation with other international organs, particular with the ICC.

VII. Other issues to be considered

In addition to the foregoing issues, we need to consider some other issues, such as the structure and organization of the commission (panel, secretariat, governing council and so on), creation of a fund (if any, its financial basis), a detailed process of resolving claims (production of evidence, hearings and so on).

¹³⁷ Report of the Secretary-General, *supra* note 40, para. 22.

¹³⁸ Further Measures to Avoid Multiple Recovery of Compensation by Claimants, Decision taken by the Governing Council of the United Nations Claims Commission at its 29th meeting held on 24 September 1992, S/AC.26/1992/13 (25 September 1992).

¹³⁹ See Article 75 of the Rome Statute and Rules 94-99 of the Rules of Procedure and Evidence.