

**Searching for Justice:  
Comprehensive Action in the Face of Atrocities**  
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**VICTIMS OF ATROCITIES – ACCESS TO REPARATIONS\***

Victims of gross violations of human rights and international humanitarian law are not a homogeneous group. They have and will come from a diversity of backgrounds and experiences. The context of the violation will differ, as will the nature of the violation and the form and degree of suffering. Similarly, the physical and personal circumstances of survivors in the aftermath of atrocity will differ. For some, the violations will have forced them to flee their homes. They may be internally displaced or have been forced into exile. They may be living in refugee camps or supported by family and friends overseas. Most, however, will have remained in their home countries, and there may be continuing security issues and direct threats of reprisals.

Victims' perceptions of reparations and the 'reparations process' will be as varied and multidimensional as the victims themselves. For instance, victims in the midst of conflict with immediate and urgent security concerns will not have time to think about 'reparations'. Cultural differences may also impact on perceptions of reparations. In some cultures, active participation in criminal proceedings may be essential whereas in others, the admission of guilt by the wrongdoer will be most important. In some contexts, the fact that one can never undo what was done or make adequate reparations may mitigate against reparations, whereas in others, the symbolic effect is understood to be extremely beneficial and worthwhile.<sup>1</sup> The context of the violation may give rise to very specific perceptions of what form(s) reparations should take. For example, a situation of massive

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\* Authored by Thordis Ingadottir (Associate, Project on International Courts and Tribunals, Center on International Cooperation, New York University), Carla Ferstman (Legal Director, The Redress Trust), Edda Kristjansdottir (Assistant Legal Counsel, Permanent Court of Arbitration). In light of the organization of the conference, the paper will neither address criminal prosecution nor civil litigation as a form of reparation.

<sup>1</sup> See, generally, The Redress Trust. Torture Survivors' Perceptions of Reparations, Preliminary Survey. London, 2001, available at <http://www.redress.org/publications/TSPR.pdf>, (site last visited December 2002).

population displacement and ethnic cleansing may necessitate a program for the return of refugees and displaced persons, and/or the development of other sustainable solutions for these victims.

Victims' right to reparations is well established, both at the national and international level. However, the actual enforcement of this principle differs considerably. In many, - if not most, - situations, there have been no available mechanisms at all, and victims have had no access to reparations. In the few instances when reparations have been provided, the mechanisms have differed widely, and have depended on each constitutional, political and historical situation. At the national level, reparations have been enforced through civil and/or criminal proceedings and/or provided by national reparations programs. At the international level reparations have mainly been awarded through mass claims mechanisms, international courts and tribunals, and various trust funds.

## **THE RIGHT TO REPARATION**

The right to reparation is a fundamental principle of international law. As established by the Permanent Court of International Justice and upheld by international jurisprudence, the breach of an international obligation entails the duty to make reparation.<sup>2</sup> The International Law Commission has recently reaffirmed this principle in its 53<sup>rd</sup> Session when it adopted the draft articles on responsibility of States for internationally wrongful acts.<sup>3</sup> The responsibility of states to provide reparation also applies to international

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<sup>2</sup> *Factory at Chorzow, Jurisdiction, Judgement No. 8, 1927, P.C.I.J., Series A, no. 17, p. 29; Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 184 ; Interpretation des traites de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif, C.I.J., Recueil, 1950, p. 228.*

<sup>3</sup> See Report of the International Law Commission - 53rd session (23 April - 1 June and 2nd July - 10 August 2001), UN Doc. (A/56/10). In particular, the draft articles provides that the state responsible for an internationally wrongful act is under an obligation to "cease that act, if it is continuing, [and to] offer appropriate assurances and guarantees of non-repetition, if circumstances so require," (draft article 30) and "to make full reparation for the injury caused by the internationally wrongful act." (draft article 31). Paragraph 2 of draft article 31 provides that "injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State." See also Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833 (2002).

human rights law. This is supported by international human rights treaties<sup>4</sup> and declarative instruments,<sup>5</sup> and has been recognized in the judgments of an array of international tribunals.<sup>6</sup> Similarly, the violation of norms of international humanitarian law gives rise to a duty to make reparations. Under international humanitarian law, the Hague Convention regarding the Laws and Customs of Land Warfare<sup>7</sup> includes specific requirements for compensation. Likewise, the four Geneva Conventions of 12 August 1949 contain a provision of liability for grave breaches and the 1977 Additional Protocol I (Art.91) specifically provides for the payment of compensation.

Two important developments may further enhance the principle relating to victims' right to reparation. Firstly, negotiations are taking place among dozens of states and civil actors to have the **Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law** adopted.<sup>8</sup> The principles, prepared initially by Professor van Boven and finalized by Professor M. Cherif Bassiouni, constitute a significant contribution to the codification of different forms of reparations and state responsibility

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<sup>4</sup> See specifically, the Universal Declaration of Human Rights (Art. 8), the International Covenant on Civil and Political Rights (art. 2(3), 9(5) and 14(6)), the International Convention on the Elimination of All Forms of Racial Discrimination (art. 6), the Convention of the Rights of the Child (art. 39), and the Convention against Torture and other forms of Cruel, Inhuman and Degrading Treatment (art. 14). It is also found in several regional instruments, e.g. the European Convention on Human Rights (art. 5(5), 13 and 41), the Inter-American Convention on Human Rights (art. 25, 68 and 63(1)), the African Charter of Human and Peoples' Rights (art. 21(2)).

<sup>5</sup> For example, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art. 19), General Assembly resolution 47/133 of 18 December 1992; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), Recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; and the Declaration on the Elimination of Violence against Women.

<sup>6</sup> See, for example the ruling of the Inter-American Court of Human Rights in the *Velásquez Rodríguez Case*, Reparations, Judgment of 21 July 1989, Series C No. 7 para. 25; *Godínez Cruz Case*, Reparations, Judgment of 21 July 1989, Series C No. 8, para. 23; *Aloboetoe et al. case*, Reparations, Judgment of 10 September 1993, Series C No. 15, para. 43; *Soering v. United Kingdom*, ECHR App. No. 14038/88 Judgment of 7 July 1989; *Aksoy v. Turkey*, ECHR App. No. 21987/93, Judgment of 18 December 1996, *Papamichalopoulos vs. Greece* E.C.H.R. Serial A, No 330-B (1995), at p 36.

<sup>7</sup> Art. 3, 1907 Hague Convention IV.

<sup>8</sup> The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, UN Doc. E/CN.4/2000/62, 18 January 2000.

to provide for them.<sup>9</sup> Secondly, the entry into force of the Rome Statute of the International Criminal Court may have a major significance for the enhancement of reparations. For the first time in history, victims have been given the right to participate in the criminal proceedings before an international criminal court, in their own right, and to claim reparation against the convicted person, including restitution, compensation, and rehabilitation. The judges of the court have a crucial work ahead, as according to the Rome Statute the judges of the court “shall establish principles relating to reparations” and the actual enforcement of the above development depends largely on their findings. At the same time a Trust Fund is now being set up for victims within the jurisdiction of the court, and at the outset, the controllers of the fund have to develop the criteria on what victims can benefit from the fund, at what time, and in what form.

## **NATIONAL REPARATIONS PROGRAMS**

At the national level, reparation for violations of human rights and international humanitarian law can take and have taken a number of forms.

In a purely domestic context, most civil law jurisdictions allow victims and/or other interested parties to apply for reparation in conjunction with criminal proceedings. Through the adhesion procedure, the victim is a party to the proceedings insofar as the civil claim is concerned and generally has the right to be informed of significant decisions taken in the case, to inspect the case file, to bring witnesses and experts to support the civil claim, and to be represented by legal counsel. In Rwanda, for example, domestic laws recognize the right to reparation, and victims have claimed and have been awarded vast amounts in damages as part of the criminal prosecutions which have proceeded pursuant to the **Organic Law on the Organization of Prosecutions for**

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<sup>9</sup> For instance, the principles stipulate that reparation should be adequate, effective, prompt, proportional to the gravity and the harm suffered, and should include various forms, such as: restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition. Furthermore, the principles note that states have multiple requirements - to take “appropriate legal and administrative measures to prevent violations; investigate violations, and, where appropriate, take action against the violator in accordance with domestic and international law; provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation; afford appropriate remedies to victims; and provide for or facilitate reparation to victims.” (principle 3).

**Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990.**<sup>10</sup> Lack of funds has inhibited enforcement.<sup>11</sup>

Crimes under international law can also be characterized as a civil wrong - intentional assault, battery, intentional infliction of mental suffering, or as negligence or breach of fiduciary duty, and can be subject to the jurisdictions of civil courts. In the United Kingdom, as with most common law countries, a civil action for loss or damage is usually brought separately. The primary difference of a separate civil action is the differing standard of proof, and different rules relating to costs and court fees.

Additionally, whereas most States have recognized the inapplicability of statutes of limitations for crimes under international law with respect to criminal proceedings, there is usually a limitation period that applies to civil claims. In the UK, civil claims are subject to limitation periods, though the Court has discretion to allow the action to proceed out of time if the Court considers it equitable on both parties. In limited circumstances, it is possible to lodge an extraterritorial claim for a breach of a civil wrong constituting a crime under international law.<sup>12</sup> Principles of *forum non conveniens* may, in certain common law jurisdictions, provide courts with the discretion to stay civil proceedings where it is considered that it would be "clearly and distinctly more appropriate" for the case to be brought in an alternative country. The types of factors that may be taken into account include the location of the parties and of the witnesses, and the

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<sup>10</sup> *Organic Law No. 08/96 of August 30, 1996*. According to private sources in Rwanda, as at 31 December 2001, out of the trials of 6,454 individuals before the specialized chambers, more than 36 billion Rwandan franc had been awarded in reparations proceedings, though there had been no enforcement.

<sup>11</sup> See International Crisis Group. *International Criminal Tribunal for Rwanda: Justice Delayed*. 7 June 2001. Africa Report No. 30. Available at: [http://www.intl-crisis-group.org/projects/africa/rwanda/reports/A400442\\_02102001.pdf](http://www.intl-crisis-group.org/projects/africa/rwanda/reports/A400442_02102001.pdf) [site last visited January 2003]. The Report cites Assistant Public Prosecutor Emmanuel Rakangira as follows: "Currently there are billions of Rwandan Franc in the form of damages (awarded by national courts). No, its practically impossible." The Report continues by stating that "In the four years since trials started in Rwanda, the amounts were of course very generous on paper. Close to US 100 million have been awarded after only some 4,000 people have been tried. In reality, however, not a single cent has been paid out because the defendants are indigent."

<sup>12</sup> While the rules relating to jurisdiction will vary, see for example, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 27 September 1968 which regulates such matters for contracting States. The Brussels Regulation (Council Regulation 44/2001), which came into force on 1 March 2002 replaces the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in all EU member states except Denmark.

place where the wrong was committed or where its effects were felt. US courts have been at the forefront, where a variety of claims have been lodged, including those initiated pursuant to the Alien Tort Claims Act and other statutes. Significantly, the decision in the Holocaust Victims Assets Litigation<sup>13</sup> led to the initiation of several international claims mechanisms to process the claims of the vast numbers of victims.

Many jurisdictions provide for criminal compensation schemes where the victim is unable to obtain full and fair compensation through criminal or civil courts. For example, in France, article 706-3 of the Code of Criminal Procedure provides for full compensation in these circumstances. One of the conditions for the application of Article 706-3 is “3. The injured person is of French nationality. If not, the actions were committed on French territory and the injured person is either is a national of a State member of the European Economic Community or, subject to the provisions of international treaties and agreements, was legally resident on the date of the actions or the application.”<sup>14</sup> Similarly, in the Netherlands, a victim or next of kin unable to recover damages from the perpetrators or an insurance company may submit a claim to the Criminal Injuries Compensation Fund.<sup>15</sup>

A number of States have instituted compensation schemes as part of transitional measures or international settlement agreements in the aftermath of massive atrocities, though awards have been largely symbolic and have at times failed to take into account the full range of victims that have suffered. For example, Germany instituted a claims process for victims of Nazi persecution and created the Foundation “**Remembrance, Responsibility**

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<sup>13</sup> See, particularly, the Corrected Memorandum and Order of Korman, CJ. E.D.N.Y. 2 August 2000. [96 Civ. 4849 (ERK) (MDG) (Consolidated with 99 Civ. 5161 and 97 Civ. 461) [[http://www.swissbankclaims.com/PDFs\\_Eng/MemorandumOrder.pdf](http://www.swissbankclaims.com/PDFs_Eng/MemorandumOrder.pdf)]; Special Master’s Proposed Plan of Allocation and Distribution of Settlement Proceeds. 11 September 2000. [96 Civ. 4849 (ERK) (MDG) (Consolidated with 99 Civ. 5161 and 97 Civ. 461) [[http://www.swissbankclaims.com/PDFs\\_Eng/VolumeIPlan.pdf](http://www.swissbankclaims.com/PDFs_Eng/VolumeIPlan.pdf)]; Class Action Settlement Agreement and amendments thereto [[http://www.swissbankclaims.com/PDFs\\_Eng/exhibit1toPlanofAllocation.pdf](http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf)].

<sup>14</sup> France [2<sup>nd</sup> periodic report to CAT - CAT/C/17/Add.18 of 8 October 1997, at para. 157.

<sup>15</sup> Netherlands: Third periodic report to the CAT [CAT/C/44/Add.8 5 January 2000], para. 47.

**and Future**” to provide payments to victims,<sup>16</sup> and the Government of Austria instituted similar funds.<sup>17</sup> In Chile, the government passed legislation providing assistance to victims and their families and created the **National Corporation for Reparation and Reconciliation**.<sup>18</sup> In the case of South Africa, a **Reparations and Rehabilitations Committee** was established as part of the Truth and Reconciliation Commission. Its recommendations formed part of the final report of the Truth and Reconciliation Commission though to date, no action has been taken to implement the recommendations. In November 2002, a law was submitted to the Guatemalan Congress, which would establish a **National Reparations Program** for victims of Guatemala’s 36 year conflict, which is an integral part of the 1996 UN peace accords.<sup>19</sup>

## **REPARATIONS FOR WAR DAMAGES AND MASS CLAIMS MECHANISMS AT THE INTERNATIONAL LEVEL**

Reparations for war damages have long historical roots, dating back to early centuries.<sup>20</sup> Following the World War I and II, war reparations were subject to detailed agreements among the belligerents. Currently, the International Court of Justice has several on-going cases where a state party is claiming reparations for violations of human rights, humanitarian law, and the laws of war. In the case of *Bosnia and Herzegovina v.*

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<sup>16</sup> The Law on the Creation of a Foundation “Remembrance, Responsibility and Future” of 2 August 2000, entry into force on 12 August 2000 (Federal Law Gazette: BGBl. 2000 I 1263), as amended on 4 August 2001, entry into force 11 August 2001 (Federal Law Gazette: BGBl. 2001 I 2036). <http://www.stiftung-evz.de>

<sup>17</sup> Guidelines for Awarding Payments from the Fund of the Republic of Austria for Reconciliation, Peace and Cooperation (Reconciliation Fund) [<http://www.reconciliationfund.at>]; Federal Law on the Establishment of a General Settlement Fund for Victims of National Socialism and on Restitution Measures (General Settlement Fund Law), as well as on an Amendment to the General Social Security Law and the Victims Assistance Act (Federal Law Gazette I No. 12/2001) [<http://www.nationalfonds.org/aef/english/index.htm>]

<sup>18</sup> See Law No. 19.123, published in Diario Oficial (Feb 8, 1992); reprinted in Ministry of Foreign Affairs, Republic of Chile, Law Nr. 19,123: Creating the National Corporation for Reparation and Reconciliation (1992). See also other legislation providing reparations to victims of the military regime, such as law 19.234 (sobre el Exonerado Politico), Law 1907 and the PRAIS (Programa de Reparacion Integralde Salud). Many have argued that the measures have been inadequate in that they only recognise a very narrow class of victims. See Jorge Correa S., *Dealing With Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 Notre Dame L. Re. 1455, 1458-60 (1992).

<sup>19</sup> The \$396 million reparation program would entail various forms of reparations, including compensation, support for Guatemalans who were displaced by the conflict and support to locate and exhume bodies of those killed in massacres.

<sup>20</sup> For historical precedents, see D.J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claim Settlement*, 27 N.Y.U.J.Int’l L. & Pol. 1 (1994).

*Yugoslavia*, regarding application of the Convention of the prevention and punishment of the crime of genocide, Bosnia and Herzegovina claims that Yugoslavia “has an obligation to pay Bosnia and Herzegovina, in its own right and as *parens patriae* for citizens, reparations for damages to persons and property as well as to the Bosnian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court.”<sup>21</sup> Similarly, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)*, Croatia requested the court to adjudge and declare that Yugoslavia “has an obligation to pay to the Republic of Croatia, in its own right and as *parens patriae* for its citizens, reparations for damages to persons and property, as well as to the Croatian economy and environment caused by the foregoing violations of international law in a sum to be determined by the Court”.<sup>22</sup> In the *Legality of the Use of Force* cases, initiated by Yugoslavia against NATO member states, in respect of the bombing of targets in the territory of Yugoslavia, Yugoslavia requested the court to adjudge and declare that relevant states are “obliged to provide compensation for the damage done to the Federal Republic of Yugoslavia and to its citizens and juridical persons”. Similarly, in *Armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)* the Congo claims that it is “entitled to compensation from Uganda in respect of all acts of looting, destruction, removal of property and persons, and other unlawful acts attributable to Uganda, in respect of which the Democratic Republic of the Congo reserves the right to determine at a later date the precise amount of the damage suffered, in addition to its claim for the restitution of all property removed”.<sup>23</sup>

The **United Nations Compensation Commission (UNCC)** - established by the UN Security Council in 1991 to handle and pay compensation for losses, damages and injury resulting directly from Iraq’s invasion and occupation of Kuwait - brought about important developments with respect to reparations for war damages. Traditionally, these

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<sup>21</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Application filed 20 March 1993, para. 134 and 135@.

<sup>22</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia)*, Application filed 2 July 1999, para. 36.

<sup>23</sup> *Armed Activities on the Territory of Congo (Democratic Republic of the Congo v. Uganda)*, Application filed 23 June 1999, para. IV. 3.

processes were limited to state governments as actors, which at the same time have had full discretion whether to circulate the received compensation to their citizens. In the UNCC process, individuals, non-governmental organizations, corporations and intergovernmental organizations could for the first time in history become beneficiaries of the process along with sovereign states. About 2.6 million claims were filed with the UNCC. As of October 2002, claimants had received awards totaling over US \$ 16 billion.

Partly based on the experience of the UNCC, mass claims processes have entered to the forefront of international legal procedures for deciding large numbers of claims arising from armed conflict. A growing trend can now be discerned, whereby provisions are being inserted into formal peace negotiations for redress to victims of war crimes and massive human rights violations. Given the inevitably large scope of such compensation programs, a number of methods have been developed to make them more efficient and less costly than traditional claims processing methods. The use of certain mass claims techniques that are well known at national levels (in the contexts of class actions, mass torts, insurance claims and bankruptcy proceedings), in the reviewing and deciding of large numbers of claims arising out of largely the same fact patterns, such as statistical sampling and averaging techniques, the grouping and classification of homogenous claims, the use of evidentiary assumptions and generalizations for claims that correspond to certain known fact-patterns, and relaxed burdens of proof in cases where documentation is scant or unavailable has assisted. However, compensation processes take many different forms depending on how they are funded and by whom. Examples range from the disbursement of a finite settlement amount to large groups of victims paid by the perpetrators of the injustice; restitution to victims of property or assets that were looted or stolen from them; or more open-ended processes where claimants stand to receive payment after a valuation of the harm caused and the extent of the payer's liability.<sup>24</sup>

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<sup>24</sup> The Iran-United States Claims Tribunal is an example of this last form of claims process. For more detailed information on this Tribunal, see the *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States*

In addition to the UNCC, recent mass claims processes include the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT) (created to provide restitution to Holocaust victims whose Swiss bank accounts were seized in World War II), the Commission for Real Property Claims in Bosnia and Herzegovina (CRPC) (Created under the Dayton Peace Agreement to decide claims for real property in Bosnia and Herzegovina), the Housing and Property Claims Commission in Kosovo (HPCC), the German Forced Labor Compensation Program (GFLCP) (whereby the German government and industry provide compensation to Holocaust slave and forced laborers and the victims of certain other Nazi injustices), the Holocaust Victims Assets Program (HVAP) (compensating victims of Holocaust slave labor under a 1998 settlement with Swiss banks), and the Eritrea-Ethiopia Claims Commission (EECC) (which is to settle all claims between the two governments, on behalf of their nationals, for harm arising out of the war between them).

In these mass claims mechanisms the actual victims and eventual claimants are rarely involved in the settlement negotiations or in the initial design of the claims process. However the success of each such program will depend on its ability to provide a sense of closure and finality, and the extent to which it will promote peace and reconciliation between the parties. It is therefore important that victims' needs are taken into account in the development of the mechanism, and that conflicts of interest between different groups of victims claiming compensation from the same program are avoided. Equally, it is vital to ensure that the decision-makers are able to act in an efficient manner, that the operating costs of the program do not exceed reasonable expectations, and yet allowing all the claims to be given as thorough review and attention as possible. Each mass claims process needs to be as transparent, flexible and economic as possible, reaching out effectively to the entire population of potentially eligible claimants, using uncomplicated application methods and criteria for their decisions.

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*of America and the Government of the Islamic Republic of Iran* (Claims Settlement Declaration), 19 January 1981 [<http://www.iusct.org/claims-settlement.pdf>]; Tribunal Rules of Procedure, 3 May 1983 [<http://www.iusct.org/tribunal-rules.pdf>]; See also, Brower, Charles and Brueschke, Jason. *The Iran-United States Claims Tribunal*, Martinus Nijhoff Publishers, 1998.

## REPARATIONS AWARDED BY INTERNATIONAL CRIMINAL COURTS

With the rapid development of international criminal law in the past decade, judges, drafters and others have debated the degree to which principles of reparation should be a part of international criminal processes. **The International Criminal Tribunal for the former Yugoslavia (ICTY)** and **International Criminal Tribunal for Rwanda (ICTR)** have very limited mandate to award reparations. In addition to imprisonment, the tribunals can only order restitution of property, i.e. they “may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners”.<sup>25</sup> The tribunals were not given mandate to award compensation to victims. However, to facilitate such proceedings at the national level, the rules of procedure and evidence of both tribunals stipulate that a tribunal’s judgment finding the accused guilty of a crime which has caused an injury to a victim, shall be sent to relevant national authorities and pursuant to relevant national legislation, a victim may bring an action in a national court or other competent body to obtain compensation. The tribunal’s judgment shall be final and binding as to the criminal responsibility of the convicted person for such injury.<sup>26</sup>

At the outset, and largely in recognition of the fact that reparation before national courts would not, in the circumstances be likely or feasible, some of the judges of the ICTY thought that the tribunal should have been given the mandate to award compensation, and some thought it was highly inappropriate to prioritize restitution over property over compensation.<sup>27</sup> In a later report on the issue of compensation to victims, the judges of the ICTY concluded that “the need, or even the right, of the victims to obtain compensation is fundamental for restoration of the peace and reconciliation in the

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<sup>25</sup> See article 24.3 of the ICTY statute and article 23.3 of the ICTR statute.

<sup>26</sup> Rule 106 of ICTY and ICTR Rules of Procedure and Evidence.

<sup>27</sup> See comments made by Judge Cassese, in *State Responsibility and the Individual, Reparation in Instances of Grave Violations of Human Rights*, at 48.

Balkans”.<sup>28</sup> However, considering the possibility of having the statute of the tribunal amended in order to confer upon it such a power, they concluded that the tribunals should not be given the task. Among the reasons, was that such responsibility would increase the workload of the court considerably and have impact on the conduct of proceedings and length of trials. Furthermore, they raised the question of how victim compensation should be funded, given the fact that most accused do not have any resources.<sup>29</sup> In the end, the judges recommended that a separate claims commission should handle the process, and that the UN Security Council and the Secretary General should request appropriate organs of the UN to consider the matter.

Similarly, the judges of the ICTR discussed the possibility of having the ICTR statute amended in order to confer upon it a power to order the payment of compensation to victims from the convicted person. While supporting the principle that victims should be compensated, the judges concluded that the responsibility for processing and assessing claims for compensation should not be given to the court. They considered that such a huge task would hamper the work of the tribunal and be destructive to its principal mandate.<sup>30</sup> Rather, they proposed that other options should be considered, such as the establishment of a specialized agency within the UN to take on the task, or a scheme administered by some other agency or governmental entity. The judges did raise the possibility that the tribunal could exercise limited power to order payments from a trust fund for victims appearing as witnesses.<sup>31</sup> The President of the ICTR, in her statement to the UN General Assembly in October 2002, urged member states to help compensate victims, arguing it as essential for reconciliation in the country.<sup>32</sup> The Prosecutor of the

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<sup>28</sup> See Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council, Annex, UN Doc. S/2000/1063, 3 November 2000.

<sup>29</sup> Ibid.

<sup>30</sup> In 2000 the ICTR did assist victims through Support Programme for Witnesses, a project directed by the tribunal’s Gender Issues and Assistance to Victims Unit, implemented by non-governmental organizations active in Rwanda, and financed by tribunal’s Trust Fund. This initiative remained controversial, both within the tribunal, at the UN Secretariat, and by governments, as many considered such support outside the mandate of the tribunal. Following the advice of the UN Office of the Legal Affairs, the project was abandoned in 2002.

<sup>31</sup> See Letter dated 9 November 2000 from the President of the International Criminal Tribunal for Rwanda addressed to the Secretary General, UN Doc. S/2000/1198, 15 December 2000, Annex.

<sup>32</sup> See *ICTR President Call for Compensation for Victims*, ICTR Press Release, Arusha, 31 October 2002. See also Seventh annual report of the International Criminal Tribunal for the Prosecution of Persons

ICTR is “supportive of the victims and survivors playing a greater part in the proceedings of the tribunal and hopes that the tribunal might have a freer hand in compensating survivors and victims”.<sup>33</sup>

The establishment of the **International Criminal Court** is the most significant development in the quest for reparations for victims. The permanent nature of the court is an important development from the selective nature of its predecessors. The court provides a permanent, accessible avenue for prosecution of individuals – and the process can be initiated by the UN Security Council, ICC member states, ICC Prosecutor, and indirectly victims, as they can bring violations to the Prosecutor’s attention. Another significant development is that for the very first time before an international criminal tribunal, victims of crimes can access the court to express their views and concerns,<sup>34</sup> and to claim reparation against the convicted person, including restitution, compensation, and rehabilitation.<sup>35</sup> Furthermore, the Rome Statute of the International Criminal Court provides for the establishment of a trust fund for the benefit of victims within the jurisdiction of the court and their families.<sup>36</sup>

While the Rome Statute stipulates the right of victims to participate and to claim reparations the ultimate implementation of these provisions remains to be seen. As for participation in the criminal proceedings, ultimately the judges will have quite some discretion in deciding both the extent and manner of such proceedings.<sup>37</sup> The Rome Statute also provides that the future judges of the court “shall establish principles relating

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Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, UN Doc. A/57/163-S/2002/733, 2 July 2002, para. 90 and 91.

<sup>33</sup> Ibid, para. 72.

<sup>34</sup> Articles 15.3, 19.3 and 68.3 of the Rome Statute. See also rules 89-93 of the ICC Rules of Procedure and Evidence.

<sup>35</sup> Article 75 of the Rome Statute. See also rules 94-99 of the ICC Rules of Procedure and Evidence.

<sup>36</sup> Article 79 of the Rome Statute.

<sup>37</sup> According to article 68.3 of the Rome Statute: “Where the personal interest of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence”. See also rule 89 and 90 of ICC Rules of Procedure and Evidence.

to reparations”. Victims may request the court to initiate reparation procedure, and the court can also commence such procedures on its own motion. However, the judges are given full discretion whether they will order reparations in each case (“may make an order”, art. 75.2). The court can appoint experts to assist in determining the scope and modalities of the reparations (rule 97). When awarding reparations, the court may do so on an individual basis and/or a collective basis (rule 97). The Rome Statute does not give the judges authority to order reparations *from* the Trust Fund for victims - only those funds collected as part of the reparations procedure from the convicted person/s will be distributed to victims *through* the Trust Fund.<sup>38</sup>

In accordance with the Rome Statute, the Assembly of States Parties has adopted a resolution on the establishment and management of a **Trust Fund for victims within the jurisdiction of the court and their families**.<sup>39</sup> The resolution sets out the basic structure of the trust fund, funding, and administration, but no decisions have yet been made on the range of victims that can benefit from the fund, in what form, and at what time. The Trust Fund will *inter alia* be funded by voluntary contributions, money and other property collected through fines and forfeiture transferred to the fund by order of the court, and resources, other than assessed contributions, as the Assembly of States Parties may decide to allocate to the fund.<sup>40</sup> A Board of Directors will manage the Trust Fund, reporting to the Assembly of States Parties. The Board of Directors shall develop suggestions on the operation of the Trust Fund, for considerations and adoption by the Assembly of States Parties.

Similar to the ICTY and ICTR, the **East Timor Panels with Exclusive Jurisdiction over Serious Criminal Offences** and the **Special Court in Sierra Leone** may, in

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<sup>38</sup> The court may order that an award for reparations be made through the Trust Fund where the number of the victims, and the scope, forms and modalities of reparations makes a collective award more appropriate. Also, the court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organizations approved by the Trust Fund. See rules 98.3 and 98.4 of the ICC Rules of Procedure and Evidence.

<sup>39</sup> See Draft resolution of the Assembly of States Parties relating to the establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, UN Doc. PCNICC/2002/2, annex XIII, 9 September 2002.

<sup>40</sup> During the negotiations unsuccessful proposals were made on contributions to the Trust Fund from states parties assessed contributions to the court.

addition to imprisonment, only order a fine, and forfeiture of proceeds, property and assets derived from the crime. Notable, as their statutes were partly based on the Rome Statute, they were not given the mandate to order compensation or other means of reparations. However, the regulation on the establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, stipulates that a trust fund may be established, benefiting victims within the jurisdiction of the panels and their families.<sup>41</sup> As of December 2002, the Trust Fund has not been established.

## **HUMAN RIGHTS MECHANISMS**

The **Inter-American Court of Human Rights** has established considerable jurisprudence on reparations to victims against member states, which are found in violations of the American Convention on Human Rights. Its case law includes disappearances in Honduras, executions by state officials in Suriname, and executions of “street children” in Guatemala . Reparations by the court have included a requirement of the relevant state to investigate the violations, prosecute those responsible, issue the verdict of condemnation, make a public apology to victims, adopt legislative or convention-related measures, guarantee non-repetition, take concrete measure to locate and identify the moral remains of victims, build memorials and/or monuments, pay compensations for pecuniary and non-pecuniary damages, provide health and educational benefits, and designate an educational center with the name in memory of victims.

The process for the determination of reparations has varied. In some cases, the Inter-American Court has ruled that reparations should be determined by mutual agreement among the respondent state, the Inter-American Commission and the victims, reserving the power to approve the agreement and continue the reparations proceedings in event

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<sup>41</sup> Similar to the ICC Trust Fund, the panels may order money and other property collected through fines, forfeiture, foreign donors or other means to be transferred to the Trust Fund. The Trust Fund shall be managed according to criteria to be determined by an UNTAET directive; see *Regulation No 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences*, UN Doc. UNTAET/REG.2000/15, 6 June 2000, Section 25.

that an agreement can not be reached (see also rule 56 of the Rules of Procedure).<sup>42</sup> Agreements between parties have entailed compensation to victims of up to \$250,000.<sup>43</sup> When the court has itself decided on reparations, compensation for non-pecuniary damages have ranged between \$30,000 to \$90,000.<sup>44</sup>

The jurisprudence of the Inter-American Court of Human Rights has served an important role in the development of reparations to victims of gross violations of human rights. However, it's role is limited by the fact that only member states and the Inter-American Commission of Human Rights can bring cases before the court, and the commission will not bring cases to the court, if the court has previously addressed the matter.

Similarly, the **European Court of Human Rights** has established considered jurisprudence on reparations to victims. According to article 41 of the European Convention on Human Rights:

If the Courts finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

When awarding reparations, the Court distinguishes between pecuniary and non-pecuniary damages. However, the court's implementation of article 41 has still not led to clear policy on reparations to victims, neither in what form reparations are provided, nor in the method for calculation. The Court has on occasion pronounced that the very finding of a violation of a person's human rights is sufficient redress, and on other occasions has ordered monetary compensation. The case law indicates that victims of state homicide, torture and expropriation have been particularly successful in obtaining

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<sup>42</sup> See for instance *Chumbipuma Aguirre et al. v. Peru*, judgment of November 30, 2001.

<sup>43</sup> *Ibid.*

<sup>44</sup> In the *Alobeboetoe et al.* six victims received \$29,000 each, while one \$39,000; in the *Certi Hurtado Case* \$25,000 were awarded to him, \$10,000 to his wife, and \$5000 to each of his children; in *Villagran Morales et al v. Guatemala* reparations for non-pecuniary damages arranged between \$23,000 to 30,000 to

monetary compensation. The awards ordered for non-pecuniary damages in cases regarding violations in south-east Turkey (violations of article 2 on right to life and/or article 3) have ranged between GBP 10,000-25,000.<sup>45</sup> Recently, the Court in the *Beyeler* case awarded EUR 1,300,000 to an art dealer for restitution of a painting (“compensation for the damage, including ancillary costs and costs incurred before domestic courts”), the highest compensation awarded by the Court so far. Similar to the ICTY, some judges at the ECHR have expressed criticism over less favorable treatment of fundamental human rights claims as opposed to some other.<sup>46</sup>

Additionally, a number of UN mechanisms provide for a limited right of individual petition. For instance, individuals may petition **the Committee against Torture** regarding complaints against state parties that have accepted to receive individual complaints in accordance with Article 22 of the Convention. Similarly, **the Human Rights Committee** may be petitioned in respect of complaints relating to state parties who have accepted individual complaints under the Optional Protocol. The practice of these bodies has been to make a finding, as appropriate, that a particular State party has violated the relevant treaty, and on occasion to order that the state take specific measures, including awarding compensation or other forms of reparation. It is not the practice of

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each victim, \$26,000 to mothers and grandmother, and \$3,000 to each sibling; in the *Loyaza Tamaoy Case* the victims was awarded \$50,000, her children \$10,000 each, and \$20,000 to her parents

<sup>45</sup>See *Salman v. Turkey*, judgment of 27 June 2000 (GBP 25,000); *Ilhan v. Turkey*, judgement of 28 June 2000 (GBP 25,000); *Aksoy v. Turkey*, judgment of December 18, 1996 (GBP 50,000); *Aydin v. Turkey*, judgment of 25 September 1997 (GBP 25,000); *Tekin v. Turkey*, judgment of 9 June 1998 (GBP 10,000); *Çakici v. Turkey*, judgment of 8 July 1999 (GBP 25,000); *Kaya v. Turkey*, judgment of 19 February 1998 (GBP 10,000). See also *Ogur v. Turkey* (FRF 100,000 or about EUR 15,245).

<sup>46</sup> In the *Beyeler* case, a dissenting opinion criticizes the amount of compensation as exceeding by far what seems reasonable: “The applicant bought “Portrait of a Young Peasant” for “EUR 310,000”. The compensatory award of EUR 1,300,000 represent almost 420 per cent of the price originally paid for the painting...the remaining compensation awarded by the Court for appreciation in the value of the painting and non-pecuniary damage represent an all-time high in the history of the Court. This is so although the case concerns almost exclusively pecuniary questions and no traditional vital human-rights interest”; See *Beyeler v. Italy*, judgment of 28 May 2002, dissenting opinion of Judge Greve. In the case of *Ogur v. Turkey*, where the court found double violation of the fundamental right to life, the court at the same time denied pecuniary damages for lack of information on victims income. In a partly dissenting opinion, it is hardly criticized that the court should not have invited applicant to submit details of the claim, or assessed the damages on an equitable bases. With a reference to such practices by court in other cases, the dissenting judge noted: “I will try hard not to conclude that, in the eyes of the majority, loss of life is less worthy of empathy than loss of clients. In this case, a State which has solemnly undertaken to cherish the right to life, has wantonly plucked and tossed away the being of a young man, paying the price of a small

these bodies to make awards for reparation directly. Given that the power of these bodies to ensure that states parties comply with their orders is limited, the actual receipt of reparation will vary from state to state.

### **International Trust Funds**

The United Nations General Assembly, in its *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, encourages the establishment of national funds for compensation of victims of crimes. It also encourages the establishment of other funds for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate.<sup>47</sup>

The Trust Fund established by the Assembly of States Parties to the International Criminal Court will be the first major international trust fund dedicated to victims of war crimes and crimes against humanity.<sup>48</sup> However, the ICC Trust Fund will only be accessible to victims within the jurisdiction of that court. Various funds have been established at the international level benefiting victims of certain crimes. For instance, several trust funds currently under the responsibility of the Secretary-General of the United Nations, are dedicated to humanitarian assistance and some to victims of major human rights violations.<sup>49</sup> **The United Nations Voluntary Fund for Victims of Torture** has been operating since 1983 and during its 20 years it has received total of \$ 54 million from states and others – the US by far being the largest donor contributing

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car – almost an entertainment tax on homicide. In the Strasbourg market it seems that life comes cheap, and killing is a tremendous bargain.” See also *supra* note 25.

<sup>47</sup> General Assembly Resolution 40/34 of 29 November 1985, principle 13.

<sup>48</sup> Unsuccessful proposals were made for establishment of a fund for victims in the negotiations leading to the adoption of the statute of the International Criminal Tribunal for the former Yugoslavia. The National Alliance of Women’s Organizations for instance proposed that the Security Council establish a fund for the benefit and compensation of victims of war crimes and crimes against humanity.

<sup>49</sup> As of 31 December 2001, there were 205 general trust funds under the administration of the UN Secretary-General, with total income of \$978,4 million in the biennium 2000-2001, and expenditure of \$663.7 million during the same period.

\$27.6 million, followed by Netherlands with \$3.8 million.<sup>50</sup> In the last four years, the fund has been able to disburse about \$7 million a year. In the year 2002, grants of total 6.9 million were allocated to 166 organizations in sixty countries.<sup>51</sup> **The United Nations Voluntary Trust Fund on Contemporary Forms of Slavery** has since 1997 contributed total \$390,450 to projects.<sup>52</sup> In the year 2002, grants of total \$122,000 were allocated to twenty-one projects. The Dayton Peace Agreement envisaged the establishment of a **Refugees and Displaced Persons Property Fund**, -to assist those who were unable or unwilling to return to their homes. While the lack of financing for the Compensation Fund was the primary reason for its failure, additionally, politically, the international community was committed at all costs to the principle of ensuring a safe and viable return for those who were forced to leave their homes during the conflict and the operation of a compensation fund was seen to go against this fundamental principle.<sup>53</sup> The Lomé Peace Accord stipulates the establishment of **special fund for war victims in Sierra Leone**.<sup>54</sup> In the beginning of the year 2003 this fund has still not been established. Currently, voluntary contributions are being sought for the financing of the Special Court for Sierra Leone and Sierra Leone Truth and Reconciliation Commission.

## CONCLUSION

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<sup>50</sup> The United Nations Voluntary Fund for Victims of torture was established by General Assembly Resolution 36/151 of 16 December 1981. The fund receives voluntary contributions from governments, non-governmental organizations and individuals, which it distributes through established channels of assistance to torture victims and their relatives.

<sup>51</sup> See United Nations Voluntary Fund for Victims of torture, Report of the Secretary-General, UN Doc. A/57/268, 26 July 2002.

<sup>52</sup> The United Nations Voluntary Trust Fund on Contemporary Forms of Slavery, was established by General Assembly Resolution 46/122 of 17 December 1991. Among purposes of the fund is to extend humanitarian, legal and financial aid, through established channels of assistance, to individuals whose human rights have been severely violated as a result of contemporary forms of slavery.

<sup>53</sup> General Framework Agreement for Peace in Bosnia and Herzegovina, initialed in Dayton, Ohio, 21 November 1995, signed in Paris, 14 December 1995, ILM 75 (1996), Annex 7, art. 13.

<sup>54</sup> According to article XXIX of the agreement “[t]he Government, with the support of the International Community, shall design and implement a programme for the rehabilitation of war victims. For this purpose, a special fund shall be set up. According to Sierra Leone Truth and Reconciliation Commission Act 2000, the Commission may provide information or recommendations to or regarding the Special Fund for War Victims provided for in Article XXIV of the Lomé Peace Agreement, or otherwise assist the Fund in any manner the Commission considers appropriate but the Commission shall not exercise any control over the operations or disbursements of that Fund.

While the range of mechanisms and procedures listed above attest to the breadth of reparations, processes and the degree to which the principle of reparation has taken root in both national and international law, it is also evident that victims of atrocities have no guaranteed access to reparations.

The ability of victims to access domestic remedies for serious human rights violations will depend on whether domestic laws and procedures enable victims to claim and obtain enforceable remedies – this will vary significantly from state to state, even though in theory, states will have a series of laws and treaty obligations requiring them to ensure reparation to victims. There may be a number of other barriers hindering such access, including laws providing immunities or amnesties to those responsible for the perpetration of the abuses or statutes of limitations impeding legal actions. Other barriers may include the failure of a government to acknowledge the wrong, often resulting in the protection or sealing of the data necessary to prove the violation in a court of law. In some instances, victims may have security concerns in coming forward. Finally, even when courts or other bodies have managed to award reparations to victims, the enforcement of the same often leads to new hurdles for victims, particularly when there is little will on the part of the governments concerned to enforce. In some situations the international human rights tribunals will be able to enforce action in limited number of cases, but they are in no way able to handle mass claims stemming from major atrocities.

Reparation to victims through mass claims mechanisms established between states through arbitration or international litigation have been able to give victims some tangible redress in limited situations. In these instances states have had to allocate a significant amount of resources to award reparations to victims. However, many of today atrocities take place in domestic context and this avenue has not been available for those victims.

The establishment of the International Criminal Court and its ability to award reparations to victims is a major development. At the same time, it must be kept in mind that the court can only make award against individuals – it has no authority to issue a judgment against a state. Based on the experience of the ad hoc tribunals, it can be expected that

many if not most of the defendants will be indigent and victims will encounter major problem in enforcing their orders of reparation. Similarly, it shall be noted that the Trust Fund for Victims will almost entirely be funded by voluntary contributions. Judging from the income of existing trust funds, this might not entail huge amounts of sources. The UN Security Council has still not responded to the requests of the International Criminal Tribunals for Rwanda and the former Yugoslavia to resolve the question of reparations. While the ICC took a proactive stance in respect of reparations, the Special Court in Sierra Leone and Special Panel for East Timor failed to follow suit.

The type of reparations afforded at a national or international level will in practice depend on what jurisdictions have been seized, what funds are available, how persistent the victims are in pursuing their rights, the good will of the state(s) concerned and/or the interest of the international community. These will not necessarily reflect the wishes of victims or the nature of the violations. The lack of funds has often been used to justify the absence of a reparations program, though there have been too few instances when creative alternatives have been employed and other forms of reparations have been awarded. The fundamental challenge is to find a way in which to ensure that victims of the worst atrocities can realize their right to reparation for the harm suffered, while recognizing the uniqueness of situations and the range of possible reparations models. This is not merely a question of compensation or restitution – the process of reparation, by acknowledging the harm done, will help to restore dignity to victims, contributing to their recovery.