



Amsterdam Center for International Law

*Impact of International Courts on Domestic Criminal Procedures in Mass Atrocity Cases
(DOMAC)*

Work Package 7 on Reparations

Report of Workshop I
**‘The interactions between Mass Claims Processes and
Cases in Domestic Courts’**

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Introduction

On 4 December 2008, as part of DOMAC Work Package 7 (WP7), the first of two planned workshops took place at the Amsterdam Center for International Law of the University of Amsterdam. The purpose of Workshop I was to explore actual responses by domestic courts to international mass claims processes (MCPs), to collect experiences, and identify what lessons have been learned and which issues deserve further study. Four chief areas served as case studies: (1) Italian and German court decisions on challenges by military internees excluded from the German Forced Labour Compensation Programme; (2) domestic responses in Bosnia and Herzegovina to the work of an international housing claims commission established in the aftermath of the conflict in the 1990s; (3) the procedural infrastructure of mass claims litigation in domestic courts – whether a new unification initiative is needed for mass atrocity litigations; and (4) programmes implemented and avenues being explored as part of the International Criminal Court’s Trust Fund for Victims – and implications of the Court’s complementarity principle for victim reparations.

The Workshop examined the role of MCPs within public international law as interpreted by domestic courts. It compared whether and why certain categories of claims or claimants have fared better than others in domestic courts; and whether responses from domestic courts have had any significant impact on litigants’ choice between either creating new ad hoc MCPs or turning to domestic courts; and whether the experiences of MCPs have provided procedural solutions transferable to the domestic context. What follows is a summary of the presentations and the ensuing discussions. Thanks are due to Tuuli Karjala and Stefanie Kufner for their help with note-taking during the Workshop.

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WORKSHOP I: SUMMARY OF PRESENTATIONS AND DISCUSSIONS

Morning Session

Chaired by Edda Kristjánsdóttir, DOMAC WP7, UvA

Opening Remarks by Harmen van der Wilt¹

'I have been asked to open this workshop on the interaction between Mass Claims Processes and cases in domestic courts. The subject matter is part and parcel of the larger DOMAC project which stands for Impact of International Courts on Domestic Criminal Procedures in Mass Atrocity Cases, and is financed by the European Union within the framework of the FP7. DOMAC unites Reykjavik University, Hebrew University, University College London, and the University of Amsterdam.

As its title already suggests, this research project addresses the influence of international criminal tribunals and of other international courts (such as the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR)) on domestic criminal proceedings, bringing to justice perpetrators of international crimes in the aftermath of mass atrocities. The project covers many aspects, such as whether domestic courts are prepared to apply legal standards developed at an international level. The ultimate aim of the DOMAC project is to suggest avenues for improving the interaction between international and domestic courts in order to accomplish a single coherent system of international criminal justice.

The success of this venture, in my personal opinion, is predicated on the question whether international tribunals will be accepted by the public at large. In my view, international criminal justice should not be a solipsist pastime, or 'l'art pour l'art'; it should resound in the hearts and minds of people. Some may find this a commonplace and maybe it is, but practice regrettably shows that the message is lost upon many and that the goal is difficult to achieve. Sharing the principle that international criminal justice should somehow involve the general public obviously does not entail that we all agree on the goals of international criminal justice. We are all familiar with the heated discussions in this respect: Does it contribute to reconciliation? Could it serve as a kind of therapy? Does it deter people from engaging in international crimes? And so on.

Some years ago, Richard Ashby Wilson in an article in *Human Rights Quarterly*,² challenged the well-known thesis propounded by Hannah Arendt and others that criminal courts should confine themselves to meting out justice and should not attempt to write definitive historical accounts of mass atrocities, because they are ill-equipped to do so. Wilson's counter-argument rested on two pillars: (a) system criminality simply requires a record of the broader context or picture; and (b) international criminal tribunals may be in a better position to do the job, as they are not involved as one of the parties in the conflict and are more detached.

I am somewhat hesitant to take sides in this interesting debate, as it depends on your definition of historiography. I am not entirely convinced that international criminal tribunals are qualified to draw the larger political picture, in the great tradition of Oswald Spengler or Raymond Aron. But the tribunals may start, less ambitiously, from the other side and assemble from piecemeal histories some important historical truths. And here the topic of today's workshop comes in.

¹ Professor of International Criminal Law, University of Amsterdam (UvA); UvA representative on DOMAC Steering Committee.

² Richard A Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27(3) *Human Rights Quarterly* 908 (2005).

Assessing mass claims of victims renders an opportunity to capture personal histories. All those personal histories may in turn contribute to a better understanding of the cultural, psychological, and political backgrounds of conflicts from which mass atrocities emerge. Moreover, the involvement of victims in legal proceedings implies – or at least should imply – the recognition of their misery and suffering. A good performance of both international and domestic criminal courts in paying attention to the plight of those who have been most dramatically involved may well contribute to a popular acceptance of international criminal justice. For these reasons, the topic addressed by today’s workshop is indispensable for the whole DOMAC project.’

PANEL ONE: Litigation arising in connection with the German Forced Labour Compensation Programme and other Mass Claims Processes

Presentation by Norbert Wühler³

Before discussing the German Forced Labour Compensation Programme, Dr Wühler offered examples of other recent compensation programmes that have an interesting national – international dimension:

1. Turkey

Compensation programme established in 2006 to distribute reparations ordered by the European Court of Human Rights (ECtHR).

In 2001, a case was brought against Turkey before the ECtHR in relation to an alleged violation of the European Convention of Human Rights (ECHR), mainly due to activities of the Turkish armed forces carried out in connection with counter-terrorism activities. By 2004, more than 1,500 cases had been filed, mostly by Kurdish internally displaced persons who alleged violation of their property rights because they were unable to return to their villages of origin and use their land and houses. Turkey lost a ‘test’ case,⁴ and the ECtHR in 2006 ordered compensation to the victims.⁵ Turkey had established a domestic compensation programme by legislation which it amended in 2004 (Law on the Compensation of Damages that Occurred Due to Terror and the Fight Against Terror, Law 5233). Subsequent challenges to that mechanism have been dismissed by the ECtHR.⁶ The compensation programme is dealing with approximately 300,000 cases through several hundred damage assessment and compensation commissions.

³ Director, Reparation Programmes, International Organization for Migration (IOM) in Geneva, Switzerland, and member of the Kosovo Property Claims Commission.

⁴ *Doğan and others v Turkey* (Applications nos 2203-8811/02, 8813/02 and 8815-8819/02), Judgment 29 June 2004, rectified 18 November 2004, available at <<http://www.echr.coe.int/echr>>.

⁵ *Doğan and others v Turkey* (Applications nos 8803-8811, 8813/02 and 8815-8819/02), Pilot Judgment (Just Satisfaction), 13 July 2006, final 13 October 2006.

⁶ See *Icyer v Turkey*, Decision on Admissibility, 12 January 2006; and *Kanar and others v Turkey*, Decision on Admissibility, 30 March 2006. The Court held that by not filing a compensation claim under Law 5233, the applicant had failed to exhaust all available domestic remedies.

2. Kosovo

While the example from Turkey is one of a domestic claims mechanism challenged before an international court and adjusted in light of such assessment, an example of the opposite scenario, namely, an international claims mechanism challenged before domestic courts, is that of Kosovo.

A Housing and Property Directorate (HPD) and a Housing and Property Claims Commission (HPCC) were established under the auspices of the United Nations Interim Administration Mission in Kosovo (UNMIK).⁷ In March 2006, a new Kosovo Property Agency (KPA) was established pursuant to UNMIK Regulation 2006/10.⁸ The same Regulation established the Kosovo Property Claims Commission (KPCC) as an independent body with the mandate to resolve property claims resulting from the February 1998 – 20 June 1999 armed conflict in Kosovo. The KPA took over the staff and assets of the former HPD, and assumed responsibility for the implementation of all residential property claims that were pending with the HPD as of 4 March 2006. The KPCC has to date resolved more than half of the approximately 40,000 claims filed with it for the loss of residential and commercial real property. In the case of an unsatisfactory outcome, a claimant can appeal the decision of the KPCC to a special chamber of the Supreme Court of Kosovo.⁹ No appeal has been decided yet.

Following the declaration of independence by Kosovo, the Parliament of Kosovo in 2008 passed legislation that in essence repeated the provisions of UNMIK Regulation 2006/50, except that it modified the procedure for the appointment of the Commission.¹⁰ The Kosovo member of the Commission is appointed by the Parliament of Kosovo, upon a proposal by the President of the Supreme Court. Following the introduction of the European Rule of Law Mission – EULEX Kosovo, the two international members of the KPCC are appointed by the International Civilian Office / EU Special Representative pursuant to his authority under the Comprehensive Proposal for the Kosovo Status Settlement, dated 26 March 2007, and other instruments.¹¹

3. Colombia

The different mechanisms established for victims of almost half a century of conflict and violence in Colombia by, on the one hand the Law on Justice and Peace¹² and, on the other hand, the Administrative Reparations Programme set up in the country, serve as an example of the relationship between regular judicial proceedings and special remedies made available to victims outside the regular court system. Under the Justice and Peace

⁷ See < <http://www.kpaonline.org/>>.

⁸ UNMIK Regulation 2006/10 ‘On the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property’, UN Doc. UNMIK/REG/2006.10 (4 March 2006), provisionally suspended and replaced by UNMIK Regulation 2006/50, UN Doc. UNMIK/REG/2006/50 (16 October 2006), implemented by Administrative Direction No 2007/05, UN Doc UNMIK/DIR/2007/5 (1 June 2007). See <<http://www.hpdkosovo.org>>.

⁹ UNMIK/DIR/2007/5, *supra* note 8, Chapter VI.

¹⁰ Law N. 03/L-079, amending UNMIK Regulation 2006/50, ‘On the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property’ (13 June 2008).

¹¹ See < <http://www.eulex-kosovo.eu> >.

¹² Law 975 of 25 July 2005.

Law, victims have to participate in ordinary criminal proceedings against the perpetrators in order to claim and obtain relief. This is a very cumbersome and ineffective process for the victims, and therefore a parallel administrative mechanism was set up by Presidential Decree to streamline the reparations process and detach it from the criminal cases. The initial Justice and Peace Law was challenged in the Constitutional Court of Colombia which declared certain of its provisions unconstitutional.¹³ In this decision, the Court referred, inter alia, to judgements of the Inter-American Court of Human Rights. Challenges to the Administrative Reparations Programme are pending before the Constitutional Court.

4. Cyprus

Property issues abound in Cyprus and they are one of the main obstacles to efforts to reunify the island. The Republic of Cyprus joined the EU in 2004, but EU law has been suspended in northern Cyprus for the purposes of Cyprus' succession. There is a maze of legal provisions, procedures, and fora with respect to the property rights of Cypriots who, in the context of the events of 1974, were displaced from the north of the island to the south, and vice versa, and who as a result abandoned their properties. Claims have been made and cases have been brought by numerous parties, including the following: Greek Cypriots who left property in the north of the island; Turkish Cypriots who left property in the south; foreigners (many British, but others as well) who had bought property in the north; and foreigners who had bought property in the south. The fora where cases have been brought and decided include the Ministry of Interior of the Republic of Cyprus as the 'custodian' of abandoned Turkish Cypriot properties in the south; courts of the Republic of Cyprus; an Immovable Property Commission of the 'Turkish Republic of Northern Cyprus' (TRNC – which is only recognized by Turkey); British courts; the European Court of Human Rights; and the Court of Justice of the European Communities. The latter is currently considering the famous *Oram's* case in which decisions have previously been rendered by courts in the Republic of Cyprus and the United Kingdom.

The relationship between domestic and international fora plays a role in many of these cases and decisions, but the Immovable Property Commission (I P Commission) in the TRNC comes closest to the kind of mass claims process whose interaction with cases in domestic courts is the focus of the present Workshop.¹⁴ In *Xenides-Arestis v Turkey*,¹⁵ the ECtHR found that the compensation and restitution mechanism established by the I P Commission, in principle, is a remedy that provides for adequate and effective redress. However, in *Demades v Turkey*,¹⁶ the ECtHR decided that an applicant who had already received a decision of the Court on the entitlement in principle to compensation should not then be required to apply to the I P Commission to seek reparation.

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¹³ Sentence C-370/06 of 18 May 2006; forthcoming ILDC 660 (CO 2006).

¹⁴ The I P Commission was established under the 'Law for the Compensation, Exchange and Restitution of Immovable Properties', Law No 67/2005, enacted by the authorities of the TRNC.

¹⁵ *Xenides-Arestis v Turkey* (Just Satisfaction) (46347/99 of 7 December 2005).

¹⁶ *Demades v Turkey* (Just Satisfaction) (16219/90 of 22 April 2008).

The German Forced Labour Compensation Programme (GFLCP)

In the mid-1990s, a number of class action lawsuits were brought in United States courts by former forced labourers against German companies that had exploited such labourers under the Nazi regime. Subsequent negotiations between representatives of these claimants and the German companies, as well as representatives of the German and United States Governments and interested Eastern European Governments, resulted in the termination of these lawsuits and an agreement to set up a compensation fund and a claims mechanism.¹⁷ This agreement became the basis for the German Foundation Act, the German federal law that established the Fund and the German Foundation, which in turn created the actual claims mechanism.¹⁸ The collection, review, and payment of the claims was assigned by the German Foundation to seven partner organisations, among them the International Organisation for Migration (IOM) which established GFLCP to implement this programme. Claimants who received compensation under this programme had to waive their right to take part in any future claims programmes or any court proceedings relating to the involvement of German industry during the Nazi regime and World War II.

Litigation or challenges to the claims process

The so-called Italian Military Internees (IMI) cases have generated the most interesting and widely known court decisions in connection with GFLCP.¹⁹ They are not, however, the only domestic court cases arising out of this claims process.

Cases that have been brought before domestic courts in Germany include:

- most typically, cases involving claimants who felt that they had not received adequate compensation under GFLCP;
- other cases involving claimants excluded from the programme for technical reasons, such as late-filed claims, or for not falling under the jurisdiction according to the Foundation Act (eg, Russian prisoners of war who were specifically excluded as a result of the negotiations);
- cases concerning amounts distributed to heirs, and disputes between heirs of deceased claimants;
- cases involving internal disputes between claimants of Roma descent, mostly in South-East Europe;
- criminal cases involving allegations of fraud by family members and others who felt excluded from the process or from payments;

¹⁷ Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation 'Remembrance, Responsibility and the Future', The Government of the United States of America and the Federal Republic of Germany, done at Berlin, 17 July 2000, available at <<http://www.compensation-for-forced-labour.org>>.

¹⁸ Law on the creation of a Foundation 'Remembrance, Responsibility and the Future' of 2 August 2000, entered into force 12 August 2000 (German Federal Law Gazette BGBl. 2000 I 1263), as amended 4 August 2001, entered into force 11 August 2001 (BGBl. 2001 I 2036), and as amended 21 August 2002 (BGBl. 2002 I 3347), available at <<http://www.compensation-for-forced-labour.org>> ('German Foundation Act').

¹⁹ For further references see summary of the presentation of Andrea Gattini below.

- cases due to confusion among potential beneficiaries concerning the many overlapping holocaust claims programmes – as it was often not easy to determine under which programme the victims’ claims would fall; and
- cases concerning the eligibility of Roma persons to benefit from related humanitarian programmes that were not based on claims but on humanitarian criteria and that included financial and in-kind support.

In the case of *Wos v Poland*,²⁰ a claimant who had applied under two World War II reparations programmes in Poland brought a case against Poland before the ECtHR concerning the right to access to court and to a legal remedy (Article 6 ECHR). In 1993, the applicant, on account of his forced labour, had applied to the Polish-German Reconciliation Foundation for compensation from the funds contributed by the German Government under an Agreement of 16 October 1991; and in 2000 he applied to the Polish Foundation for compensation under a scheme for slave and forced labourers established under the Joint Statement of 17 July 2000, the German Foundation Act, and the subsequent Agreement of 16 February 2001 between the German Foundation and the Polish Foundation. On 17 April 2001, the Polish Foundation’s Verification Commission rejected his request on the ground that he did not satisfy the deportation requirement of the German Foundation Act. The ECtHR noted that the applicant had been left in a legal lacuna when both the ordinary and administrative courts established that they had no jurisdiction to hear his claims. Consequently, he had no possibility to have the Polish Foundation’s decisions reviewed by a ‘tribunal’ within the meaning of Article 6(1) ECHR. The Court emphasized that ‘it would not be consistent with the rule of law in a democratic society, or with the basic principle underlying Article 6 § 1 – namely that civil claims must be capable of being submitted to a judge for adjudication – if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons’²¹ The Court considered that the absolute exclusion of judicial review in respect of the decisions issued by the Polish Foundation under the first compensation scheme was disproportionate to the legitimate aim pursued, and that it impaired the very essence of the applicant’s ‘right of access to a court’ within the meaning of Article 6(1).

This decision of the ECtHR was then relied upon in a case brought by a lawyer in the Administrative Court of Berlin on behalf of 4,200 IMIs. In dismissing this case, the Court decided inter alia that the reasoning of the ECtHR did not apply for the IMIs precisely because there was a judicial remedy available in Germany to claimants excluded from GFLCP. The Court also followed an earlier decision of the German Federal Constitutional Court which had found that the exclusion of IMIs from the programme by the German Foundation Act did not violate their rights under the German Basic Law (Constitution).

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²⁰ *Case of Woś v Poland* (Application no. 22860/02), Judgment 8 June 2006, Final 8 September 2006.

²¹ *Woś v. Poland*, *id.*, para 106.

Presentation by Andrea Gattini²²

Historical background

In September 1943, after the fall of Mussolini, Italy signed an armistice agreement with the Allied Powers and in October 1943 war was declared against Germany. German troops, however, were still present on Italian ground due to having been former allies, and they now disarmed many Italian soldiers and brought them to Germany. Fighting also continued in Italy as part of the ongoing civil war. Massacres took place, contributable to both German and Italian actors.

Litigation in Italy

In 1946, all Italian participants in the civil war were given a general amnesty. In Article 77(4) of the 1947 Paris Peace Treaty,²³ Italy waived all claims of reparations against Germany. Under the 1961 Bonn Treaty,²⁴ Germany, although not under any obligation to do so due to the 1947 waiver, agreed to pay 40 million Deutschmarks to the Italian victims of Nazi persecution. According to Italian Presidential Decree 2043/1963, which provided for the domestic application of the Treaty, the sum was intended to cover also cases of forced labour. Italian Military Internees (IMIs) were, however, denied the right to apply to the GFLCP²⁵ as they had not been persecuted as such by Germany. A group of IMIs sued but were denied access to the German Foundation Fund by German courts. One of the claimants, Luigi Ferrini, brought a suit against the Federal Republic of Germany before the Arezzo tribunal²⁶ and, on appeal, to the Florence Court of Appeal.²⁷ Both courts declined jurisdiction on ground of foreign state immunity. The Italian Court of Cassation in 2004 overturned these judgements and held that Germany had no privilege of state immunity due to nature of international crime of the conduct.²⁸ The Court went so far as to affirm a principle of universal civil jurisdiction, but then stressed the fact that part of the relevant conduct had taken place in the territory of the forum. The decision of Court of Cassation was generally welcomed in Italian legal literature, although it remained silent on important issues such as the basis of an individual right to reparations. Some have however construed such an implicit statement from the Court's phrase: 'customary international law parameter of injustice of the damage'. Neither did the Court express its opinion on the matter of the possible lapse of the claim because of the waiver of the Italian state or the lapse of time, because the Court strictly limited itself to the jurisdictional aspects.

²² Full Professor of International Law, Law Faculty of the University of Padova, Italy.

²³ Treaty of Peace with Italy, between Italy and the Council of the four allied powers (France, United Kingdom, United States, USSR), signed in Paris, 10 February 1947, 49 U.N.T.S. 3; T.I.A.S. No. 1648; 42 A.J.I.L. (1948) Supp. 47; text available at <<http://www.ena.lu>>.

²⁴ Bilateral Compensation Agreement for victims of the Nazi Regime (Italy/Federal Republic of Germany), signed in Bonn, 2 June 1961 (*Vertrag vom 2. Juni 1961 zwischen der Bundesrepublik Deutschland und der Italienischen Republik über Leistungen zugunsten italienischer Staatsangehöriger, die von nationalsozialistischen Verfolgungsmaßnahmen betroffen worden sind*), available at <<http://www.juris.de>>.

²⁵ See summary of presentation by Norbert Wühler above.

²⁶ *Ferrini v Germany*, Arezzo Tribunal, No 1403/98, 3 November 2000.

²⁷ *Ferrini v Germany*, Court of Appeal, Florence, 14 January 2002.

²⁸ *Ferrini v Germany*, Court of Cassation, no 5044/4; ILDC 19 (IT 2004), 11 March 2004.

Litigation in Germany

After the *Ferrini* case, 942 IMIs and association representing their interests brought a case to the German Federal Constitutional Court (*Bundesverfassungsgericht*), which held in June 2004 that there had been no breach of an individual right to reparation, as such right had not existed at the time of World War II under either domestic or international law.²⁹ The Court also concluded that there had been no breach of the German Constitution, and it therefore dismissed the complaint.

In the 2006 *Distomo* case, the relatives of Greek victims of the SS claimed that Germany had no state immunity and was liable to pay 60 million Euros as reparations.³⁰ The *Bundesverfassungsgericht* again held that Germany was not liable for the reparation payments due to state immunity.

Litigation in the United Kingdom

In 2006, the UK House of Lords issued a judgment in the *Jones* case concerning torture.³¹ The House of Lords held that there was a lack of state immunity due to a grave breach of *ius cogens*, but it commented on the *Ferrini* case saying it had not been an accurate statement of the position of international law as it was generally understood and accepted.

European Court of Justice

In February 2007, the European Court of Justice (ECJ) issued a preliminary ruling in the *Lechouritou* case, referred by a Greek judge.³² As in the *Distomo* case, *Lechouritou* also concerned a 1944 civil massacre, and the question before the ECJ concerned the application of Council Regulation (EC) No 44/2001.³³ According to a unanimous ECJ, the subject matter fell outside the scope of Regulation 44/2001 and there was therefore no need to answer the second question on state immunity. Throughout the case, the German Government argued for state immunity and against the applicability of Regulation 44/2001. The Dutch Government supported the German Government's opinion, as did the Italian Government, although it remarked that there had to be some exception in *ius cogens* cases.

European Court of Human Rights

In the case of *Associazione nazionale Reduci dalla Prigionia v Germany*, on 4 September 2007, the 5th Chamber unanimously stated that, according to the 1907 IV Hague Convention or the 1977 First Protocol to the 1949 Geneva Conventions, there is no individual right for compensation for war crimes. However, this statement should be

²⁹ *Italian Military Internees Case*, Joint constitutional complaint, BVerfG, 2 BvR 1379/01; ILDC 438 (DE 2004); (2004) *Neue Juristische Wochenschrift*, 2357, 28 June 2004.

³⁰ *Distomo Case*, Joint constitutional complaint, BVerfG, 2 BvR 1476/03; ILDC 390 (DE 2006), 15 February 2006.

³¹ *Jones v Ministry of Interior for the Kingdom of Saudi Arabia & Others* [2006] UKHL 26; ILDC 521 (UK 2006).

³² ECJ (Second Chamber) Case C-292/05 (*Lechouritou and Others v Federal Republic of Germany*) 15 February 2007.

³³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12, p 1.

compared to the decision of the Grand Chamber in the *Markovic* case of some months earlier, in which the Court did not exclude that there could be an individual right for compensation for war crimes, even though it dismissed the claim because it held that ‘there was no substantial right of action in [Italian] domestic law’ for acts related to the exercise of foreign policy.³⁴

Latest developments in Italy

On 29 May 2008, the Italian Court of Cassation issued a joint judgement in twelve cases,³⁵ some of which dealt with IMIs while others dealt with the massacres committed in 1943–1944. In its judgement, the Court of Cassation maintained its position in *Ferrini* and held that despite a contradiction between the customary international law rule of state immunity and human rights principles, precedence was to be given to the more fundamental of the two, namely, human rights. While recognizing that international law was not so clear on state immunity, the Court concluded that its role as the Supreme Court was to contribute to the emergence of the new rule that was developing on state immunity. According to the Court, the commitment of international crimes marked the ‘breaking point of a tolerable exercise of state sovereignty’. Although jurisdiction was once again based not only on universal jurisdiction but also on territorial jurisdiction – the *locus delicti* having been in Italy – some of the twelve cases had taken place entirely outside Italian territory. This time the Court of Cassation spent some words on the issues related to Article 77(4) of the Peace Treaty and the subsequent 1961 Bonn Treaty, by saying that it would be a matter of the merits to ascertain the date of acquisition of the right to reparation. By this one could infer that the Court wanted perhaps to hint that such a right could have been lost because of the waiver, or that could not have existed at the time of the events.

One of the twelve cases of 29 May 2008 – IMI case No 14201/2008 – was brought not only against the German state but also against the Daimler Chrysler corporation for which the plaintiff had been forced to work. The case against Daimler was dismissed, as the company did not have a seat in Italy, and the Court explained that the case could not be brought there against a private company having its seat in Germany.

Another of the 29 May 2008 judgements also dealt with partial execution of an award for damages in the *Distomo* case, which had been issued in October 1997 by the District Court of Livadeia in Greece,³⁶ and which had been confirmed by the Greek Supreme Court (*Areios Pagos*) on 4 May 2000.³⁷ The Italian Court of Cassation decided that it was possible to partially enforce the *Distomo* case against Germany, not under Regulation 44/2001, but rather under Article 64 of the Italian statute on private international law and jurisdiction, No 218 of 1995.

³⁴ *Markovic and Others v. Italy*, (2007) 44 EHRR 52, 14 December 2006.

³⁵ *Germany v Mantelli and ors*, Preliminary order on jurisdiction, No 14201/2008; ILDC 1037 (IT 2008), 29 May 2008.

³⁶ *Prefecture of Voiotia v Federal Republic of Germany*, Decision of the District Court of Livadeia, English translation (excerpts) in: (1997) *Revue hellénique de droit international* (RHDI) 595; 30 October 1997.

³⁷ *Germany v Prefecture of Voiotia, representing 118 persons from Distomo village*, Petition on cassation against default, no 11/2000, 49 *Nomiko Vima* (Law Tribune) 2000, pp 212–229; ILDC 287 (GR 2000), 4 May 2000.

A new apex was reached on 22 October 2008 in the *Milde* case. The Military Court in La Spezia had held in 2006 that a former German soldier, Josef Max Milde, had been responsible for a massacre in Italy, and it had recognized the right of some of the families of the victims to receive compensation from Germany. The judgment was confirmed by the Military Appellate Court in Rome. Germany appealed the decision to the Court of Cassation, which, for the third time, decided that Germany was not protected by state immunity. From then on the *Milde* judgment is therefore enforceable.³⁸ As a result, on 23 December 2008, Germany brought a case against Italy before the International Court of Justice (ICJ) asking it to adjudge and declare that Italy violated its international law obligations by failing to respect the jurisdictional immunity of Germany under international law.³⁹

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Presentation by Paul Dubinsky⁴⁰

The presentation explored two main themes:

1. What is the appropriate role for national and international tribunals in relation to reparations and state immunity?
2. To what degree should ordinary rules of procedure be used to adjudicate actions (civil or criminal) that stem from international crimes and atrocities?

Overarching issues

The credibility of the human rights movement continues to be at risk because of the general lack of reliable mechanisms for delivering remedies to victims of egregious human rights violations. More consensus needs to be reached among human rights lawyers and scholars on the appropriate relationship between human rights violations and remedies, such as restitution, reparations, and injunctions.

Of course, the best remedy would be prevention – steps, whether judicial or otherwise, that prevent atrocities and the human suffering that accompanies them. But there is at least anecdotal evidence that human rights law (both substantive and procedural) has made little headway toward prevention: (1) the world's brief experience with humanitarian intervention (Kosovo, Somalia) has left a mixed record. Perhaps the biggest tragedy of the current war in Iraq is that the concept of humanitarian intervention has been severely discredited. (2) It is difficult to point to any historical examples that show that either the work of criminal tribunals or the award of reparations actually has deterred the commission of atrocities. These two observations suggest a few sobering questions:

- Will atrocities continue? Probably yes.

³⁸ *Criminal Proceedings against Josef Max Milde*, Corte di Cassazione, First Criminal Section, No. 1072/09, ILDC 1224 (IT 2009), 13 January 2009.

³⁹ [Update: Proceedings instituted by the Federal Republic of Germany against the Italian Republic (*Germany v Italy*), 23 December 2008, application available at <<http://www.icj-cij.org>>.]

⁴⁰ Associate Professor, Wayne State University Law School.

- Will humanitarian interventions be utilised to prevent them? Probably not, at least not in the near future.
- Will international criminal law continue to be a response to atrocities? Yes, in part because criminal tribunals are less expensive and risky than humanitarian intervention and more targeted than economic sanctions.
- What is the status of the rights of victims to judicial remedies? This question remains unresolved under customary international law. Most likely, some kind of right to restitution or reparations eventually will emerge.

If such rights for victims under international law do emerge, where will they most likely be enforced? In national or international courts? If national courts are preferred, should the process be supervised by international courts?

So far, there is little clarity with respect to individual remedies in these cases and hardly any case law on collective remedies. Thus far, judicial responses to transnational atrocities largely have involved Western countries sitting in judgment on non-Western countries. Such one-sidedness is problematic and probably unsustainable. In the future, it will be important for international tribunals in particular to stay above the political dimension of the issues at hand and clear of the charge of selective prosecution.

The number and resources of international courts is insufficient to process large numbers of reparations claims. Given this reality, the proper role of international tribunals should be to develop customary international law, which can then be used by large numbers of national courts influence each other.

Thus far, one of the greatest shortcomings of national courts has been their reluctance to award forward-looking remedies and their tendency to consider only individual claims rather than harms to collectives. Let me give two brief examples of injured collectives:

Tibet is an example of rampant violations of fundamental human rights, but also of cultural genocide which could not be redressed by individual claims. The situation can only be redressed by forward-looking remedies with the purpose of assuring the survival of the Tibetan people and their culture.

The example of German reparations to Jewish victims, in the form of forward-looking remedies stands as an important example of how one might think about forward-looking reparations to a collective.⁴¹

Procedural rules

The lack of agreement on certain procedural issues has proven to be a hard obstacle. The development of human rights class actions has brought to light a real procedural problem: national codes of civil procedure were not designed to deal with mass actions on atrocities. There is still no intellectual progress in developing procedural law with these types of mass actions in mind. The work of the International Law Association's

⁴¹ See further, Paul R Dubinsky, *Justice for the Collective: the Limits of the Human Rights Class Action*, 2004 Survey of Books, 102 Mich L Rev 1152 (2004).

Committee on International Civil Litigation and the Interests of the Public was an admirable attempt to bring some structure to the problem of mass action proceedings.⁴² However, the Committee discussed group litigation on a very general level, with no conclusions reached on the very specific legal area of mass litigation concerning atrocities. The draft expressly did not include discussion of mass claims processes.⁴³ There was no carve-out for mass atrocity litigation; it is a rather pro-defendant document.

In conclusion, two groups of lawyers and academics are finding themselves having to work together: proceduralists and human rights lawyers. There is an impending clash between human rights class action litigations and the harmonization and development of procedural law.

Discussion

Q: There appears to be a slight slowdown in the creation of new international mass claims processes. Is this incidental or is there a trend moving towards national courts for claims of victims of mass atrocities?

A: Although there is not a complete slowdown, there has indeed been a shift to another sphere; many such initiatives are fueled by political agendas and lobbying. Some past compensation programmes were created due to political and financial pressures, such as the Swiss banks settlement. There is on-going talk about many African processes in post-conflict situations. It is not easily understandable why the comfort women cases against Japan could not have succeeded by the same methods as the Holocaust programmes.

Q: Why did Italy and Germany sign a second peace treaty in 1961 (Bonn Treaty)?

A: The 1947 peace treaty did not include all possible claims stemming from the atrocities. At the end of the 1950s – start of the 1960s, Germany entered into several bilateral treaties concerning victim compensation.

Q: Regarding international jurisprudence and collective remedies: are there any dialogues between international and national courts?

A: The idea to push the role of national courts further may be shortsighted: it would be more efficient to wait for the international courts to pave the way. For example, the Italian Court of Cassation in *Ferrini* founded its competence on the *obiter dictum* of the International Criminal Tribunal for the Former Yugoslavia

⁴² See Report and Draft Resolution of the ILA Committee on International Civil Litigation and the Interests of the Public, submitted to the ILA 73rd Conference, Rio de Janeiro, 17-21 August 2008, available at <<http://www.ila-hq.org>>.

⁴³ *Id.*, section B.6, n3.

(ICTY) in the *Furundžija* case.⁴⁴ That dictum, however, has been criticized. According to some, the ICTY went far beyond its competence in that judgment. But the Inter-American Court of Human Rights has sought to find global solutions; and the ICJ considered in its Wall Advisory Opinion that Israel had an obligation to compensate individuals in accordance with international law.⁴⁵

The dialogue between national and international courts is at its best in the framework of the European Community. In other parts of the world, the co-operation has been less successful. Outside of the Western world, the record of co-operation is not very encouraging, if one looks at the impact of international courts on non-European domestic courts, such as in Latin America.

Q: How can different forms of collective remedies (both backward- and forward-looking remedies) be implemented efficiently in post-conflict situations where there are sometimes no courts? As far as the example of Tibet and cultural genocide: in practical terms, the concept of cultural genocide does not exist in any of the relevant instruments.⁴⁶ How can reparations for the concept be enforced, and who determines what the damage was to the collective? Are national courts really in the best position to do that? If collective rights do exist, how are the harms distinct from the harms faced by individuals? Should the collective remedy exist in theory or only in practice?

A: In the Guatemalan reparations programme, the focus has been on collective non-monetary remedies. Villagers of razed villages have come together and demanded a remedy as a collective. In Guatemala, it was culturally important to ‘bury’ disappeared persons in a ceremony, which is another type of collective remedy.

In Cambodia, there was no pre-defined scope of reparations, but it was decided that the only remedies available would be collective and symbolic.

⁴⁴ *Prosecutor v Furundžija (Anto)*, Trial judgment, Case No IT-95-17/1-T ICTY, ICL 17 (ICTY 1998), (1999) 38 ILM 317, [1998] ICTY 3, 10th December 1998, Trial Chamber II (ICTY), para 155 (‘Proceedings could be initiated by potential victims if they had locus standi before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act.’).

⁴⁵ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p 136, para 153: (‘Israel is . . . under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the Occupied Palestinian Territory. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered. 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.’)

⁴⁶ While cultural genocide was included in drafts of the Genocide Convention (see UN Doc. A/362, GAOR, second sess 6th Committee, Summary Records, 16 September – 26 November 1947, Annex 3), it does not appear in the final text, see Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly Resolution 260 A (III), 9 December 1948. Cultural genocide was also part of the Draft Declaration on the Rights of Indigenous Peoples, but it was not included in the final Declaration adopted by the General Assembly on 2 October 2007.

National courts are in a position to establish a customary law of remedies. However, it is not and it should not be solely the role of national courts to do so.

A major problem with collective reparations is that not every ‘member’ feels connected to the collective. Diasporas are an example, as in the case of Germany making reparations to Israel, the symbolic value of such reparations did not directly benefit Jewish people living outside of Israel.

When talking about individual reparations for mass atrocities, one cannot truly get away from the concept of a ‘group’, as the violations in question usually affect a larger group, and their legal definitions often hinge on their widespread and systematic nature – whether each individual identifies with that group or not.

Q: On the importance of waivers in peace treaties: can states sign away the right to reparations and thereby the human rights of their citizens?

A: In the pre-World War II era, it was up to the state, by espousal, to seek remedies for its citizens. States could also forego making such claims.

In the modern age, there is a possibility for individuals on their own to advance claims for remedies without the possibility of such claims being waived or bargained away by their states.

Q: Reparations for mass atrocities seem not to constitute any meaningful deterrence but often rather a post-hoc substitute for economic or military intervention. International criminal law will probably continue to respond, but will there ever be a civil reparations counterpart?

A: The ICJ will probably not answer immediately the question of whether there is an individual customary international law right to reparation. When it does, the answer will probably be yes – that seems to be the movement of history.

Q: Who drives that movement – international or domestic courts?

A: In the short term, probably national courts. What international courts have delivered thus far has been disappointing. Also, they have made almost no effort to grapple with collective remedies. Cultural genocide cannot be repaired by individual remedies. The work of the Claims Conference and Germany is an example of a forward-looking collective remedy.⁴⁷

Domestic courts, in customary international law development, have the moral authority, can offer basis for legislation, can pave the way for treaties, etc. But whether for instance US courts could today serve as impetus for German compensation as it did in the late 1990s – and whether they have the same moral authority as they did then – is an interesting question.

⁴⁷ Conference on Jewish Material Claims Against Germany, <<http://www.claimscon.org>>.

Most courts that have awarded reparations have been Western – this is not sustainable in the long-run. We need to find a solution of the West judging the rest.

Afternoon Session

Chaired by Dr Jann Kleffner, UvA

PANEL TWO: Commission for Real Property Claims of Displaced Person and Refugees (CRPC), Bosnia and Herzegovina 1996-2003

Presentation by Anke Strauss⁴⁸

Historical Background

Following four years of war in Bosnia and Herzegovina (BiH) from 1992 – 1995, the CRPC was created by Annex VII of the General Framework Agreement for Peace in Bosnia and Herzegovina (the ‘Dayton Peace Agreement’ (DPA)) signed on 14 December 1995.⁴⁹



⁴⁸ Liaison Officer, Office of the IOM Permanent Observer to the United Nations, New York.

⁴⁹ General Framework Agreement for Peace in Bosnia and Herzegovina, initialed in Dayton 21 November 1995, signed in Paris 14 December 1995, ‘Dayton Peace Agreement’, 35 ILM 75, at 138, available at <http://www.law.kuleuven.ac.be/ipr/eng/CRPC_Bosnia/CRPC/new/en/main.htm>; and <http://www.pca-cpa.org/MCP/index_MCP.htm>.

The distribution of BiH's major ethnic groups was:

- in 1991: Bosniaks 43.47%; Serbs 31.21%; Croats 17.38%; other 7.92%; and
- in 2000: Bosniaks 48%; Serbs 37.1%; Croats 14.3%; other 0.6%.

The war left one-third of the housing stock destroyed or uninhabitable, and more than half of Bosnia's 4.5 million pre-war inhabitants were internally displaced or refugees.

There were two parallel transition processes: (1) rebuilding a war-torn country; and (2) establishing democratic structures and conditions after the fracturing of a formerly socialist system.

Before the conflict, BiH, as one of the former Republics of Yugoslavia, had a primarily socialist approach to property rights. Thus, a sizable percentage of property was socially owned. There was private ownership of single-family dwellings, and social ownership of multiple-party apartment housing in urban centers with occupancy rights to users. An occupancy right to socially-owned property is a form of property entitlement – stronger than a lease, but not equal to private property (deed). Pursuant to Annex X DPA, BiH became an international protectorate governed by the Office of the High Representative (OHR).

CRPC Statistics

- The duration of the Commission's work was March 1996 – December 2003.
- There were nine Commissioners (3 international, 2 Croats, 2 Bosniaks, and 2 Serbs, appointed by President of the ECtHR, Fed BiH, and Republica Srpska, respectively).
- There were 350 staff members at the peak of the process (deployed throughout former Yugoslavia and Western Europe, including in mobile outreach teams).
- Number of claims received: 240,333 claims for 319,220 properties.
- Number of decisions issued: 312,239.
- Requests for reconsideration: 2,494.

Chapter 2 of Annex VII DPA provides:

'All refugees and displaced persons have the right to freely return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them. The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina. The Parties confirm that they will accept the return of such persons who have left their territory, including those who have been accorded temporary protection by third countries. The Parties shall ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution, or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion.'⁵⁰

⁵⁰ Chapter 2 of Annex VII (Articles 7-16) established the CRPC and described it in a fair amount of detail.

Mandate

According to Annex VII DPA, the CRPC was to ‘receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.’

De facto, there was never any compensation paid out in this claims process, as no funds were available. The CRPC’s mandate ended in 2003. Its successor Commission has taken this a step further, stimulating the revision of the Strategy of Bosnia and Herzegovina for the Implementation of Annex VII DPA, which looks at developing strategic measures and activities aimed at addressing the issue of the right to damage compensation in accordance with the DPA. However, still today, there is no functioning compensation fund in place.

The DPA provided that the CRPC should promulgate its own rules and regulations, consistent with the Peace Agreement, as might be necessary to carry out its functions. In developing the rules and regulations, the Commission was to consider the relevant domestic laws on property rights.

Legal review

Individual case review and decisions were made by lawyers, followed by a 100% quality control by the team leader and a 50% quality control by the quality control unit. A full review of a random sample of decisions (minimum 10%) was performed by two national Commissioners, members of the Legal Working Group. The Commission adopted the entire group of decision proposals.

Verification

Individual claims verification took place across the 148 BiH municipalities wherever evidence was missing. While Article XII(1) of Annex VII DPA granted access to all property records, the conduct of verification was obstructed in many municipalities throughout the country.

Jurisdiction

The CRPC never had exclusive jurisdiction over claims regarding property rights; the domestic administrative and judicial system was in place throughout the process. Rather, the CRPC was designed as an independent and impartial fast-track mechanism to adjudicate property disputes, as obstruction and a lack of cooperation had been anticipated. Most importantly, the Commission’s decisions were to be final, and any title, deed, mortgage, or other legal instrument created or awarded by the Commission was to

it stipulated the proceedings before the CRPC –most importantly, it laid down that ‘the Commission decisions [should] be final, and any title, deed, mortgage, or other legal instrument created or awarded by the Commission [should] be recognized as lawful throughout Bosnia and Herzegovina.’

be recognized as lawful throughout Bosnia and Herzegovina. Only a small minority of CRPC's decisions were challenged.

Reconsideration

Although the CRPC's decisions were final, the Commission in 1999 introduced the possibility of filing requests for reconsideration, taking into account the imperatives of due process and acknowledging the danger of inaccuracies occurring in a mass claims process. The claimants and other parties with a legal interest in the real property being decided upon were thus allowed to file requests for reconsideration. Despite the over 300,000 decisions rendered by the Commission, the Reconsideration Section remained a very small exercise: the total number of reconsideration requests did not exceed 2,500 or 0.8% of all CRPC decisions.

Implementation

The CRPC had no implementation competence. According to Annex VII DPA and the Law on Administrative Procedures, housing authorities in the municipality where the claimant's property was located were responsible for the implementation of CRPC decision certificates.

Interaction with the domestic system – at the decision-making stage

Individual claims verification by CRPC required access to all property records at local courts and cadastres. Obstruction was a big issue, as was destruction of evidence due to the ethnic background of conflict. The CRPC was a parallel process within the domestic system; the local courts remained competent to confirm the validity of wartime transfers. The local system had strict evidentiary rules. Along the way, the CRPC's rules were amended to accommodate domestic occupancy rights.

Interaction with the domestic system – at the appeal stage

- CRPC decisions were final and binding.
- Domestic courts were not competent to review CRPC decisions.
- The Human Rights Chamber created by the DPA was not competent to review CRPC decisions.
- Claimants only had the right to file requests for reconsideration internally in the claims process.

Despite the BiH 1999 Law on the implementation of CRPC decisions, there was still often a lack of implementation. The problem was the flawed property legislation ('Law on Abandoned Apartments and Property') and its application at the municipal level.

Interaction with the domestic system – during implementation

There was no link between the CRPC and the domestic system until October 1999 when the Law on Implementation of Decision of the CRPC was enacted. The CRPC had no implementation mandate. Hence, there was (1) administrative implementation, (2) upon request, (3) by the municipality in which the property was located. It was possible to challenge the municipality in domestic court for non-enforcement of a CRPC decision;

and it was possible to challenge a municipality before the Human Rights Chamber (Annex VI DPA) for non-enforcement of CRPC decision (as the last instance).

One of the main challenges to enforcing CRPC decisions were the temporary occupants, many of whom were themselves displaced persons.

The Cantonal Court of Mostar issued a series of decisions, the first one of which ordered the competent administrative organ to decide on the enforcement of the case (28 December 2000).⁵¹ In a second decision (21 April 2001), after the organ had still not implemented the CRPC certificate in question, the Court issued a conclusion on the execution of the CRPC decision, including an order to the temporary user to vacate the property within 90 days. After the administrative organ failed to implement the conclusion, the Court issued a third decision, ordering the administrative organ to execute the conclusion and threatening the Head of the organ with a fine and requesting his dismissal (20 February 2002).

Human Rights Chamber

There was direct applicability of the European Convention on Human Rights (ECHR) with priority over national law (despite the fact that BiH was not a member of the Council of Europe and hence had not ratified the Convention; BiH ratified the ECHR in July 2002).⁵² The Human Rights Chamber was competent for events after 14 December 1995, unless there were ongoing/continued violations dating back from the conflict. The relevant provisions were Article 8 ECHR ('Everyone has the right to respect for his private and family life, his home and his correspondence'); and Article 1 First Protocol ECHR ('Every natural person is entitled to the peaceful enjoyment of his possessions').

Due to their final and binding nature, the Human Rights Chamber did not review the substance of CRPC decisions, but rather the lack of their implementation. It ruled that non-enforcement of CRPC decisions violated decision certificate holders' right to respect for their home as guaranteed by Article 8 ECHR. The failure of the authorities to allow an applicant to regain possession furthermore constituted interference with his right to peaceful enjoyment of possessions and violated his rights under Article 1 First Protocol ECHR.⁵³

Suspension of enforcement proceedings

The original version of the law on CRPC decisions envisioned that 'enforcement proceedings before the responsible administrative organ should not be suspended pending the court decision.' However, following a ruling of the Human Rights Chamber regarding unequal treatment of temporary occupants, the High Representative amended the law in 2003, automatically suspending enforcement proceedings.

⁵¹ Cantonal Court Mostar file No U-420/2000.

⁵² For details see Christopher Harland, Ralph Roche, Ekkehard Strauss 'A commentary to the European Convention on Human Rights as applied in Bosnia and Herzegovina and at Strasbourg', 2003.

⁵³ See eg *Bofkovski v Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, 6 April 2001, CH/97/73; *Petrović v the Federation of Bosnia and Herzegovina*, 9 March 2001, CH/00/6142; *Leko v the Federation of Bosnia and Herzegovina*, 9 March 2001, CH/00/6144 – the decisions of the Human Rights Chamber are available at <wwwuser.gwdg.de/~ujvr/hrch/hrch.htm>.

Interaction with the domestic system – additional non-compliance measures

The Office of the High Representative, under its so-called ‘Bonn Powers’, had the right to remove officials holding public office who were obstructing the peace process. From the Peace Implementation Council Conclusions (Bonn December 1997),⁵⁴ came a right to use measures to ensure implementation of the DPA throughout BiH and its entities, as well as the smooth running of the common institutions. Such measures could include actions against persons holding public office or officials who were absent from meetings without good cause or who were found by the High Representative to have been in violation of legal commitments made under the DPA or the terms of its implementation.

Informal interaction

- Regular contact with local authorities.
- Media outreach, Regional Offices, Mobile Teams – the CRPC led to a more coherent administrative approach (including throughout 23 cantons in the Fed BiH).
- Release of highly-qualified local staff after completion of the work (now working in courts, cadastres, and high offices) was a ‘DOMAC effect’ (ie, effect of this international process on the local court system).

Summary – Interaction with the domestic system

- CRPC decisions were final and binding.
- They were enforced through municipalities.
- Challenges of lack of enforcement are made before domestic courts.
- Challenges of lack of enforcement can be brought to the Human Rights Chamber as the final instance.

Handover to national authorities

The CRPC was originally given a mandate of five years but was extended to the end of 2003. Then, a temporary domestic CRPC (‘DCRPC’) was created which also works on appeals and military apartments. A transfer of all remaining cases to municipalities took place in late 2004.

Discussion

Q: Why was there no monetary compensation by the CPRC?

A: There was no political will to set up a compensation fund in BiH. The country had no economy – for example, tourism and the little industry there was had disappeared – and the international donors were not interested in a compensation process. Prior to 1992, there had been no real estate market in the country due to the socialist political system. One shortcoming of the Dayton arrangement was that it had no mechanism for linking up claimants for example to swap properties of persons not wishing to return. This is a lesson for future property processes.

⁵⁴ See <http://www.ohr.int/pic/default.asp?content_id=5183>.

It is interesting here to compare CPRC with the Kosovo property process. There, the original plan was to redress Albanians, but the process was reversed: 90% of the claimants turned out to be Serbs who did not wish to return but rather to do something with their property rights. There is now a viable market (to rent or sell rights). The Kosovo process has been constantly under-funded – even just to run the process – and there is also no compensation paid out. In an underfunded programme, it is difficult to retain staff. One creative solution was to offer staff of the property commission additional training in exchange for a commitment to work for a certain number of months (although this did not work in order to retain IT staff who were in too high a demand on the job market to opt for this solution.)

Q: Would a domestic court system have been useful? Is there room for future actions against Serbia and for many acts committed by Bosnians?

A: Consider, for example, that the German property claims resolution process is still on-going almost twenty years after the German reunification in 1989.⁵⁵ A property claims process has to be tailor-made to fit each situation. The Kosovo domestic courts currently have a backlog of 65,000 cases. Pragmatic solutions are needed in the aftermath of such social disruptions where the local judicial system has also been weakened.

⁵⁵ *Gesetz zur Regelung Offener Vermögensfragen*; <<http://www.gesetzesweb.de/VermG.html>>.

PANEL THREE: The International Criminal Court and the Trust Fund for Victims: claims and complementarity

Presentation by Fiona McKay⁵⁶

The International Criminal Court (ICC) has not yet dealt with reparations (the first trial being scheduled for January 2009), hence there is no practice yet on the part of the Registry, or the Court's Trust Fund for Victims, responding to Court-ordered reparations. There is, however, participation of victims in the Court's legal proceedings.

Legal framework of reparation before the ICC

- It is not clear yet whether there will be mass claims or individual claims processes at the ICC; there might even be no such processes.
- The only thing which is required of the Court with respect to reparation to victims is, according to Article 75(1) of the Rome Statute, that: it '*shall* establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.'⁵⁷ The Van Boven Principles influenced this definition.⁵⁸ The rest of the provisions of Article 75 are couched in permissive language, ie, 'may' instead of 'shall'.
- The Court's Rules provide that reparations orders may be either on an individualized or a collective basis, as the Judges see appropriate.⁵⁹
- Therefore, individual reparations are one possibility, and they could happen in different ways:
 1. claims could be managed by the Court's Registry;
 2. claims could be managed by the Trust Fund for Victims (according to terms agreed with the relevant Chamber of the Court);
 3. claims could be assigned to external experts; or
 4. claims could be referred to some kind of domestic process.

It is important to note, however, that what the ICC might do may not involve any kind of claims process at all. The minimum requirement is that the Court adopt principles of reparations. It is also important to note that whilst victims have the right to present claims, the Trial Chamber can decide to deal with reparations on its own motion.

It seems that people mainly talk about collective reparation, but it may not be clear what this actually means. Even in the case of collective awards, there may still be a need to identify beneficiaries and to put in place a claims registration process. For example, if the

⁵⁶ Head of Victims Participation and Reparations Section, Registry, International Criminal Court.

⁵⁷ Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9, entered into force 1 July 2002, Article 75(1) (emphasis added), available at <<http://www.icc-cpi.int>>.

⁵⁸ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by UNGA Resolution 60/147 of 21 March 2006, UN Doc A/RES/60/147, available at <<http://www2.ohchr.org/english/law/remedy.htm>>.

⁵⁹ ICC Rules of Procedure and Evidence, Ref-ICC-ASP/1/3, available at <<http://www.icc-cpi.int>>.

Court were to order the establishment of a school, but specified that this school was for certain victims, than there would be a need to define who these children are exactly.

Interaction between international and domestic proceedings: what will the ICC itself do and what will be referred to national jurisdictions?

Does the principle of complementarity apply to reparations, and if so, how?⁶⁰ Will the Court's chamber look at whether there is some domestic avenue for the victims, and will this avenue be used first? In Sudan, for example, the government has established a scheme that purports to repair victims. Because of the Court's broad discretion, how should it decide, and on what basis, whether to step in? Article 17 of the Rome Statute, which sets out the complementarity principle, speaks to prosecution. Would the Court apply the same criteria to evaluate the quality and quantity of a domestic award of reparation? Would the wishes of the victims be considered relevant and, if so, how does the Court ascertain their wishes? For instance, victims may insist on individual reparations even though local community leaders claiming to speak on their behalf may argue that there is need for collective reparations, or vice versa.

Another relevant question as regards the interaction between the ICC and national jurisdictions is what happens if a victim has already received some form of reparation from another source, even an external source? Is it relevant which source that is?

The ICC very clearly needs to rely on domestic implementation as it does not have an enforcement arm. The Court itself would not in its own name initiate proceedings in the countries in question. States therefore need to cooperate with the Court, also in the enforcement. Article 109 of the Rome Statute regulates enforcement of fines and forfeitures. There is a lot of potential for different court proceedings on a national level.

Collective versus individual reparation and the relevance of domestic forms of reparations processes

According to Article 75(2) of the Rome Statute, the ICC can order 'restitution, compensation and rehabilitation.' Clearly, this was not intended to be an exhaustive list, and satisfaction and guarantees of non repetition are additional forms of reparations listed in the van Boven principles.

The ICC Victims Participation and Reparations Section is often asked in the field whether, if the Court orders reparation, the Accused could be ordered to return and go through some kind of healing process at the national level. There seems no reason to exclude such measures, as long as they are compatible with the Court's legal framework, but the question is how to get such a procedure right. How is an international court to decide what is the right thing in a context where views differ greatly?

Paul Dubinsky talked in his presentation about the constructive role that national courts can play. There is indeed extraordinary potential for national courts, and one of the hopes for the ICC is that it will play a similar role, in reinforcing international standards and best practices, including in relation to reparations, and establishing law and practice that

⁶⁰ Rome Statute, Article 17.

could be followed at the national level to the benefit of victims. For example, could the ICC inspire new legislation or improvements in claims processes within states? Very few states have yet enacted legislation to implement the Rome Statute of the ICC that specifically address the question of reparation. Canada is a positive example where a fund has been established, but for the rest, there are not many examples. This is therefore another area of potential for the court to influence domestic legal systems.

Conclusion

To finish on a positive note, the idea is that the ICC, as a permanent international institution, will have time to adjust its approach to reparations with experience as it deals with different situations and cases, and get it right in the long run. The ICC may also be able to play a useful role in standard-setting, models, and persuading states to enact relevant legislation.

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Presentation by Andre Laperrière⁶¹

The Trust Fund for Victims (TFV) is not exactly part of the ICC but rather its ‘Siamese twin’; both were born from the Rome Statute.⁶² A state which becomes a member of the court also becomes part of the TFV.

Rule 85 of the ICC Rules of Procedure and Evidence sets out the definition of ‘victims’ and in order to prove victimhood, facts are to be taken at face value.⁶³ The threshold of proof for proving victimhood is thus lower than the standard of proof required to convict and accused person.⁶⁴ The Trust Fund has the mandate to help victims on a prima facie basis. In its immediate actions, it faces all the difficulties of reconciling the numerous legal cultures that emerge in this political institution.

⁶¹ Director, ICC Trust Fund for Victims.

⁶² Rome Statute, Article 79 (establishing the Trust Fund). See also Regulations of the Trust Fund for Victims, Ref-ICC-ASP-4-Res3, available at <http://www.icc-cpi.int>.

⁶³ ICC Rules of Procedure and Evidence, Rule 85 contains the following definition:

(a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

See also Regulations of the Trust Fund for Victims, paras 62 and 63:

‘62. The Secretariat shall verify that any persons who identify themselves to the Trust Fund are in fact members of the beneficiary group, in accordance with any principles set out in the order of the Court.

63. Subject to any stipulations set out in the order of the Court, the Board of Directors shall determine the standard of proof for the verification exercise, having regard to the prevailing circumstances of the beneficiary group and the available evidence.’

⁶⁴ Rome Statute, Article 66(3) provides that ‘[i]n order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.’

The TFV tries to influence and lobby the Court to pay attention to and to learn from the situations which the TFV monitors – before the Court reaches the stage of addressing reparations in a case.

Mandate of the Trust Fund

The TFV has a dual mandate:

1. presence in the field – and helping people whom justice does not reach; and
2. assisting within the context of a trial – this has not happened yet, as no victims have claimed reparation in an ongoing case.

The Court may decide to use the TFV as link between the victims and the Chamber after trial. There may be victims who cannot afford to wait two or three years for reparation. Therefore, the TFV was given the mandate to assist victims even during trial. It then has to work in close cooperation with the Court and not interfere with the trial. To take Congo as an example, the country is three times the size of Europe. Because of the remoteness and difficulty of communication, justice is unreachable for the victims there. But the victims are there, and they need assistance. So we need to help them.

Complementarity

The philosophy of the Rome Statute is to accuse perpetrators on the one hand, and to help victims on the other hand. Mass claims, genocide, these are complex cases with many perpetrators and many victims. The numbers alone are incredible, and one cannot approach them as in a normal court case, as it is a mass situation; one cannot use the same traditional justice that has been used for hundreds of years and that was designed to deal with smaller disputes and not conflicts on such a scale. Therefore, we should invent a new platform.

Because of the magnitude of the crimes and masses of victims within the ICC's jurisdiction, and the need to proceed with the trial in reasonable time, the Court has to make choices. It has to choose amongst thousands of crimes and choose to pursue some and not others. The system therefore is incomplete and this means that reparation is also incomplete to some degree. In terms of complementarity, it must be acknowledged that traditional justice in the affected countries was not set up to deal with mass atrocities.

What constitutes reparation?

In domestic legal systems, once accused persons have been sentenced and have served their sentences, they have paid their debt to society. But that does not help the victims. A system is needed that takes care of the needs of the victims. Reparations imply very many different things. Time, for example, is an important factor. In too many countries, we equate reparations with money. The loss of a leg is worth so and so much, etc. This approach is too simplistic and does not take into account the cultural and economic background of victims of mass atrocities in different parts of the world. What do those people hope for? There are two things they invariably mention:

1. Accountability. Victims want those responsible to say that what they did was wrong and that they are sorry. They want to hear this from the perpetrator or from

the Court in the perpetrator's stead. By acknowledging the horrors and their status as victims, the feeling of guilt, of shame, of being a victim can be removed.

2. Returning to one's former life. To overcome the sense of guilt and shame of being a victim, in the end, what most victims want is to return to their old lives. But who should pay for this? States can facilitate the freezing and seizing of assets of the suspects. These assets can be used as a contribution towards reparations. This depends on the willingness of states to freeze and trace such assets, and there may be a competition for reparation resources and competing claims against the perpetrators (eg, by victims, the government itself, etc). Choices will have to be made, and the assets may furthermore be in a non-member state which is under no duty to cooperate with the Court.

Money

Charity tends not to be appreciated. People prefer to earn their recovery – to get back their dignity, to get their due. One problem is that rebel dictators have absolute power, and absolute power is expensive. It requires a massive influx of money. But, due to their life style, they also have an enormous out-flux of money. The chances that they still have the money once they are on trial are slim. But, again, money is not all that the victims are asking for. They aspire to accountability and to no longer feeling victimized. After speaking with thousands of victims, I note that not a single one has asked for money. They did not ask for charity, as charity makes a person a victim. As reparations, they rather want their own dignity back; to be a winner, not a beggar.

In Liberia, everybody was part of the conflict. Everybody was a victim or a perpetrator. There were those who master-minded the war, and the lesser criminals who contributed to it. Children were forced into combat. The level of guilt, so to speak, is not the same among perpetrators. When finally peace is restored, one needs to forge a social agreement on who where the master-minds, and who were not. The traditional court systems that we have are not well adapted to this. We have to find a formal way to try and punish people in a manner that corresponds to the crime that they have committed. These decisions cannot be issued from The Hague; they have to issue from the communities themselves. This is where the ICC is hampered: our Western values cannot be used everywhere. Money often makes people feel as if their silence is being bought. Even though it is well meant, people's values can be so different that money is not a possible solution to the situation at all.

Time

The last element has to do with time. In cases of aggression, during the first moments after the aggression, the victims try to re-group or go into hiding for reasons of protection, shame, guilt, and fear. People may stay hidden for a long time after the conflict. Some victims of Auschwitz could only tell their stories sixty years later. It takes time for victims to speak their real thoughts and feelings. They need time to regain strength. To help them, we have to learn how to wait.

Discussion

Q: In national legal systems, we do not ask victims what they want – why all the emphasis on asking the victims what they prefer? How does the ICC distinguish between victims and non-victims, as eg in the case of child soldiers – are they seen as perpetrators or victims?

A: Contrary to clear-cut legal categories, it actually *de-marginalizes* victims if assistance is also given to non-victims (as in, for example, admitting not only child-victims to a school, but other children from the same community).

What too many designs for reparations programmes forget is precisely to ask the victims what they really want before establishing the criteria.

Q: The ICC will enter into new territory in establishing principles on reparation. Where will it draw upon for inspiration – from domestic jurisprudence or international law principles? As a matter of state responsibility and general international law issues, is there a need to develop from the ground a body of international civil law? Is that realistic?

A: There is a connection to human rights instruments. Often, administrative-type measures will be needed. There would clearly be a need to enhance some principles in an imaginative way, but there are plenty of things to draw upon. There is more practice when it comes to state responsibility than when it comes to individual responsibility.

It is not yet clear whether the ICC and the TFV will look to the same principles. The TFV deals with victims of mass atrocity situations; the Court deals with the victims of individual perpetrators.

Q: Is individual criminal responsibility really the way to approach this subject. In many cases, the individual on trial will not be able to meet reparation demands. The mandate to assist victims is different from the mandate of a trust fund. There can be voluntary funding by states – can it also be by organizations? If so, can the money be earmarked for specific purposes?

A: The TFV is funded by governments, foundations, by private organizations, and by individuals.

The TFV can receive voluntary contributions as long as the money is legitimate. Its mission is to assist; without any bias. There are also victims of the army or of the police; they all deserve help. The TFV is not a prosecutor; it deals with a lot of child soldiers and it tries to help those who want to contribute to their society and want to learn.

The TFV and the Court complement one another. The TFV is providing material support in some areas until the victims can provide for themselves, but this is not considered as part of reparation by the Court.

Q: There is a genuine fear that the ICC is digging its own grave by dealing with so many victims.

A: Once the Court decides what to do about reparation, the TFV will have to decide how to respond to the large numbers.

One has to be careful not to further stigmatize the victims. They need to be taught and their re-integration needs to be facilitated. That is outside the boundaries of traditional justice; but it is part of healing, of repairing.

Note on future WP7 developments

Written articles that may emanate from Workshop I will be posted and/or referenced on the DOMAC website (www.domac.is), together with related reports and documentation forming part of Work Package 7.

A second WP7 Workshop will be organized in Spring 2010.