

INTERNATIONAL LAW ASSOCIATION
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REPARATION FOR VICTIMS OF ARMED CONFLICT

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REPARATION FOR VICTIMS OF ARMED CONFLICT
(SUBSTANTIVE ISSUES)

INTRODUCTION

by Professor Natalino Ronzitti (Chair)

The works of the Committee on Reparation for Victims of Armed Conflict, as it was called after the Rio de Janeiro Conference (2008), have been going on since the Berlin workshop (2004). The Committee, which was directed until the Giessen intersessional meeting (September 2009) by Dr. Luke Lee, was able to deepen the subject and to make substantial progress taking into account the developments in customary international law and the case-law both at the international and domestic level. The recent conflicts, the great suffering of the civilian population and the quest for justice prompted the Committee to accelerate its work, a task which was excellently carried out by our Rapporteur, Professor Rainer Hofmann.

The Committee held that it was not advisable that the drafting of a Declaration on the substantive part be extended any longer. Several principles are emerging and the Declaration might help consolidate them and, at the same time, develop new law. The old provisions contained in the Hague Convention No. IV and restated in the Protocol I Additional to the Geneva Conventions, according to which a Party to the conflict is responsible for the violations of the law of armed conflict and is liable to pay compensation, should be modernized and brought in conformity with the developments of International Humanitarian Law. Moreover, the ICJ has several times taken position on the relations between International Humanitarian Law and Human Rights: the new findings should help set out principles for the reparation of the victims of armed conflicts.

A Declaration is expected not only by the victims, but also by NGOs, international organizations and last, but not the least, by governments, domestic tribunals and international courts.

As pointed out by our Rapporteur, the Committee took the decision to address only the substantive part in its Declaration, leaving the procedural part for further elaboration and deepening. This is due, in particular, to the case *Germany v. Italy*, pending before the ICJ, which involves problems of State immunity and issues of retroactivity, since it relates to violations committed during World War II. A very important point that the ICJ should clarify, hopefully by the end of 2011, is the impact of the new peremptory norms on war crimes and mass murder on the procedural aspects of the compensation for the victims of armed conflicts.

After the adoption of the Declaration on the substantive issue, the work of the Committee will continue, in order to prepare a Draft Declaration on the procedural part. It is for the Committee to decide whether to keep two separate declarations or whether to merge them into a two-part document.

PRELIMINARY REMARKS
by Professor Rainer Hofmann (Co-Rapporteur)

In line with the decisions taken by the Committee at the Berlin workshop in August 2004 and the results of the discussion at the Frankfurt intersessional meeting in September 2005, the Co-Rapporteurs prepared, for the Toronto conference in June 2006, interim reports on substantive issues (*Rainer Hofmann*) and procedural issues (*Shuichi Furuya*) and presented a preliminary analysis of issues to be addressed in drafting a model statute for an *ad hoc* Compensation Commission (*Shuichi Furuya*) (see ILA, Report of the 72nd Conference, Toronto 2006, pp. 766 ff., 783 ff. and 794 ff.). In light of the discussion at Toronto, a first Draft Declaration of International Law Principles on Compensation for Victims of War (Substantive Issues) was finalized in September 2007 and circulated among Committee members for comments. Many such comments were received and taken into account in establishing a second Draft Declaration which was submitted for general discussion at the Rio de Janeiro Conference in August 2008 (see ILA, Report of the 73rd Conference, Rio de Janeiro 2008, pp. 460 ff.). Moreover, an initial Draft Declaration of International Law Principles on Compensation for Victims of War (Procedural Issues) and a Draft Model Statute of an *Ad Hoc* International Compensation Commission was prepared by Professor *Shuichi Furuya* (ILA, Report of the 73rd Conference, Rio de Janeiro 2008, pp. 494 ff. and 500 ff.). Among the many results of the Rio de Janeiro Conference was the decision, taken by the ILA Executive Council, to change the name of the Committee into *Committee on Reparation for Victims of Armed Conflict*.

Based on the general discussion at Rio de Janeiro, a third Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues) was circulated among Committee members for comments in July 2009. Many such comments were received and served to establish a list of issues to be discussed and decided upon at the Giessen intersessional meeting held in September 2009. On the basis of the conclusions of this very intensive and fruitful meeting under the able chairmanship of Professor *Natalino Ronzitti* who had been appointed as the new Chairman of the Committee subsequent to the resignation of Dr *Luke Lee* from this position, a fourth Draft was prepared in November 2009 and circulated among Committee members. Again, many comments were received, both from Committee members who had attended the Giessen meeting and from those who had been unable to do so. In light of these comments, a fifth draft was prepared and circulated among Committee members for final comments and preliminary approval in April 2010. The below Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues) is the outcome of this final exchange of views among Committee members. It will be submitted for general discussion at The Hague Conference in August 2010 and, with possible final changes, will be the subject of a proposal for a Resolution to be accepted by the 74th ILA Conference.

This Draft Declaration should be read taking into account the following introductory remarks: In view of the relevant state practice and taking note of a strong majority among scholars, the Committee came to the conclusion that, until most recently, international law did not provide for any right to reparation for victims of armed conflicts. The Committee submits, however, that the situation is changing: There are increasing examples of international bodies proposing, or even recognising, the existence of, or the need to establish, such a right. In this situation, the Committee decided to draft a Declaration which is reflecting international law as it is progressively developing.

In the process of drafting, the Committee took into account legally binding instruments such as the four 1949 Geneva Conventions and the 1977 Additional Protocols as well as universally applicable human rights treaties. Moreover, it based its work, as far as possible, on non-binding instruments such as the *International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts* (Annex to General Assembly Resolution 56/83 U.N. Doc. A/56/49 (Vol. I)/Corr.4) (*ILC Articles on State Responsibility*); the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UN Doc.A/RES/60/147) (*Basic Principles*); the *2007 Chicago Principles on Post-Conflict Justice*, drafted by the International Human Rights Institute, the Chicago Council on Global Affairs, the Istituto Superiore Internazionale di Scienze Criminali and the Association Internationale de Droit Pénal; and the *Updated Set of Principles for the Protection of Human Rights through Action to Combat Impunity* (Commission on Human Rights, 61st Session, February 8, 2005, UN Doc. E/CN.4/2005/102/Add.1).

The Declaration is structured into five sections. Section I, entitled *General Part*, contains definitions of the basic terms used throughout the Declaration: Fully in line with present international law, the term *reparation* includes restitution, compensation, satisfaction and guarantees and assurances of non-repetition (Article 1 in conjunction with Articles 6-10, respectively). As to the scope of application of the Declaration, the Committee decided that the term *armed conflict* should cover all situations where international humanitarian law is applicable (Article 2). It further decided that the violation of any international law rules applicable during armed conflict may give rise to the right to reparation and other secondary rights and obligations as reflected in the Declaration; such applicable international law rules include international humanitarian law, but also other regimes such as, in particular, international human rights law as applicable during armed conflict (Article 3). For the purposes of the below Declaration, the term *victim* means any person who has suffered harm as result of a violation of such applicable rules (Article 4). The Declaration also addresses the controversial issues of incidental losses and the question as to whether only serious or gross violations of international law entail a right to reparation. The Committee determined that *responsible parties* would not only be States but also International Organisations and, as appropriate, other non-state actors (Article 5). Section II (Articles 6-10) deals with the various rights of victims of armed conflict whereas Section III (Article 11) addresses the obligation of responsible parties to strengthen the rights of victims. Section IV (Articles 12-13) stipulates the obligations of the international community to promote justice, peace and reconciliation and of states to assure victims' rights to reparation under national law. The Final Clauses in Section V (Articles 14-16) refer to issues such as the interpretation of the provisions

of the Declaration and its progressive development, confirm that such provisions shall have no retroactive effect and address the problem of statutes of limitation.

It should be borne in mind that this Declaration only deals with the substantives aspects of the right to reparation for victims of armed conflict. As regards the procedural aspects, it is to be noted that the Committee decided to suspend its relevant work in order to be able to take into account the future judgement of the International Court of Justice in the *Jurisdictional Immunities of the State (Germany v. Italy)* case.

Throughout my work on drafting the below Declaration, I benefitted from the continuous support of all Committee members. Specific thanks for their intensive participation in the intersessional meetings at Frankfurt and Giessen, their contribution to the discussion during the conferences at Toronto and Rio de Janeiro as well as their very useful written comments at various stages of the project go to *Roland Bank, Ruth Donner, Cordula Droege, Dieter Fleck, Lady Hazel Fox, Shuichi Furuya, Hans van Houtte, Marie Jacobsson, Jann Kleffner, Luke Lee, James Nafziger, Kazuhiro Nakatani, Photini Pazartzis, Natalino Ronzitti, David Ruzié, Robbie Sabel, Ben Saul, Elke Schwager, and Liesbeth Zegveld*. Since the Rio de Janeiro conference, *Edda Kristjánsdóttir* was instrumental in putting the Draft together. Finally, most sincere thanks are due to my former research assistants *Andrea Friedrich* and, above all, *Friedrich Rosenfeld* – in particular his never failing support enabled me to finalize the present Draft.

**DRAFT DECLARATION OF INTERNATIONAL LAW PRINCIPLES ON REPARATION FOR VICTIMS OF
ARMED CONFLICT
(SUBSTANTIVE ISSUES)**

INTERNATIONAL LAW ASSOCIATION

INTERNATIONAL COMMITTEE ON REPARATION FOR VICTIMS OF ARMED CONFLICT

Prepared by

Professor Rainer Hofmann (Co-Rapporteur)*

SECTION I
General Part

ARTICLE 1
Reparation

1. For the purposes of the present Declaration, the term “reparation” is meant to cover measures that seek to eliminate all the harmful consequences of a violation of rules of international law applicable in armed conflict and to re-establish the situation that would have existed if the violation had not occurred.
2. Reparation shall take the form of restitution, compensation, satisfaction and guarantees and assurances of non-repetition, either singly or in combination.

Commentary

- (1) Article 1 introduces the term “reparation”, which represents the basic remedy laid down in the present Declaration. Article 1(1) contains a general definition. Article 1(2) specifies details on different types of reparation.
- (2) The definition in article 1(1) is well established in international law. Its origins can be traced back to the *Chorzów Factory* case, in which the Permanent Court of International Justice held:

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

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Two elements of this definition merit special attention. Above all, the encompassing nature of reparation has to be emphasized. The adjective “all” expresses the idea that in principle every type of harm, whether material or immaterial, is addressed by reparation.² Since it is often impossible to entirely undo the effects of a violation of international law, article 1(1) is formulated as an obligation of means.³

In addition, article 1(1) makes clear that two situations need to be compared when making reparation: the current situation and the hypothetical situation that would exist had the violation of international law not occurred. It is the gap between the two situations that is bridged by reparation. The re-establishment of the status quo ante, i.e. the situation that existed before the breach, may not be sufficient for reparation.⁴

- (3) Article 1(2) takes into account the fact that a violation of international law⁵ may result in different types of harm. Accordingly, different forms of reparation are set out in this provision. Article 1(2) mentions restitution, compensation, satisfaction, and assurances and guarantees of non-repetition.⁶ The Declaration thereby focuses on the remedies stipulated in the ILC Draft Articles on State Responsibility.⁷ By adhering to the language used by the ILC, the Committee does not intend to exclude other forms of reparation.
- (4) For the reasons set out in Section II, the interplay of these different forms of reparation is left open by the present Declaration. All that article 1(2) makes clear is that different forms of reparation may be granted singly or in combination.

ARTICLE 2 *Armed Conflict*

For the purposes of the present Declaration, the term “armed conflict” is understood in the same way as under international humanitarian law.

Commentary

- (1) The term “armed conflict” delineates the temporal and geographical frame within which reparation claims of victims may arise. The present Declaration does not provide a definition of this term. Instead, it contains a dynamic reference to international humanitarian law. This has the following reason: there is no definite and unambiguous definition of what constitutes an armed conflict under international law. However, there is consensus that all the situations which are referred to by international humanitarian law constitute an armed conflict. Contrary to other regimes which might also be applicable in armed conflict, international humanitarian law is a set of rules which is solely dedicated to limiting the effects of armed conflict. It covers international as well as non-international armed conflicts.
- (2) International armed conflicts concern situations where transboundary armed force is used between two or more High Contracting Parties. Thus, common article 2 of the 1949 Geneva Conventions applies “to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” International armed conflicts also cover the phase of occupation.⁸ According to article 1(4) of the 1977 Additional Protocol I to the 1949 Geneva Conventions they further include situations “in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”.

Economic Order. He wishes to sincerely thank Andrea Friedrich and Friedrich Rosenfeld, Research Assistants at the Wilhelm Merton Centre, for their most valuable support in preparing this Draft Declaration.

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

² See however the remarks on emotional harm *infra* para. (4) of the Commentary to Article 4

³ On the standard of reparation, see also *infra* para. (3) of the Commentary to Article 6.

⁴ See H. van Houtte / B. Delmartino / I. Yi, *Post-War Restoration of Property Rights under International Law, Vol. I: Institutional Features and Substantive Law* (Cambridge 2008), 287 (discussing payment of monetary compensation in lieu of restitution of property); J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge 2002), 211.

⁵ See Article 3.

⁶ These forms of reparation are further explained in Section II of this Declaration.

⁷ See Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part II. Article 34 mentions restitution, compensation and satisfaction. Assurances and guarantees of non-repetition are mentioned in Article 30 lit. b.

⁸ Article 2 common to Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

- (3) Non-international armed conflicts are referred to in common article 3 of the 1949 Geneva Conventions. This provision leaves unclear what is meant by an “armed conflict not of an international character”. Insofar, three developments offer guidance.⁹

First, article 1(1) of the 1977 Additional Protocol II to the 1949 Geneva Conventions needs to be mentioned. Article 1(1) stipulates that the Protocol shall apply to conflicts “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [the] Protocol.” The Protocol is meant to develop and supplement article 3 common to the 1949 Geneva Conventions without modifying that article’s existing conditions of application.

Second, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) merits attention. In *Prosecutor v. Tadic*, the tribunal held that

“an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.¹⁰

Finally, article 8(2)(f) of the Rome Statute of the International Criminal Court (ICC) offers guidance as to what constitutes a non-international armed conflict. It stipulates:

“Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”

Under current international law, the threshold for characterizing hostilities as non-international armed conflict is thus lower than the one contained in article 1(1) of the 1977 Additional Protocol II to the 1949 Geneva Conventions.¹¹ Only two conditions have to be met: (i) the groups involved in the conflict have to feature an organized structure; and (ii) the violence committed must be qualified as “protracted”. The criterion of protracted armed violence has been interpreted as referring more to the intensity of the armed violence than to its duration. According to the Trial Chamber in *Prosecutor v. Haradinaj et al.*, indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; the number of civilians fleeing combat zones as well as the involvement of the UN Security Council.¹² Armed conflict does not include situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.¹³

- (4) The temporal and geographical scope of both international and non-international armed conflicts is not strictly confined to the exact time and place of hostilities.¹⁴ The four 1949 Geneva Conventions contain provisions that apply beyond the cessation of hostilities.¹⁵ Equally, their guarantees apply beyond the narrow geographical context of the actual theatre of combat operations.¹⁶ The present Declaration applies in all these situations.

⁹ For details see C. Greenwood, *Scope of Application of Humanitarian Law*, in: D. Fleck (ed.), *The Handbook of international humanitarian law* (Oxford 2008), 45 (54 ff.); A. Cullen, *The Parameters of Internal Armed Conflict in International Humanitarian Law*, 12 U. Miami Int'l & Comp. L. Rev. (2004), 189 – 229.

¹⁰ *Prosecutor v. Tadic*, Case No. IT 94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, P 70 (Oct. 2, 1995), para. 70.

¹¹ See A. Zimmermann, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers Notes - Article by Article* (Baden - Baden 1999), 285.

¹² *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04-84-T, Judgement of 3 April 2008, para. 49.

¹³ See J. Pictet, *The Geneva Conventions of 12 August 1949, Commentary*, Volume IV, International Committee of the Red Cross (Geneva 1952), 36 ff. See also M. P. Fischer, *Applicability of the Geneva Conventions to „Armed Conflict“ in the War on Terror*, 30 Fordham Int'l L. J. (2007), 509 (514) on the question of whether terrorists fall under the protocols additional to the 1949 Geneva Conventions. For a different view see D. Jinks, *September 11 and the Laws of War*, 28 Yale J. Int'l L. (2003), 1 (38). As regards reparation for terrorist acts, see the *Guidelines on the Protection of Victims of Terrorist Acts*, adopted by the Committee of Ministers of the Council of Europe on March 2, 2005 at the 917th meeting of the Ministers’ Deputies. For further information see E. Roucouas, *Compensation for Victims of Terrorism: The Council of Europe’s Guidelines on the Protection of Victims of Terrorist Acts*, in: International Bureau of the Permanent Court of Arbitration (ed.), *Redressing Injustices through mass claims processes – Innovative Responses to Unique Challenges* (Oxford et al. 2006), 267 ff. See also Resolution S/RES/1566 (2004), adopted by the Security Council at its 5053rd meeting, on October 8, 2004, para. 10, as well as *Human Rights and Terrorism*, Commission on Human Rights resolution 2002/35, para. 11.

¹⁴ See e.g. *Prosecutor v. Tadic*, supra note 10, para. 67: “The definition of armed conflict varies depending on whether the hostilities are international or internal but, contrary to Appellant’s contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.”

¹⁵ See e.g. Article 5 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 970, Article 5 *Geneva Convention relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S.

The breach of an international obligation by an act not having a continuing character occurs at the moment when the act is performed.¹⁷ The Declaration may thus remain applicable even if the harmful effects occur at a time when international humanitarian law is no longer applicable.

- (5) The applicability of international humanitarian law to peace operations of the United Nations is still disputed among scholars. Some authors argue that international humanitarian law is to a wide degree reflected in customary international law and as such binding law for the United Nations.¹⁸ This view is supported by a bulletin of the Secretary General of 1999 in which it is stated that the “fundamental principles and rules of international humanitarian law” set out in the bulletin might be applicable to United Nations forces.¹⁹ Others argue that at least the Security Council is not bound by international humanitarian law except for those norms which have obtained the status of *ius cogens*.²⁰ The Committee takes note of these conflicting views. It suggests that in principle the present Declaration should also apply to peace operations of the United Nations.

ARTICLE 3 *Applicable Law*

The primary norms the violation of which may give rise to the secondary rights and obligations reflected in the present Declaration are the rules of international law applicable in armed conflict, the object and purpose of which is to protect the victim in the sense of Article 4.

Commentary

- (1) The right to reparation – in whatever form – presupposes a violation of international law.²¹ Since the present Declaration only addresses reparation for victims of armed conflict,²² it is only a limited set of primary rules the violation of which may give rise to the secondary rights and obligations reflected in the present Declaration.²³ These are defined as the “rules of international law applicable in armed conflict the object and purpose of which is to protect the victim in the sense of Article 4”. Recognition of a right to reparation for violations of these rules is without prejudice to any right to reparation for other violations.
- (2) The phrase “rules of international law applicable in armed conflict” covers several regimes:
- a. The applicability of the rules of international humanitarian law is self-evident. As has been explained in the commentary to article 2, it is the original purpose of this regime to limit the harmful effects of armed conflict.
 - b. In addition to international humanitarian law, there are also other regimes that may apply in armed conflict. Most importantly, there is increasing support for the general applicability of international human rights law in armed conflict.²⁴ The applicability of international human rights law in armed conflict was already mentioned in the

972, Article 6 *Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 973* and supra note 8.

¹⁶ See *Prosecutor v. Tadic*, supra note 8, para. 69. See also C. Greenwood, *Scope of Application of Humanitarian Law*, in: D. Fleck (ed.), supra note 9, 59 ff.

¹⁷ This is consistent with article 14 of the *International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts*, annex to General Assembly resolution 56/83 U.N. Doc. A/56/49(Vol.I)/Corr.4 (hereinafter ILC Articles on State Responsibility). Article 14(1) stipulates: “The breach of an international obligation by an act of a State not having a continuing character occurs at the moment when the act is performed, even if its effects continue.”

¹⁸ J. Fry, *The UN Security Council and the Law of Armed Conflict: Amity or Enmity?*, 38 *Geo. Wash. Int’l L. Rev.* (2006), 327 (345); R.D. Glick, *Lip Service to the Laws of War: Humanitarian Law and United Nations Armed Forces*, 17 *Mich. J. Int’l L.* (1995 – 1996), 53 (106). See also C. Greenwood, *Scope of Application of Humanitarian Law*, in: D. Fleck (ed.), supra note 9, p. 51 ff.

¹⁹ Secretary-General’s Bulletin, Observance by United Nations forces of international humanitarian law, UN Doc. ST/SGB/1999/13, 6 August 1999, Section 1.

²⁰ K. Boon, *Legislative Reform in Post-conflict Zones: Just Post Bellum and the Contemporary Occupant’s Law-Making Powers*, 50 *McGill L. J.* (2005), 285 (311). For a comprehensive analysis of the Security Council’s limits see E. de Wet, *The Chapter VII Powers of the United Nations Security Council* (Oxford 2004), p. 178 ff.

²¹ See Article 4.

²² See Article 2.

²³ The distinction between primary and secondary rules is well established in the law of state responsibility. “Secondary rules” are those rules that govern the legal relations resulting from the breach of substantive rules, the so-called “primary rules”. For further reference see J. Crawford, *The International Law Commission’s Articles on State Responsibility, Introduction, Text and Commentaries*, supra note 4, p. 14 and J. Combacau / D. Alland, “Primary” and “Secondary” Rules in the Law of State Responsibility: *Categorizing International Obligations*, in: R. Provost (ed.), *State Responsibility in International Law*, (Aldershot 2002), 67 ff.

²⁴ See e.g. United Nations Human Rights Committee, General Comment No. 31 (2004), U.N. Doc. CCPR/C/21/Rev.1/Add.13 para. 11; A. M. Gross, *Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?*, 18 *Eur. J. Int’l*

1977 Additional Protocols to the 1949 Geneva Conventions.²⁵ The International Court of Justice (ICJ) elaborated on this issue for the first time in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, in which it opined that the protection of human rights norms does not cease in armed conflict.²⁶ This statement was confirmed in the advisory opinion on the *Wall on the Palestinian Territory*²⁷ as well as in the judgement in *Congo v. Uganda*.²⁸

Although the problem of how norm-collisions between the regimes of international human rights law and international humanitarian law should be dealt with is not yet fully settled in legal doctrine, the following statement of the ICJ provides some guidance:

“As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.”²⁹

One might interpret this passage as favouring the application of the *lex specialis* rule. This rule suggests that if a matter is regulated by a general standard as well as by a more specific rule, then the latter should take precedence over the former.³⁰ Generality and speciality are relational concepts that have to be assessed with regard to subject matter and the parties to the case.³¹ According to the *lex specialis* rule, it is thus not one of the two regimes that enjoys general priority over the other; rather, the question as to which rule prevails has to be assessed in each particular case.

- c. Article 3 does not cover the *ius ad bellum*. As those rules primarily protect the territorial integrity of States, it is still unclear whether an individual claim to reparation can be based on their violation.³² The law of armed conflict applies to the conduct of hostilities regardless of whether the resort to force is later deemed justified. Nor does reparation for victims preclude any later finding of responsibility to an injured State for breaches of the *ius ad bellum* or criminal responsibility of individual actors.

As of the effective date of this Declaration, only some claims for reparation have been based on a violation of the *ius ad bellum*, the most prominent of which being Security Council Resolution 687 (1991) establishing Iraq’s liability under international law “for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq’s unlawful invasion and occupation of Kuwait.”³³

Ius ad bellum claims were also dealt with by the Ethiopia-Eritrea Claims Commission. Though acknowledging Eritrea’s responsibility to pay reparation for violations of the *ius ad bellum*³⁴, the Commission made clear that particular care has to be observed in determining the amount of compensation. Thus, the Commission held:

L. (2007), 1 ff.; O. Ben-Naftali / Y. Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 *Isr. L. Rev.* (2003 – 2004), 17 (50); J. A. Frowein, *The Relationship Between Human Rights Regimes and Regimes of Belligerent Occupation*, 28 *Israel Yearbook on Human Rights* (1998), 1 (9); W. Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 *Eur. J. Int’l L.* (2005), 741 (743 f.). Apart from international human rights law international investment law might for example be applicable. See H. van Houtte / B. Delmartino / I. Yi, *Post-War Restoration of Property Rights under International Law*, supra note 4, 222 f. Likewise, international environmental law might be applicable.

²⁵ See Article 72 of Additional Protocol I, Preamble to Additional Protocol II.

²⁶ *Legality of the Threat or Use of Nuclear Weapons*, ICJ, Advisory Opinion 1996, 240, para. 25. In the context analysed, the court still considered international humanitarian law as *lex specialis*.

²⁷ *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 2004, 178, para. 106.

²⁸ *Case Concerning Armed Activities on the Territory of the Congo*, (Dem. Rep. Congo v. Uganda), December 19, 2005, para. 216

²⁹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra note 27, para. 106.

³⁰ ILC, Fifty-eight session, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report on the Study Group of the ILC finalized by Martti Koskenniemi, 13 April 2006, p. 34, para. 56. See also p. 39, para. 66.

³¹ *Ibid.*, p. 60, para. 111 ff. See also C. Dröge, *Elective affinities? Human rights and humanitarian law*, 90 No. 871 *IRRC* (2008), 501 (524).

³² See L. Zegveld, *Remedies for victims of violations of international humanitarian law*, 85 No. 851 *IRRC* (2003), 497 (501); D. Fleck, *Individual and State Responsibility for Violations of the Ius in Bello – An Imperfect Balance*, in: W. Heintschel von Heinegg / V. Epping (ed.), *International Humanitarian Law Facing New Challenges* (Heidelberg et al. 2007), 171 (180); H. van Houtte / B. Delmartino / I. Yi, *Post-War Restoration of Property Rights under International Law*, supra note 4, 238; E. Schwager, *Ius bello durante et bello confecto* (Berlin 2008), 119.

³³ UN Security Council Resolution 687 (April 8, 1991), para. 16.

³⁴ Partial Award between the Federal Democratic Republic of Ethiopia and the State of Eritrea, *Jus Ad Bellum*, Ethiopia’s Claims 1-8, 19 December 2005. See also Eritrea-Ethiopia Claims Commission Decision Number 7: Guidance Regarding *Jus ad Bellum* Liability, 27 July 2007.

“Imposing extensive liability for conduct that does not violate the *jus in bello* risks eroding the weight and authority for that law and the incentive to comply with it, to the injury of those it aims to protect. The Commission believes that, while appropriate compensation to a claiming State is required to reflect the severity of damage caused to that State by the violation of the *jus ad bellum*, it is not the same as that required for violations of *jus in bello*.”³⁵

Given this scarcity of State practice, the present Declaration does not postulate an individual right to reparation for violations of the *ius ad bellum*.³⁶ It only addresses reparations for violations of international rules applicable in armed conflict but not for violations of the *ius ad bellum*. This is without prejudice to any existing rights. In light of the recent developments on the crime of aggression³⁷, the Committee does not exclude that violations of the *ius ad bellum* will give rise to a right to reparation in the future.

- (3) A right to reparation can only arise from a violation of norms, whose object and purpose is the protection of victims in the sense of Article 4. The Declaration thereby takes into account that not all norms intend to confer benefits on victims. Assessing the object and purpose of a norm is a matter of interpretation. Article 31 Vienna Convention on the Law of Treaties can be applied by analogy.³⁸

ARTICLE 4 *Victim*

1. For the purposes of this Declaration, the term “victim” means natural or legal persons who have suffered harm as a result of a violation of the rules of international law applicable in armed conflict.
2. This provision is without prejudice to the right of other persons – in particular those in a family or civil law relationship to the victim – to submit a claim on behalf of victims provided that there is a legal interest therein. This may be the case where the victim is a minor child, incapacitated or otherwise unable to claim reparation.

Commentary

- (1) Article 4(1), which is in large part drafted in line with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law (hereinafter: “Basic Principles”)³⁹ and the Chicago Principles on Post-Conflict Justice,⁴⁰ lays down the conditions required to establish the existence of a victim. Four elements are identified. First, the group of possible victims is specified as comprising natural and legal persons. Second, a violation of international law must have occurred. Third, harm must have been suffered. Finally, a link between the violation of international law and the harm suffered has to be established.

Group of possible victims

- (2) As to the first element, it is important to note that the scope of the present Declaration is not limited to harm suffered by natural persons. Consistent with international State practice,⁴¹ it also covers legal persons to the extent the nature of rights defined in this Declaration permits. Legal persons include corporations or other entities. Claims of legal persons

³⁵ Eritrea Ethiopia Claims Commission, Final Award between The Federal Democratic Republic of Ethiopia and The State of Eritrea, Ethiopia’s Damages Claims, 17 August 2009, para. 316. The relative weight of such economic considerations might be questioned. For a general discussion see Y. Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, 42 *Van. J. Transnat’l L.* (2009), 181 (195 ff.).

³⁶ See however *Case Concerning Armed Activities on the Territory of the Congo*, supra note 28, Declaration de M. le Juge Verhoeven, para 5, for a discussion of State claims.

³⁷ See Resolution RC/Res.6, adopted at the 13th plenary meeting of the Review Conference of the Rome Statute, Kampala (Uganda), 11 June 2010, available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf (accessed 05 September 2010).

³⁸ See Vienna Convention on the Law of Treaties, Done at Vienna on 23 May 1969, Art. 31.

³⁹ *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* (hereinafter: “Basic Principles”), A/RES/60/147, para. 8. Deviations from these Basic Principles will be explained when appropriate.

⁴⁰ International Human Rights Law Institute, Chicago Council on Global Affairs, Istituto Superiore Internazionale di Scienze Criminali, Association Internationale de Droit Pénal, *The Chicago Principles on Post-Conflict Justice*, 2007, Principle 3.

⁴¹ For the practice of the *United Nations Compensation Commission*, see Decision S/AC.26/1991/4 of 23 October 1991. See also article 5 (8) of the *Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea* and article VII of the *Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran*.

shall not take priority over claims of natural persons. No restrictions are made as regards the nationality of victims. As a consequence, situations are conceivable where victims have claims against their State of nationality.⁴²

Unlike the Basic Principles, the present Declaration does not explicitly stipulate that the group of victims comprises persons who “individually or collectively” suffered harm.⁴³ ILA members at the Biennial Conference in The Hague could not find consensus on this language. This deviation from the Basic Principles is without prejudice to the rights of persons who have suffered collectively. Such victimization of groups might especially occur in situations of widespread, systematic violations of rules of international law applicable in armed conflict. As explained in the commentary to article 6, the present Declaration leaves room for collective reparation.

Violation of international law

- (3) The scope of the present Declaration is generally confined to persons who are harmed as a result of a violation of rules of international law applicable in armed conflict.

As regards incidental losses, which are sometimes referred to as “collateral damages”, two situations have to be distinguished. On the one hand, incidental losses might be caused by unlawful conduct. Article 51(5)(b) and article 57(2)(b) of Additional Protocol I to the 1949 Geneva Conventions prohibit attacks causing incidental losses which are excessive in relation to the concrete and direct military advantage anticipated. Here, a right to reparation might be triggered. On the other hand, incidental losses might be caused by lawful conduct according to the rules of international law applicable in armed conflict, given that not every injury to civilians constitutes a violation of international law. It is as yet unclear whether a right to reparation is triggered in such a situation.⁴⁴ Care should be taken not to render the distinction between lawful and unlawful conduct meaningless. The fact that victims may be entitled to reparation for harm caused by lawful conduct does not mean that responsible parties are to be equally liable for consequences of lawful and unlawful conduct.⁴⁵ Rather, pragmatic solutions are to be encouraged.

As an important deviation from the Basic Principles, which are restricted to serious violations of international humanitarian law and gross violations of international human rights law, the present Declaration does not set a threshold of gravity. It is the position of the Committee that from a normative point of view, there are no compelling reasons to a priori limit the right to reparation to infringements of a certain gravity. Rather, the concept of reparation as laid down in the *Chorzów Factory* case should apply to every violation of rules of international law applicable in armed conflict. The introduction of a threshold, whose boundaries are not clearly defined, might also give responsible parties an excuse not to pay reparation.⁴⁶ This is not desirable.

In practice, however, a comprehensive concept of reparation addressing every violation of rules of international law applicable in armed conflict may be unattainable. This problem is addressed below.⁴⁷

Harm

The existence of harm is central to the notion of victim. Harm can be understood as the negative outcome resulting from the comparison of two conditions of one person: the condition with and without the causing event.⁴⁸ There was discussion as to the examples of harm referred to in the Basic Principles. The Committee finally decided not to explicitly mention “physical or mental injury, emotional suffering, economic loss or substantial impairment of [victims’] rights”.⁴⁹ This has the following reasons: Reparation for emotional suffering other than mental injury might overexpand the concept of reparation. Likewise, it is questionable whether every form of economic loss should be covered by reparation. Finally, the recognition of a “substantial impairment of fundamental rights” as harm risks conflating the question of whether a violation of law has occurred with the question of whether harm has been caused. In addition, the adjective “substantial” might create the impression that the harm must reach a certain threshold of severity. As explained above, the present Declaration does not endorse such a threshold.

⁴² H.M. Holtzmann / E. Kristjánisdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, (Oxford 2007), 53 ff. For a different view see A. Steinkamm, *War damages*, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume IV (Amsterdam et al. 2000), 1354 (1356 f.).

⁴³ *Basic Principles*, supra note 39, para. 8.

⁴⁴ As regards situations, where the incidental loss was preceded by a violation of the ius ad bellum, see also supra note 32.

⁴⁵ For a detailed analysis of a strict liability regime for incidental losses see Y. Ronen, *Avoid or Compensate? Liability for Incidental Injury to Civilians Inflicted During Armed Conflict*, supra note 35.

⁴⁶ On the problem of measuring human rights violations see M. Stohl / D. Carelton / G. Lopez / S. Samuels, *State Violation of Human Rights: Issues and Problems of Measurement*, 8 Hum. Rts. Q. (1986), 592 (592 ff.).

⁴⁷ See infra para. (3) of the Commentary to Article 6..

⁴⁸ See H. Rombouts / S. Vandeginste, *Reparation for Victims of Gross and Systematic Human Rights Violations: the Notion of Victim*, *Third World Legal Studies* (2000 – 2003), 89 (97).

⁴⁹ *Basic Principles*, supra note 39, para. 8.

Harm can be suffered not only by the individual whose rights have been violated but also by third persons. As an example, the killing of a person may cause mental injury (e.g. posttraumatic stress disorder) to members of his or her family or persons present at the scene. There is precedence in State practice that such persons should have a right to reparation as well. Ruling upon civil claims in the *Duch* case, the Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia for example held that responsibility is “not limited to persons against whom the crimes were committed, but may also be the cause of injury to a larger group of victims.”⁵⁰ The Inter-American Court of Human Rights likewise acknowledged in the *Aloeboetoe* case that under limited conditions, third parties might file a claim for compensatory damages.⁵¹ The United Nations Claims Commission (UNCC),⁵² the European Court of Human Rights⁵³ as well as the Human Rights Committee⁵⁴ have taken similar approaches. Mention should also be made of article 24(1) of the International Convention for the Protection of All Persons from Enforced Disappearance which defines a victim in the sense of the Convention as “the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance”.⁵⁵ The Committee holds the view that it is the suffering of harm which qualifies these third persons as victims. It sees no compelling reason to a priori restrict this group of third persons to members of the “immediate family”, “dependants” or “persons who have suffered harm in intervening to assist victims in distress or to prevent victimization” as done in the Basic Principles.

Persons who have not suffered harm do not qualify as victims. However, they might inherit a claim of a victim according to the applicable legal rules on inheritance.

Link

- (4) A further requirement for establishing the existence of a victim is that there be a link between the violation of international law and the harm suffered.⁵⁶ There is consensus that causality between the violation of international law and the harm suffered is a necessary condition to establish this link. At the same time, there has been a marked reluctance to grant reparation for every harm caused by a violation of international law. Notably, the International Law Commission stated:

“[C]ausality in fact is a necessary but not a sufficient condition for reparation. There is a further element, associated with the exclusion of injury that is too “remote” or “consequential” to be the subject of reparation.”⁵⁷

Establishing a link between the violation of international law and the harm suffered is thus a normative process. Different criteria including foreseeability,⁵⁸ directness⁵⁹ and proximate cause⁶⁰ have been used for this task. In its Decision Number 7, the Ethiopia Eritrea Claims Commission favoured the criterion of proximate cause, which it explained as follows:

“In assessing whether this test is met, and whether the chain of causation is sufficiently close in a particular situation, the Commission will give weight to whether particular damage reasonably should have been foreseeable

⁵⁰ Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, Judgement, Case File No. 001/18-07-2007/ECCC/TC (KAING Guek Eav alias Duch), para. 642.

⁵¹ *Aloeboetoe et al. v. Suriname, Reparations (Art. 63 (1) American Convention on Human Rights)*, Judgement of September 10, 1993, Inter-AmCtHR (Ser.C) No.15 (1994), paras 67, 76. See also *Loayza Tamayo v. Peru*, Judgement of November 27, 1998, Inter-AmCtHR (Ser.C) No.42 and *Blake v. Guatemala*, Judgement of January 22, 1999, Inter-AmCtHR (Ser.C) No.48. For further reference see J. Schönsteiner, *Dissuasive Measures and the ‘Society as Whole’: A Working Theory of Reparations in the Inter-American Court of Human Rights*, 23 Am. U. Int’l L. Rev. (2008), 127 (133 ff.).

⁵² According to decision S/AC.26/1991/3, Nr. 3 (c) of the Governing Council of the United Nations Compensation Commission, October 18, 1991, a spouse, child or parent of the individual who suffered death may claim compensation for pecuniary losses resulting from mental pain and anguish. See also H.M. Holtzmann / E. Kristjánssdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, supra note 42, 59 f.

⁵³ See e.g. *Velikova v. Bulgaria*, Application No. 41488/98, Judgement of May 18, 2000 and *Case of Kurt v. Turkey*, Application No. 15/1997/799/1002, Judgement of 25 May 1998.

⁵⁴ See e.g. *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000, U.N. Doc. CCPR/C/78/D/950/2000 (2003).

⁵⁵ Article 24(4) and (5) of the Convention stipulate a right to reparation for these victims. Similar provisions can be found in some national legal systems. See also article XVII *Guidelines on human rights and the fight against terrorism*, adopted by the Committee of Ministers of the Council of Europe on July 11, 2002, at the 804th meeting of the Ministers’ Deputies. As an example of national legislation see article 11, 12 Law on Missing Persons of Bosnia and Herzegovina.

⁵⁶ See B. Graefrath, *Responsibility and Damages Caused: Relationship between Responsibility and Damages*, 185 RdC (1984) 2, 9 (95). It has to be noted, however, that in mass claims processes, lowered standards of proof might be adopted. See H.M. Holtzmann / E. Kristjánssdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, supra note 42, 210 ff.

⁵⁷ J. Crawford, *The International Law Commission’s Articles on State Responsibility, Introduction, Text and Commentaries*, supra note 4, 204.

⁵⁸ See for example the *Naulilaa case (Responsibility of Germany for damage caused in the Portuguese colonies in the south of Africa) (Portugal v. Germany)*, UNRIIAA, vol. II, p. 1011 (1031).

⁵⁹ Security Council Resolution 687, for example, specified that the UNCC’s jurisdiction was limited to direct injury.

⁶⁰ Eritrea-Ethiopia Claims Commission, Decision Number 7: Guidance Regarding Jus ad Bellum Liability, 27 July 2007, para. 13 and Eritrea-Ethiopia Claims Commission, Final Award between The Federal Democratic Republic of Ethiopia and The State of Eritrea, Ethiopia’s Damages Claims, 17 August 2009, para. 39.

to an actor committing the international delict in question. The element of foreseeability, although not without its own difficulties, provides some discipline and predictability in assessing proximity.”⁶¹

At the same time, it made clear that other criteria might prove necessary in other situations. Paraphrasing the International Law Commission, it held:

“The degree of connection may vary depending upon the nature of the claim and other circumstances.”⁶²

The Committee endorses this view and suggests that two considerations guide the choice of the appropriate criterion to apply: first, the need to exclude harm that is too remote (such as e.g. the harm suffered by unrelated persons far removed from the conflict who are merely emotionally affected by the news on the conflict); and second, the need not to unduly limit the number of victims. The two aspects should be balanced carefully. The Committee further recalls that according to Article 3, victims have to fall under the protective ambit of the primary norm.⁶³

- (5) The disclaimer in article 4(2) allows due account to be taken of situations where victims are in no position to claim themselves, as for example when the victim is incapacitated or a minor child. In these situations, third persons might be legally entitled to claim on behalf of the victim. However, reparation has to be awarded to the victim.⁶⁴

ARTICLE 5 *Responsible Party*

1. For the purposes of the present Declaration, the term “responsible party” means States and International Organizations responsible for a violation of rules of international law applicable in armed conflict.
2. Responsible parties may also include non-State actors other than International Organisations responsible for a violation of rules of international law applicable in armed conflict. Such responsibility is without prejudice to the responsibility of States and International Organizations under international law for violations of such rules committed by non-State actors.

Commentary

- (1) Article 5 introduces the term “responsible party” to designate those actors that are responsible to make reparation for violations of rules of international law applicable in armed conflict. Article 5 is divided into two paragraphs: article 5(1) addresses the responsibility of States and International Organizations, whilst article 5(2) deals with non-State actors other than International Organizations.
- (2) Article 5(1) is consistent with general principles of international responsibility. The responsibility of States for violations of international law has been confirmed by the International Law Commission in its Draft Articles on State Responsibility.⁶⁵ Likewise, the responsibility of International Organizations has been confirmed in studies of the International Law Association⁶⁶ and the International Law Commission.⁶⁷ As yet, there is no consensus on the question whether, and if so to what extent, member States of International Organizations are liable for acts of the latter, save that reparation is owed for violations by either.⁶⁸

⁶¹ *Ibid.*

⁶² *Ibid.*, The International Law Commission stated in the Commentary to its Draft Articles on State Responsibility that „the requirement of a causal link is not necessarily the same in relation to every breach of an international obligation.“ See Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, supra note 7, p. 93.

⁶³ See supra para. (3) of the Commentary to Article 3.

⁶⁴ For the consistent practice of the UNCC, see for example the *Recommendations made by the Panel of Commissioners concerning Individual Claims for Serious Personal Injury or Death*, S/AC.26/1994/1, p. 19. See also article 13 *CRPC Book of Regulations on the Conditions and Decision Making Procedure for Claims for Return of Real Property of Displaced Persons* on the possibility of filing a claim for someone else.

⁶⁵ See Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, supra note 7, p. 26. It is safe to assume that these articles are in most parts binding as customary law.

⁶⁶ International Law Association, Berlin Conference 2004, Accountability of International Organizations, Final Report 2004, available under: <http://www.ila-hq.org/en/committees/index.cfm/cid/9>.

⁶⁷ International Law Commission, Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006) Chapter VII, Responsibility of International Organizations, p. 246 ff.

⁶⁸ On this issue see the Dutch judgements in two Srebrenica cases LJN: BF0181, Rechtsbank’s Gravenhage, 265615 / HA ZA 06/1671 and LJN: BF0182, Rechtsbank’s Gravenhage, 265618/ HA ZA 06-1672. The appeal was dismissed: Gerechtshof’s Gravenhage, LJN: BL8979, 200.022.151/01. See also *Agim Behrami and Bekir Behrami v. France and Ruzhdi Saramati v. France, Germany and Norway*, ECtHR, Grand Chamber Decision as to the Admissibility of Application no. 71412/01 and Application no. 78166/01, 2 May 2007. On these decisions see C.A. Bell, *Reassessing Multiple Attribution: The International Law Commission and the Behrami and Saramati Decision*, 42 N.Y.U. J. Int’l L. & Pol. (2010), 501 ff. See also T. Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 Harv. Int’l L. J. (2010), 113 ff.

- (3) Article 5(2) makes clear that different actors may be responsible for acts of non-State actors. These can be the non-State actors themselves, States and International Organizations.

Non-State actors

Non-State actors may be bound by rules of international law applicable in armed conflict. As regards international humanitarian law, the Appeals Chamber of the Special Court for Sierra Leone has stated:

“[I]t is well settled that all parties to an armed conflict, whether states or non-state actors, are bound by international humanitarian law, even though only states may become parties to international treaties.”⁶⁹

An overview of which rules are to be observed by non-State actors can be found in the customary international humanitarian law study of the International Committee of the Red Cross (ICRC).⁷⁰ As regards other norms, such as international human rights law, there have been proposals to create an obligation of non-State actors by drawing on the theory of *Drittwirkung*.⁷¹ The fact that the UN Security Council and the UN General Assembly have repeatedly denounced serious violations of both international humanitarian and human rights law committed by non-State actors such as organized armed groups supports the idea that they are bound by these rules.⁷²

Some developments indicate that non-State actors may have a secondary obligation to make reparation. Article 75 of the Rome Statute can be considered as an expression of the emerging regime of responsibility of non-State actors.⁷³ In addition, the International Commission of Inquiry on Darfur stressed that it is not only incumbent upon States to pay compensation for the crimes perpetrated by its agents and officials or *de facto* organs. Rather, it argued that

“a similar obligation is incumbent upon rebels for all crimes they may have committed, whether or not the perpetrators are identified and punished.”⁷⁴

This is in line with the Basic Principles which state that

“[i]n cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim”.⁷⁵

Finally, there is some relevant domestic jurisprudence. In the United States there have for example been attempts to bring claims against organized armed groups under the Alien Tort Claims Act (ATCA) and the Torture Victims Protection Act (TVPA).⁷⁶ Similarly, there have been initiatives to bring lawsuits against corporations that were

⁶⁹ Prosecutor v. Sam Hinga Norman, Case No. SCSL 2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 May 2004, para. 22.

⁷⁰ J.M. Henckaerts / L. Doswald-Beck / International Committee of the Red Cross (eds.), *Customary international humanitarian law*, (Cambridge 2005).

⁷¹ A. McDonald, *The Development of a victim-centered approach to international criminal justice for serious violations of international humanitarian law*, in: J. Carey / W.V. Dunlap / R.J. Pritchard (eds.), *International Humanitarian Law – Prospects*, (Ardley 2006), 237 (252 ff.). The theory of *Drittwirkung* has its roots in German constitutional law. Its basic premise is that the German constitution does not only provide for defensive rights against the State but can also determine private law relationships. See also A. Clapham, *Human Rights Obligations of Non-State Actors*, (Oxford 2006) and D. Fleck, *Humanitarian Protection against Non-State Actors*, in: J. A. Frowein / K. Scharioth / I. Winkelmann / R. Wolfrum (eds.), *Verhandeln für den Frieden/Negotiating for Peace – Liber Amicorum Tono Eitel*, (Berlin 2003), 69 ff.

⁷² See e.g. SC Res. 1814 (15 May 2008), para. 16, addressed to “all parties in Somalia” and SC Res. 1778 (25 September 2007), Preamble, which concerns “activities of armed groups and other attack in eastern Chad, the north-eastern Central African Republic and western Sudan which threaten the security of the civilian population, the conduct of humanitarian operations in those areas and the stability of those countries, and which result in serious violations of human rights and international humanitarian law.” For further resolutions of the Security Council and the General Assembly see C. Tomuschat, *The applicability of human rights law to insurgent movements*, in: H. Fischer / U. Froissart / W. Heintschel von Heinegg / C. Raap (eds.), *Krisensicherung und Humanitärer Schutz – Crisis Management and Humanitarian Protection, Festschrift für Dieter Fleck*, (Berlin 2004), 573. See also P. H. Kooijmanns, *The Security Council and non-state entities as parties to conflicts*, in: K. Wellens (ed.), *International Law: Theory and Practice: Essays in Honour of Eric Suy*, (The Hague 1998), pp. 333 ff. and J. Kleffner, *The collective accountability of organized armed groups for systems crimes*, in: A. Nollkaemper / H. van der Wilt (eds.), *System Criminality in International Law*, (Cambridge 2009), 238 (254 ff.).

⁷³ See L. Zegveld, *Compensation for the Victims of the Chemical Warfare in Iraq and Iran*, in: C. Ferstman / M. Goetz / A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity – Systems in Place and Systems in the Making*, (Leiden et al. 2009), 369 (372). See also *infra*, note 126, for further information on the reparation provisions under the Rome Statute.

⁷⁴ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, para. 600, available at: http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

⁷⁵ *Basic Principles*, *supra* note 39, para 15 (emphasis added).

⁷⁶ ATCA and TVPA, 28 U.S.C. 1350. See J. Kleffner, *The collective accountability of organized armed groups for systems crimes*, in: A. Nollkaemper / H. van der Wilt (eds.), *System Criminality in International Law*, *supra* note 72, 256 ff.

considered to be responsible for human rights abuses. While there are still many obstacles to holding them accountable, this might change in the future.⁷⁷

The Committee recognizes the possibility that non-State actors are already liable to pay reparation for violations of the law of armed conflict. It strongly encourages the further development of a regime of responsibility for such actors. This is mandated by the rule of law which has been described as

“a principle of governance in which all persons, institutions and entities public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”⁷⁸

A regime of responsibility for non-State actors shall not be interpreted as an acknowledgement of their legitimacy or lawfulness.

States and International Organizations

Violations of rules of international law applicable in armed conflict by non-State actors might also trigger the responsibility of States and International Organizations. Two possible scenarios include acts of non-State actors that are attributable to States or International Organizations,⁷⁹ or where responsibility of a State or an International Organization is triggered for an omission to protect people against the unlawful acts of non-State actors.⁸⁰ Article 5(2) makes clear that the responsibility of non-State actors is without prejudice to the responsibility of States or International Organisations.

- (4) It has to be emphasized that the party responsible for the violation may not be the same entity as the one which funds actual reparations. As of now, there is however only scarce State practice in this regard. The most relevant examples concern the change of a government, which does not exempt a responsible party from its obligation to make reparation. The African Commission on Human and Peoples' Rights, for instance, held in *Achutan and Amnesty v. Malawi*:

“Principles of international law stipulate, however, that a new government inherits the previous government's international obligations, including the responsibility for the previous government's mismanagement. The change of government in Malawi does not extinguish the present claim before the Commission. Although the present government of Malawi did not commit the human rights abuses complained of, it is responsible for the reparation of these abuses.”⁸¹

SECTION II

Rights of Victims of Armed Conflict

ARTICLE 6

Right to Reparation

Victims of armed conflict have a right to reparation from the responsible parties.

Commentary

- (1) Article 6 enshrines the core principle of the present Declaration. It addresses three issues of the right to reparation: the holder of the right (victims), its content (reparation) and the obligated parties (responsible parties).

⁷⁷ For further reference see Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/14/27, 09 April 2010, paras. 88 ff.

⁷⁸ UN DOC. S/2004/616, para. 6. See also J. Kleffner, *The collective accountability of organized armed groups for systems crimes*, in: A. Nollkaemper / H. van der Wilt (eds.), *System Criminality in International Law*, supra note 72, 259.

⁷⁹ See the comprehensive analysis of L. Zegveld, *The Accountability of Armed Opposition Groups in International Law*, (Cambridge 2007).

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

⁸¹ *Achutan and Amnesty International v. Malawi*, African Commission on Human and Peoples' Rights, Comm. Nos. 64/92, 68/92 and 78/92 (1995), para. 12.

- (2) As regards the holder of the right to reparation, article 6 regards the right as belonging to victims, as defined in article 4. Since the group of victims covers individual persons as well as collectives, article 6 does not only reflect an individual right but also leaves room for collective reparation. The one does not preclude the other in any given case.

Individual reparation

- a. Under traditional international law, the existence of an individual right is not dependent on the international procedural capacity to assert it.⁸² This dissociation of rights and enforcement mechanisms was recognized in the jurisprudence of the Permanent Court of International Justice⁸³ and confirmed by the International Court of Justice in the *LaGrand Case*.⁸⁴ As a consequence, rights may be recognized as belonging to individuals even in instances where claims of individuals are submitted by their State of nationality.⁸⁵
- b. As stated above, the obligation to make reparation has its roots in general principles of State responsibility as expressed in the *Chorzów Factory* case;⁸⁶ article 3 of the 1907 Hague Convention IV; article 91 of the 1977 Additional Protocol I to the 1949 Geneva Conventions; as well as in international human rights instruments.⁸⁷ The existence of an individual right as a corollary to the obligation to make reparations has however long been disputed – especially with regard to international humanitarian law. Consistent with the concept of intertemporal law,⁸⁸ State practice in this field has been influenced greatly by the changing view on the legal position of the individual under international law. Whilst claims of the individual were traditionally denied, the dominant view in literature has increasingly come to recognize an individual right to reparation – not only under international human rights law, but also under international humanitarian law.⁸⁹ The same shift is discernible in State practice.

⁸² See H. van Houtte / B. Delmartino / I. Yi, *Post-War Restoration of Property Rights under International Law, Vol. I: Institutional Features and Substantive Law*, supra note 4, 241; S. Kadelbach, *Staatenverantwortlichkeit für Angriffskriege und Verbrechen gegen die Menschlichkeit*, in: Deutsche Gesellschaft für Völkerrecht (ed.), *Entschädigung nach bewaffneten Konflikten, Die Konstitutionalisierung der Welthandelsordnung*, (Heidelberg 2003), 63 (83 f.); B. Heß, *Kriegsentschädigung aus kollisionsrechtlicher und rechtsvergleichender Sicht*, in: Deutsche Gesellschaft für Völkerrecht (ed.), *Entschädigung nach bewaffneten Konflikten, Die Konstitutionalisierung der Welthandelsordnung*, (Heidelberg 2003), 107 (116); L. Zegveld, *Remedies for victims of violations of international humanitarian law*, supra note 32, 507; R. Pisillo Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: an Overview*, 1 J. Int'l Crim. Just. (2003), 339 (343); E. Roucouas, *Facteurs privés et droit international public*, 299 RdC (2002), 9 (48); A. Randelzhofer, *The Legal Position of the Individual under Present International Law*, in: A. Randelzhofer / C. Tomuschat (eds.), *State Responsibility and the individual: reparation in instances of grave violations of human rights*, (The Hague et al. 1999), 231 (233); R. Provost, *International Human Rights and Humanitarian Law*, (Cambridge 2002), 16; A. Fischer-Lescano, *Subjektivierung völkerrechtlicher Sekundärregeln. Die Individualrechte auf Entschädigung und effektiven Rechtsschutz bei Verletzungen des Völkerrechts*, 45 Archiv des Völkerrechts (2007), 299 (331). See however V. Epping, *Völkerrechtssubjekte*, in: K. Ipsen (ed.), *Völkerrecht*, (München 2004), 55 (98); H. Mosler, *The International Society as a Legal Community*, 140 RdC (1974), 1, 70; I. Brownlie, *Principles of Public International Law*, (Oxford 1970), 60; H. Kelsen, *Principles of International Law*, (New Jersey 2004) (reprint), 143 ff.

⁸³ *Jurisdiction of the Courts of Danzig, Advisory Opinion*, PCIJ, Series B, No.15 (1928), 17 f. See also *Appeal from a Judgement of the Hungaro-Czechoslovak Mixed Arbitral Tribunal* (The Peter Pázmány University v The State of Czechoslovakia), PCIJ Series A/B, No. 61 (1933), 231, where it was held that the “capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself”. This statement, which has been made with regard to civil rights, holds true for any legal order.

⁸⁴ *LaGrand*, (Germany v. United States of America), 2001 ICJ Reports, 466 (494), para. 77. See also *Avena and Other Mexican Nationals*, (Mexico v. United States of America), Judgement, 2004 ICJ Reports, 12 (27 f.), para. 40.

⁸⁵ The compensation process under the UNCC serves a prominent example. See N. Wühler, *The United Nations Compensation Commission*, in: A. Randelzhofer / C. Tomuschat (eds.), *State Responsibility and the individual: reparation in instances of grave violations of human rights*, supra note 82, 213 (216).

⁸⁶ *Factory at Chorzów, Merits*, supra note 1, p. 47.

⁸⁷ See e.g. Article 41 European Convention on Human Rights; Article 63 Inter-American Convention on Human Rights; Article 27 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. On the right to reparation under human rights treaties see also E. Schwager, *Ius bello durante et bello confecto*, supra note 32, 103 – 111; R. Bank / E. Schwager, *Is there a Substantive Right to Compensation for Individual Victims of Armed Conflict against a State under International Law?*, 49 GYIL (2006), 367 (398 ff.).

⁸⁸ See T.O. Elias, *The Doctrine of Intertemporal Law*, 74 Am. J. Int'l L. (1980), 285 (285 ff.) and International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, 13 April 2006, paras. 475 ff. The doctrine has its origin in the *Island of Palmas case*, where it was held: “A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.” See *Island of Palmas Case*, 4 April 1928, RIAA II, 829 (845).

⁸⁹ L. T. Lee, *The Right of Victims of War to Compensation*, in: R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya*, (Dordrecht 1993), 489; E.-C. Gillard, *Reparation for violations of international humanitarian law*, 85 No. 851 IRRC (2003), 529 (536); F. Kalshoven, *State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of the Hague Convention IV of 1907 to Article 91 of Additional Protocol I and Beyond*, 40 Int'l & Comp. L. Q. (1991), 827 ff.; L. Zegveld, *Remedies for victims of violations of international humanitarian law*, supra note 32, 506; R. Pisillo Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview*, supra note 82, 342 f.; F. Francioni, *Reparation for Indigenous Peoples: Is International Law Ready to Ensure Redress for Historical Injustices?*, in: F. Lenzerini (ed.), *Reparations for Indigenous Peoples – International and Comparative Perspectives*, (Oxford 2008), 27 (40); M. Sassoli, *State Responsibility for Violations of International Humanitarian Law*, 84 No. 846 IRRC (2002), 401 (419); R. Bank / E. Schwager, *Is there a Substantive Right to Compensation for Individual Victims of Armed Conflict against a State under International Law?*, supra note 87, 367 ff.; E. Schwager, *Ius bello durante et*

- c. The modern-day practice of granting reparation is often said to date back to the 1794 Jay Treaty,⁹⁰ article 7 of which stipulated the obligation of Great Britain to make full compensation to American merchants who had sustained losses as a consequence of a capture of their vessels. The treaty also contained an obligation of the United States to compensate British merchants.⁹¹
- d. Following World War I, an elaborate reparation regime was established under the Treaty of Versailles.⁹² The treaty was founded on the premise that the settlement of war claims belonged to the exclusive sphere of States. Under its article 297, which set the legal basis for the U.S.-German Mixed Claims Commission, individuals were exceptionally entitled to compensation, but their home states were entitled to dispose of these claims.⁹³
- e. Reparation practice in the immediate aftermath of World War II did not reflect significant changes to the traditional approach.⁹⁴ The agreements entered into by the Allied forces with Germany and Japan contained State waivers of individual claims.⁹⁵ As a consequence, victims could not successfully claim reparation in national courts.
- f. Under modern international law, things have changed. A foreshadowing of a new approach could already be found in 1952, when the Higher Regional Court of Münster accepted an individual right to reparation under international law. Although the court did not explicitly mention the legal basis for this right, it referred among others to article 3 of the 1907 Hague Convention.⁹⁶
- g. Other national courts (albeit mainly lower courts), long hesitant to grant an individual right to reparation, have in recent years shown more willingness to approve such claims.

Japanese District Courts awarded compensation or at least implicitly recognized a right to reparation, in the cases of *Korean Comfort Women*⁹⁷ and *Forced Transportation and Forced Labour of Chinese People*.⁹⁸

belo confecto, supra note 32, 146 –163; R. Hofmann, *Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation against States under International Law*, in: P.-M. Dupuy / B. Fassbender / M. N. Shaw / K. P. Sommermann (eds.), *Common Values in International Law – Essays in Honour of Christian Tomuschat*, (Kehl et al. 2006), 341 (357); see also *Victims' Compensation and Participation, Appendix to UN Doc. S/2000/1063, Judges' Report of 13 September 2000*. For an opposite view see: C. Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 Tul. J. Intl & Comp. L. (2002), 157 (183); J. Long, *What remedy for abused Iraqi detainees?*, 187 Mil. L. Rev. (2006), 43 (78); D. Fleck, *Individual and State Responsibility for Violations of the Ius in Bello – An Imperfect Balance*, in: W. Heintschel von Heinegg / V. Epping (eds.), *International Humanitarian Law Facing New Challenges*, supra note 32, 190 – 193; A. Steinkamm, *War damages*, in: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume IV, supra note 42, 1357; A. Randelzhofer/ O. Dörr, *Entschädigung für Zwangsarbeit? – Zum Problem individueller Entschädigungsansprüche von ausländischen Zwangsarbeitern während des Zweiten Weltkrieges gegen die Bundesrepublik Deutschland*, (Berlin 1994), 34.

⁹⁰ The „Treaty of Amity Commerce and Navigation, between His Britannick Majesty; and the United States of America“ (Jay Treaty) of November 19, 1794, is available at: <http://www.yale.edu/lawweb/avalon/diplomacy/britain/jay.htm>.

⁹¹ Article 6 Jay Treaty.

⁹² The Treaty of Peace between the Allied and Associated Powers and Germany, 28 June 1919, Art. 231 ff.

⁹³ See B. Heß, *Kriegsentschädigung aus kollisionsrechtlicher und rechtsvergleichender Sicht*, in: Deutsche Gesellschaft für Völkerrecht (ed.), *Entschädigung nach bewaffneten Konflikten, Die Konstitutionalisierung der Welthandelsordnung*, supra note 82, 134 and R. Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945*, 20 Berkeley J. Int'l L. (2002), 296 (310).

⁹⁴ B. Heß, *Kriegsentschädigung aus kollisionsrechtlicher und rechtsvergleichender Sicht*, in: Deutsche Gesellschaft für Völkerrecht (ed.), *Entschädigung nach bewaffneten Konflikten, Die Konstitutionalisierung der Welthandelsordnung*, supra note 82, 142.

⁹⁵ As an example for the agreements with Germany see Article 2 (A) Paris Agreement of 1946. For further information on the agreements, in particular the 1951 San Francisco Peace Treaty with Japan see L. Hein, *War Compensation: Claims against the Japanese Government and Japanese Corporations for War Crimes*, in: J. Torpey (ed.), *Politics and the Past: On Repairing Historical Injustices*, (Maryland 2003), 127 (132).

⁹⁶ Higher Administrative Court Münster, III A 1279/51, NJW 1952, 1030. In this case, an individual claim for reparation was based on law no. 47 of the Allied High Commission which related to compensation for damages resulting from the occupation.

⁹⁷ *Korean Comfort Women v. Japan*, Shimonoseki Branch, Yamaguchi District Court, April 27, 1998; S. H. Bong, *Compensation for Victims of Wartime Atrocities – Recent Developments in Japan's Case Law*, 3 J. Int'l Crim. Just. (2005), 187 (195). For further information see M. Frulli, *When are States Liable towards Individuals for Serious Violations of Humanitarian Law? The Markovich Case*, 1 J. Int'l Crim. Just. (2003), 406 (417 f.); H. N. Scheiber, *Taking Responsibility: Moral and Historical Perspectives on the Japanese War-Reparations Issues*, 20 Berkeley J. Int'l L. (2002), 233 (235 – 238); C. P. Meade, *From Shanghai to Globocourt: An Analysis of the 'Comfort Women's' Defeat in Hwang v. Japan*, 35 Vanderbilt J. Transnat'l L. (2002), 211 (225 – 231); and, for recent developments, M. Asada / T. Ryan, *Post-War Reparations between Japan and China and Individual Claims: The Supreme Court Judgments in the Nishimatsu Construction Case and the Second Chinese "Comfort Women" Case*, 14 ZJapanR / J. Japan. L. (2009), 257 ff.

⁹⁸ *Chinese victims of forced labour v. Japan and Mitsui Mining Inc.*, Fukuoka District Court, April 26, 2002; *Chinese victims of forced labour v. Japan and the company A*, Kyoto District Court, January 15, 2003; *Chinese victims of forced labour v. Japan and Hazamagumi Inc. et al.*, Tokyo District Court, March 11, 2003; *Chinese victims of forced labour v. Japan and Rinko Corporation*, Niigata District

In a July 2000 judgment, the Amsterdam District Court implicitly recognized the notion of individual humanitarian rights.⁹⁹ The claimants were seeking to invoke alleged violations of article 52 of the 1977 Additional Protocol I to the 1949 Geneva Conventions during NATO's bombing against the former Yugoslavia as basis for compensation claims against members of the Dutch Government. The court rejected this claim because, in its view, such violations had not occurred.¹⁰⁰ It also clarified that rules of international humanitarian law did not protect persons against stress and tension that were consequences of the air strikes as such and did not protect persons with regard to whom the rules and norms had not been violated *in concreto*.¹⁰¹ While confining the right to invoke the rules to those who personally were the victims of violations of international humanitarian law, the court, however, recognized the possibility of deriving individual rights from international humanitarian law rules.

As regards the victims of the massacre of *Distomo*, Greek lower courts – in contrast to the German courts in subsequent related judgements¹⁰² – recognized an individual right to compensation for the atrocities committed by the German occupation forces in 1944.¹⁰³ The Greek Minister of Justice and the Higher Supreme Court ultimately refused the execution of the judgements for reasons of State immunity. The claimants then sought enforcement in Italy. Germany instituted proceedings against Italy before the International Court of Justice subsequent to various decisions denying State immunity to Germany.¹⁰⁴

The ruling of the Italian Court of Cassation in *Ferrini*¹⁰⁵ has also been interpreted as implicitly granting an individual right to reparation.¹⁰⁶

It is remarkable that these judgements stemming from events that took place during World War II have strongly been influenced by post-war developments in international human rights law and by the modern view on the right to reparation. This collides with the concept of intertemporal law, according to which no individual right to reparation could arise at the time when the violations of international law were committed, as no such individual right was at that time recognized by the majority of States.

- h. As for international jurisprudence, the International Court of Justice stated in its advisory opinion on the *Wall in the Occupied Palestinian Territory*:

“Israel has the obligation to make reparation for the damage caused to all the natural and legal persons concerned. [...] The Court considers that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction.”¹⁰⁷

The Court here abandoned the view that reparation was to be made to States with individuals as ultimate beneficiaries. Rather, it found it incumbent upon the responsible party to grant reparation directly to the individuals themselves. For this reason, the judgement has been interpreted as endorsing an individual right to reparation, even if it is drafted in the language of obligations.¹⁰⁸

Court, March 26, 2004, all cited in: S. H. Bong, *Compensation for Victims of Wartime Atrocities – Recent Developments in Japan's Case Law*, supra note 97, 196 – 198; for recent developments see M. Asada / T. Ryan, *ibid.*, 257 ff.

⁹⁹ Gerechtshof te Amsterdam, Vierde meervoudige burgerlijke kamer, *Dedovic v. Kok et al*, Judgment of 6 July 2000.

¹⁰⁰ *Ibid.*, para. 5.3.22.

¹⁰¹ *Ibid.*, para. 5.2.23.

¹⁰² German Federal Court of Justice, Judgment of June 26, 2003, NJW 2003, 3488; German Federal Constitutional Court, Decision of February 15, 2006, NJW 2006, 2542. See also ECtHR, *Kalogeropoulou and Others v. Greece and Germany*, Application No. 59021/00, Decision of 12 December 2002.

¹⁰³ *Prefecture of Voiotia v. Federal Republic of Germany*, Court of First Instance of Leivadia Case No. 137/1997, Judgment of October 30, 1997, cited in: I. Bantekas, *Prefecture of Voiotia v. Federal Republic of Germany, Case No. 137/1997, Court of First Instance of Leivadia, Greece, October 30, 1997*, 92 Am. J. Int'l L. (1998), 765. *Prefecture of Voiotia v. Federal Republic of Germany*, Hellenic Supreme Court Case No.11/2000, Judgment of May 4, 2000, cited in: M. Gavouneli / I. Bantekas, *Prefecture of Voiotia v. Federal Republic of Germany, Areios Pagos (Hellenic Supreme Court), Case No.11/2000, May 4, 2000*, 95 Am. J. Int'l L. (2001), 198.

¹⁰⁴ International Court of Justice, Press Release No. 2008/44, 23 December 2008.

¹⁰⁵ *Ferrini v. Federal Republic of Germany*, Corte Suprema di Cassazione, Decision of March 11, 2004, no. 5044/2004, para. 9, 2006 ILR 658 f. The decision was also challenged by Germany before the International Court of Justice, supra note 104.

¹⁰⁶ R. Bank / E. Schwager, *Is there a Substantive Right to Compensation for Individual Victims of Armed Conflict against a State under International Law?*, supra note 87, 380. This view has not been undisputed because the judgement primarily deals with matters of immunity.

¹⁰⁷ *Legal Consequences of the Construction of a Wall on the Occupied Palestinian Territory*, supra note 27, 198, para. 152 f.

¹⁰⁸ See E. Schwager, supra note 32, 152 ff. and R. Bank / E. Schwager, *Is there a Substantive Right to Compensation for Individual Victims of Armed Conflict against a State under International Law?*, supra note 87, 393 ff.

A further example that tends towards the recognition of an individual right to reparation can be found in the European Court of Human Rights decision in *Markovic and others*,¹⁰⁹ which entertained the possibility that

“as a result of changes in case-law, it has been possible to claim such a right since 2004.”¹¹⁰

- i. It should be noted that in most of the recent judgements where individual claims were rejected, the tribunals – be they national or international – did so on the basis of procedural aspects, such as State immunity¹¹¹ or the missing procedural capacity of the individual.¹¹² The material question of whether an individual right to reparation exists has therefore rarely been addressed on the merits.¹¹³
- j. Ad hoc claims commissions established in the aftermath of conflicts have also contributed to the development of an individual right to reparation.

Above all, mention should be made of the UNCC, which was established by the Security Council in 1991 to process claims and pay compensation for losses resulting from Iraq’s invasion and occupation of Kuwait.¹¹⁴ Its Provisional Rules for Claims procedure provided that

“a government may submit claims on behalf of its nationals”¹¹⁵.

Thus, individuals were granted a right to compensation that was to be submitted by their home State.¹¹⁶ In exceptional cases, however, private legal persons could directly submit claims to the commission, and a special procedure was put in place to process claims of stateless individuals.¹¹⁷

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

“to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals [...] of one party against the Government of the other party or entities owned or controlled by the other party.”¹¹⁸

Claims could thus be submitted by each of the parties on its own behalf or on behalf of its nationals, including both natural and juridical persons.¹¹⁹

¹⁰⁹ *Markovic and others v. Italy*, ECtHR Judgement of December 14, 2006, Application no. 1398/03.

¹¹⁰ *Ibid.*, para. 111. This assertion had been made by the claimants. In the view of the judges, the existence of a right to reparation after 2004 was however not relevant to the case, because it would not justify the conclusion that such a right already existed before.

¹¹¹ See for example *President of the Council v. Markovic*, Corte di Cassazione, Decision of June 5, 2002, no. 8157/2002, 2006 ILR 652 (655 f.); *Margellos and others v. Federal Republic of Germany*, Anotato Eidiko Dikastirio (Special Supreme Court), Judgement of 17 September 2002, cited in: M. Panezi, *Sovereign Immunity and Violation of Ius Cogens Norms*, 56 RHDI (2003), 199, 203 f., para. 14.

¹¹² See for example *President of the Council v. Markovic*, Corte Suprema di Cassazione, Decision of March 11, 2004, no. 8157/2002, 2006 ILR 652 (656); *Chinese victims of sexual violence v. Japan*, Tokyo District Court, April 24, 2003, cited in: S. H. Bong (ed.), *The Right of War Crime Victims to Compensation before National Court – Compensation for Victims of Wartime Atrocities – Recent Developments in Japan’s Case Law*, supra note 97, 200 f.

¹¹³ Exceptions concern for example the decisions rendered by the German Federal Constitutional Court in the Distomo case and in the case of the Italian Military Internees (IMI) claiming reparation. In both instances, the court held that article 3 of the 1907 Hague Convention applies only between States; it denied an individual right to reparation based on this provision. See Federal Constitutional Court, Decision of June 28, 2004, NJW 2004, 3257 (3258) and Federal Constitutional Court, Decision of February 15, 2006, NJW 2006, 2542 (2453).

¹¹⁴ UN Security Council Resolution 687 (1991), para. 18; UN Security Council Resolution 692 (1991), para. 3.

¹¹⁵ See article 5 (1) lit. a) of the Provisional Rules for Claims Procedure, UN Doc. S/AC.26/1992/10, available at: <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G92/712/76/img/G9271276.pdf?OpenElement>.

¹¹⁶ As regards persons who were not in a position to have their claims submitted by a government, the UNCC Governing Council entrusted international organisations with this task. See UNCC Governing Council, *Guidelines relating to paragraph 19 of the Criteria for Expedited Processing of Urgent Claims*, S/AC.26/1991/5, 23 October 1991.

¹¹⁷ Article 5 (3) UNCC Provisional Rules for Claims Procedure. See also H. M. Holtzmann / E. Kristjánssdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, supra note 42, 59.

¹¹⁸ See Article 5 (1) of the Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, December 12, 2000, 40 International Legal Materials (2001), 260 (262). For further details on the EECC see W. Kidane, *Civil Liability for Violations of International Humanitarian Law: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in the Hague*, 25 Wis. Int’l L. J. (2007), 23 ff.

¹¹⁹ *Ibid.*, article 5 (8). Exceptionally, governments were entitled to file claims of certain non-nationals. See H. M. Holtzmann / E. Kristjánssdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, supra note 42, 68.

An ad hoc compensation commission was also proposed to the Security Council by the International Commission of Inquiry on Darfur in 2004.¹²⁰ In its report, the Commission pointed out that

“there has now emerged in international law a right of victims of serious human rights abuses (in particular war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses.”¹²¹

- k. Codification efforts of UN bodies have shown a notable trend towards recognizing an individual right to reparation.

Principle 31 of the Updated Set of Principles to Combat Impunity, for example, states:

“Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.”¹²²

Similarly, one of the most fundamental principles of the Basic Principles provides:

“Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to the following as provided for under international law: [...] adequate, effective and prompt reparation for harm suffered.”¹²³

- l. In line with these developments, Principle 3 of the Chicago Principles on Post-Conflict Justice stipulates:

“States shall acknowledge the special status of victims, ensure access to justice, and develop remedies and reparations.”¹²⁴

In the pertinent commentary it is stated:

“Victims have the right to equal and effective access to justice, factual information concerning violations and adequate, effective and prompt reparations.”¹²⁵

- m. An individual right to reparation has also emerged in the field of international criminal law.¹²⁶ Article 75 of the Rome Statute provides that the court may award reparation while taking into account the scope and extent of any damage, injury and loss occurred.¹²⁷ Such an order can be requested by the victim who is in so far entitled to apply to the court.¹²⁸
- n. The above-mentioned developments provide strong support for the assertion that current international law endorses the entitlement of the individual to reparation for the violation of rules of international law applicable in armed conflict.¹²⁹ The Committee can find no reason why the individual, who already enjoys strong protection under international human rights law, should have a weaker position under the rules of international law

¹²⁰ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, supra note 74, paras 590-603. The Compensation Commission is also mentioned in the Darfur Peace Agreement, Art. 8 lit. (e).

¹²¹ *Ibid.*, para. 597. This passage may be criticized for equating serious human rights violations with international crimes.

¹²² *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, Commission on Human Rights, 61st. Session, February 8, 2005, E/CN.4/2005/102/Add.1.

¹²³ *Basic Principles*, supra note 39.

¹²⁴ *The Chicago Principles on Post-Conflict Justice*, supra note 40, Principle 3.

¹²⁵ *Ibid.*

¹²⁶ See C. Ferstmann, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15 LJIL (2002), 667 ff.; L. Zegveld, *Compensation for the Victims of the Chemical Warfare in Iraq and Iran*, in: C. Ferstman / M. Goetz / A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity – Systems in Place and Systems in the Making*, supra note 73, 372; G. Bitti / G. González Rivas, *The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court*, in: International Bureau of the Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes – Innovative Responses to Unique Challenges* (Oxford et al. 2006), 299 ff.; E. Kristjánsdóttir, *International Mass Claims Processes and the ICC Trust Fund for Victims*, in: C. Ferstman / M. Goetz / A. Stephens (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity – Systems in Place and Systems in the Making*, supra note 73, 167 ff.; L. Zegveld, *Victims’ Reparations Claims and International Criminal Courts*, 8 J. Int’l Crim. Just. (2010), 79 ff.

¹²⁷ See Article 75 of the Rome Statute, available under: <http://www.un.org/law/icc/statute/romefra.htm>; article 24 (3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and article 23 (3) of the Statute of the International Criminal Tribunal for Rwanda (ICTR) contain similar rules. .

¹²⁸ See Rule 94 of the Rules of Procedure and Evidence of the ICC.

¹²⁹ See supra note 89.

applicable in armed conflict. This would create perverse incentives for parties to armed conflicts. The Committee therefore strongly encourages an ongoing cross-fertilization between the different regimes of international law.

Collective reparation

- o. The concept of collective reparation has been even less explored than the right to individual reparation.¹³⁰ Still, there are some developments that indicate that international law endorses collective reparation.
- p. The Inter-American Court of Human Rights has repeatedly awarded reparation to collectives. In *Moiwana v. Suriname*, for example, it held:

“Given that the victims of the present case are members of the N’duka culture, this Tribunal considers that the individual reparations to be awarded must be supplemented by communal measures; said reparations will be granted to the community as a whole.”¹³¹

- q. Likewise, truth commissions have emphasized the need of collective reparation. Examples include the recommendations of the truth commissions for Peru,¹³² Guatemala,¹³³ Sierra Leone¹³⁴ or Timor-Leste.¹³⁵ The growing use of truth commissions in many parts of the world renders these national mechanisms significant for the assessment of a right to collective reparation under international law.
- r. The concept of collective reparation has also been endorsed in several soft law principles. In the Preamble to the Basic Principles, the General Assembly for example notes that

“contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups who are targeted collectively”.¹³⁶

The Basic Principles’ definition of victims accordingly includes persons who are harmed collectively. In a similar vein, article 32 of the Updated Set of Principles to Combat Impunity stipulates that

“Reparations may also be provided through programmes [...] addressed to individuals and to communities.”¹³⁷

- s. Collective reparations also receive support from the Rules of Procedure and Evidence of the International Criminal Court (ICC) which envision that the Court may order reparation “on a collective basis” and that where appropriate a “collective award” can be made through the Trust Fund.¹³⁸
- t. The Committee takes note of these developments. It emphasizes that the present Declaration should in principle also apply to collective reparation while strongly encouraging further development of this concept.

- (3) As regards the content of the right to reparation, the present Declaration does not specify which standard is to be observed. The Committee suggests that the following considerations guide the determination of the extent of reparation.

¹³⁰ See F. Rosenfeld, *Collective Reparation for Victims of Armed Conflict*, 92 No. 879 IRRC (2010), doi: 10.1017/S1816383110000494, published online by Cambridge University Press; P. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 Mich. L. Rev. (2004), 1152 (1182); N. Roth-Arriaza, *Reparations Decisions and Dilemmas*, 27 Hastings Int’l L. & Comp. L. Rev. (2004), 151 (181); S. Vandeginste, *Reparation*, in: D. Bloomfield et al. (ed.), *Reconciliation After Violent Conflict: A Handbook* (Stockholm: IDEA Handbook Series, 2003), p. 145, 147; L. J. Laplante, ‘*On the indivisibility of rights: truth commissions, reparations, and the right to development*’, Yale Hum. Rts. & Dev. L.J. (2007) 10: 159 ff. See also the publication of the Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States – Reparation Programmes*, p. 19 ff., available at: <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf> (accessed 27 April 2010). For further references on group rights see P. Jones, *Group Rights*, The Stanford Encyclopedia of Philosophy (Winter 2008 Edition), available at: <http://plato.stanford.edu/entries/rights-group/#Bib> (accessed 27 April 2010).

¹³¹ IACtHR, *Case of the Moiwana Community v. Suriname*, Judgement of June 15, 2005 (Preliminary Objections, Merits, Reparations and Costs), para. 194. For a further example see IACtHR, *Case of the Mayagna (Sumo) Awas Tingi Community v. Nicaragua*, Judgement of August 31, 2001 (Merits, Reparations and Costs).

¹³² *Peruvian Truth and Reconciliation Commission, Plan of Integral Reparations (PIR)*, June 2003, para. 3.6., available at: <http://www.cverdad.org.pe/> (accessed 27 April 2010).

¹³³ *Guatemala, Memory of Silence, Report of the Commission for Historical Clarification, Conclusions and Recommendations*, Recommendations, III, para. 10, available at: <http://shr.aas.org/guatemala/ceh/report/english/toc.html> (accessed 27 April 2010).

¹³⁴ Final Report of the Truth & Reconciliation Commission of Sierra Leone, Vol. 2, Chapter 4, Reparations, para. 27, available at: <http://trcsierraleone.org/> (accessed 27 April 2010).

¹³⁵ *Chega!*, *Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR)*, available at: <http://www.cavr-timorleste.org/en/cheгаReport.htm> (accessed 27 April 2010), para. 12.7

¹³⁶ *Basic Principles*, supra note 39.

¹³⁷ *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, supra note 122, Principle 32.

¹³⁸ Rules 97 and 98 Rules of Procedure and Evidence of the International Criminal Court (ICC).

- a. From the perspective of the individual victim, it is in principle desirable to receive full reparation. Thus, full reparation might best approximate the aim of reparation to eliminate all the harmful consequences of a violation of rules of international law applicable in armed conflict. An obligation to make full reparation is also expressed in article 31 of the ILC Draft Articles on State Responsibility.
- b. Due to the large number of victims in the aftermath of many conflicts this obligation might not always be fulfilled. Full and prompt reparation to every victim might surpass the economic capacities of the responsible party.¹³⁹ This could have destabilizing effects in the post-conflict phase. Furthermore, an individualized assessment of every victim's case can cause enormous delays and strains on resources.¹⁴⁰ A collective claims settlement might in such situations prove to be the best available solution.¹⁴¹
- c. International law does not at present provide a clear rule on how to reconcile the conflicting interests of promptness and due process, full reparation and equal treatment of all victims. Article 42(4) of a prior draft of the ILC Articles on State Responsibility stipulated:

“In no case shall reparation result in depriving the population of a State of its own means of subsistence.”¹⁴²

Using the language of article 1(2) common to the ICCPR and ICESPR, that early draft was intended to take due account of the dangers which full reparation might imply for a post-conflict society trying to rehabilitate itself. The draft was finally rejected after ILC Members pointed out that the population of the injured State would be similarly disadvantaged by a failure to make full reparation.¹⁴³ Under Article 25 of the final Draft Articles on State Responsibility the non-performance of obligations can be excused only under very limited circumstances.¹⁴⁴

- d. In spite of this, there is considerable State practice supporting the view that the non-performance of the obligation to make full reparation might be justified in immediate post-conflict situations. The Ethiopia Eritrea Claims Commission, for example, held:

“[T]he Commission could not disregard the possibility that large damages awards might exceed the capacity of the responsible State to pay or result in serious injury to its population if such damages were paid. It thus considered whether it was necessary to limit its compensation awards in some manner to ensure that the ultimate financial burden imposed on a Party would not be so excessive, given its economic condition and its capacity to pay, as to compromise its ability to meet its people's basic needs.”¹⁴⁵

In support of this approach, it pointed at human rights considerations¹⁴⁶ as well as the function of reparation, emphasizing that reparation has a remedial and not a punitive function.¹⁴⁷

- e. In a similar vein, Security Council Resolution 687 establishing the UNCC requested the Secretary-General to develop

“mechanisms for determining the appropriate level of Iraq's contribution to the Fund [...] taking into account the requirements of the people of Iraq, Iraq's payment capacity [...] and the needs of the Iraqi economy”.¹⁴⁸

¹³⁹ M. Eichhorst, *Rechtsprobleme der United Nations Claims Commission* (Berlin 2002), 108; C. Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations*, in: A. Randelzhofer / C. Tomuschat (ed.), *State responsibility and the individual: reparation in instances of grave violations of human rights*, supra note 82, 1 (21); M. Reisman, *Compensation for Human Rights Violations: The Practice of the Past Decade in the Americas*, in: A. Randelzhofer / C. Tomuschat (ed.), *State responsibility and the individual: reparation in instances of grave violations of human rights*, supra note 82, 63 (67).

¹⁴⁰ J. Hagelberg, *Die völkerrechtliche Verfügungsbefugnis des Staates über Rechtsansprüche von Privatpersonen* (Baden - Baden 2006), 136; H. Das, *The Concept of Mass Claims*, in: International Bureau of the Permanent Court of Arbitration (ed.), *Redressing Injustices through Mass Claims Processes – Innovative Responses to Unique Challenges* (Oxford et al. 2006), 3 (5).

¹⁴¹ On the importance of collective claims settlement see C. Tomuschat, *Darfur – Compensation for the Victims*, 3 J. Int'l Crim. Just. (2005), 579 (586) and idem, *Reparation in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law*, in: M. Cohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law - Liber Amicorum Lucius Caflisch* (Leiden 2007), 569 (590). For further reference see also H.M. Holtzmann / E. Kristjánsdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, supra note 42, N. Wühler / H. Niebergall, *Property Restitution and Compensation*, (Geneva 2008) and P. de Greiff, *The Handbook of Reparations* (Oxford 2006).

¹⁴² Report of the International Law Commission on the work of its forty-eighth session, 6 May – 26 July 1996, UN Doc. A/51/10, 66.

¹⁴³ Third report on State responsibility, International Law Commission, 52nd session, A/CN.4/507, p. 19, para. 38 ff.

¹⁴⁴ J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, supra note 4, 178 ff.

¹⁴⁵ Ethiopia Eritrea Claims Commission, Final Award between the State of Eritrea and the Federal Democratic Republic of Ethiopia, Eritrea's Damages Claims, 17 August 2009, para. 22.

¹⁴⁶ *Ibid.*, paras 20 f.

¹⁴⁷ *Ibid.*, para. 26.

- f. Likewise, the arbitral tribunal in the *Russian Indemnity Case* accepted that, in principle, an extremely difficult financial situation could justify a delay in payment.¹⁴⁹
- g. In various lump sum agreements concluded in the aftermath of conflicts,¹⁵⁰ account has been taken of the economic capacities of the responsible State. For example, the parties to the San Francisco Treaty of Peace with Japan of 20 January 1951 recognized

“that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations”.¹⁵¹

Important considerations militate against affording lump sum agreements too much weight for the purposes of the present Declaration. First, such agreements were concluded on the underlying premise that only States were entitled to compensation and that therefore States alone could dispose of their claims.¹⁵² It is questionable whether under contemporary international law a State still has treaty-making power with regard to claims of individuals.¹⁵³ Secondly, in *Barcelona Traction*, the ICJ hesitated to qualify lump sum agreements as a source of law.¹⁵⁴ The Iran-United States Tribunal similarly ruled in *INA Corp. v. Iran* that such agreements

“are not motivated by *opinio iuris*, but rather are generally products of the particular prevailing social, economic, and political constraints bearing on the parties.”¹⁵⁵

- h. In sum, there are good reasons for arguing that the extent of reparation should be determined on a case-by-case basis.

The Committee could not find a definite answer as to whether Article 25 of the ILC Draft Articles on State Responsibility is a sufficient legal basis to justify the non-performance of the obligation to make full reparation in post-conflict-situations. In any case, considerations of international human rights law as well as the principle of non-discrimination as enshrined in common article 3(1) of the 1949 Geneva Conventions and in article 12 of the 1949 Geneva Convention I should be considered when determining the extent of reparation.

- (4) As regards the obligated party, article 6 clarifies that victims have a claim against the responsible party. This does not preclude that other actors might also have obligations towards victims. Section IV addresses, for example, the obligations of other States and the international community.

ARTICLE 7 *Restitution*

Restitution consists of measures that re-establish the situation which existed before the violation of rules of international law applicable in armed conflict occurred.

¹⁴⁸ S/Res/687 of April 3, 1991, para. 19; see also J. Crook, *The UN Compensation Commission: What Now?*, 5 Int'l L. FORUM 2003, 276 (277, 278).

¹⁴⁹ *Russian Indemnity*, 1912 UNRIAA, vol. XI, 431 (443).

¹⁵⁰ J. Hagelberg, *Die völkerrechtliche Verfügungsbefugnis des Staates über Rechtsansprüche von Privatpersonen*, supra note 140, 103 ff. See also R. Lillich / B. Weston / H. Burns, *International Claims: Their Settlement by Lump Sum Agreements, Part II: The Agreements* (Charlottesville, 1975).

¹⁵¹ Article 14 (a) Treaty of Peace with Japan. UNTS 1952 (reg. No. 1832), vol. 136, 45 – 164.

¹⁵² On the treaty making power of States under traditional international law, see H. Kelsen, *Principles of International Law*, supra note 82, 145 f.: “Rights of individuals not only may be established but also be abolished by a treaty. Since the state under general international law has lawmaking power with respect to its nationals, it may, in a treaty concluded with another state, dispose of the rights, especially of the property rights of its nationals.”

¹⁵³ A. Gattini, *To What Extent Are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages?*, 1 J. Int'l Crim. Just. (2003), 348 (350); H. van Houette / B. Delmartino / I. Yi, *Post-War Restoration of Property Rights under International Law, Vol. I: Institutional Features and Substantive Law*, supra note 4, 304.

¹⁵⁴ *Case Concerning the Barcelona Traction, Light and Power Company Limited*, ICJ, Judgement of February 5, 1970, para. 61. For a critique see R. Lillich / B. Weston / H. Burns, *International Claims: Their Settlement by Lump Sum Agreements*, supra note 150, 12 ff. See also B. W. Eichhorn, *Reparation als völkerrechtliche Deliktshaftung, Rechtliche und praktische Probleme unter besonderer Berücksichtigung Deutschlands (1918 – 1990)* (Baden-Baden, 1992), 112.

¹⁵⁵ 1985 Iran-U.S. Claims Tribunal Rep. 399.

Commentary

- (1) Article 7 explains the concept of restitution. The definition is in line with article 35 ILC Draft Articles on State Responsibility, but unlike that article, article 7 does not determine the interplay of restitution with other forms of reparation.
- (2) As regards the definition of restitution, it is important to note that restitution only seeks to re-establish the *status quo ante*, that is the situation prior to the violation of international law. This standard is narrower than the standard for reparation under article 1. Thus, it does not require a comparison of the current situation with the hypothetical situation that would exist had the violation of international law not taken place. Differences between the two approaches might for example exist, where property has changed in value or in substance.¹⁵⁶

Consistent with article 35 ILC Draft Articles on State Responsibility, Committee members opted for the narrow approach. They did so in order to clearly trace the line between restitution and compensation. At the same time, they stressed that restitution might have to be complemented by other forms of reparation to eliminate all the negative consequences of the violation of international law. Further, they emphasized that a victim's present situation may be considered for prioritizing a particular claim.

Particular care has to be observed in determining the status quo ante. An abstract approach which merely considers the victim's economic situation is not sufficient to protect the integrity of his or her legal interests. Therefore, a concrete approach which focuses on the victim's individual legal interests has to be taken. Unlike compensation restitution thus generally does not consist in monetary payment. Rather, it encompasses measures such as the return of movable and immovable property and persons.¹⁵⁷

- (3) As regards the interplay of restitution with other forms of reparation, the Committee members took note of the fact that article 35 ILC Draft Articles on State Responsibility stipulates a primacy of restitution. Under that article restitution has to be made provided and to the extent that it
 - (a) Is not materially impossible; [and]
 - (b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.”

Committee members agreed that as a matter of logic, restitution can only be made provided and to the extent it is not impossible.¹⁵⁸ Moreover, they did not exclude the possibility of a responsible party being able to invoke the principle of proportionality in cases where the burden imposed is out of proportion to the benefit gained by the victim.

At the same time, Committee members had doubts as to whether a strict rule on the interplay of different forms of reparation can be formulated. Thus, they considered that there are also situations where restitution is of no real benefit for the victim. Refugees and Internally Displaced Persons, for example, might have no interest in returning to a location where emotionally painful and traumatic events have taken place. Such a situation was also envisaged by Hans van Houtte, who stated in his capacity as Chairman for Legal Issues of the Property Claims Commission in Bosnia – Herzegovina:

“Whenever refugees or displaced persons could not envisage returning home, inter alia because they continued to fear ethnic animosity, they should be entitled to just compensation.”¹⁵⁹

Committee members also noted that some authorities suggest that victims have a right of free choice between the different forms of reparation.¹⁶⁰ In the absence of definite and unambiguous standards on this issue, the Committee

¹⁵⁶ See H. van Houtte / B. Delmartino / I. Yi, *Post-War Restoration of Property Rights under International Law, Vol. I: Institutional Features and Substantive Law*, supra note 4, 287.

¹⁵⁷ Cf. for example the legal framework for the real property commission in Kosovo as specified in UNMIK Regulation 2000/60 of 31 October 2000.

¹⁵⁸ See for example *British Claims in the Spanish Zone of Morocco*, 1925 UNRIAA, vol. II, 615 (621-625, 651-742); *Religious Property Expropriated by Portugal*, 1920 UNRIAA, vol. I, 7 (11-16); *Walter Fletcher Smith*, 1927 UNRIAA, vol. II, 913 (918); *Heirs of Lebas de Courmont*, 1957 UNRIAA, vol. XIII, 761 (764); *Forests of Central Rhodope*, 1933 UNRIAA, vol. III, 1405 (1432).

¹⁵⁹ H. van Houtte, *The Property Claims Commission in Bosnia-Herzegovina – A New Path to Restore Real Estate Rights in Post-War Societies*, in: K. Wellens (ed.), *International Law: Theory and Practice – Essays in Honour of Eric Suy* (The Hague 1998), 549 (550).

¹⁶⁰ Such a right to choose freely between compensation and restitution was formally acknowledged in Annex 7 Article I of the Dayton Peace Agreement. In practice, however, the provision was not implemented. Annex 7 Article I met with strong criticism by international donors who made every effort to assist refugees in returning home instead of funding provisions permitting compensation for those who did not wish to return. See R. C. Williams, *Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard – Setting and Practice*, 37 N.Y.U. J. Int'l L. & Pol. (2006), 441 (454); E. Rosand, *The Right to Compensation in Bosnia: An Unfulfilled Promise and a Challenge to International Law*, 33 Cornell Int'l L. J. (2000), 113 (130 ff.); M. Cox, *The Right to*

decided not to address the interplay of the different forms of reparation in the present Declaration but rather to leave it to be determined in each case.

ARTICLE 8 *Compensation*

Compensation covers any financially assessable damage.

Commentary

- (1) Article 8 addresses compensation, which represents the most commonly awarded form of reparation. The provision is in line with article 36 ILC Draft Articles on State Responsibility, but unlike that article, article 8 does not determine the interplay of compensation with other forms of reparation and does not include a reference to loss of profits.¹⁶¹
- (2) Compensation consists in monetary payment.¹⁶² Being the most common medium of exchange, monetary payment serves as a highly effective form of compensation. Such payment may only be awarded, however, if the damage can be expressed in financial terms. Specific parameters of such assessment have to be determined in each particular case.¹⁶³
- (3) In line with the Committee's approach not to address the standard for reparation, article 8 does not address the standard for compensation either. For the same reason, it does not explicitly mention loss of profits. As a general rule, the Committee emphasizes that compensation is victim-centered; its function is not to penalise the responsible party.¹⁶⁴ The Committee takes note of the fact that international tribunals have relied on the principle of commensurability to determine the appropriate amount of compensation. Thus, the arbitral tribunal in the *Lusitania* case stated:

“The fundamental concept of ‘damages’ is [...] reparation for a loss suffered; judicially ascertained compensation for wrong. The remedy should be commensurate with the loss, so that the injured party may be made whole.”¹⁶⁵

- (4) Interest may be awarded as a proper element of compensation. The obligation to pay interest is well established in international law. The Iran-United States Tribunal, for example, ruled that

“claims for interest are part of the compensation sought and do not constitute a separate cause of action requiring their own independent jurisdictional grant.”¹⁶⁶

Similarly, Decision 16 of the UNCC Governing Council provided that

“[i]nterest will be awarded from the date the loss occurred until the date of payment, at a rate sufficient to compensate successful claimants for the loss of use of the principal amount of the award.”¹⁶⁷

Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina, 47 Int'l Comp. & L. Q. (1998), 599 (611 ff.); H. Das, *Restoring Property Rights in the Aftermath of War*, 53 Int'l Comp. & L. Q. (2004), 429 (433, 441 – 442).

¹⁶¹ See also the commentary to article 7.

¹⁶² See E.-C. Gillard, *Reparation for violations of international humanitarian law*, supra note 89, 531. For a different view see J. de Preux, Art. 91, in: Y. Sandoz et al. (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva 1987), 1056, para. 3655, who suggests that compensation may also be awarded in the form of services.

¹⁶³ F. H. Paolillo, *On Unfulfilled Duties: the Obligation to Make Reparation in Cases of Violation of Human Rights*, in: V. Götz et al. (ed.), *Liber amicorum Günther Jaenicke – Zum 85. Geburtstag* (Berlin et al. 1998), 291 (306). For examples see J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, supra note 4, 220 f. See also B. Graefrath, *Responsibility and Damages Caused: Relationship between Responsibility and Damages*, supra note 56, 98 f. For further information on how to assess the harm suffered see H. van Houtte / B. Delmartino / I. Yi, *Post-War Restoration of Property Rights under International Law, Vol. I: Institutional Features and Substantive Law*, supra note 4, 292 ff.

¹⁶⁴ See *Ethiopia Eritrea Claim Commission, Final Award between The Federal Democratic Republic of Ethiopia and The State of Eritrea, Ethiopia's Damages Claims*, 17 August 2009, para. 29; Velásquez Rodríguez (*Compensation*), Inter-AmCtHR, Series C, No. 7 (1989), p. 52. See also W. Heintschel von Heinegg, *Entschädigungen für Verletzungen des humanitären Völkerrechts*, in: Deutsche Gesellschaft für Völkerrecht (ed.), *Entschädigung nach bewaffneten Konflikten/Die Konstitutionalisierung der Welthandelsordnung* (Heidelberg 2003), 32, and B. Graefrath, *Responsibility and Damages Caused: Relationship between Responsibility and Damages*, supra note 56, 101 f. For a different view see S. Rosenne, *War Crimes and State Responsibility*, in: Y. Dinstein / M. Tabory (ed.), *War Crimes in International Law* (The Hague et al. 1996), 65 (101). For a general reappraisal of punitive damages in international law see N. Jørgensen, *A Reappraisal of Punitive Damages in International Law*, 68 BYIL (1997), 247 ff.

¹⁶⁵ *Lusitania Case*, 1923 UNRIIAA, vol. VII, 32 (39).

¹⁶⁶ 1987 Iran-U.S. Claims Tribunal Rep. 285 (289).

¹⁶⁷ *Decision 16*, Awards of Interest, January 4, 1993, S/AC.26/1992/16. Given the unavailability of funds, the UNCC Governing Council finally took the decision to take no further action with respect to the issue of awards of interests. See UNCC Governing Council, *Awards of interest*, 10 March 2005, S/AC.26/Dec.243 (2005).

According to article 38 of the ILC Draft Articles on State Responsibility:

- “1. Interest on any principal sum payable under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.
2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.”

There are no internationally recognized uniform standards for calculating the interest due.¹⁶⁸

ARTICLE 9 *Satisfaction*

1. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
2. Satisfaction shall not be out of proportion to the harm.

Commentary

- (1) Article 9 addresses satisfaction. The provision is in line with article 37 ILC Draft Articles on State Responsibility, but unlike that article does not determine the interplay of satisfaction with other forms of reparation.¹⁶⁹ Besides, it does not stipulate that satisfaction shall not take a form humiliating the responsible party. By adhering to the language of the ILC, the Committee does not intend to exclude other forms of satisfaction such as those mentioned in the Basic Principles.¹⁷⁰
- (2) Article 9(1) explains the concept of satisfaction. Two elements characterize every form of satisfaction. First, there must be harm which cannot be expressed in financial terms. Second, the chosen measure of satisfaction must contribute to alleviating the harm. A wide range of measures may fall under this definition, some of which are enumerated in a non-exhaustive manner in article 9(1).

The first example is an acknowledgement of a breach. This form of satisfaction typically consists in establishing the facts of a violation of international law and in the responsible party accepting responsibility.

In order to establish the facts of a violation of international law, measures such as due inquiry, fact-finding or an investigation may be necessary.¹⁷¹ Establishing public knowledge of the suffering and the truth about perpetrators has been recognized as an essential step towards rehabilitation and reconciliation.¹⁷² This is also confirmed by the Basic Principles, which consider verification of the facts and full and public disclosure of the truth as an element of satisfaction.¹⁷³

Once the facts have been established, the responsible parties may be obliged to accept responsibility. The UN Sub-Commission on the Promotion and Protection of Human Rights has stressed the importance of accepting responsibility.¹⁷⁴

¹⁶⁸ See 1987 Iran-U.S. Claims Tribunal Rep. 285 (290). See also B. Graefrath, *Responsibility and Damages Caused: Relationship between Responsibility and Damages*, supra note 56, 98, and J. Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, supra note 4, 238 f. See also H.M. Holtzmann / E. Kristjánssdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, supra note 42, 281 ff.; G. H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal. An Analysis of the Decisions of the Tribunal* (Oxford 1996), 474 ff.; C. N. Brower / J. D. Brueschke, *The Iran-United States Claims Tribunal* (The Hague 1998), 620 ff.

¹⁶⁹ See also the Commentaries to Articles 7 and 8.

¹⁷⁰ See *Basic Principles*, supra note 39, para. 22.

¹⁷¹ On due inquiry as a form of satisfaction see *Velásquez Rodríguez*, Inter-Am.Ct.H.R., Judgement of July 29, 1988, Series C, No. 7 (1989), para. 177, 181; *Barríos Altos*, Inter-Am.Ct.H.R., Judgement of May 14, 2001, Series C, No. 75 (2001), para. 5; *Laureano v. Peru*, Communication No. 540/1993, *Hum. Rts. Com*, 56th Session, para. 8.3; UN Doc. CCPR/C/56/D/540/1993 (1996). See also ECtHR, Grand Chamber, *Case of Nachova and Others v. Bulgaria*, Applications nos. 43577/98 and 43579/98, Judgement, 6 July 2005, para. 110 on the duty to investigate under Article 2 of the Convention. Arguably, such a duty to investigate constitutes a primary obligation. The Committee does not intend to blur the distinction between primary and secondary obligations. See also supra note 23.

¹⁷² See UNCHR Res. 2001/70, April 25, 2001, E/CN.4/RES/2001/70, para. 8; UNCHR Res. 2002/79, April 25, 2002, E/CN.4/RES/2002/79, para. 9; UNCHR Res. 2003/72, April 25, 2003, E/CN.4/RES/2003/72, para. 8; see also M. C. Bassiouni, *International Recognition of Victims' Rights*, 6 *Hum. Rts. L. Rev.* (2006), 203 (275 f.).

¹⁷³ *Basic Principles*, supra note 39, para. 22.

¹⁷⁴ UNSubCHR Res. 2002/5, August 12, 2002. E/CN.4/SUB.2/RES/2002/5, para. 3.

Expressions of regret and public apologies¹⁷⁵ are examples of satisfaction, which represent a further step towards the victims. In their utmost form, they may take the form of a plea for forgiveness.¹⁷⁶

Other forms of satisfaction might include measures such as disciplinary or criminal trials of individual responsible parties or the award of symbolic damages.¹⁷⁷ Guarantees of non-repetition, which are dealt with in article 10, may also amount to a form of satisfaction.¹⁷⁸ The reasons for dealing with them separately are explained in article 10.

The different forms of satisfaction can be combined depending on the circumstances of each particular case. Thus, an acknowledgment of a breach is often made simultaneously with an expression of regret or a public apology. For example, the International Commission of Inquiry on Darfur stressed that

„[d]epending on the specific circumstances of each case, reparation may take the form of [...] satisfaction including a public apology with acknowledgment of the facts and acceptance of responsibility“¹⁷⁹

- (3) Article 9(2) takes account of the detrimental effects which satisfaction can potentially have for the responsible party and thereby also on the likelihood of lasting reconciliation. This caveat makes clear that satisfaction should not be disproportionate. Unlike article 37 ILC Draft Articles on State Responsibility, it does not explicitly stipulate that satisfaction shall not take a form humiliating the responsible party. The Committee thereby takes into account that there are too many situations where responsible parties might claim to be humiliated by reparation. To accommodate such subjective perceptions risks unduly limiting the right to reparation.

ARTICLE 10

Assurances and Guarantees of Non-Repetition

The responsible party is under an obligation to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.

Commentary:

- (1) Article 10, which is drafted in line with article 30 ILC Draft Articles on State Responsibility, introduces assurances and guarantees of non-repetition as the fourth form of reparation. These measures, which could be considered as a form of satisfaction, seek to ensure the future performance of international obligations. Their focus on the future is the reason for dealing with them separately.¹⁸⁰
- (2) Assurances of non-repetition are given verbally – often, they are made to the public. As an example for an assurance of non-repetition, one might adduce the *LaGrand* case, where the ICJ held:
- “the commitment expressed by the United States to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), must be regarded as meeting Germany’s request for a general assurance of non-repetition.”¹⁸¹
- (3) Guarantees of non-repetition consist of acts other than verbal expressions. The Basic Principles list the following examples of such guarantees:

¹⁷⁵ See Resolution S/2004/616 para. 54 and R. B. Bilder, *The Role of Apology in International Law and Diplomacy*, 46 Va. J. Int’l L. (2006), 433 (449). See also E. Roxstrom / M. Gibney, *The Status of State Apologies*, 23 Hum. Rts. Q. (2001), 911 ff. For the opposite view see S.M. Sullivan, *Changing the Premise of International Legal Remedies: The Unfounded Adoption of Assurances and Guarantees of Non-Repetition*, 7 UCLA J. Int’l L. & Foreign Aff. (2002-2003), 265 (271).

¹⁷⁶ See E. Roxstrom / M. Gibney, *The Status of State Apologies*, supra note 175, 911 (935).

¹⁷⁷ See also *Basic Principles*, supra note 39, para. 22; E. C. Gillard, *Reparations for violations of international humanitarian law*, supra note 89, 531 f.; A. Gattini, *To What Extent Are State Immunity and Non-Justiciability Major Hurdles to Individuals’ Claims for War Damages?*, supra note 153, 367; N. Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 Hastings Int’l & Comp. L. Rev. (2004), 157 (159); UNCHR Res E/CN.4/RES/2001/70, 2002/79, 2003/72; *Cesti Hurtado v. Peru*, Inter-AmCtHR, Series C No. 78 (2001), para. 51; *Trujillo Oroza v. Bolivia*, Inter-AmCtHR, Series C No. 92 (2002), para. 92, 93 lit.d), 118, 119. On the reparative effect of victims’ participation in international criminal law see J. de Hemptinne, *Challenges Raised by Victims’ Participation in the Proceedings of the Special Tribunal for Lebanon*, 8 J. Int’l Crim. Just. (2010), 165 ff.

¹⁷⁸ See J. Crawford, *The International Law Commission’s Articles on State Responsibility, Introduction, Text and Commentaries*, supra note 4, 233.

¹⁷⁹ *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, supra note 74, para. 599.

¹⁸⁰ See J. Crawford, *The International Law Commission’s Articles on State Responsibility, Introduction, Text and Commentaries*, supra note 4, 199.

¹⁸¹ *LaGrand (Germany v. United States of America)*, supra note 84, para. 124.

- a. Ensuring effective civilian control of military and security forces;
- b. Ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality;
- c. Strengthening the independence of the judiciary;
- d. Protecting persons in the legal, medical and health-care professions, the media and other related professions and human rights defenders;
- e. Providing, on a priority and continued basis, human rights and international humanitarian law education to all sectors of society and training for law enforcement officials as well as military and security force;
- f. Promoting the observance of codes of conduct and ethical norms, in particular international standards, by public servants, including law enforcement, correctional, media, medical, psychological, social service and military personnel, as well as by economic enterprises
- g. Promoting mechanisms for preventing and monitoring social conflicts and their resolution;
- h. Reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of humanitarian law.”¹⁸²

SECTION III

Obligations of Responsible Parties

ARTICLE 11

Obligation to Strengthen the Rights of Victims

1. Responsible parties shall make every effort to give effect to the rights of victims to reparation.
2. They shall establish programmes and maintain institutions that facilitate access to reparation, including possible programmes addressed to persons affected by armed conflicts other than the victims defined in this Declaration.

Commentary

- (1) Stated in broad terms, article 11(1) contains a general obligation to give effect to the rights of victims. Taking account of the dissociation of rights and enforcement mechanisms in international law, this provision represents a necessary complement to the victims’ right to reparation as set out in article 6.¹⁸³
- (2) Article 11(2) clarifies that programmes, procedures, and institutions have to be maintained or established in order to provide prompt reparation.¹⁸⁴ The importance of reparation programmes has been emphasized by the Secretary-General of the United Nations in his report “The rule of law and transitional justice in conflict and post-conflict societies”:

“Programmes to provide reparations to victims for harm suffered can be effective and expeditious complements to the contributions of tribunals and truth commissions, by providing concrete remedies, promoting reconciliation and restoring victims’ confidence in the State.”¹⁸⁵

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

“Reparations may also be provided through programmes, based upon legislative or administrative measures, funded by national or international sources, addressed to individuals and communities.”¹⁸⁶

Importantly, article 11(2) calls upon the responsible parties to include persons affected by armed conflicts other than the victims defined in this Declaration. Article 11(2) thereby acknowledges that a broad range of persons might be negatively affected by armed conflicts. An example are persons who suffer harm from lawful conduct.¹⁸⁷

¹⁸² *Basic Principles*, supra note 39, para. 23.

¹⁸³ See also M. C. Bassiouni, *International Recognition of Victims’ Rights*, supra note 172, 232.

¹⁸⁴ See S. Furuya, *Draft Model Statute of an Ad Hoc International Compensation Commission*, in: International Law Association (ed.), *Report of the 73rd Conference Rio de Janeiro* (London 2008), 500 ff. See also M. Rau, *State Liability for Violations of International Law Humanitarian Law – The Distomo Case Before the German Federal Constitutional Court*, 7 No. 7 German Law Journal (2006), 701 (720) who stresses the need of establishing compensation commissions.

¹⁸⁵ Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, August 23, 2004, S/2004/616, para. 54.

¹⁸⁶ Updated Set of principles for the protection and promotion of human rights through action to combat impunity, supra note 122.

¹⁸⁷ See supra para. (3) of the Commentary to Article 4.

SECTION IV
Obligations of the International Community and States

ARTICLE 12
Promotion of Justice, Peace and Reconciliation

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

Commentary

- (1) Stated in broad terms, article 12(1) appeals to the international community to provide assistance during and in the wake of armed conflicts. This provision is based on the premise that the protection of justice, peace and reconciliation is a concern of the entire international community. This idea is enshrined in common article 1 of the 1949 Geneva Conventions. At the same time, it takes due account of the factual impediments to transitional justice. Fragile post-conflict societies struggling with a lack of resources or a power-vacuum will often be dependent on the assistance of the international community.
- (2) Article 12(2) gives an example of means by which this end shall be pursued.¹⁸⁸ Fostering a culture of rule of law serves two distinct but equally important functions. On the one hand, it helps victims once a violation of international law has taken place. On the other hand, it seeks to prevent future violations of international law.

The pivotal role of the rule of law has constantly been stressed in international instruments. One prominent example is principle 32 of the Updated Set of principles for the protection and promotion of human rights through action to combat impunity,¹⁸⁹ which provides:

“States shall ensure that victims do not again have to endure violations of their rights. To this end, States must undertake institutional reforms and other measures necessary to ensure respect for the rule of law, foster and sustain a culture of respect for human rights, and restore or establish trust in government institutions.”

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

“While the international community is obliged to act directly for the protection of human rights and human security where conflict has eroded or frustrated the domestic rule of law, in the long term, no ad hoc, temporary or external measures can ever replace a functioning national justice system.”¹⁹⁰

ARTICLE 13
Reparation under National Law

Notwithstanding and without prejudice to the rights set out in the present Declaration, States shall assure that victims have a right to reparation under national law. Nothing in this article shall affect or limit any right of victims or other persons to reparation that may already exist under national law.

Commentary

- (1) Article 13 calls upon States to develop remedies under domestic law for victims of violations of the law of armed conflict.¹⁹¹ The underlying premise of this article is that notwithstanding the rights reflected in the present Declaration,

¹⁸⁸ For further examples see the publication of the Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States – Reparation Programmes*, supra note 130, p. 39 ff.

¹⁸⁹ *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, Commission on Human Rights, supra note 122.

¹⁹⁰ Report of the Secretary-General, supra note 185, para. 34.

the concurrent application of domestic reparation provisions might strengthen the rights of victims. Article 13 makes clear that such additional remedies should be without prejudice to the rights reflected in the Declaration. In particular, there should be no obligation to exhaust local remedies before claiming reparation under international law. Article 13 is moreover without prejudice to already existing rights under national law.

- (2) There are some legal orders which already provide victims of armed conflict with a remedy. In *Bici & Bici v. Ministry of Defence*, the British High Court of Justice ruled for example that soldiers of the British army were responsible under national law for injurious acts committed during a peacekeeping operation in Kosovo.¹⁹² In a similar vein, U.S. courts acknowledge claims against soldiers for illegal acts committed during armed conflict. Already in *Little v. Barreme*, it was for example held that officers bear responsibility for the execution of illegal commands despite the existence of a military chain of command.¹⁹³

In most legal orders, claims brought directly against the State have traditionally been denied.¹⁹⁴ Often, it is argued that private law as such is not applicable at all, or is suspended, during armed conflict.¹⁹⁵ The Committee takes the view that such rigid approaches are to the detriment of victims. It recommends that States develop effective remedies for victims in their national legal orders. Already existing remedies should be improved with a view to strengthening the rights of victims and their access to remedies.

Such an obligation to provide for domestic remedies is nothing unfamiliar to international law. Under international human rights law, States are obliged to provide for a remedy in case a violation has occurred.¹⁹⁶ Similarly, the Declaration of Basic Principles for Victims of Crime and Abuse of Power¹⁹⁷ of 1985 requires that

“States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support.”¹⁹⁸

The Committee notes with concern that many States take a very conservative approach towards international law and consider it a body of law, which does not create individual rights. The Committee therefore calls upon States either to make international law directly applicable or to implement it in their domestic legal order.

SECTION V *Final Clauses*

ARTICLE 14 *Interpretation and Progressive Development*

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

¹⁹¹ For a comprehensive analysis see E. Schwager, *Ius bello durante et bello confecto*, supra note 32, p. 189 ff.

¹⁹² *Mohamet Bici and Skender Bici v. Ministry of Defence*, High Court of Justice, 2004 EWHC 786 (QB), Case No: LS 290157.

¹⁹³ *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

¹⁹⁴ See E. Schwager, *Ius bello durante et bello confecto*, supra note 32, p. 201 ff.

¹⁹⁵ See e.g. *Shaw Savill and Albion Company Ltd v. The Commonwealth*, (High Court of Australia 1940), 66 CLR 344, 362 and BGH, *Distomo*, BGHZ 155, 279;

¹⁹⁶ See e.g. Article 2 III International Covenant on Civil and Political Rights; Article 14 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and Article 6 International Convention on the Elimination of All Forms of Racial Discrimination.

¹⁹⁷ Adopted by General Assembly Resolution 40/34 of November 29, 1985, available at:

http://www.unhchr.ch/html/menu3/b/h_comp49.htm. These principles did not explicitly deal with victims of violations of human rights or humanitarian law. Nevertheless, they stress the need to strengthen the position of persons who have been adversely affected by abuses of power by granting them an individual right to reparation.

¹⁹⁸ *Ibid.*, para. 19.

Commentary

- (1) Article 14 expresses in unambiguous terms that the present Declaration is to be understood as a step towards strengthening the rights of victims.
- (2) Paragraph 1 emphasizes that the Declaration applies only to the extent that rights of victims and other persons who have suffered from the consequences of armed conflict are not limited. Any doubt or disagreement as to its meaning or application shall be resolved in a manner most favourable to the victims and other persons who have suffered from the consequences of armed conflict.
- (3) Paragraph 2 encourages States to progressively develop a protective regime for all persons who have suffered from the consequences of armed conflicts within the larger framework of international agreements.
- (4) Paragraph 3 establishes that the best interests of victims of armed conflict, as the guiding spirit and purpose of the Declaration, will govern pertinent interpretations of international law.

ARTICLE 15
Non-retroactivity

1. The rights and obligations reflected in the present Declaration shall have no retroactive effect.
2. This is without prejudice to any rules set forth in the present Declaration, which exist independently of the Declaration.

Commentary:

- (1) Article 15 takes account of the fact that the present Declaration is reflecting international law as it is progressively developing.
- (2) The rules and principles emanating from this process shall not apply retroactively. The principle of non-retroactivity stipulated in Article 15 (1) is in line with the principle of inter-temporal law, which requires that “a juridical fact [...] be appreciated in light of the law contemporary with it”.¹⁹⁹
- (3) Article 15 (2) makes clear that the principle of non-retroactivity is not intended to limit any already existing rights. This is in line with Article 14 (1).

ARTICLE 16
Statutes of Limitation

Statutes of limitation may not unduly impact the exercise of the rights and obligations reflected in the present Declaration.

Commentary

- (1) Article 16 addresses statutes of limitation for reparation claims. Statutes of limitation set forth a specific period of time within which claims have to be lodged in order to succeed. Claims that are brought too late might be dismissed. Some legal orders consider statutes of limitation as a substantive defence, others regard them as a procedural defence.
- (2) There is little guidance in international law as to whether there are statutes of limitation for reparation claims. The constituting documents of mass claims processes typically have contained a deadline within which claims had to be submitted.²⁰⁰ However, this deadline only concerned the claims settlement before the respective claims settlement body. It did not exclude a settlement before a different claims settlement body or national court – if available.
- (3) The Committee does not exclude that there might be a need to adopt statutes of limitation for reparation claims. The objective of statutes of limitation is usually twofold. On the one hand, they ensure the fairness of the procedure. It is in particular the availability and value of evidence, which might diminish over time and undermine the fairness of the procedure. For example, if a finite sum of money has to be apportioned evenly between similarly affected victims, it is important to know the total number of eligible claimants before distributing payment. On the other hand, statutes of

¹⁹⁹ Supra note 88.

²⁰⁰ H.M. Holtzmann / E. Kristjánssdóttir, *International Mass Claims Processes: Legal and Practical Perspectives*, supra note 42, 158 ff.

limitation help to bring about legal peace, repose and finality. Thus, post-conflict societies might reach a certain point where an ongoing claims settlement might have disruptive effects.

- (4) The Committee emphasizes that statutes of limitation for reparation claims have to be clearly distinguished from statutes of limitation in international criminal law.²⁰¹ The latter are impermissible. As regards statutes of limitation for reparation claims, particular care has to be observed not to unduly impact the rights of victims.

²⁰¹ See however L. Zegveld, *supra* note 126, 107 f. arguing that in case of international crimes, the same limitation rules should apply.