



Amsterdam Center for International Law

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

**Work Package 7 on Reparations**

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**Report of Workshop II**

**'The interactions between Mass Claims Processes and  
Cases in Domestic Courts'**

Amsterdam Center for International Law  
University of Amsterdam  
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## **Introduction**

The second workshop of DOMAC Work Package 7 (WP7) took place at the Amsterdam Center for International Law, University of Amsterdam (UvA), on 18 June 2010. In the same manner as the first workshop,<sup>1</sup> the purpose was to collect experiences and lessons from different reparations mechanisms for mass atrocities. Workshop II encompassed four discussion panels. Panel I concerned the International Court of Justice (ICJ) reparations cases and related domestic procedures; Panel II explored the impact of decisions by the European Court of Human Rights (ECtHR) through the case studies of compensation mechanisms in Cyprus and Turkey; Panel III focused on two major claims processes involving Iraq; and Panel IV on two case studies from Africa—the Eritrea Ethiopia Claims Commission and reparations initiatives in Sudan. In addition, an update on the Kosovo housing restitution programme (discussed at Workshop I) was reported.

This report is a summary of the presentations and discussions during the event, which was attended by experts in the field of reparations, as well as international law students. Special thanks are due to Nikola Petrovsky, academic assistant, UvA, for his research and help in organizing the workshop, as well as with drafting the report.

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<sup>1</sup> See Report of WP7 Workshop I, available at [www.domac.is](http://www.domac.is).

## WORKSHOP II: SUMMARY OF PRESENTATIONS AND DISCUSSIONS

### *Morning Session*

*Chaired by Prof André Nollkaemper, UvA*

### **Opening Remarks by Edda Kristjánsdóttir<sup>2</sup>**

Edda Kristjánsdóttir offered special thanks to Dr Norbert Wöhler for his help with both workshops in terms of suggesting and contacting experts for WP7 and for his own in-depth input. She also noted that Dr Kudret Ozersay could not attend the workshop as originally planned, due to his recent appointment as special representative of the Turkish Cypriot leader for ‘Cyprus Talks’. Replacing him on the programme was Mr Mert Guclu.

The objective of the DOMAC project is to study the impact of international courts on domestic prosecutions, sentencing, etc, in mass atrocity cases—hence mostly on criminal procedures, but also on human rights courts and the International Court of Justice (ICJ). DOMAC is an EU FP7 funded project, and the funder expressed interest in including victim issues, so the DOMAC consortium was pleased to include a work package on reparations. In order to study victim reparations, however, one needs to look in quite different directions than only to criminal procedures and at a variety of institutional mechanisms. Thus, while at first glance it might seem that WP7 has mixed together unrelated topics, it is essentially exploring what happens when a claim—or decision—demands that fines (civil or criminal), compensation, or return of property arising out of a mass atrocity situation are sought directly for the individual victims rather than their state. There are various contexts in which this may happen, such as in the courts discussed in this workshop, ad hoc commissions, mass claims processes, and transnational public litigation.

Since the first workshop in December 2008, WP7 has participated in a meeting with Balkan judges in Belgrade, Serbia, on the impact of the Kosovo and Bosnia housing commissions;<sup>3</sup> in a side-conference of the Review Conference of the Rome Statute of the International Criminal Court (ICC) in Kampala, Uganda, organized jointly by DOMAC and Redress;<sup>4</sup> and WP7 has also followed another research project that concluded with a book launch and conference at the ECtHR on the so-called ‘pilot judgment procedure’ of that court.<sup>5</sup> WP7 is organizing a panel during the final DOMAC conference in Amsterdam on 30 September – 1 October 2010, *inter alia* on the considerable impact of transnational litigation (in particular under the US Alien Tort Statute) on this field in general. Finally, it bears mention that WP7 has liaised with the work of the International Law Association (ILA) committee on reparations for victims of armed conflict, which in August 2010 adopted a declaration on the right to reparations.<sup>6</sup>

Where is the field of mass atrocity reparations headed? With so many different procedures, where should legal practitioners begin if they wish to represent victims claiming reparations for mass atrocities? It is one thing to become a criminal prosecutor; it is another to bring a case before a human rights body; lobby domestic legislators to create a compensation fund; mobilize UN member states to champion initiatives on behalf of a victimized group; empanel an arbitral tribunal or mixed commission; or bring a lawsuit in a domestic court—and if so, in

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<sup>2</sup> Researcher, UvA. leader of DOMAC WP7.

<sup>3</sup> See November 2009 presentation by Edda Kristjánsdóttir on housing and property commissions in Kosovo and Bosnia & Herzegovina and subsequent developments, available at [www.domac.is](http://www.domac.is).

<sup>4</sup> For more information see [www.domac.is](http://www.domac.is).

<sup>5</sup> PHILIP LEACH ET AL, RESPONDING TO SYSTEMIC HUMAN RIGHTS VIOLATIONS (Intersentia 2010).

<sup>6</sup> Resolution 2/2010 Reparation for Victims of Armed Conflict, text available at [www.ila-hq.org/en/committees](http://www.ila-hq.org/en/committees).

what country and should it be in civil or criminal court? These different avenues require such different qualifications, skills, and experience, that it is little wonder that so few practitioners get involved or even write about the legal issues involved.<sup>7</sup> Yet, there is a great amount of cross-fertilization and knowledge-sharing between these different areas of practice, as they grapple with many of the same issues and practical challenges, and it must be possible to pass on more of this knowledge to the legal community.

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## **UPDATE: Kosovo Property Claims Commission**

**By Norbert Wöhler<sup>8</sup>**

*The 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). In March 2006, a new Kosovo Property Agency (KPA) was established pursuant to UNMIK Regulation 2006/10.<sup>9</sup> 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 resources of the former HPD, and assumed responsibility for the implementation of all residential property claims decisions that were pending with the HPD as of 4 March 2006. The Housing and Property Directorate had jurisdiction to consider residential claims by persons who were displaced as a result of the conflict and were claiming repossession; it did not have authority to decide on ownership. The currently functioning KPCC is composed of one national and two international members. It has jurisdiction to decide ownership claims over agricultural, residential, and commercial property relating to the conflict but does not have jurisdiction to award monetary compensation.<sup>10</sup>*

### Transitional issues

Kosovo is an example of perhaps the most complicated web of interfaces between an international claims mechanism (the HPCC and later KPCC), the international entities that established it, and national courts and other entities.

On 17 February 2008, Kosovo proclaimed its independence from Serbia. The new Kosovo Assembly subsequently adopted a law that made the KPA a part of the national constitutional system.<sup>11</sup> The new law essentially repeated the language of the relevant UNMIK Regulation that had established the KPCC, except for provisions governing the appointment of the Commissioners of the KPCC, who were now to be appointed by the Kosovo Assembly upon recommendation by the Supreme Court. The two international members of the Commission continue to be appointed by the International Civilian Office—the office tasked with supporting Kosovo's European

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<sup>7</sup> Opinions as to what the law should do are rather expressed in non-legal writings in the social sciences fields.

<sup>8</sup> Director, Reparation Programmes, International Organization for Migration, Geneva, Switzerland; Member, Kosovo Property Claims Commission (KPCC). Martin Clutterbuck, Head of the Office of the KPCC, provided valuable information and comment for this update.

<sup>9</sup> 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).

<sup>10</sup> For more background, see Report of Workshop I, WP7, at [www.domac.is](http://www.domac.is).

<sup>11</sup> Law No. 03/L-079 incorporating UNMIK Regulation 2006/50 with few amendments.

integration.<sup>12</sup> Meanwhile, UNMIK has transferred most of its activities in the area of justice to EULEX, including those relating to the KPA and KPCC.<sup>13</sup>

There are not only legal but also political issues that have affected the functioning of the KPA. For example, the KPA has regional offices in Serbia for assisting and supporting the work of the Commission. Upon Kosovo's declaration of independence, the Serbian government decided to close these offices, thereby disabling direct contact of the KPA with Serbian claimants in Serbia. It took two years of negotiations, with the support of the UNHCR, before a solution was reached and the offices reopened with the same functions as before.

The Commission relies on its Secretariat for a number of matters, including communications with claimants and verification of documents in public archives and elsewhere. One of the tasks is to look up court decisions and archives both in Kosovo and Serbia in order to verify property transactions, inheritance issues, etc. In practice, this functions quite well, and in cases where the KPCC has doubts as to the authenticity of documents, it will rely on the services of the local police and forensic institute for opinions. Some difficulty has been encountered, however, in the cooperation with the Kosovo Cadastral Agency. Although all local entities are supposed to cooperate with the Commission and provide access to documents free of charge, the cadastral agency maintained that the KPA should not be exempt from paying fees. This issue could only be resolved after lengthy negotiations.

#### Interface with local courts

There are many layers of interface between the KPCC and the Kosovo courts in terms of jurisdiction. The KPCC has specific jurisdiction for deciding claims for loss of property ownership that occurred during the conflict, but it cannot award *compensation* for such loss. Cases claiming compensation before the Commission have to be dismissed and claimants may seek compensation before the national courts that do have jurisdiction over such cases. However, it appears that parties have tried to re-litigate cases before the local courts that were rejected by the HPCC or the KPCC on the merits. There have also been cases where parties have brought claims before the local courts that fall within the jurisdiction of the KPCC. In order to share information about these respective jurisdictional grants, a meeting is being organized between KPCC members, Kosovo judges, EULEX judges, and members of the Appeals Chamber of the Kosovo Supreme Court.

#### Challenges before human rights panel

By way of update, it is pertinent to note that a May 2010 opinion by the Human Rights Advisory Panel<sup>14</sup> examined a complaint by a woman (the 'complainant') who had purchased a flat in Kosovo 1992 and lived in it until she fled the country in 1999. Prior to the purchase, in 1991, Mr S.A. had been evicted from that same flat on the basis of discriminatory legislation. Both persons filed claims with the HPCC, which due to technical error failed to join the cases together for processing and granted the complainant the right to repossess the flat in 2004. After the error was discovered, the 2004 decision was overturned and Mr S.A. was granted the right to occupy the flat

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<sup>12</sup> See [www.ico-kos.org](http://www.ico-kos.org).

<sup>13</sup> See [www.eulex-kosovo.eu](http://www.eulex-kosovo.eu).

<sup>14</sup> *Dadica Kušić v UNMIK*, Case No 08/07 (15 May 2010). The Human Rights Advisory Panel was established in 2006 by UNMIK Regulation No. 2006/12 (23 March 2006).

provided he pay to the complainant a sum to be determined by the HPD. The complainant requested reconsideration in 2005, adducing evidence of 1993 domestic court proceedings in Kosovo that had nullified S.A.'s right to the flat, but the HPCC rejected the reconsideration request. The complainant filed her complaint with the Human Rights Advisory Panel in 2007, but even by the end of 2009, the amount of compensation owed by Mr S.A. could not yet be determined, as the rules for calculating compensation had not yet obtained the required approval.

The Human Rights Advisory Panel dismissed several of the complainant's allegations of breaches of the European Convention on Human Rights (ECHR) as filed too late,<sup>15</sup> but her allegations of ongoing violations of articles 6(1) and article 1 of Protocol 1, of the ECHR, owing to the failure to execute the decision in her favour were upheld.<sup>16</sup> The Panel did not find it reasonable that, in 2009, nine years after the creation of the reparations scheme, the administrators had failed to adopt a mathematical formula for calculating compensation (albeit a complex task, given hyperinflation in the former Yugoslavia, former socialist regulations, and current market value after the war). A formula developed in consultation with an expert in 2004 was supposed to have enabled the government of Kosovo to draft a new law on the subject, but UNMIK argued that the delay was justifiable due to 'the complicated legislative process in Kosovo, the relationship between the KPA and the Government of Kosovo, the difficult policy choices required and apparently the scarcity of donor funds'. The Panel disagreed and found that the ongoing failure to execute the HPCC's decisions (ie not letting Mr S.A. know how much to pay or else give up possession of the flat) violated article 6(1) ECHR and article 1, Protocol 1, ECHR, and it urged the competent authorities in Kosovo to take all possible steps to ensure that the necessary administrative measures for the execution of HPCC decisions be adopted without delay.<sup>17</sup>

It is of particular interest to the DOMAC study that, as a threshold matter for finding a violation of the right to fair trial, the Panel had to determine whether the HPCC constituted a 'tribunal'. Article 6(1) ECHR in principle only applies to proceedings before a 'tribunal'. The Panel relied *inter alia* on the ECtHR's definition of tribunal in *Cyprus v Turkey*<sup>18</sup> (discussed below) and noted that although a tribunal must have jurisdiction to examine all questions of fact and law relevant to the dispute before it, article 6(1) 'does not require it to be a "court of law of the classic kind, integrated within the standard judicial machinery of the country".<sup>19</sup> Hence, despite the fact that the HPCC was not a court but a special purpose mass claims body, it had been established by law, determined claims in an adversarial process on the basis of rules of law, and issued final decisions that were executed by an administrative body (HPD). 'The HPCC was therefore judicial in function and Article 6 of the ECHR applies to proceedings before the HPCC.'<sup>20</sup>

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<sup>15</sup> See id, para 31 (allegations that the HPCC had violated the right to a fair trial (Art 6(1)), right to respect for home and private life (Art 8), and constituted an ineffective remedy (Art 13), and violated the right to the peaceful enjoyment of property (Art 1, Protocol 1, ECHR)).

<sup>16</sup> Id, paras 65-70.

<sup>17</sup> Id, p 14, recommendation no 5.

<sup>18</sup> *Cyprus v Turkey*, [Grand Chamber], no. 25781/09, judgment of 10 May 2001, ECHR, 2001-IV, s 233.

<sup>19</sup> *Dadica Kušić v UNMIK*, supra note 14, para 55, citing ECtHR, *Campbell and Fell v United Kingdom*, judgment of 28 June 1984, Series A, No. 80, p 39, s 76.

<sup>20</sup> Id, para 56.

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### ***Discussion***

Q: Is the Appeals Chamber of the Kosovo Supreme Court functioning?

A: The two international members of the Chamber have been appointed, however the one national member is not appointed as yet. It is a pending issue.

Q: Are there any appeals pending before the Chamber?

A: In total, twelve appeals have been submitted to the Chamber and are pending before it. It is a very small number compared to the 7000 decisions rendered by the KPCC.

Q: In the initial phase of the establishment of the Commissions, were there any provisions for regulating possible re-litigation in national courts?

A: The UNMIK regulations clearly provided that the property commission have exclusive jurisdiction over specific cases. It would be an error for the local courts to overrule decisions of the KPCC that fell within its jurisdiction.

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## **PANEL ONE: Mass Atrocity Reparations at the International Court of Justice**

### **Presentation by Thordís Ingadóttir<sup>21</sup>**

#### Introduction

Working Package 7 on reparations is very important to the DOMAC project and in general for the legal and political debate on international criminal justice. It is astonishing how much separation there is between the different groups active in this field. Ten years after its establishment, it is still being debated at the International Criminal Court (ICC) how reparations should be approached, despite extensive practice to draw on. There is a definite need for bridging the gap between the different forums in this area.

There are at present eight international criminal tribunals operating in the world. Although envisioned to ‘fix everything’ in the aftermath of mass atrocities, their inefficiency to bring justice to victims has been slowly coming to light. Now that the ad hoc criminal tribunals are winding down their practice, it is obvious that these tribunals, as well as the ICC, will only deal with a small portion of the cases and prosecutorial policy is to prosecute only top offenders. There are 164 cases at International Criminal Tribunal for the Former Yugoslavia (ICTY); half of that

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<sup>21</sup> Associate Professor, Reykjavik University, Iceland; Director of DOMAC. Prof Ingadóttir's presentation is a contribution of DOMAC WP2 to WP7.

number at the International Criminal Tribunal for Rwanda (ICTR); a handful of cases at the Special Court for Sierra Leone (SCSL), none at the Special Tribunal for Lebanon; and only a few indictments in each of the cases before the ICC. This reality has resulted in continued recourse to national jurisdictions by those seeking reparations for victims. It is therefore of crucial importance to continue to look to the decisions of the permanent jurisdictions, such as the ICJ and the European Court of Human Rights (ECtHR), and consider how those established tribunals can affect prosecutions and reparations mechanisms at the national level. Looking specifically at the ICJ, it is clear that the nature of that court's case law has been changing: most of the cases submitted in recent years relate to international human rights law and international humanitarian law—a court which had more often been associated with maritime law and boundary disputes.

There have been several cases of direct DOMAC relevance before the ICJ, including the *Armed Activities case (DRC v Uganda)*,<sup>22</sup> the *Genocide case (Bosnia v Serbia)*,<sup>23</sup> *Croatia v Serbia*,<sup>24</sup> the *Hostages case (US v Iran)*,<sup>25</sup> and also the universal jurisdiction cases of *Congo v Belgium*,<sup>26</sup> *Congo v France*,<sup>27</sup> and the recent case of *Belgium v Senegal*.<sup>28</sup> The case of *Germany v Italy* on jurisdictional immunities<sup>29</sup> is expected to have an impact on domestic court procedures once it has been decided. In the limited time here, I will discuss a few cases relating to the duty to prosecute at the national level, primarily the *Armed Activity Case (DRC v Uganda)*.

### Duty to prosecute

A state can both have a primary and secondary obligation to enforce an individual criminal responsibility at the national level. States have undertaken in international conventions to investigate and prosecute grave breaches of international humanitarian law, and serious violations of human rights. The duty to prosecute can also be inherent in a state's obligation to make reparations for an international wrongful act.

#### *Armed Activities case (DRC v Uganda)*

In this case, the court found Uganda responsible for grave atrocities committed against the Congolese civilian population during a military presence in the DRC. Uganda was held to have violated its obligations under international human rights law and humanitarian law by killing civilians, committing rape and torture, destroying property, and failing to distinguish between civilian and military targets. In its claim, Congo stated that Uganda had failed to prosecute individuals responsible for these grave violations. This was a general submission, relying on violations of the Geneva Convention, the Hague Convention, the Convention Against Torture, etc—there was

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<sup>22</sup> Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment, ICJ Reports 2005, p 168.

<sup>23</sup> Case concerning the application of the Convention on Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), ICJ General List 91, 26 February 2007.

<sup>24</sup> Case concerning application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia), application filed 2 July 1999.

<sup>25</sup> United States Diplomatic and Consular Staff in Tehran, Judgment, ICJ Reports 1980, p 3.

<sup>26</sup> Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium), Judgment, ICJ Reports 2002, p 3.

<sup>27</sup> Certain Criminal Proceedings in France (Republic of the Congo v France), application filed 11 April 2003.

<sup>28</sup> Belgium v Senegal (to prosecute or extradite under the Torture Convention obligations).

<sup>29</sup> For discussion of this case, see Report of Workshop I, WP7, [www.domac.is](http://www.domac.is).

no reference to specific articles in the claim. One could have expected the court to rely on article 146 of the Geneva Convention, which contains an explicit duty on a state to prosecute grave breaches. However, in its findings, the court did not mention article 146 of Geneva Convention IV or article 85 of Protocol I to bring to courts those committing grave breaches of the conventions. At the same time, establishing the state responsibility of Uganda, the court found that Uganda's troops had committed grave breaches of Geneva Convention IV and of Protocol I.<sup>30</sup> The court's silence on the issue is addressed in one of the judges' separate declarations:

'Nevertheless, since grave breaches of international humanitarian law were committed, there is another legal consequence which has not been raised by the DRC and on which the Court remains silent. That consequence is provided for in international humanitarian law. There should be no doubt that Uganda, as party to both the Geneva Conventions of 1949 and the Additional Protocol I of 1977 remains under the obligation to bring those persons who have committed these grave breaches before its own courts (Article 146 of the Fourth Geneva Convention, and Article 85 of the Protocol I Additional to the Geneva Conventions).'<sup>31</sup>

Similarly, the court did not address the obligation to prosecute stipulated in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, or such an obligation considered inherent in the other human rights treaties. At the same time, the court found that actions by the Ugandan troops had violated various international human rights law norms, including the right to life and the prohibition against torture or degrading treatment, as enshrined in articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR) and articles 4 and 5 of the African Charter on Human and Peoples' Rights.<sup>32</sup>

The court's silence on the issue of an obligation to prosecute may be explained by the *non ultra petita* rule: the court is bound by parties' submissions. In its submission, the DRC did not make specific reference to article 146 of the Geneva Convention, article 85 of Protocol I Additional to the Geneva Conventions, or relevant articles of the human rights treaties. So, while the court found that Uganda's troops committed grave breaches of the Geneva Conventions and that the state of Uganda breached article 7 on torture and article 6(1) on the right to live of the ICCPR, a decision on Uganda's failure to prosecute might have been beyond the court's jurisdiction. At the same time, the DRC's final submission argued that Uganda 'fail[ed] to punish persons under its jurisdiction or control having engaged in the above-mentioned acts', supported by general reference to the Hague Regulations, Geneva Conventions, and human rights treaties.

The court's jurisprudence regarding a state's obligation to prosecute as a primary obligation is not rich. In the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, among the United States' submissions was that Iran 'should submit to

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<sup>30</sup> Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment, ICJ Reports 2005, p 168, para 207.

<sup>31</sup> *Id.*, Declaration of Judge Tomka, para 9.

<sup>32</sup> The Court did not include in its list of provisions of international instruments violated by Uganda the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, while DRC referred to that instrument in its arguments and both parties have ratified that instrument without any reservations.

its competent authorities for the purposes of prosecution, or extradite to the United States, those persons responsible for the crimes committed against the personnel and the premises of the United States Embassy and Consulates in Iran.<sup>33</sup> The United States' submission was argued *inter alia* in light of article 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, which stipulates that member states are obligated to prosecute the crimes defined in the convention or extradite them to trial in other states.<sup>34</sup> Despite the fact that the court found Iran to be in violations of various treaties and international customary law, it did not address this submission.

The issue of prosecuting serious international crimes was also in the background in the *Case Concerning the Arrest Warrant of 11 April 2000*.<sup>35</sup> The court's decision confined itself to international law regarding immunities, without addressing the subject of universal jurisdiction for serious international crimes—in this case acts punishable in Belgium under the Law of 16 June 1993 concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and of Protocols I and II of 8 June 1977 Additional Thereto.

The court was less restrained in the *Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case.<sup>36</sup> Among Bosnia and Herzegovina's submission was one that Serbia had failed its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide to punish acts of genocide and its obligation to cooperate with international penal tribunals having jurisdiction. In interpreting the obligation stipulated in the Genocide Convention on states' duty to punish the crime of genocide, the ICJ concluded that the obligation only related to states where genocide had taken place; other states were not obligated by the convention to punish—not even those states of which the perpetrators were nationals. And as the genocide in question had taken place outside Serbia, that state was not obligated by the convention to prosecute. However, the court did find that Serbia had failed its obligation under the convention to cooperate with the international penal tribunal, in this case the International Criminal Tribunal for the former Yugoslavia (ICTY), in particular 'for having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide . . . , and thus having failed fully to co-operate with that Tribunal'.<sup>37</sup>

The duty to prosecute individuals for international crimes is increasingly being presented to the court, as illustrated by the recent application by Belgium against Senegal. The duty to prosecute as a primary obligation is at the center of another pending case at the court—*Application of the Convention on the prevention and punishment of the crime of genocide (Croatia v Serbia)*. Among Croatia's claims is

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<sup>33</sup> Case Concerning United States Diplomatic and Consular Staff in Tehran, United States of America v Iran, Judgment of 24 May 1980, ICJ Reports 1981, p 45, para 8.

<sup>34</sup> Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1035 U.N.T.S. 167, Article 7.

<sup>35</sup> Case Concerning the Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v Belgium, Judgment of 14 February 2002.

<sup>36</sup> Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro, Judgment of 26 February 2007.

<sup>37</sup> *Id.* para 471(6).

that Serbia breached its legal obligation in article III and IV of the Genocide Convention by not punishing individuals who committed acts of genocide.<sup>38</sup>

As to the duty of a state to prosecute as a secondary obligation—ineligible in a state's obligation to make reparations for an international wrongful act—citing article 37 of the Draft Rules of Responsibility of States for Internationally Wrongful Acts, the DRC included in its written submissions that in light of Uganda's violation of international obligations, Uganda shall 'render satisfaction for the injuries inflicted by it upon the [DRC], in the form of . . . and the prosecution of all those responsible'.<sup>39</sup> However, this submission with respect to prosecution was subsequently withdrawn, as was a broader claim for reparations. Importantly, the court concluded that Uganda did have an obligation to make reparations to DRC for the injury caused, and decided that, failing an agreement between the parties, the question of reparations due to the DRC should be settled by the court.<sup>40</sup> At the time of writing, the two states are still negotiating the issue of reparations. Unfortunately, based on DOMAC interviews in the field, it appears that the negotiations concern only compensation, and that the possibility of prosecution has been set aside.

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### ***Discussion***

Q: It remains an issue at the ICJ whether damages should be awarded to victims rather than to states. Even if the court had awarded damages in the *Genocide case*, the question would have been whether to order Serbia or Bosnia to allocate the compensation to actual victims rather than the state.

A: The UNCC experience could be used here, ie, monitoring of whether states directed the compensation to intended beneficiaries.

Q: Could the ICJ order a state to directly make reparations to specific group of individuals?

A: In the *Advisory Opinion on the Construction of a Wall in the Palestinian Territories*,<sup>41</sup> the ICJ stated that reparations must be awarded to those who had suffered damages by the state of Israel. However, the court cannot add anything that has not been asked for. The legal basis for awarding compensation to individuals is a different one from compensation awarded to states. If properly stated in a decision, it would enable us to understand where the money should go, or it would give individuals a basis for claiming compensation before national courts. This was done in the Wall Advisory Opinion.

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<sup>38</sup> International Court of Justice, Application Instituting Proceedings, 2 July 1999, Application of the Convention on the prevention and punishment of the crime of genocide, Croatia v Yugoslavia, para 35. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Croatia v Serbia, Judgement of 18 November 2008 (Preliminary Objections), para 21.

<sup>39</sup> Case concerning armed Activities on the Territory of the Congo, para 24.

<sup>40</sup> Case concerning armed Activities on the Territory of the Congo, para 345(13) and para 345(14).

<sup>41</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p 136.

Q: Have there been cases where states claimed that the ICJ should order reparations at the level of individual victims (through the states)?

A: Notably, the Counter-Memorial filed by Serbia in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* made the submission that Croatia shall redress the consequences of its internationally wrongful acts, including by paying ‘full compensation to the members of the Serb national and ethnic group from the Republic of Croatia for all damages and losses caused by the acts of genocide’.

Q: Is there a primary obligation to prosecute as a reparation claim?

A: There is not an explicit discussion of this in the court’s jurisprudence. In the *Genocide case* for example, Serbia could not have a duty to prosecute. The Genocide Convention specifies that prosecution must be exercised by the country where the actual act took place. However, it is expected that in the *Belgium v Senegal* case—which raises questions relating to the obligation to extradite or prosecute—this issue will be addressed.

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## **PANEL TWO: Impact of European Court of Human Rights decisions—reparation mechanisms in Cyprus and Turkey**

### Background common to the three presentations

#### *Cyprus*

After the Turkish military operations in Cyprus in July and August 1974, the northern part of Cyprus remained under the control of Turkish military forces. This resulted in most of the Greek inhabitants of the northern part fleeing and abandoning their properties. In 1983, the ‘Turkish Republic of North Cyprus’ (‘TRNC’) was self-proclaimed—an act condemned by the international community, including the UN Security Council<sup>42</sup> and the Council of Europe, which still consider the government of Cyprus to be the sole legitimate government on the island. In disregard of the international reactions, ‘TRNC’ adopted its own Constitution in 1985, article 159 of which stipulates that all abandoned property is considered ‘state property’. Turkey remains the only state that recognizes ‘TRNC’. Many property claims by the legal owners (mainly Greeks) have been brought over the years and an appropriate mechanism has been sought for providing redress to the victims.

#### *Turkey*

In 1984, an armed conflict broke out between the Turkish security forces and members of the Kurdish Workers Party (PKK) in South-East Turkey. During the clashes, in 1985-1987, over 1000 villages were destroyed, their populations evacuated and internally displaced in Turkey. In 1987, an emergency regulation was established

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<sup>42</sup> UNSC Resolution 541/1983.

in most provinces in the conflict zone. The clashes continued, including terrorist attacks, until the mid-1990s, and many other villagers were evicted. In the early 1990s, the first claims for redress for loss of property and housing arrived at the ECtHR.

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## Presentation by Dr Costas Paraskeva<sup>43</sup>

### 1. Cyprus

#### *Loizidou v Turkey (1996)*<sup>44</sup>

Ms Loizidou owns certain plots of land in northern Cyprus but has been prevented from gaining access to her properties since 1974 as a result of the presence of Turkish forces exercising overall control in the area. Ms Loizidou claimed a violation of her right to property under article 1, Protocol 1 (right to property), of the ECHR, and the ECtHR concluded that Turkey exercised effective and overall control over ‘TRNC’ and that its responsibility could be invoked before the court.<sup>45</sup>

The concept of jurisdiction under article 1 of the ECHR is not limited to a national territory of a member state, and the court has held that responsibility may arise as a result of military action and a contracting party exercising effective control outside its national jurisdiction. Thus the court held that Turkey had committed continuous violations of Ms Loizidou’s right to property by denying her access to her land.<sup>46</sup> This judgment confirmed that Greek Cypriots remained the legal owners of their properties in the north. Later, in 1998, the court ordered just satisfaction for Loizidou: Turkey was to pay CYP 300,000 in pecuniary damages and CYP 20,000 in non-pecuniary damages. The *Loizidou* case is a relevant judgment for subsequent applications by Cypriots denied access to their properties in the ‘TRNC’.

#### *Cyprus v Turkey (2001)*<sup>47</sup>

In this inter-state case, the ECtHR found that Turkey had committed continuous violations of article 1, Protocol 1; article 8 (right to home); and article 13 (effective remedy) of ECHR. It concluded that ‘for the purposes of [the exhaustion requirements under] the former Article 26 (current Article 35 § 1) of the Convention, remedies available in the “TRNC” may be regarded as ‘domestic remedies’ of the respondent State and that the question of their effectiveness is to be considered in the specific circumstances where it arises,’ on a case by case basis.<sup>48</sup> Accordingly, the inhabitants of the territory may be required to exhaust these remedies unless their inexistence or ineffectiveness can be proven—a point to be examined on a case-by-case basis.<sup>49</sup> The court reaffirmed that the government of Cyprus remained the sole legitimate

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<sup>43</sup> Human rights lawyer, Lellos P Demetriades LLC., Cyprus.

<sup>44</sup> ECtHR, Judgement, App no 15318/89, 18 December 1996.

<sup>45</sup> Loizidou, para 56.

<sup>46</sup> Loizidou, para 64.

<sup>47</sup> Cyprus v Turkey, Judgement, App No 25781/94, 10 May 2001.

<sup>48</sup> Cyprus v Turkey, para 102.

<sup>49</sup> Cyprus v Turkey, para 98.

government of Cyprus and found continuous violations of article 1, Protocol 1,<sup>50</sup> and article 8 of ECHR attributed to Turkey for the actions of the ‘TRNC’ authorities.<sup>50</sup>

The ECtHR also held that there had been a violation of article 13 ECHR by reason of the failure to provide to Greek Cypriots not residing in northern Cyprus any remedies to contest interferences with their rights under article 8 and article 1, Protocol 1.<sup>51</sup>

If the court finds a state to be in violation of the ECHR, the obligations imposed can be classified into three broad categories:

- i. Payment of just satisfaction, if such amount is awarded. In a number of cases, the court has considered the identification of a violation to constitute just satisfaction. However, in cases such as *Loizidou*, just satisfaction was awarded.
- ii. Individual measures, which the member state has to take in order to put the applicant in a position s/he would have been in had the violation not occurred.
- iii. ‘General Measures’, as a most important category, ordering the responding state to eliminate the root of the problem that generates a number of applications.

#### *Xenides-Arestis v Turkey (2005)<sup>52</sup>*

In *Xenides*, the applicant had been prevented from living in her home or using her property since August 1974. On 30 June 2003, the ‘TRNC’ Parliament enacted the ‘Law on Compensation for Immovable Properties Located within the Boundaries of the Turkish Republic of Northern Cyprus’ (Law 49/2003). A commission (the predecessor of the IPC<sup>53</sup>) was set up under this law with a mandate to decide compensation claims. The UN plan for the reunification of Cyprus (the Foundation Agreement—Settlement Plan or ‘Annan Plan’<sup>54</sup>) was put to a vote in Cyprus on 24 April 2004, with two separate referendums being held for the Greek-Cypriot and Turkish-Cypriot communities. As the plan was rejected in the Greek-Cypriot referendum, it did not enter into force.

The ECtHR concluded that there was no obligation under article 35(1) of ECHR to have recourse to remedies that are inadequate or ineffective. This was followed by an assessment of the effectiveness of Law 49/2003. Several conclusions were reached:

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<sup>50</sup> *Cyprus v Turkey*, para 172 (‘...displaced persons unable to apply to the authorities to reoccupy the homes which they left behind.’). Id, para 184 ‘at least since June 1989 the “TRNC” authorities no longer recognised any ownership rights of Greek Cypriots in respect of their properties in northern Cyprus’).

<sup>51</sup> The court concluded that there had been a violation of Article 13 of ECHR by reason of the respondent state’s failure to provide to Greek Cypriots not residing in northern Cyprus any remedies to contest interferences with their rights under article 8 of ECHR and article 1 of Protocol 1 (*Cyprus v Turkey*, para 194).

<sup>52</sup> *Xenides-Arestis*, ECtHR Judgment, App no 46347/99, 22 December 2005. Also relevant is the admissibility decision in *Xenides*, in which the ECtHR decided on the nature, validity, availability, effectiveness, and adequacy of the remedy in Law 49/2003, see *Xenides-Arestis*, ECtHR Decision, App no 46347/99, 2 September 2004.

<sup>53</sup> On the International Property Commission (IPC), see below.

<sup>54</sup> See [www.hri.org/docs/annan/Annan\\_Plan\\_Text.html](http://www.hri.org/docs/annan/Annan_Plan_Text.html).

- The compensation offered by Law 49/2003 is limited to pecuniary loss for immovable property. No provision is made for movable property or non-pecuniary damages. The terms of compensation do not allow for the possibility of restitution of the property withheld. Thus, although compensation is available, this could not, in the opinion of the court, be considered as a complete system of redress regulating the basic aspect of the interferences complained.
- Law 49/2003 did not address the applicant's complaints under articles 8 and 14 (right not to be discriminated against) of ECHR.
- Law 49/2003 is vague as to its temporal application, ie, whether it has retrospective effect concerning applications filed before its enactment and entry into force; it merely refers to the retrospective assessment of compensation.
- The composition of the compensation commission raised concerns since the majority of its members are living in houses owned or built on property owned by Greek Cypriots. An international composition would have enhanced the commission's standing and credibility.
- The compensation-based remedy proposed by Turkey could not fully redress the negation of the applicant's property rights.
- The remedy proposed by Turkey did not satisfy the requirements of article 35(1) of ECHR in that it could not be regarded as an 'effective' or 'adequate' means for redressing the applicant's complaints.

The court also found violations of the right to property and the right to home, holding that 'the violation of the applicant's rights guaranteed by Article 8 of the Convention and Article 1 of Protocol 1 No. originates in a widespread problem affecting large numbers of people, namely the unjustified hindrance of her "respect for her home" and "peaceful enjoyment of her possessions" as a matter of "TRNC" policy or practice' (systemic problem).<sup>55</sup>

Applying article 46 of ECHR, the court stipulated: 'the respondent State must introduce a remedy which secures genuinely effective redress for the Convention violations identified in the instant judgment in relation to the present applicant as well as in respect of all similar applications pending before it . . .'.<sup>56</sup> Here the court considered the fact that there were some 1400 applications pending on the same issue, and it recognized that there was a widespread problem deriving from the 'TRNC' policy and practice.

After the *Xenides-Arestis* judgment, acting upon recommendations in previous decisions, the 'TRNC' authorities adopted a new Law on Compensation (Law 67/2005), which entered into force 22 March 2005.<sup>57</sup> This law established a new reparations mechanism: the Immovable Properties Commission (IPC). In December 2006, the ECtHR delivered a judgment on just satisfaction for *Xenides-Arestis* and stated that 'the new compensation and restitution mechanism, in principle, has taken

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<sup>55</sup> *Xenides-Arestis*, ECtHR Judgment, App no 46347/99, 22 December 2005, para 38.

<sup>56</sup> *Id.* para 40.

<sup>57</sup> Law 67/2005: Law for the compensation, exchange and restitution of immovable properties which are within the scope of sub-paragraph (b) of paragraph 1 of Article 159 of the Constitution, as amended by Law nos. 59/2006 and 85/2007.

care of the requirements of the decision of the Court on admissibility of 14 March 2005 and the judgment on the merits of 22 December 2005'.<sup>58</sup>

*Demopoulos and others v Turkey (2010) (Admissibility decision)*<sup>59</sup>

The 2010 *Demopoulos* case concerning the status of the IPC presents an about-face in the ECtHR's policy. In this case, eight applications by Greek Cypriots were joined and considered by the court in terms of their admissibility. The new Law 67/2005 was found to be an effective remedy for the purpose of the ECHR and the applications were declared inadmissible. The new IPC is composed of two international members, and there is a right to appeal IPC decisions before the High Administrative Court of 'TRNC'. The new law allows for restitution of property, compensation for pecuniary and non-pecuniary damage, and exchange of property.

In *Demopoulos*, the ECtHR concluded in relevant part that:

- The IPC has been functioning since March 2006 and has concluded 85 applications, in which significant sums of money have been paid in compensation; restitution of property has been made to four applicants and exchange of property effected in several other cases. . . . There are currently over 300 other claims pending examination by the IPC.<sup>60</sup> Therefore the court was satisfied with the adequacy of the redress,<sup>61</sup> as well as the amount of compensation.<sup>62</sup>
- No specific and substantiated grounds concerning any lack of subjective impartiality of the IPC members had been put forward.<sup>63</sup>
- Law 67/2005 provided an accessible and effective framework of redress in respect of complaints about interference with the property owned by Greek Cypriots.
- This decision is not to be interpreted as requiring that applicants make use of the IPC; they may choose not to do so and await a political solution.

## 2. Turkey

*Comparison of the Demopoulos and Icyer decisions on admissibility*

The *Icyer v Turkey* case<sup>64</sup> is the latest in a series of cases before the ECtHR concerning the 1984 armed conflict between the Turkish security forces and members of the Kurdish Workers Party (PKK) in South-East Turkey. In *Icyer*, the ECtHR found that recommendations issued in previous case law, ie *Dogan and others v Turkey*,<sup>65</sup> had been met. In *Dogan* the court had found violations by the Turkish government of articles 8 and 13, and article 1, Protocol 1, of ECHR. It also concluded that there was a structural problem with regard to the internally displaced Kurdish villagers and indicated possible measures to be taken in order to end the situation.

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<sup>58</sup> Xenides-Arestis v Turkey (just satisfaction), App. 46347/99, para 37, 7 December 2006.

<sup>59</sup> Deomopoulos and others v Turkey, ECtHR, Decision on Admissibility, App No. 46113/99, 1 March 2010.

<sup>60</sup> Demopoulos, para 104.

<sup>61</sup> Id, para 119.

<sup>62</sup> Id, para 123.

<sup>63</sup> Id, para 120.

<sup>64</sup> Icyer v Turkey, App No. 18888/02, 12 January 2006.

<sup>65</sup> Dogan and others v Turkey, App. No. 8803-8811/02, 29 June 2004.

	IPC - 'TRNC'	South East Turkey DACs
Number of decisions by the respective commissions	85	440
Affected population	211,000	380,000
Applications before commissions	433	170,000
Cases pending before ECtHR before the delivery of the admissibility decisions in <i>Deomopolous</i> and <i>Icyer</i>	2 of 1400	800 of 1500

Two crucial passages from the two decisions merit comparison:

In *Icyer*, the court observed at the outset that the applicant could return to his village without any hindrance by the authorities.<sup>66</sup> In *Demopoulos*, the court put weight on the non-existence of effective remedies due to the applicable legislation and to prevailing official attitudes and policies. That situation has changed: there is now legislation which seeks to provide a mechanism of redress and which has been interpreted to comply with international law, including the ECHR, and the political climate has improved, with borders to the north no longer closed.<sup>67</sup>

In *Demopoulos*, however, the court did not state that Greek Cypriots could return to their villages ‘without hindrance by the authorities’. There is a lack of discussion on article 8 in this judgment (the right of displaced persons to return to their homes), but an extensive discussion on the right to property. This remains an issue: one cannot see from this decision whether the establishment of the IPC actually addressed the denial of the right to respect for the home of displaced persons, nor can one see any procedures before the IPC where Greek Cypriots apply to return to their homes.

### Conclusion

There is still no guarantee that applicants will find an effective remedy in the ‘TRNC’ (it is not yet confirmed in practice). Those that have already applied before the ECtHR will now have to file complaints under the ‘TRNC’ domestic system and then, if not satisfied, reapply to the ECtHR. This can result in lengthy proceedings, and therefore one can speak of a denial of justice by the ECtHR.

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### **Presentation by Mert Guclu<sup>68</sup>**

A legal remedy should be available both in theory and practice—one that is accessible, capable of providing redress, and have a reasonable prospect of success. Each remedy and its application has to be considered on a case-by-case basis. The IPC decisions have been held to be in conformity with the ECHR and relevant ECtHR case law.

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<sup>66</sup> Icyer, para 75.

<sup>67</sup> Demopoulos, para 90.

<sup>68</sup> Department of International Relations, Eastern Mediterranean University, Turkish Cypriot community.

### *IPC facts*

The impact of the ECtHR's decisions has contributed to the establishment of a national institution that is in line with its standards:

- Heirs and successors are allowed to apply, regardless of nationality or residence abroad.
- There is another remedy available before the Ministry of Interior, meaning that a person who is not Cypriot and who left a piece of property before 1974 can apply for that property to the Interior Ministry under a separate mechanism totally established under the ministry.
- Three types of redress are available before the IPC: restitution, exchange of property, and compensation.
- IPC decisions are not final; they are subject to review and revision by the High Administrative Court of the TRNC in case of appeal.
- The IPC is funded by an annual budget approved by the TRNC.
- Applicants have easy access to compensation awarded to them.
- Civil procedure rules apply before the IPC, which follow an Anglo-Saxon system.
- Even if the applicant does not possess the original title deed, 'transactional title deeds' can be used as effective evidence.
- Cross examination of witnesses is allowed before the IPC if the applicant so wishes. The presence of witnesses is mandatory and failure to appear may result in a one-year imprisonment or a EUR 1000 fine.
- The IPC is accessible; travel for the purpose of a hearing (from south to north) is funded by the Commission.
- Errors in an application are not returned for correction to the applicant, but are corrected by the IPC registry.
- As of 11 June 2010, 549 applications had been lodged with the Commission and it had paid GBP 43,090,850 in compensation, ruled for exchange and compensation in two cases, for restitution in one case, and for restitution and compensation in five cases, and in one case ruled for partial restitution.
- Language interpreters (Turkish and Greek) are provided by the Commission.
- Confidentiality is provided during a hearing if a party requests. Anonymity is guaranteed.
- Continuity is ensured: if a judge is absent or unable to serve, this will not affect the procedure as another judge will be appointed.
- The Commission will exist until 21 December 2011, as specified in Law 67/2005. This limitation, however, is for budgetary reasons only; the time-frame may be extended.
- In calculating, the IPC takes into account the market value of the property as of 1974, increasing value to date, and taking into account the loss of use and enjoyment. Also, if the applicant is claiming his or her home, then non-pecuniary damages are available.

### Conclusion

In *Demopoulos*, the ECtHR stated that:

'it would be unrealistic to expect that as a result of these cases the Court should, or could, directly order the Turkish Government to ensure that these applicants obtain access to, and full possession of, their properties,

irrespective of who is now living there or whether the property is allegedly in a militarily sensitive zone or used for vital public purposes.<sup>69</sup>

‘However, if it is not possible to restore the position, the Court, as a matter of constant practice, has imposed the alternative requirement on the Contracting State to pay compensation for the value of the property.<sup>70</sup>

As a result of international law, especially the developments in the decisions of the ECtHR, there needed to be an effective remedy, and therefore the IPC was formed. As other claims processes, it is not without procedural problems. The system of the Commission must develop and have a procedure capable of quick amendment so as to respond to future legal developments before the ECtHR.

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### **Presentation by Sandra Lyngdorff<sup>71</sup>**

#### Immovable Property Commission (IPC)

After the ECtHR’s decision in *Demopoulos and Others v Turkey*, the IPC is now regarded as an effective domestic remedy which needs to be exhausted by claimants. The IPC has been operational since March 2006 and, according to its website, 164 applications have been concluded as of 31 May 2010 and over 300 other claims are pending.<sup>72</sup>

If no friendly settlement is reached during an initial hearing on the merits (a so-called ‘mention meeting’), a public hearing is scheduled. Appeals can be made to the ‘TRNC’ High Administrative Court, and subsequently to the ECtHR. However, most applications end in a friendly settlement at the ‘mention’ stage and only one applicant has so far lodged an appeal.

To date, compensation has been paid to claimants in the majority of cases (97 of 164), 55 claims have been revoked, restitution after settlement in one case, compensation and exchange in two cases, compensation and restitution in five cases, restitution in one case, partial restitution in one case, and two claims have been rejected. In total, GPB 42,680,100 have been paid in compensation.<sup>73</sup> Restitution is thus a very rare remedy.

As the ECtHR has found the IPC to constitute an effective remedy, the 1400 cases lodged with it have been referred to the IPC. Greek Cypriots will accordingly have to file an application with the IPC in order to have exhausted domestic remedies as required by the ECtHR. If Greek Cypriots do not apply to the IPC, they will either have to show the ECtHR (i) that the IPC is for some reason inadequate or ineffective in the particular circumstances of the case; (ii) that there existed special circumstances

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<sup>69</sup> Demopoulos, para 112.

<sup>70</sup> Id, para 114.

<sup>71</sup> DOMAC Researcher; PhD Candidate, University of Amsterdam.

<sup>72</sup> See Presidency of Immovable Property Commission Monthly Bulletin for May 2010, available at <http://northcyprusipc.org>.

<sup>73</sup> As of 31 May 2010.

absolving them from the exhaustion requirement; or (iii) have their cases settled in the course of finding a final solution to the Cyprus problem.

### Arguments for and against the establishment of the IPC

#### *Advantages*

- Law 67/2005 provides for the possibility of restitution of property, exchange and/or compensation, and also for non-pecuniary damages and compensation for loss of use, which is what the applicants who have applied to the ECtHR have been claiming.
- There is faster resolution of applications at the IPC than at the ECtHR.
- The IPC members may be better than the ECtHR at assessing compensation as there is a requirement that its members have experience in public administration and evaluation of property and they are familiar with the local situation.
- There is also a possibility to appeal the IPC's decision and, ultimately, take the case back to the ECtHR. However, that process would take several years.

#### *Disadvantages*

- Greek Cypriot applicants before the court have argued that the IPC is only 'for show'; that it is a sham process, put up only to 'trick' the ECtHR into believing that an effective remedy for Greek Cypriots exists in northern Cyprus and that the aim of the 'TRNC' authorities is to legitimise the illegal seizure of property.
- There have been discussions in Cyprus about what to do regarding Greek Cypriots who do apply to the IPC, with talk of black lists, legal action, or even stripping them of their refugee status.
- Greek Cypriot applicants have argued that they cannot use the remedy offered by the 'TRNC' for a number of reasons, eg, as the 'TRNC' does not exist and is not recognized, and that using the remedy on the northern side might equal recognition of the 'TRNC' and deny Cypriot sovereignty over the northern part of the island.
- Many Greek Cypriots believe that the 'TRNC' would not offer an effective remedy or doubt that such remedy would be independent and impartial.
- Amounts offered by the IPC tend to be much lower than those claimed by the applicants, at least when compared to the applications examined by the ECtHR. The amount awarded by the ECtHR in pecuniary damages for the loss of use of the property (where the applicant did not lose title) is approximately the same amount the IPC offers for loss of use *and* the value of the property. However, the ECtHR dealt with the adequacy of compensation awarded by the IPC in the *Demopoulos* decision and was not convinced by the applicants' arguments that the awarded compensation would fall short of what could be regarded as reasonable compensation.
- There are some indications that the IPC procedure favours people who are economically desperate. As of 31 May 2010, it had concluded 164 cases, 97 of which were resolved with 'only' compensation. This clearly contrasts with the claims for compensation for loss of use made by the applicants to the ECtHR. According to an interview with a Greek Cypriot single mother who applied to the IPC, her reasons for applying were simply financial. She struggled to provide for her children in the south, while she had inherited her father's land in the north, which was estimated to be worth around £500,000. In the

interview she said ‘. . . I don’t believe every Cypriot puts their country first. Sometimes you have no other choice. . . . Day by day hope for solution is fading. In my piece of land they have built houses. The first time I went, there were two houses, now there are 13 and they continue to build. Isn’t it time to get something back for something you can’t have?’<sup>74</sup>

- By compensating Greek Cypriots instead of restituting properties, the remedy might contribute to a further ethnic division of the island, with the IPC ‘buying out’ Greek Cypriot property in the north.

#### Damage Assessment Commissions (DACs) in South-East Turkey

During the 1980s and 1990s, as a result of Turkey’s conflict with the PKK, over 1000 villages were destroyed and evacuated in South-East Turkey. Many houses were set on fire by the Turkish security forces, and over 360,000 people (mainly Kurdish) were forcibly displaced. Villagers lost their homes and their livelihood, and many were also physically maltreated by the security forces. Internally displaced persons (IDPs) are now seeking compensation in order to be able to return to their homes and rebuild their lives. According to a national survey from December 2006, at least half of the IDPs wished to return home.

Just one month after the *Dogan v Turkey* judgment, Turkey adopted the 2004 Compensation Law (the Compensation Law), the purpose of which was to establish principles and procedures for compensation for material damages suffered due to terrorist acts or activities undertaken during the fight against terror. The Compensation Law established the composition and duties of the Damage Assessment Commissions (DACs), the process by which applications for damages were to be submitted, and the amount and form of damages to be provided. There are about 100 commissions in 75 provinces.

The Compensation Law covers loss for:

- immovable and movable properties, damage to animals, trees and agricultural products;
- damages resulting from injury, physical disability and death, and expenses for medical treatment and funerals;
- material damages due to inability to reach assets because of the anti-terrorism activities.

The Compensation Law also provides for a friendly settlement procedure and cash or in-kind (which is given priority) payments for damages. Any reparation already granted is deducted (eg, losses compensated by the state or the ECtHR, or losses suffered by persons convicted for terrorism-related acts). By August 2009, 361,238 cases had been filed with the Commissions and over 50% (190,307) of these had been finalized, including 120,557 awards of compensation and 69,750 negative decisions.<sup>75</sup>

The ECtHR has found the Compensation Law and its Damage Assessment Commissions (DACs) to constitute an effective remedy which must be exhausted, and it has referred close to 1500 cases to DACs. Therefore, claimants have no choice

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<sup>74</sup> Jean Christou, ‘Why I went to the property commission’ *Cyprus Mail* (10 June 2007).

<sup>75</sup> Council of Europe Parliamentary Assembly, ‘Solving property issues of refugees and displaced persons’ Report by Committee on Migration, Refugees and Population (8 January 2010) Doc 12106 p 21, para 108.

but to apply to the Commissions or show the ECtHR that the remedy is not effective; or that special circumstances apply.

### Arguments for and against the functioning of DACs

#### *Advantages*

- The Compensation Law and the DACs have the potential to offer an effective compensation mechanism and to normalize the lives of many IDPs. According to Human Rights Watch, villagers say that it is first and foremost the financial cost of returning that makes it practically impossible and the compensation awarded by the DACs could eliminate this obstacle.<sup>76</sup>
- In contrast to the time-consuming proceedings before the ECtHR, the Compensation Law states that the DACs have to finalize every application within 6 months of the day the application is made.
- The fact that IDPs can receive compensation for the time when they were unable to access their homes and villages is an important aspect, as many IDPs could not provide for themselves due to the displacement. Many of the IDPs were farmers who lost their livelihoods, ie, fields and animals in addition to their homes.
- The primary concern of the Compensation Law is not the restitution of property *per se*, as IDPs rarely face legal or practical obstacles to returning to their property—in the majority of cases no one else is living on their properties—but the Law is more focused on providing compensation for material damages and injuries caused during the displacement.
- IDPs often have difficulties accessing documentary evidence such as title deeds etc, and the DACs are to accept a broad range of evidence.

#### *Disadvantages*

While national and international NGOs and legal experts have recognized the Compensation Law as a positive step, attention has also been drawn to a number of problems in the law and its implementation that may undermine IDPs' right to just compensation.

- Progress in assessment and payment of compensation is slow: the EU in its progress report on Turkey has eg noted that '... due to lack of resources and the heavy workload of the Damage Assessment Commissions, progress in the assessment and payment of compensation has been slow.'<sup>77</sup>
- Lack of independence: six out of seven members of the DACs are civil servants, which can make the applicants doubt their independence and impartiality. Some police officials who previously worked in the anti-terror branches are allegedly working in the Secretariats of the DACs, which can undermine confidence in the process.
- Inconsistencies in the application of the Compensation Law and inconsistencies in the damages awarded: there are around 100 DACs and various reports have indicated inconsistencies in the application of the Law,

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<sup>76</sup> Human Rights Watch, 'Unjust, Restrictive, and Inconsistent. The Impact of Turkey's Compensation Law with Respect to Internally Displaced People' (December 2006), p 9, available at [www.hrw.org/legacy/backgrounder/eca/turkey1206/](http://www.hrw.org/legacy/backgrounder/eca/turkey1206/).

<sup>77</sup> Commission of the European Communities, 'Turkey 2008 Progress Report' (5 November 2008) SEC(2008) 2699, p 27. See also Commission of the European Communities, 'Turkey 2009 Progress Report' (14 October 2009) SEC(2009)1334, p 32.

both between and within provinces, and shortcomings which lead to uneven and unbalanced calculations of compensation.<sup>78</sup> According to Human Rights Watch, a trend towards lower damages could be seen right after the ECtHR's decision in *Icyer*, and DACs even sought to revise assessments already made and offer lower amounts after the *Icyer* decision.<sup>79</sup> To tackle this problem, the Turkish Ministry of Interior has allegedly issued standardised guidance on award levels to the DACs. The Ministry has also allegedly sought legal advice from international experts, provided training to the Commissions, and developed a database to standardise and harmonise their decisions.<sup>80</sup>

- No compensation for psychological suffering: in cases where the ECtHR has found a violation of articles 2 or 3 of ECHR in addition to a violation of article 1, Protocol 1, ECHR, the court has awarded applicants non-pecuniary damages for psychological suffering. No such compensation is available under the Compensation Law.
- High proportion of claims rejected: out of the applications that had been finalized as of August 2009, just over 60% had received compensation, leaving almost 40% disqualified from being granted compensation.<sup>81</sup> One expert has argued that 'it should . . . be generally assumed that internally displaced persons are eligible to apply for compensation unless it can be shown that they are not'.<sup>82</sup>
- No proper instance of appeal: if a friendly settlement cannot be reached between the claimant and the DAC, the claimant can go to a domestic court. However, the court proceedings open a new case and the domestic court does not examine whether the Compensation Law was correctly applied or not. This procedure therefore cannot be seen as being an appeals process. Also, Human Rights Watch has found that the option to go to court is not practically possible for many villagers as litigants opening an action have to pay 4% of their claim in court fees.<sup>83</sup>
- The Compensation Law does not deal with issues such as lack of infrastructure, removal of landmines, and the village guard system. The

<sup>78</sup> See eg The Internal Displacement Monitoring Centre (IDMC) of the Norwegian Refugee Council (NRC), 'Training on the Protection of IDPs: Workshop for non-governmental organizations in Turkey' (Ankara 8-9 June 2006), p 4, report available at <http://www.internal-displacement.org/>; Rhodri C Williams, 'Property Compensation: Observations on Turkey's Compensation Law No. 5233 in International Context', p 5, available at [http://www.brookings.edu/fp/projects/idp/2006\\_RCW\\_Turkey.pdf](http://www.brookings.edu/fp/projects/idp/2006_RCW_Turkey.pdf); UNCHR, 'Mission to Turkey, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (16 November 2006) A/HRC/4/26/Add.2, p 13; and Agri Bar et al. 'Law 5233 is Unjust', p 2, available at [http://www.tohav.org/zorunlugoc/LAW\\_5233\\_IS\\_UNJUST.pdf](http://www.tohav.org/zorunlugoc/LAW_5233_IS_UNJUST.pdf).

<sup>79</sup> Human Rights Watch, 'Unjust, Restrictive, and Inconsistent. The Impact of Turkey's Compensation Law with Respect to Internally Displaced People' (December 2006), p 17.

<sup>80</sup> The Internal Displacement Monitoring Centre (IDMC) of the Norwegian Refugee Council (NRC), 'Turkey: Need for continued improvement in response to protracted displacement' (26 October 2009) p 9, available at <http://www.internal-displacement.org/>.

<sup>81</sup> Council of Europe Parliamentary Assembly, 'Solving property issues of refugees and displaced persons' Report by Committee on Migration, Refugees and Population (8 January 2010) Doc. 12106 p 21, para 108.

<sup>82</sup> Rhodri C Williams, 'Property Compensation: Observations on Turkey's Compensation Law No 5233 in International Context', p 5, available at [http://www.brookings.edu/fp/projects/idp/2006\\_RCW\\_Turkey.pdf](http://www.brookings.edu/fp/projects/idp/2006_RCW_Turkey.pdf).

<sup>83</sup> Human Rights Watch, 'Unjust, Restrictive, and Inconsistent. The Impact of Turkey's Compensation Law with Respect to Internally Displaced People' (December 2006), p 14.

villages used to have electricity and phone connections, there were functioning road systems and they had access to schools. Now there is nothing. Landmines pose a serious danger to returning IDPs: in 2006, it was estimated that 900,000 units remained to be removed. The village guard system was set up in Turkey in the mid-1980s. Local members of the gendarmerie required local villagers to enroll as village guards. Village guards were armed and paid and were to help the Turkish Army in the fight against the PKK. If they refused, the gendarmes would allegedly destroy their houses and forcibly evict them from their village. The EU noted in late 2009 that no steps had been taken to abolish the system of village guards and that new village guards were actually being recruited.<sup>84</sup> And reports indicate that in many cases, authorization for IDPs to return to villages is conditional on the willingness of the returnees to serve as village guards.

- No possibility of bringing perpetrators to justice: the Compensation Law does not provide for any investigations, acknowledgment of responsibility, or the possibility of bringing perpetrators to justice.

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### ***Discussion***

Q: Can the ‘TRNC’ support awarding compensation to all claimants if most of them apply to the IPC? At the moment there are only about 500 claims. What if the IPC is flooded by claims? Also, compensation for loss of enjoyment is awarded. If this is calculated, how can the ‘TRNC’ budget support this burden?

A: As to the low number of applications to the IPC, it is a political decision. There are two fractions: one is supporting the idea that Greek Cypriots should massively apply before the Commission, while the other urges them not to apply since it would only contribute to the recognition of the ‘TRNC’ and go against the Greek Cypriot side in the negotiations.

Q: In international law, restitution is considered the proper remedy and compensation a secondary one. However, restitution is a problem in northern Cyprus, how will it be reached? What about the Turkish people who have been settled in northern Cyprus in the past 35 years, can they be moved again so a proper restitution can be exercised?

A: Who is a ‘settler’ in the current context? This is a problem that exists for 35 years now. Many Turkish Cypriots are born on the island and do not consider themselves settlers.

The burden of proof is different for claims of compensation than for restitution before the IPC.

Q: What does the *Orams* judgment, delivered by the European Court of Justice (ECJ) mean for the process?<sup>85</sup> How will the development before the ECJ affect the current restitution plan in Cyprus?

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<sup>84</sup> Commission of the European Communities, ‘Turkey 2009 Progress Report’ (14 October 2009) SEC(2009)1334, p 32.

<sup>85</sup> See Case C-420/07 Apostolides v Orams (ECJ 28 April 2009).

A: There are approximately 30,000 properties similar to the one in the *Orams* case. These are all potential claims. However, the Greek Cypriots need to identify which EU citizen occupies the property. It is a very time-consuming and a very expensive procedure. It is difficult to estimate the real effects to the process.

Q: Is there individual accountability to any extent? What is the basis for compensation? Is there any investigation?

A: There is investigation under orders of ECtHR judgments where violations of articles 2 and 3 of ECHR were found, but not in every case. It can be assumed that the accountability for damage is the effect of activities of PKK or the state reaction in the region.

Q: Are there any cases before the ECtHR that are trying to have the IPC declared an ineffective remedy?

A: There is only one case before the High Administrative Court in ‘TRNC’. This does not mean that IPC is ineffective. We need a number of cases that will show its ineffectiveness.

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*Afternoon Session*  
*Chaired by Edda Kristjánsdóttir*

### **PANEL THREE: Iraq reparation schemes**

#### **Presentation by Peter van der Auweraert<sup>86</sup>**

##### Introduction to the Property Claims Commission

The Property Claims Commission (PCC) is a successor organization to the Commission for the Resolution of Real Property Disputes (CRRPD) that operated between 2006 and 2010 in Iraq. CRRPD, in turn, was a successor of the Iraq Property Claims Commission (IPCC) that functioned between 2004 and 2006.

PCC deals with land disputes that originated in the forced displacement and expropriation policies of the Saddam Hussein regime in Iraq. It has exclusive jurisdiction to deal with property claims originating from the period between July 1968 and April 2003,<sup>87</sup> when the regime was toppled. The PCC was originally established by the Coalition Provisional Authority (CPA) and was subsequently confirmed by the Iraqi Parliament. The PCC is an entirely Iraqi national institution that is fully embedded in the domestic legal order, and although there was international support (by the IOM and UNCHR) during its establishment, there is now no international involvement whatsoever in the process. The PCC incorporates 33 judicial committees all throughout Iraq, three dedicated Boards of Appeal within the Federal Cassation Court in Baghdad, and a Secretariat based in Baghdad.

As of June 2010, the PCC had received approximately 160,000 claims, with 30 June 2010 being the filing deadline. Out of the total received, 80,000 claims have been resolved at first instance, and 45,000 have been finally resolved and hence become enforceable.

For the previous owners, the remedies available from the PCC are either restitution or compensation at the current market value. Current owners who have to vacate their land or property following a restitution decision by the PCC have the right to obtain compensation at the current market value, as long as they are not the first right-holders following the expropriation by the former regime.<sup>88</sup>

Thus, the only type of loss covered by the PCC is immovable property loss. The Commission is funded from the state budget through the Iraqi Ministry of Finance which is liable to pay compensation to previous and current owners. To date, compensation has been paid for 1200 claims, totaling US\$ 250 million.<sup>89</sup>

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<sup>86</sup> Senior Legal Officer, Reparations Programmes Unit, International Organization for Migration, Geneva, Switzerland.

<sup>87</sup> These dates coincide with the coming to power of the Baath Party in Iraq, and the fall of the regime following the US-led invasion.

<sup>88</sup> Given the way in which expropriation was carried out by the former regime in Iraq, the first right-holder is almost invariably the State, usually through the Minister of Finance.

<sup>89</sup> PCC information, 31 December 2009.

## 1. The PCC is connected to the ordinary justice system

### *Through the legal culture and ordinary Iraqi law*

The Judicial Committees and Boards of Appeal are composed of Iraqi judges appointed by the Higher Judicial Council that nominates all other judges in the country. Here we are witnessing a number of implications of the Iraqi judicial culture being ‘imported’ into the Commission. For example, there is considerable resistance by the judges to using so-called ‘mass claims procedures’, such as the attempt to expedite review by standardizing decisions in similar cases and grouping them together for decision based on drafts prepared by the legal counsel working within the PCC and assisting the judges. Although this would clearly increase the PCC’s efficiency, the local judges have refused to accept the approach as they are not used to working in this way in the civil courts, where a judge is seen as an independent figure who should not rely on a decision drafted by legal counsel.

Ordinary substantive and procedural law applies residually in the Commission. As to substantive law, for example, the PCC relies on the Iraqi Inheritance Law to decide how to allocate property to heirs. As to procedural law, the Law on Civil Procedure applies to a large extent, and the Iraqi Public Employment Law applies to the contracts and salaries of staff of the Commission. These factors have turned the PPC into a quasi-judicial institution rather than what one would expect in a body facing 160,000 claims.

The full resolution of some cases requires cooperation by both the PCC and the civil courts, and even though the PCC has exclusive jurisdiction for land disputes in its mandate, the examples below illustrate the practical complexities involved.

### *Through overlapping caseload*

Some cases before the PCC require the intervention of the ordinary courts for their full resolution.

### *Agricultural contracts*

The Iraqi agricultural regime during Saddam Hussein’s regime was based on the state owning agricultural land and handing out agricultural long-term lease contracts to farmers. Especially in the north of Iraq, a considerable proportion of this agricultural land had been taken by the former regime from its owners for political reasons (and hence is eligible for restitution or compensation under the PCC mandate). At present, a significant number of previous owners are claiming restitution of that land, raising the issue of what needs to happen with the holders of agricultural lease contracts on this land if and when the land is returned to the previous owners.

Initially, the PCC judicial committees had ruled that the issue of restitution and cancellation of agricultural lease contracts should be dealt with together and that the latter should receive compensation in case the land in relation to which the contract was awarded would be returned to the previous owner. In appeal, however, the Cassation Commission has ruled that the agricultural lease contracts issue falls outside the PCC mandate and that hence the judicial committees cannot rule on what should happen to those contracts post-restitution or award compensation to the holders of those contracts.

As a consequence, holders of agricultural lease contracts must now apply to the civil courts in order to receive compensation for improvements they have made on the land, a process that is bound to take many years. Hence a gap has appeared between the moment when PPC decides to return ownership to the previous owner, and the time when the civil court decides to award compensation to the holders of an agricultural lease contract. This situation has led to farmers refusing to leave the land and hence the impossibility of enforcing PCC restitution decisions.

#### *Squatters and illegal occupants*

Since 2003, Iraq has seen significant new displacement and return movements, leading to a whole new set of land and property issues including the occupation by both public and private land by squatters and illegal occupants. As a consequence, some landowners who stand to receive their land back from the PCC are now faced with the additional need to apply to the civil courts to have squatters and/or illegal occupants evicted from their land. One outstanding question is how the courts can deal with cases where these squatters or illegal occupants number in the tens or hundreds and how the owners can have their eviction judgments enforced, given the difficult security situation in many places. Finally, unless the Iraqi Government can come up with alternative housing solutions for these squatters and illegal occupants, the problem of squatting and illegally occupying land is likely to persist.

#### 2. The PCC is dependent on the ordinary justice system

Even though the PCC is an independent, *ad hoc* commission, it is dependent on a number of other state institutions for its ability to implement its mandate.

#### *Enforcement*

The PCC is dependent on the ordinary judicial system for enforcement; it does not have independent enforcement capacity. Once a decision is delivered, the enforcement provisions of the Civil Procedure Code apply, and the enforcement has to be exercised through the Enforcement Department of the Ministry of Justice. To the extent that there are weaknesses in the ordinary justice system, they are thus imported into the PCC process. The Enforcement Department is understaffed and unsurprisingly, given present circumstances in Iraq, hampered in enforcing PCC decisions in some areas by the wider security situation and undue political interference in the process.

The PCC's lack of individual capacity thus only places additional burdens on the state institutions, and solutions are being sought in order for the PCC to function more efficiently, such as by strengthening the Enforcement Department. This is an important lesson for international ad hoc mechanisms (and even permanent ones like the ICC) that for the most part need to rely on local enforcement mechanisms.

#### *Property Registration Department*

The PCC requires the collaboration of the Property Registration Department in at least three ways. It requires the Property Registration Department to (1) provide it with the necessary property deeds so that it can verify in whose name the property was registered in the past; (2) put a lien on the properties that are affected by a claim before the PCC as according to the applicable law they can no longer be subject to transfers until the PCC has taken a final decision on the claim; and (3) make the necessary changes to the cadastre following a final restitution decision. In practice, this has given rise to numerous problems caused by a lack of resources on the part of

the Property Registration Department to deal with the extra work caused by the PCC and, especially in the earlier period, a refusal by some property registration offices to recognize the authority of the PCC.

### 3. The PCC is sometimes perceived as a competitor by the ordinary justice system

#### *Judicial appointments*

In Iraq, the Higher Judicial Council appoints all judges, including those sitting in the PCC Judicial Committees and Cassation Commission. The PCC has been adversely affected by the slowness in nominating judges on the part of the Higher Judicial Council, which some observers have blamed on the lack of enthusiasm for the PCC within the judiciary. Some civil judges have complained that the establishment of the PCC was a mistake and that the ordinary civil courts could have dealt with its caseload. The biggest victim of the nomination problem has been the Cassation Commission, which was already a bottleneck within the PCC process (not helped by the fact that the appeals rate is very high, up to 80 percent in the Kirkuk Province). Following the death of two judges within the Cassation Commission, its work ground to halt, as it took the Higher Judicial Council close to two years to appoint their replacements.

#### *Changes to the PCC's formal relationship with the ordinary judicial system*

The 2010 Law replacing the Commission for the Resolution of Real Property Disputes with the PCC made important changes to the appeals structure, in part aiming to increase the capacity at the cassation level. The appeals mechanism now comprises three (rather than one) appeals boards. Institutionally, whereas the earlier Cassation Commission was independent from the ordinary justice system, the new Appeals Boards now are located within the Federal Cassation Court and hence fall under its authority. If looked at from the viewpoint of the critique by some within the ordinary justice system regarding the need for the PCC, these changes can be understood as a 'takeover' of the PCC by the ordinary judicial system. It remains to be seen how this will change the nature of the PCC jurisprudence, which is seen by some Iraqi critics as having been too victim-friendly and insufficiently sensitive to the need to protect state interests.

#### Conclusions

- Arguably, the close interconnections between the PCC and the ordinary justice system have played a role in the PCC's inability to adopt rules and procedures adapted to the exceptional nature of its claims load. In the end, the PCC judicial committees operate largely like ordinary civil courts, with an overall resolution rate that is not discernibly faster than the ordinary court system. The nature of the PCC is hence closer to a special, *ad hoc* court system than a mass claims process.
- This raises the question whether, in the end, the use of the ordinary justice system (eg through the appointment of special judges to deal with former regime-related land claims) would not have yielded the same or, indeed, better results? The competition and non-recognition of authority would then have played a lesser role.
- Looking forward, it is clear that future efforts to establish *ad hoc* land claims commissions need to ensure from the outset that such commissions will indeed work more efficiently and expediently than the ordinary courts system. There

should be no automatic assumption that this will always be the case, as it is entirely dependent on a set of contextual factors that will differ in each situation.

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### **Presentation by Linda Taylor<sup>90</sup>**

#### Background

The United Nations Compensation Commission (UNCC) was established in 1991 as a subsidiary organ of the United Nations Security Council.<sup>91</sup> It was the first compensation system established under the authority of Chapter VII of the UN Charter. Under Resolution 687, Iraq was liable under international law for any direct loss, damage, including environmental damage and depletion of natural resources, or injury to foreign governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait. Successful claimants were compensated from the compensation fund that received a percentage of the proceeds from sales of Iraqi oil under UN auspices. Initially, the fund received 30% and at the present 5% of the proceeds. Any further changes going forward have to be approved by Iraq and the UNCC Governing Council.

The UNCC was not established as a court or arbitral tribunal, but rather as a political organ that performed essentially a fact finding function of examining claims, verifying their validity, evaluating losses, assessing payments, and resolving disputed claims. It was an original system; a special procedure suited to the circumstances and the need to bring justice to the victims of Iraq's invasion of Kuwait.

UNCC had a tripartite structure: (1) a Governing Council with the same composition as the Security Council, which was the political organ of the UNCC, set policy and approved awards of compensation; (2) Commissioners, acknowledged international experts in relevant fields, acting in personal capacity. They served on three-person panels, reviewing and verifying claims and alleged losses, and making recommendations concerning compensation to the Governing Council; and (3) the Secretariat, which supported both the Governing Council and the Commissioners by providing legal, technical, and administrative assistance.

#### Categories of claims

The numbers and types of claims and losses sustained drove the claims categories and processes by which claims were reviewed and resolved. This is one of the features that worked best and has been a model for later mass claims systems. The Council was particularly mindful of the fact that nearly one million third-party nationals had to flee Kuwait and Iraq at the time of the invasion and occupation. Claims categories A, B and C were designated as 'urgent humanitarian claims', to be resolved using expedited mass claims techniques. Claimants had limited interaction with the Commission and were required to provide simple or reasonably minimum evidence that was supplemented by third-party data that the Commission acquired and used.

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<sup>90</sup> Former Legal Adviser and Head of Legal Services, UNCC 2006-2007; Chief of Section, Legal Services Branch, UNCC 1999-2005. The views expressed by Ms Taylor are her own and do not necessarily reflect the views of the United Nations.

<sup>91</sup> S/RES/687 (1991), 8 April 1991; and S/RES/692 (1991), 20 May 1991.

99% of all claims fell into these categories (2.6 million claims) and they were resolved within nine years.

Claims categories D, E and F were large individual claims, claims of corporations and governments, and international organizations. These required individualized review and had to be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and amount of the claimed losses.

In the end, approximately 2.7 million claims were filed in the six categories by over 100 governments and international organizations. A total of US\$52.4 billion was awarded in compensation (of which US\$29 billion has been paid). All but the nine largest compensation awards have been paid in full.

#### The UNCC interaction with domestic institutions (or lack thereof)

The UNCC was not an exclusive jurisdiction forum for claims for damage, loss, or injury resulting from Iraq's invasion and occupation of Kuwait. It was anticipated that claims would be made before domestic courts as well, and it was recommended that the Governing Council develop coordination mechanisms to ensure that the aggregate of compensation awarded by the UNCC and a court or tribunal did not exceed the amount of the loss.<sup>92</sup>

The Governing Council determined that, for all claims categories, any compensation received from any other source would be deducted from the total amount of losses put forward at the UNCC. At the same time, the Iraqi government was requested to provide information about claims against Iraq in national courts and other fora for losses eligible for compensation at the UNCC. Also, the claimant governments were invited to provide information on lawsuits pending in their national courts or any compensation granted in their courts for losses compensable at the UNCC. The Governing Council also placed an obligation on claimants themselves to notify the UNCC of compensation they received from other sources.

In actual practice, very few UNCC claimants filed lawsuits against Iraq elsewhere, for a number of reasons, including:

- The vast majority of claims at the UNCC were filed on behalf of individuals claiming relatively small amounts.
- Other claimants faced a number of hurdles before national courts, such as issues of standing, sovereign immunity, and enforceability of judgments.

#### Relevant cases in domestic courts

##### *Kuwait Airways Corporation case*

KAC filed a claim before the UNCC for loss of aircraft, spares, engines, and ground equipment. It also sued the Iraqi government before UK courts for losses allegedly suffered as a result of the invasion and occupation. The proceedings against Iraq in UK courts were discontinued. KAC also pursued a lawsuit in UK courts against its insurers with respect to the insurers' liability under a policy of insurance. That litigation went up to the House of Lords which decided that KAC was entitled to

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<sup>92</sup> Letter by the UN Secretary General to the Security Council, 1991.

recover the maximum amount under their insurance policy.<sup>93</sup> That information was taken into account before the relevant UNCC panel. Since the amount received under the insurance policy was higher than what would otherwise have been recommended by the panel, KAC got no award of compensation. Some of the KAC's insurers and re-insurers also brought a claim before the UNCC for the amounts they paid under the insurance policy. The relevant UNCC panel found that the loss was compensable and recommended an award of compensation.

Mention of the UNCC was also made by the English Commercial Court in a dispute between insurers and re-insurers and retrocessionaires with respect to the London market's treatment of the KAC and other losses. The court decided that the award had to be shared between the participants in the insurance coverage.<sup>94</sup>

*Agrokomplect, AD v Republic of Iraq*<sup>95</sup>

Agrokomplect, a Bulgarian company that had been working on a land reclamation project for the government of Iraq at the time of the invasion, brought a claim at the UNCC for contract and other losses. Compensation was awarded for only certain of the losses. Agrokomplect also brought an action against Iraq in US district court for the same losses. The court noted the existence of the UNCC award and went on to consider whether it had subject matter jurisdiction over the lawsuit. The court decided that the lawsuit was barred by the Foreign Sovereign Immunities Act, and that decision was affirmed on appeal.

Other interactions

There were other types of interactions relating to judgments and arbitral awards. Where a claimant received a judgment or arbitral award, the claimant had to provide sufficient evidence to enable the panel to determine which portion of the UNCC claim, if any, had not been compensated by other sources; the panel would consider only the unrecovered portion of the claim. Panels said it was not the purpose of the UNCC to provide an alternate source of funding for arbitral awards or court judgments against Iraq in other fora. The only instances at the UNCC where claimants were able to get compensation was where they could show that there were other direct losses that were not covered by the judgment or arbitral award.

At the UNCC there were no appeals, so its decisions were final. There was a procedure to allow for the correction of technical errors. There were some instances of lawsuits against the UNCC by claimants attempting to challenge the amount of compensation or decisions of no compensation. The privileges and immunities of the UN were asserted in such cases.

Another interaction between the UNCC and national courts was with respect to the applicable law. According to the UNCC, the primary law to be applied by the Commissioners was relevant Security Council Resolutions, decisions of the Governing Council, and, where necessary, Commissioners were to apply other relevant rules of international law. Virtually all panels of Commissioners cited relevant domestic and international cases in their panel reports, while addressing a number of legal issues—including the objective and aim of compensation, the concept

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<sup>93</sup> [1999] 1 Lloyd's Rep. 803.

<sup>94</sup> [2009] EWHC 2787 (Comm).

<sup>95</sup> 524 F.Supp.2d 16 (D.C. 2007).

of direct loss, the nature and impact of intervening acts to break the chain of causation, the compensability of claims for war risk insurance, the treatment of incidental gains, the concept of betterment, interest, and, since all awards were denominated in US dollars, the date of the conversion of currency.

#### Environmental and cultural heritage claims

The UNCC considered environmental claims and claims for damage to cultural heritage. There were claims relating to decreases in fisheries and catches, damage to wetland resources, marine habitat, groundwater resources, etc. Some states advanced claims relating to public health issues, for example for the increased cost of medical services that were provided by states for their nationals that suffered injury. Also post-traumatic stress disorder claims were put forward by states on behalf of the state for public health reasons as well as on behalf of individuals.

Some of the types of claims could inspire thinking by claimants elsewhere and some of the decisions on the environmental claims would be of interest, in particular as to what standard one has to remediate environmental damage. The F4 panel said that primary emphasis must be placed on restoring the environment to pre-invasion conditions in terms of its overall ecological functioning, rather than on removal of specific contaminants or restoration to a particular physical condition—knowing that one can never put it back to the condition it was in before, which was probably not pristine in any event. The types of evidence adduced by governments included statistical calculations and modeling and this was challenged as being too theoretical and vague, but the panel said potential uncertainties were not reason enough to throw it out and that so long as reasonable inferences could be drawn, even though the results were approximate, they would accept such evidence.

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#### ***Discussion***

**Q:** Why are mass claims mechanisms not initially incorporated in domestic systems, since there are evident examples of problems arising with the interaction between domestic and international actors?

**A:** It is a crucial question. It depends on different factors like the capacity of the local system immediately post-conflict and during transition; the judiciary; and whether a process is designed as the only forum for settling the issues or allows claims to be brought elsewhere. Countries are not always prepared to handle such mechanisms which could be really challenging for the domestic system. But once an external mechanism has nonetheless been created, the local actors may still take issue with how it is organized and run.

**Q:** The UNCC had to take into account any domestic awards—how did it come to have that policy, and did that apply only to domestic awards that reflected actual losses or also to more humanitarian or aid-type payments?

**A:** It all flows from the principle that one should not recover twice for the same loss. The starting point was the Security Council asked the Secretary General to propose a procedure, and he replied that Res 687 does not

confer exclusive jurisdiction as it is not an organ with exclusive jurisdiction. It was recommended that the Governing Council establish guidelines on the interaction, and it reflected this in Decisions No 1 and 13 to avoid multiple recovery by claimants. It did not have to be from a court but could be from any source, including relief payments from governments.

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## PANEL FOUR: Reparations mechanisms in Africa

### Presentation by Prof Dr Hans van Houtte on Eritrea-Ethiopia<sup>96</sup>

#### Background

In May 1998, an armed conflict over boundary disputes between Eritrea and Ethiopia took place, during which many border villages were destroyed and various atrocities committed. The clashes ended with a peace treaty, the December Agreement,<sup>97</sup> which also foresaw the establishment of the Eritrea-Ethiopia Claims Commission (EECC). The Commission was mandated to settle all claims within a period of three years.

Three principal bodies were established in the December Agreement:

1. The President of the African Union was supposed to deliver a decision on who started the war. This decision was not rendered.
2. A Boundary Commission was tasked with establishing the boundary between the two countries in six months.
3. The Claims Commission, with a mandate to decide three types of claims:
  - a) interstate claims;
  - b) claims by nationals of one state against the other state; and
  - c) claims lodged by a state on behalf of nationals of the other state if they had the ethnic origin of the claimant state.

After negotiations, both states decided to limit the claims to only interstate claims and state claims on behalf of individuals. To some extent this was an advantage for the Commission's effectiveness, since it was not confronted with individual claims like other compensation commissions. In practice, the most common claims were lodged by the states on the basis of damage caused to (groups of) their own nationals. However, with such claims it was impossible to know on whose behalf the claims were brought; the names of persons were never listed or mentioned, there was never certainty that the very individuals described would be really compensated for the damage they suffered.

Another disadvantage involved the claims lodged by states on behalf of nationals of the other state that had the ethnic origin of the claiming state. As these were interstate

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<sup>96</sup> Professor, Leuven University, Belgium; President of the Eritrea Ethiopia Claims Commission (2001-2009); Legal Chair of the Comission for Real property Claims in Bosnia (1996-2003), Commissioner of the UNCC (1999-2002); Arbitrator at the Claims Resolution Tribunal for Dormant Accounts.

<sup>97</sup> Agreement signed in Algiers on 12 December 2000 between the Governments of the State of Eritrea and the Federal Democratic Republic of Ethiopia, available at [www.pca-cpa.org](http://www.pca-cpa.org).

claims, and a state can claim damages only for damages incurred by its own nationals, the Commission was obliged to dismiss them. As a consequence, Ethiopia's claim on behalf of around 10,000 farmers from north Ethiopia, who had Eritrean ethnic origin (but who were not technically Eritrean nationals) had to be denied. The only compensation that the Commission could award was expenses that Eritrea spent to resettle the farmers (as refugees).

The EECC had the option of conducting a mass claims procedure. Inspired by the UNCC, Eritrea and Ethiopia decided to create a list of fixed amounts for compensation. However, the proposed amounts were enormous and were not accepted by the Commission. The amounts claimed were substantially reduced.

The Commission also reduced the scope of matters that it would consider. Under the December Agreement, the Commission was supposed to decide upon breaches of international law and particularly breaches of international humanitarian law. However, the Commission decided to focus only on gross breaches and consistent battles. The Geneva Conventions were not directly applied during the decision-making process,<sup>98</sup> only principles of international customary law deriving from the Conventions, in addition to claims for rape.

Awarding compensation among two of the poorest countries in the world is not an evident matter. Therefore, there were hopes that in the first instance proceedings only liability would be determined, and that when the process reached the remedies and compensation stage, the parties would be satisfied with the liability established and would halt the process. However, that was not the case, and the two states insisted that compensation be awarded even for the smallest breaches found.

The claims that the Commission reviewed were usually lodged simultaneously by both parties on the same subject-matter, which contributed to consistent decision-making. It can be said that in the case of the UNCC a difference was made between the 'culprit' and the 'innocent'. Here, however, both sides were culprits and innocent at the same time. There were claims deriving from the war zones, such as on the treatment of POWs, bombings, destruction of property, killing, torture, rape, and forced labor. There were also civil claims such as for expulsion of civilians from one country to another, expropriation of businesses, confiscation, etc.

A very delicate matter concerned *jus ad bellum*, which Ethiopia claimed Eritrea had violated. In a case brought before the ICJ, that court merely touched upon the issue and left it for the EECC to make a final decision concerning which party had started the war and decide adequate compensation. *Jus ad bellum* is compensation owed to the state, but it includes damages to individuals.

The Commission's task to award compensation for violations during the war made by both sides was the most difficult one. It was not easy to determine how much someone should be compensated for deprivation of life of a relative, or for rape. Should this depend on the income of the victim? Another issue was the destruction of historical monuments (cultural heritage), and how to award adequate compensation

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<sup>98</sup> Eritrea had not ratified the Geneva Conventions when the war began.

for such damage. In total, the compensation awarded for destruction of property was significantly higher than loss of life (killings).

#### Domestic case law

In the case of *Hiwot Nemariam v Ethiopia and the Commercial Bank of Ethiopia*,<sup>99</sup> six Eritreans initiated proceedings before US courts asking for compensation. In the first instance, the court decided that these individuals should address their claim to the EECC. However, on appeal, the decision was reversed and it was decided that the United States had jurisdiction to award compensation to those individuals, since only states could claim compensation before the Commission. The same court later stated that there was immunity from jurisdiction and therefore the claims were inadmissible. In the end, these six claims were brought before the EECC and were awarded US\$6 million in compensation—but through the state as claimant.

#### Conclusion

The EECC was the only institution that kept functioning during the highest tensions between Eritrea and Ethiopia. It was considered to be a credible institution and both states submitted cases to it, respecting its authority. Decisions were rendered with great care not to put one country above the other.

In the end, US\$161 million were awarded as compensation to Eritrea, and US\$171 million to Ethiopia. There was a US\$ 10million difference that by logic could be claimed by Ethiopia from Eritrea. The question remains in such a situation, how many individuals would really be compensated? What is the impact for the private individuals? Eritrea's compensation claim was 85% for damage to individuals, in Ethiopia it was 77%. There is no information on how much was actually awarded to individuals.

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#### ***Discussion***

**Q:** Have there been any cases before the local courts in Eritrea or Ethiopia in response to the EECC's work? Is there any monitoring activity in the field by the UN or others who brokered the peace agreement and set up the Commission?

**A:** There is no such information made available to the Commission—also not by the Embassies of the two countries. This is an issue to be explored.

**Q:** What were the evidentiary rules and standards applied to rape at the EECC?

**A:** To some extent there were no standards; it was clear that rapes had occurred, but it was impossible to determine in how many cases. The Commission looked for signs only that could give indication of rape. However, that is no standard of evidence. Both sides asked for compensation for approximately two million cases, and each award was rendered with a decision containing exactly the same wording.

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<sup>99</sup> 491 F.3d 470 (D.C. Cir 2007) (*rehearing en banc denied*).

Q: Concerning the availability of evidence—in the *Bosnia* case before ICJ, for example, evidence was missing against Serbia which would have linked Belgrade directly to the atrocities, however in the ICTY *Milosevic* case, such evidence was sealed and protected. Is there access to the EECC evidentiary documents for other fora?

A: Evidence acquired by the ICRC was not available to the Commission.

Q: What was the motivation to select the reparations mechanism in the case of Eritrea and Ethiopia? The states agreed to it, but why did they settle on this method?

A: During such a negotiation, there is usually assistance by specific governments, which design the general framework of the reparations schemes. In this case, the negotiators had experience with mass claims processes.

Q: On the relationship between individual and state responsibility: when the EECC deliberated, was it considered whether mentioning any crimes that fall under universal jurisdiction would have had a different impact?

A: The Commission decided to focus only on state responsibility and not on individual responsibility. Mentioning specific crimes was deliberately left out.

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### **Presentation by Carla Ferstman on Sudan<sup>100</sup>**

#### Background

Sudan has been in a series of conflicts for many years, the main one being the clash between the North and South that started in 1955 and continued until 1972. After a short hiatus it began again in 1983 and continued until 2005. A separate conflict is the one in the Nuba mountains and the ongoing one in Darfur that began in 2003. That conflict has resulted in massive loss of life and human suffering, as well as large-scale political violence.

In terms of the influence of regional and international mechanisms on the local justice system, the African Union has had a certain impact, along with the UN and the ICC. All these institutions have had an impact at the domestic level, particularly in the realm of exhaustion of local remedies (AU) and complementarity (ICC) in terms of how the Sudanese government has responded. Thus, although Sudan does not have experience in administering reparations for serious violations of human rights or humanitarian law, it represents an interesting case of interaction between international and domestic initiatives.

There has been only one case successfully brought in domestic Sudanese court concerning compensation for human rights violations, and that case ended in a

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<sup>100</sup> Director, Redress.

friendly settlement.<sup>101</sup> As a result of restrictive immunities, no criminal complaints are known to have resulted in prosecutions.<sup>102</sup>

#### Reparations mechanisms in Sudan

The Comprehensive Peace Agreement of 2005,<sup>103</sup> although it did not include provisions on reparations or accountability, played a huge role in identifying the need for law reform, establishing an interim constitution, and fixing the framework for national responses. Indeed, much of the law reform activities currently in place in Sudan are a direct result of the existence of this peace agreement.

#### Darfur Commission of Inquiry

As Darfur is concerned, there was a recommendation by the UN Commission of Inquiry<sup>104</sup> to set up an independent compensation commission. In its report, the Commission put forward a detailed approach and plan for compensation, but the recommendation was not taken up and nothing is in place yet.

#### Darfur Peace Agreement

In 2006, the Darfur Peace Agreement<sup>105</sup> contained a section on reparations. This agreement was signed by the Government of Sudan and the Sudan Liberation Movement (SLM/A) though not by a faction of the SLM/A or the Justice and Equality Movement (JEM).

#### National compensation commission

On 26 September 2006, a national commission was set up by Presidential Decree,<sup>106</sup> so in principle there is a domestic compensation commission in Sudan, but this has had zero effect. There is a range of problems with its framework as it is very broad and general, and it has not been implemented. According to the Decree, compensation is to be paid to persons in Darfur who suffered harm as a result of the war. The provisions are silent on the responsibility of the parties for any of the violations, which is supposedly expected in the given context. The Sudanese government has pledged financing but with no recognition of its own responsibility. There is very little elaboration on how to deal with the issue of collective suffering. Even if it were implemented, the amounts of compensation contemplated are insignificant compared to the massive scale of suffering and violence.

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<sup>101</sup> Case of Cowchat Paul, Further information available with the speaker.

<sup>102</sup> This is discussed in REDRESS and SORD, *Security for all: Reforming Sudan's National Security Services*, A Report of the Project on Criminal Law Reform in Sudan, September 2009, at pp 13-14, available at: <http://www.redress.org/downloads/country-reports/Security%20for%20all%20Final.pdf>.

<sup>103</sup> The Comprehensive Peace Agreement between The Government of The Republic of The Sudan and The Sudan People's Liberation Movement/Sudan People's Liberation Army, negotiated between 2002 and 2005 and signed on 9 January 2005.

<sup>104</sup> The Inquiry Commission was established by UNSC Resolution 1546, 18 September 2004.

<sup>105</sup> Darfur Peace Agreement between the Government of the Sudan, the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), signed on 5 May 2006 by the first two listed parties.

<sup>106</sup> Presidential Decree No. 19/2006 and No. 20/2006 on establishing the Compensation Commission in Darfur.

### African Union

The African Union High Level Panel issued a report in October 2009 that contains numerous recommendations relating to reparations.<sup>107</sup> The report is quite measured, contains many important points, but it does not go into detail on the appropriate forms of reparations or how these might be implemented practically in the context of Darfur. The report discusses the merits of establishing a hybrid criminal court, though this idea has not been taken up with interest. The Sudanese government is opposed to the idea of a hybrid court and claims to have set up a number of domestic courts to deal with Darfur-related issues.

In terms of other AU processes, there are a number of cases (some of them mass claims) that are before the African Commission on Human and Peoples' Rights. For example, there is a case concerning a riot in an IDP camp in Khartoum, where a police station securing the camp was burned. As a reprisal, the government came in with a contingent and arrested at least 684 people, some of whom were later tortured or killed. A claim was filed domestically with the local police, however, despite the passage of three years, no investigation was ever opened. There was no possibility to compel an investigation or prosecution as, by law, the officers concerned were immune from prosecution and an investigation could only proceed if a decision to lift the immunity was specifically granted. The failure of the prosecution service to overturn the conditional immunity in another case was brought to the attention of the Sudanese Constitutional Court, which simply confirmed the status quo.<sup>108</sup> Both cases are now pending before the African Commission on Human and Peoples' Rights.<sup>109</sup> In a positive development, thus far the government of Sudan has responded in detail on the issue of admissibility, paving the way for important dialogue on domestic measures for redress, irrespective of the outcomes in the individual cases.

### ICC

There are currently numerous possibilities for reparations that stem from the work of the International Criminal Court in Sudan. In addition to the potential for the court to issue reparations awards at the conclusion of any case, the ICC Trust Fund for Victims (TFV) already has the ability to assist victims of crimes under the jurisdiction of the court, under its broader assistance mandate.<sup>110</sup> However, there has been no real TFV activity with respect to Darfur yet.

After the initial indictments in relation to Darfur, a debate started on implementing legislation in Sudan, aiming to address Sudan's capacity to try cases locally. Sudan does not appear to have a real interest in trying these cases, though it has implemented a series of laws presumably to avoid further scrutiny by the ICC. A National

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<sup>107</sup> African Union High-Level Panel on Darfur (AUPD), *Darfur: The Quest for Peace, Justice and Reconciliation*, Oct 2009, at paras . 201, 262, 264-74, available at <http://www.darfurpanel.org/>.

<sup>108</sup> *Farouq Mohamed Ibrahim Al Nour v (1) Government of Sudan; (2) Legislative Body*; Final order by Justice Abdallah Almin Albasir President of the Constitutional Court, 6 November 2008. This case was also filed with the African Commission on Human and Peoples Rights and is awaiting an admissibility decision. The claimant documents and case summary are available on REDRESS' website, at: <http://www.redress.org/smartweb/case-docket/redress-on-behalf-of-dr-farouk-mohamed-ibrahim-v-sudan>.

<sup>109</sup> Id, and Communication 368/2009: *Abdelhadi Ali Radi and others v Sudan* , claimant documents and a summary of the case are available on the website of REDRESS at <http://www.redress.org/smartweb/case-docket/abdel-hadi-radi-and-others-v-sudan>.

<sup>110</sup> Regulations of the Trust Fund for Victims, Resolution ICC-ASP/4/Res.3 Paras. 47-48, 50(a).

Commission of Inquiry has now been established, which has led to the prosecution of a number of low level perpetrators.<sup>111</sup>

In conclusion, even in Sudan where there is not a great deal of will to ensure accountability or afford reparations for serious crimes under international law, we can see some potential for progress being made—if only for the purpose of fending off international involvement.

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### **Concluding remarks by Dr Norbert Wöhler**

The topic of interaction between international claims mechanisms and domestic courts is multi-dimensional: in some situations, mechanisms are set up and have an impact; in other situations, it works the other way around.

There is a link between prosecutions and reparations, both at the level of individuals and state responsibility. There are many difficulties with prosecution, but the law there is moving forward and the ICC may come to play the lead role in this progress. But the ICJ can perhaps be used even more in the future to stimulate national responses and mechanisms for reparations. In some domestic areas, ‘class actions’ have had a massive impact where other mechanisms failed, and the ICJ might in time have a similar effect—similar to the ECtHR, whose pilot judgment procedure grew out of the pressure of having too many cases brought before it from common factual situations. From the perspective of persons who work in the field of getting some relief to victims, such procedures should be given every benefit of doubt.

In Turkey, the domestic mechanisms, as was presented today, were said to be slow in their performance. However, considering the time-frame in which they were created and functioned, and the numbers of processed claims, their record is very good by any mass claims standard. At the beginning of the process, the quality of those decisions may have been a different matter, but this has improved over time, and considering that over 1000 damage assessment commissions are operating throughout the country, this is certainly not a bad record in terms of the time it took and the number of cases resolved. As far as cross-fertilization between different claims mechanisms is concerned, the system of the Turkish damage assessment commissions also represents a good example in as much as it has embraced standardized valuation techniques developed and used in other claims programs.

A brief update can be given here on the Polish Holocaust claims.<sup>112</sup> The German Forced Labour Compensation Programme was a self-contained administrative process for certain categories of slave and forced laborers. The decisions were taken by this administrative mechanism, and there was an appeals possibility inside the process, but not to domestic courts. Several of the people excluded from the jurisdiction of that mechanism, and of those who were not satisfied with the amount of compensation

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<sup>111</sup> Some of these procedures are described in the annual reports of the Office of the Prosecutor to the UN Security Council. See, eg, Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 14 June 2006.

<sup>112</sup> See Report of WP7 Workshop I, at [www.domac.is](http://www.domac.is).

they received from the mechanism, tried to obtain more compensation before domestic courts, to have the mechanism as such declared unlawful by national courts. In Germany, a case went all the way up to the Federal Constitutional Court, which held that the program had enough procedural guarantees to be sustainable as a self-contained system that complied with constitutional requirements of due process.<sup>113</sup>

In Poland, there were several organizations processing claims. The *Wos* case concerned a system in the 1990s of humanitarian payments. More recently, a case went up from Poland to the ECtHR and a decision was issued in February 2010 in which the court found a violation of the due process protections of the ECHR due to the manner in which members of the appeals mechanisms were appointed, government-paid and controlled; insufficiently transparent rules of procedure of the appeals body; and therefore insufficient ability to review the administrative process before a tribunal-type mechanism. This may have significant implications for mass claims mechanisms in terms of what type of due process protections such future bodies will have to provide.

The presentation we heard today on Iraq and the Property Claims Commission very well summarized some of the typical interfaces between a newly created mechanisms and a domestic court system. Comparing this to the Kosovo context, many similarities can be found, such as dependency on the cooperation of national administrations such as cadastre and property archives, and of law enforcement agencies. These kinds of issues can be identified in many other mass claims processes.

Another more recent experience from Kosovo is that of EULEX, as far as it relates too its role of strengthening the rule of law and the judicial system. It is a very difficult task for international actors to mentor and monitor national judges and a local court system in general. Undertaking a task of training and building capacities in the justice area is a challenging task to say the least.

A very interesting example of capacity building could soon be seen in Liberia, where a truth and reconciliation commission report has, among other things, recommended reparation for victims.<sup>114</sup> That process is currently stuck in politics, but if there is success in establishing a reparations program in Liberia, persons from the Sierra Leone reparations program will no doubt be there to share their own experiences. Not only are there connections between people working on these issues in the two countries, but the Sierra Leone mechanism is the first full-fledged domestic reparations program (apart from South-Africa, which was not really a reparations program) in an African country, operating under difficult conditions. The designers of that process are eager to share their experiences with their neighbors and help them build local capacity. This has so far only happened between Latin American countries and only within the Latin American context.

Listening to Professor van Houtte's presentation today, one can only hope that the compensation for rape victims which the EECC has awarded is really going to reach those victims. In Sierra Leone, victims of sexual violence received some financial compensation, but they profit in particular from targeted in-kind benefits, such as

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<sup>113</sup> 1 BvR 1804/03 of 4 January 2005.

<sup>114</sup> See [www.trcofliberia.org](http://www.trcofliberia.org).

fistula operations and other health benefits that go a long way to rehabilitating these victims. This shows another good interface, in that the Sierra Leone program has received funding from UNIFEM to address specifically victims of sexual violence, which is the first time that such a type of program is supported by a UN agency.

Finally, a number of interesting points were raised concerning Sudan, but since those developments have unfortunately not yet reached the implementation phase, all that remains at the moment is to watch carefully the future developments in this area.

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