



Amsterdam Center for International Law

DOMAC Work Package 7

International Settlement of Mass Atrocity Claims: Responses by Domestic Courts

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Abstract

Work Package 7 (WP7) of the DOMAC research programme studies the interplay between mass claims processes (MCPs) and litigation in domestic courts. Its focus is primarily on how MCPs have been challenged in domestic courts. Reparations have been granted to victims through various forms of MCPs—both at national and international level—in response to some of the same atrocity situations as international courts have addressed. Given the increasing calls for victim reparations in post-conflict planning and peace negotiations, a project such as DOMAC takes account of the actual and potential impact of MCPs.

This report maps out how WP7 approaches the central DOMAC question: *Impact of International Courts on Domestic Criminal Procedures in Mass Atrocity Cases*. An annex to this report will be accumulated throughout the WP7 research period and will contain an inventory of relevant claims programmes and related court decisions.

Introduction

In recent decades, a growing number of mass claims processes (MCPs) have been conducted both internationally and nationally in order to provide redress to victims of mass atrocities. Established variously by negotiated treaties, agreements to arbitrate, United Nations action, or pursuant to out-of-court settlements, these different *ad hoc* programmes have provided a measure of justice to claimants who were seen as unlikely to succeed in international or domestic courts. Some MCPs were expressly designed to be an exclusive forum for claims arising from a specific set of events, to issue final and binding decisions on claims, and produce finality and legal peace. However, several MCPs have subsequently given rise to domestic and even international litigation. Others have had their operations transferred to domestic legal systems, with few if any changes in their procedures, to continue on as domestic programmes after post-conflict transition from international to domestic administration. Both of these scenarios involve impact on domestic procedures and are to be studied under DOMAC Work Package 7 (WP7).

In international law, the term ‘mass claims process’ has generally been used to refer to several different types of mechanisms, including *ad hoc* arbitral tribunals, compensation and property claims commissions, and administrative claims processing programmes. They are established to resolve claims for reparation ‘when a large number of parties have suffered damages arising from the same diplomatic, historic or other event.’¹ Legal academic commentary in this field has been contributed mostly by jurists or diplomats who have had first-hand experience of the negotiations and inner workings of such processes, and several detailed comparative surveys have been published on the practices of the largest international MCPs.² There have also been studies on the contribution of specific MCPs to the law on state responsibility, international procedural law, and international arbitration,³ and work on the right of victims to reparation.⁴ Little has been written to date, however, about the implications

¹ Howard M Holtzmann, ‘Mass Claims’, para 1, *in* MAX-PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW online edition (R Wolfrum gen ed., Oxford University Press), <<http://www.mpepil.com>>. Not all MCPs respond to mass atrocities, nor do all MCPs grant standing to individuals. The term ‘MCP’ is used to describe programmes that share certain common procedural characteristics and solutions.

² See PROPERTY RESTITUTION AND COMPENSATION: PRACTICES AND EXPERIENCES OF CLAIMS PROGRAMMES (Norbert Wühler and Heike Niebergall eds, International Organization for Migration 2008); HANS VAN HOUTTE, BART DELMARTINO AND IASSON YI, POST-WAR RESTORATION OF PROPERTY RIGHTS UNDER INTERNATIONAL LAW, VOL I: INSTITUTIONAL FEATURES AND SUBSTANTIVE LAW, AND HANS DAS AND HANS VAN HOUTTE, VOL II: PROCEDURAL ASPECTS (Cambridge Univ Press 2008); INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PROCEDURAL PERSPECTIVES (Howard M Holtzmann and Edda Kristjánsdóttir eds, Oxford Univ Press 2007). See also collections of articles in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES: INNOVATIVE RESPONSES TO UNIQUE CHALLENGES (Permanent Court of Arbitration eds, Oxford Univ Press 2006); REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING (Carla Ferstman, Mariana Goetz and Alan Stephens eds, Martinus Nijhoff 2009).

³ See List of Publications on the Iran-US Claims tribunal maintained at www.iusct.org/publications.pdf; List of Publications on the United Nations Compensation Commission, maintained at www.uncc.ch; and bibliography sections in the sources listed in note 2 for publications about other individual MCPs.

⁴ See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN General Assembly Res 60/147, 16 December 2005, at www2.ohchr.org/english/law/remedy.htm; Draft Declaration of the International Law Association (ILA

of subsequent court challenges to the work of MCPs,⁵ despite the fact that challenges have been brought both in domestic courts against international MCPs, and in international courts against domestic or hybrid MCPs.⁶ In short, the field in which these programmes operate is a ‘relatively ignored intersection of traditionally private and public international law issues at times of international crises.’⁷

In the absence of clearly established legal rules as to the modalities of reparations for international law violations, it has been up to the discretion of states whether to establish claims processes. Whether they are presented as humanitarian moral gestures or compliance with stipulations in a peace settlement, MCPs are created where there is a potential for a massive number of legal claims. The ultimate success of a claims process therefore can to some degree be measured by its ability to quiet claims and reduce or pre-empt litigation. DOMAC WP7 empirically studies which aspects of MCPs have frustrated the goal of legal peace by triggering further court litigation, and it asks whether and how such problems might have been avoided.

The present report explains how the subject of court challenges to international settlements forms part of the overall DOMAC project. But before doing so, it is useful to recall four developments that have accelerated calls for individual reparations within international law and that have thereby set the stage for a mutual impact between international claims practice and domestic procedures.

1. Reparations politics

International law has long treated mass atrocity reparations as a non-judiciable political question better dealt with by the political branches of government through diplomacy and/or with the help of international organisations. This is in keeping with the traditions of international dispute resolution, where parties turn to courts only as a last resort after negotiations and other measures have failed. But political questions, unsurprisingly, shift with political currents. Encouraged by the numerous MCPs created for Holocaust claims, and by the rapid development of human rights law and international criminal law in recent decades, what some refer to as a ‘reparations politics’ has gained influence.⁸ In the words of Elazar Barkan:

‘The perpetrator’s growing willingness to recognize the legitimacy of the victim’s claims, even a gaze, becomes the victim’s political power. . . . The moral economy of restitution enjoys a growing popularity in the private and public sectors alike. It ranges from private reparation in

Committee on Reparation to Victims of Armed Conflict, with commentaries, at www.ila-hq.org/en/committees.

⁵ Some relevant domestic court decisions may be found through the International Law in Domestic Courts database, at www.oxfordlawreports.com. Several NGOs actively monitor reparations initiatives and maintain country surveys, such as the International Center for Transitional Justice (ICTJ) www.ictj.org/en/index.html, and Redress, www.redress.org. See also writings in the field of transitional justice, such as *THE HANDBOOK OF REPARATIONS* (Pablo de Greiff, ICTJ eds, Oxford Univ Press 2006); and *THE INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE* (Oxford Univ Press).

⁶ See Norbert Wühler presentation, DOMAC Report of WP 7 Workshop I available at www.domac.is.

⁷ Lucy Reed, *Great Expectations: Where Does the Proliferation of International Dispute Resolution Tribunals Leave International Law?* 96 AM SOC’Y INT’L L PROC 219 (2002).

⁸ The term is discussed by eg John Torpey, *Making Whole What Has Been Smashed: Reflections on Reparations*, p 242, in *POST-CONFLICT JUSTICE* (M Cherif Bassiouni ed, Transnational Publishers, New York 2002). See also *LAW AND THE POLITICS OF RECONCILIATION* (Scott Veitch ed, Ashgate 2007).

criminal and civil cases to a framework for resolving historical injustices in the intra- and international arenas.⁹

The aim of the ‘reparations movement’ is to help victims of international law breaches realize their right to reparations. There has been much emphasis on achieving this by suing in domestic courts for individual or collective remedies—in other words, to make mass atrocity reparations a judiciable issue. Thus, whilst most domestic judges still deflect such reparations claims to the political arena for resolution by more traditional methods of international law and relations, the current political tide is carrying such cases back to court, in hopes of securing what José Alvarez, tongue-in-cheek, has called the ‘victory of the rule of law over diplomatic wrangling and the triumph of the lawyers over the politicians.’¹⁰ What the trend ignores, however, is that, had it not been for the efforts of politicians, the Holocaust cases pending in US courts in the 1990s against Swiss banks and German industry might never have resulted in the settlements that led to several massive international claims processes.¹¹ The cases might all have been summarily dismissed; some might still linger in the courts; while some might even have resulted in judgments favourable to some victims. Instead, cases were settled and MCPs conducted out-of-court, thereby setting powerful procedural—not legal—precedents that can be replicated in future reparations cases.

2. Ubiquity of lawyering

Reparations programmes, although established out-of-court, have a distinctly juridical flavour, so much so that victims and the public may have difficulty distinguishing the work of judicial bodies from other operations of international law. MCPs have been designed, presided over, and commented upon mostly by judges and lawyers, and although they are not ‘courts’, they are bodies constituted by an international treaty or stipulated in a court settlement. MCP procedures and methods have drawn upon international commercial arbitration as well as the methods of large and complex tort litigation and bankruptcy practice at the domestic law level. Moreover, claimants’ eligibility for relief in a MCP may be conditioned upon their waiving recourse to litigation, which signals that one is a substitute for the other, and governments have sometimes set up MCPs in exchange for dismissals of related lawsuits elsewhere. To the claimants and the members of the public, therefore, MCPs look for all intents and purposes like judicial institutions. Many may find it difficult to realize or accept that these processes, to paraphrase Oliver Wendell Holmes, are created to deliver ‘justice’, but are not courts of law.¹²

3. Individual enforcement of international law

The stated aim of most MCPs is to respond to a moral imperative to recognize the plight of victims and to guarantee relief that would be denied them if they pursued their claims in court. Some MCPs also have the express purpose of quieting legal

⁹ ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* (Johns Hopkins Univ. Press, Baltimore, London 2000) at 317.

¹⁰ José E Alvarez, *The New Dispute Settlers: (Half) Truths and Consequences*, 38 *TEXAS INT’L L J* 405, 408 (2003).

¹¹ See eg JOHN AUTHERS AND RICHARD WOLFFE, *THE VICTIM’S FORTUNE – INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST* (Harper Collins 2002).

¹² ‘This is a court of law, young man, not a court of justice.’ Quote attributed to US Supreme Court Justice Oliver Wendell Holmes, Jr.

claims and dismissing or avoiding lawsuits. The ‘right’—or rather eligibility—of a claimant to recover in a MCP generally arises from the negotiated constituting instrument of such programme, such as a peace agreement or settlement plan of allocation and distribution. The negotiating histories and preambles of the constituting instruments of MCPs often state explicitly that eligibility was not granted pursuant to a legal obligation or right. Nevertheless, individuals who have felt unfairly excluded from such reparations schemes, or who were able to opt out of such a scheme in favour of pursuing court action against the odds, have been bringing lawsuits in domestic courts. Not all have done so in the United States,¹³ and not all have been losing (issues of enforcement notwithstanding). Why do some prefer private suits over negotiated state espousal solutions? Those who opt for seeking an unlikely court remedy rather than a more-or-less guaranteed recovery from a settlement fund have often stressed that ‘it is not about the money’. The ultimate aim of such suits may be rather to ‘have one’s day in court’. Others may be undertaken more as ‘impact litigation’, which raises issues familiar from the debate about the motives of mass tort practice. Where class actions and representative litigation are ‘allowed to proceed without a credible prospect of providing redress to individual class members,’ however, some would argue that ‘it can no longer be maintained that their purpose is compensatory. Instead, they have become an instrument to enforce the underlying principles of substantive law.’¹⁴

4. *Technological advances*

Last but not least, the exponential advancement of information technology and the shrinking costs of communications have suddenly rendered easy what was, throughout most of the history of international law, impracticable. The internet now enables coordination of global group efforts without many of the structural, physical, and managerial costs inherent in a centralized institutional framework. Unencumbered by the institutional trappings of courts, MCPs have been conducted with comparatively few staff members and low overhead. After completing their mandates, MCPs are dismantled, their staff migrating and methods honed to fit the next claims process. Specially tailored ‘mass claims techniques’ have been applied in various different settings, evolving from process to process because they could—because they were not locked into a permanent framework.¹⁵ MCPs have responded impressively to difficult mandates, on limited budgets and strict timelines, and their flexibility has allowed them more pragmatic approaches than permanent courts are authorized to even consider. The argument that mass claims are impossible to resolve is no longer credible, which exposes as never before the question whether impossibility was ever a genuine reason for courts to reject claims for mass atrocity reparations.

¹³ See eg Edward F Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L REV 401 (2002). See also International Law Association (ILA) Committee on International Civil Litigation and the Interests of the Public, Report and Draft Resolution on Transnational Group Actions, adopted at ILA 73rd Conference, Rio de Janeiro, 17-21 August 2008, available at www.ila-hq.org/en/committees.

¹⁴ Jeroen Kortmann, *The Tort Law Industry*, Inaugural Lecture, University of Amsterdam, 14 November 2008, noting the use of tort litigation to enforce EU law.

¹⁵ See Veijo Heiskanen, *Virtue out of Necessity: International Mass Claims and New Uses of Information Technology*, in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES, supra note 2, at 25; Holtzmann & Kristjánssdóttir, supra note 2, section 5.06; HANS VAN HOUTTE et al, supra note 2.

I. Mass claims processes as part of the DOMAC study

The central research question of DOMAC concerns the impact of international courts on domestic criminal procedures in mass atrocity cases. The project includes Work Package 7 in recognition of the increasing prominence of the issue of reparations in mass atrocity situations and post-conflict justice. However, reparations practice has so far been carried out in the grey zones between the domestic and international; the public and private; the civil and criminal; and the judicial and political. In order to be able to take account of this practice within a project such as DOMAC, some of the parameters of the research question need therefore to be stretched or suspended. To begin with, MPCs are not *courts*. They also tend to resonate more with domestic *civil* ('tort') than *criminal* procedures. To focus only on international courts would result in a deceptively empty WP7 and leave out most of the significant reparations practice of recent history. The following sections parse the DOMAC research question to clarify how it covers the impact of international reparations programmes on domestic courts in mass atrocity cases.

a. Mass vs individual

Many natural and man-made disasters give rise to redress programmes and humanitarian aid in domestic and international settings. Large-scale claims programmes are also set up to distribute damages for harm caused by private actors, eg through hazardous products, environmental degradation, financial fraud, etc. 'Mass atrocity cases', for purposes of the DOMAC study, are understood to refer to violations of public international law norms that cause widespread harm to large—even untold—numbers of persons. 'Mass atrocities' thus encompasses harm caused by international crimes, gross violations of human rights, and violations of international humanitarian law. WP7 will focus on reparations for such violations.

International crimes tend to have a built-in *mass* or group element (such as 'widespread', 'systematic', 'indiscriminate').¹⁶ From the reparations perspective, it is thus by virtue of having been targeted or victimized as one of a *group* that a victim of such crimes or breaches can be legally recognized. But, with the exception of class actions in a few legal systems, most domestic court procedures are not designed to accommodate masses of plaintiffs. The mass aspect that defines the violation therefore becomes a practical obstacle to justice for the victim: too numerous individual claims cannot be adjudicated in accordance with domestic procedures; that might take centuries and clog court dockets. Thus, at the level of the individual, the presumed protection of international law vanishes as a mirage. Individuals, by accident of place of birth or residence, being but one of too many similarly swept up in colossal events, may find themselves outside the reaches of law, holding untested legal rights that nowhere find enforcement. What is it about international law, an individual may ask, that says that a man can go to court to obtain a remedy for damage to his house, but not for the unlawful obliteration of his village; or that a woman can recover damages for gender discrimination, but not for mass rapes as part of genocide? Few but international lawyers can see any logic to this.

¹⁶ See eg Elements of Crimes under the Rome Statute, ICC-ASP/1/3(part II-B), adoption 09.09.2002, entry into force: 09.09.2002, available at www.cii-cpi.int > legal texts and tools, wherein all crimes against humanity contain as an element conduct that was 'part of a *widespread or systematic* attack', and all crimes of genocide contain the element that victims be 'persons belonging to a particular national, ethnical, racial or religious *group*' (emphases added).

Whether or not a victim identifies personally with the group that has been harmed or targeted, international law may be unable to recognize his or her individual complaint if the liability is based on harm to a group. Mass atrocities moreover have a tendency to harm persons of many different nationalities, displaced or stateless individuals, migrants, and marginalized groups, who realistically have recourse neither directly against the violator, nor through a state of their own, and cannot produce legal proof of their injuries. MCPs have been a way to get around many thorny mass atrocity issues, such as the global dispersal of victims and the unavailability of evidence. Although they may use statistics to aid their decisions, MCPs can and do offer individualized review of claims for widespread and indiscriminate violations. Whether and how domestic courts could achieve the same would depend on a host of procedural rules that differ from country to country.

b. Domestic vs international

The DOMAC project studies the impact of *international* courts on domestic procedures. There is, however, no general civil jurisdiction at the international level where individuals can claim reparations, hence victims who have pursued damages have done so in domestic settings, either in domestic courts or mechanisms set up by domestic legislation.¹⁷ Depending on location, some individuals may be able to bring claims before the UN Human Rights Committee, the European Court of Human Rights (ECtHR), or the Inter-American Commission on Human Rights, but only against certain states.¹⁸ Some victims can also bring claims for reparation before the International Criminal Court (ICC) but only against a defendant who has been found guilty by that court. Against any other respondents, traditional international law offers individuals a system in which their state can espouse claims on their behalf, through diplomatic channels. Under this model, however, the claim as such belongs to the state, and the state is at liberty to waive reparations claims against the breaching party. Or it can agree with another state to intervene in any suits filed in its courts that seek reparations for specific harms and to recommend their dismissal.¹⁹

While the espousal model still holds sway, several developments suggest that it may be shifting. The war which sparked the modern human rights movement has also resulted in many reparations programmes, which in turn gave hopes to the victims of other atrocities.²⁰ Some high-profile domestic court settlements in the United States on behalf of victims of deposed dictators and war criminals have also fuelled expectations that victims everywhere should have access to a court of law to enforce their right to reparations. Some MCPs were designed to be an exclusive remedy for all claims arising from a specific mass atrocity situation—so that they are for example not decided inconsistently by multiple jurisdictions across the globe. Other programmes are non-exclusive, giving victims the option to choose between the MCP

¹⁷ There exist hybrid forms such as the Extraordinary Criminal Chambers in the Courts of Cambodia (<http://www.eccc.gov.kh/>) where victims can participate as parties civile. WP7 will consider the impact of such redress procedures as well.

¹⁸ See discussion in William J Aceves, *Actio Popularis? The Class Action in International Law*, 2003 UNIV CHICAGO LEGAL FORUM 353 (2003).

¹⁹ See eg Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation ‘Remembrance, Responsibility and the Future’, done at Berlin, 17 July 2000, www.compensation-for-forced-labour.org, in which the US undertook to file statements of interest in any court cases against German industry or the German state for World War II reparations.

²⁰ For discussion of the significance of the Holocaust precedent, see eg Torpey, *supra* note 8.

or domestic court. There are victims who prefer to pursue the court option at the risk of losing their case or recovering nothing, over the option of relying on what their government can provide or negotiate on their behalf.²¹ They may prefer to frame their own issues and take active control of their cases, compel testimonials and evidence from the respondents, and have their day in court, if nothing more.²² But most victims of mass atrocities have faced an uphill battle in domestic courts due to immunities and other procedural difficulties of establishing jurisdiction over the respondents, the reluctance of courts to decide questions of foreign policy, and the difficulty of enforcing any decision rendered in their favour. Private claims for redress, to the extent that they have had sufficient political backing, have therefore been channelled to the public plane and into internationally-brokered *ad hoc* mechanisms where the limitations of international law and the restrictions of domestic procedures could be eased in favour of the victims. Such mass atrocity reparations processes have taken place at the intersection of

‘two post-World War II trends in international law. The first [being] the flowing down . . . of public international law rights and duties from the exclusively state-to-state level to the private actor level, particularly in the human rights arena. The second trend . . . flows upward in the opposite direction: The expansion of international trade has led the private commercial sector to demand from states structures to support both public and private international law.’²³

One impact of international MCPs has thus been to bring into sharper focus the role of international law at these different levels: in international claims practice, in internationalized (hybrid) dispute mechanisms, or as applicable law in domestic court.

c. Court vs process

The DOMAC project studies the impact of international *courts*. Among the many labels attached to MCPs (such as ‘commission’, ‘tribunal’, ‘programme’), the word ‘court’ is noticeably absent.²⁴ The phrase ‘mass claims process’ has been used as a common denominator to describe a variety of such bodies—ranging from arbitral tribunals that also decide liability questions, to administrative claims processes that implement plans of allocation of sums after liability has been decided or agreed. In the course of conducting such programmes, a cottage industry has sprung up of specialized legal practitioners, accountants, statisticians, IT experts, and many others with experience gained from working on a string of programmes—some of them

²¹ After 11 September 2001, for example, survivors were given a choice to claim from the 9/11 fund or bring suit against the terrorists. Some opted for the latter. Reparations schemes that try to cover all victims of a conflict may be faced with mutually antagonistic groups which do not accept that suffering on the other side was as great, as happened recently in Northern Ireland, where both sides were given eligibility to claim from the same process.

²² See Beth Stephens, *Conceptualizing Violence under International Law: Do Tort Remedies Fit the Crime?* 60 ALBANY L REV 579, 583 (1997).

²³ Reed, *supra* note 7, at 221. See also Paul Dubinsky, *Human Rights Law Meets Private Law Harmonization: the Coming Conflict*, 30 YALE J INT’L L 211 (2005); ILA Report and Draft Resolution on Transnational Group Actions, *supra* note 13.

²⁴ There is ‘extreme indefiniteness of the terminology employed in the field of reparations. Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, NYU J OF INT’L L & POL 709, 712 (1999). See also Hotzmann and Kristjánssdóttir, *supra* note 2, Introduction, on nomenclature. HANS VAN HOUTTE et al, *supra* note 2, vol 2, at 38 places MCPs somewhere between the classic adjudicative model and the administrative model.

having participated in the processing of several million claims. A focus solely on the work of ‘courts’ would leave out this practice and the impact it has had on the profession of international lawyers and the field of reparations for mass atrocities.

While reparations are an important focus of human rights NGOs and policy-oriented disciplines such as transitional justice studies, the international legal studies discipline generally focuses more on the ‘court’-centred topics of international responsibility for wrongful acts and prosecutions of perpetrators of international crimes. The proliferation of international courts in recent decades has only intensified what Abram Chayes already in 1965 called a ‘myopic’ and misguided court-centred view of international law, warning that it ‘creates the wrong kind of expectations about international law, expectations that are bound to be disappointed [while] attention is diverted from the ways in which international law really operates and how these may be strengthened.’²⁵ Since international courts rarely award reparations to victims directly, the topic of reparations receives scant treatment in studies of those courts. By focusing on actual reparations practice—even if that means looking beyond the courthouse—the discourse on reparations can be extended ‘from broadly normative questions—on which the judgment of the philosopher or sociologist is entitled to as much weight as the lawyer’s—to procedural and structural matters, where lawyers really have something to say.’²⁶ This extension requires but a small side-step.

In classic international law, ‘judicial decisions’ are only a ‘subsidiary means for the determination of rules of law.’²⁷

‘The term “judicial decision” encompasses [not only international courts but also] international arbitral awards as well as the rulings of national courts. There have been many international arbitral tribunals, such as the PCA and the various mixed-claims tribunals, including the Iran-US Claims Tribunal, and, although they differ from the international courts in some ways, many of their decisions have been extremely significant in the development of international law.’²⁸

The decisions of the Iran-United States Claims Tribunal and the United Nations Compensation Commission (UNCC)—the two most influential modern-day MCPs—are already widely cited, for instance in the Commentaries to the ILC Articles on State Responsibility. Being designated a ‘court’ is thus not required for a body to be able to contribute to the interpretation of international law norms and for its decisions to have an impact on domestic procedures.

Where the court label does take on added significance is when it comes to the procedural rules and restrictions by which a decision-making body must be bound if it is to call itself a court.²⁹ MCPs clearly have not been subject to the same requirements

²⁵ Abram Chayes, *A Common Lawyer Looks at International Law*, 78 HARV L REV 1396, 1397 and 1413 (1965). See also Alvarez, *supra* note 10 at 411, calling it a half-truth that the recent proliferation of international tribunals constitutes the judicialization of international law.

²⁶ Chayes, *supra* note 25, at 1413, adding that ‘Justiciability is such a question.’

²⁷ ICJ STATUTE, Article 38(1)(d).

²⁸ MALCOLM SHAW, *INTERNATIONAL LAW* 5th ed at 104 (Cambridge 2003).

²⁹ See CHESTER BROWN, *A COMMON LAW OF INTERNATIONAL ADJUDICATION* 11 (Oxford Univ Press 2007) choosing to focus on entities that are ‘engaged in international adjudication, or at least have the capacity to adjudicate in international disputes’, and including under this definition the PCA and Iran-

as permanent courts; they have had greater freedom to economize and innovate in light of their circumstances, and even to meld with the structure of a domestic legal system where necessary. While MCPs do include due process safeguards and possibilities for review or appeal, and while they are overwhelmingly conducted by lawyers and judges on the basis of binding agreements and rules of procedure, the fact remains that they were created to decide claims that no domestic or international forum was yet able or prepared to decide, and sometimes apparently in order to avoid ones that were.

d. Crime or tort

The DOMAC project focuses primarily on the effects of international courts on domestic *criminal* procedures. To date, however, reparations for mass atrocities have had few formal connections to criminal prosecutions.³⁰ In international law, ‘State responsibility for international crimes has been punished through payment of reparations, a hybrid between criminal penalty and civil damages.’³¹ At domestic level, mass atrocity reparations procedures may belong to either civil or criminal law, depending on the national legal system. In some countries, private actions for reparations can be brought as part of criminal proceedings as *partie civile* actions.³² Under others—as in the United States—victims can bring civil actions for tort damages. Consideration of the range of possible models quickly reveals that the distinction between ‘tort’ and ‘crime’ among the different legal systems of the world is far from clear. It has even be said that, ‘outside of the accidents of a particular legal system at a particular time, there is no natural category of tort or crime and thus no essential distinction,’ and that what can be offered in terms of definition is that tort, unlike crime, ‘concentrates on the harm caused to a victim, with the amount of damages determined by the extent of the injury caused, not by the tortfeasor’s mental state.’³³ Whether a procedure is more akin to crime or tort turns on ‘whether the state or the victim controls the prosecution, whether punishment is designed to impose costs on the offender or to transfer wealth from him, whether enforcement is intended

US Claims Tribunal but excluding MCPs. The ILA Report, *supra* note 13, fn 1, expressly excludes MCPs. Christian Tomuschat, *International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction*, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES: INTERNATIONAL COURT OF JUSTICE, OTHER COURTS AND TRIBUNALS, ARBITRATION AND CONCILIATION: AN INTERNATIONAL SYMPOSIUM 285-416 (Max-Planck Institut Für Ausländisches Öffentliches Recht und Völkerrecht, 1987), defines international court or ‘judicial body’ as (1) permanent; (2) established directly by an international legal instrument; (3) deciding cases on the basis of international law; (4) on the basis of pre-existing rules of procedure that cannot be modified by the parties; and (5) issuing legally binding decisions. Cesare Romano, *supra* note 24 at 715, adds (6) composed of judges chosen before a case is submitted; and (7) deciding disputes between two or more entities, of which at least one is a sovereign state or an international organization, but concedes that mechanisms such as the Iran-US Claims Tribunal or the 1868 American-Mexican Claims Commissions are justifiably included (at 725-28).

³⁰ This may be expected to change as the ICC begins to consider reparations, although see Fiona Mackay, presentation, DOMAC WP7 Workshop I report, www.domac.is, noting that this need not ever happen.

³¹ Cherif Bassiouni, *The Prosecution of International Crimes and the Establishment of an International Criminal Court*, in 3 INTERNATIONAL CRIMINAL LAW (ENFORCEMENT) 3 (M Cherif Bassiouni ed, 1987).

³² See eg *Public Prosecutor and ors v Van Anraat*, Judgment of The Hague Court of Appeal, LJN BA4676, 2200050906-2; ILDC 753 (NL 2007).

³³ Stephens, *supra* note 22, at 582 & 584 (‘Where international law obligates one State to compensate another for injuries caused by the invasion of a legal interest, a liability akin to that of a tort arises.’)

to prevent offenses or to price them, and whether conviction is or is not accompanied by moral stigma.³⁴

In the context of reparations for mass atrocities, state espousal of claims is more similar to payments of fines to a government in a criminal justice system, whereas damages provided directly to victims through a claims process suggest civil procedures.³⁵ When suits for mass atrocity damages are brought in domestic court, as in the example of the US Alien Tort Claims Act,³⁶ that fuses domestic tort and a violation of international law.³⁷ In fact, while international law in recent decades has focused heavily on ending impunity and on procedures for enforcing international criminal law, some domestic courts have become the scene for ‘instrumentalist tort law’ to secure compliance with international law.³⁸

Negotiations leading to the establishment of a MCP usually stipulate criteria for who is eligible to benefit from the process. Such criteria may expressly exclude victims who suffered the same degree of harm at the hands of the same wrongdoers as the eligible victims, but who cannot recover because the use of force that affected their fate was legally justified, or because they did not belong to a protected population or persecuted group. In such instances, the responsibility of the actor drives the outcome (punitive purpose). However, in several MCPs, the parties paying compensation or returning assets or land have not been the actual wrongdoers or their legal successors, but the international community or legislative initiatives by successor governments creating funds or *ex gratia* schemes—which hints at a more restorative/compensatory purpose. Even where ‘responsible’ parties have funded reparations, they usually have denied any *legal* responsibility, but agreed to repair the harm out of a sense of moral duty or for tactical considerations such as securing dismissal of further lawsuits. This further suggests MCPs being used as compensatory rather than punitive justice—tort rather than criminal punishment. As hinted at above, claimants who prefer the riskier route of domestic court litigation may be motivated by a quest for corrective/punitive justice rather than compensation.

The threat of domestic litigation in some favourable domestic forum can and has been used as leverage to try to push states to conclude settlements or establish reparations programmes where none have been forthcoming. For the fact remains that a mass claims process, no matter how pragmatic or efficient, is a massive undertaking. That such programmes are created at all may signal that the claimants perhaps did stand a chance of winning in court (and setting precedents for other groups to follow suit), or at least that the financial and political costs of defending some reparations suits were higher than settling them and leaving the legal questions unanswered.

II. The impact of mass claims processes on domestic procedures

MCPs in the wake of mass atrocities have been created to serve some of the purposes which the law either could not or would not fulfil (depending on which view one adopts of the individual right to claim reparation under international law). Many

³⁴ David Friedman, *Beyond the Tort/Crime Distinction*, 76 B.U.L. REV. 103, 108-109 (1996).

³⁵ The international law on responsibility is concerned with ‘wrongful acts’, not ‘torts’ or ‘delicts’, JAMES CRAWFORD, *THE ILC ARTICLES ON STATE RESPONSIBILITY*, p 12 (Cambridge).

³⁶ 28 USC § 1350.

³⁷ Stephens, *supra* note 22 at 581.

³⁸ See Kortmann, *supra* note 14.

lessons have been learned through these processes, but the legal peace they were supposed to bring for respondents, and the sense of closure for victims, have sometimes proven elusive. Where expectations were not met, or where the processes seemed flawed, domestic and human rights courts have been invited to step in and evaluate—in a type of secondary judicial review—the adequacy or fairness of international programmes set up for mass atrocity reparations. Domestic legal systems in states in transition have also in some instances been handed a MCP as a whole to take over its operations.

There are many ways in which international and internationalized MCPs may affect domestic procedures. To offer a non-exclusive list, their impact is felt through:

- i) development of methods of efficient mass claims processing that have removed the excuse of impossibility;³⁹
- ii) procedural borrowing and staff migration from international MCPs to domestic programmes, and mass claims professionals serving as consultants to domestic reparations programmes;
- iii) transfer of a MCP's operations wholesale into a domestic legal order as part of a post-conflict transition from international administration to state-run legal institutions;⁴⁰
- iv) enactment of legislation to implement the decisions of an international MCP in the domestic legal order;⁴¹
- v) serving as examples and encouragement to victims of other violations to seek redress in domestic fora; as the Holocaust-related MCPs were a catalyst for other suits;
- vi) capacity-building and training of local staff in countries where MCPs were carried out;⁴²
- vii) forming part of an inter-court dialogue, as eg when Italian military internees who had been excluded from the German Forced Labour Compensation Programme brought cases in Italy,⁴³ which in turn led to an application by Germany against Italy before the International Court of Justice;⁴⁴
- viii) influencing the victim reparations procedures of the ICC⁴⁵ and thereby having a procedural impact at domestic level as the Rome Statute's

³⁹ Domestic MCPs may become more common once the ICC's jurisdiction begins to cover more situations. Countries, and the ICC itself, are likely to prefer that claims of victims be handled at the local level wherever possible.

⁴⁰ This was done in the case of the Commission for Real Property Claims of Displaced Persons and Refugees (CPRC) in Bosnia and Herzegovina (BiH).

⁴¹ *Id.*

⁴² This was the case for example in Kosovo, see presentation of Norbert Wuehler, Report of WP7 Workshop I, at www.domac.is.

⁴³ See *Ferrini v Germany*, Appeal decision, no 5044/4; ILDC 19 (IT 2004), which cited eg a dictum of the ICTY in *Lašva Valley, Prosecutor v Furundžija (Anto)*, Case No IT-95-17/1-T ICTY, ICL 17 (ICTY 1998), (1999) 38 ILM 317, (2002) 21 ILR 213, [1998] ICTY 3, 10th December 1998, Trial Chamber II (ICTY), that a 'victim could bring a civil suit for damage in a foreign court'.

⁴⁴ International Court of Justice, *Case concerning jurisdictional immunities (Federal Republic of Germany v Italian Republic)*, Application of the Federal Republic of Germany, December 2008, available at www.icj-cij.org > cases > contentious cases.

⁴⁵ See Edda Kristjánsdóttir, *Mass Claims Processes and the ICC Trust Fund for Victims*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY, supra note 2.

reparations provisions are implemented into the domestic law of member states.

Not all of these influences can be investigated exhaustively as part of DOMAC WP7, but some examples of all of them will nonetheless be identified.

Methodology

WP7 gathers and analyzes domestic and international court cases relating to MCPs. It also consults mass claims experts and conducts workshops with case studies, and publishes reports of the discussions at those events. WP7 seeks to identify the most common bases on which MCPs have been challenged or critiqued, and what might be done in response. It will, first, consider challenges to the manner in which a MPC was established, such as for example:

- i) whether a MCP was offered as an exclusive forum—and whether the victims were required to waive recourse to courts;
- ii) whether certain claims were excluded because the victims' state of nationality had waived them;
- iii) whether statements of interest were filed by governments to recommend dismissal of suits relating to a particular mass atrocity;
- iv) whether the MCP was negotiated with the victims adequately represented at the table;
- v) exclusion from a MCP of persons who suffered the same types of injuries at the hands of the same perpetrators, but who have no recourse to domestic courts for the same reason as those who *were* included in the process;⁴⁶
- vi) inadequacy of remedies, eg insufficient funding secured;
- vii) other bases.

Second, WP7 will consider any challenges to the adequacy and fairness of the procedures of a MCP, such as for example:

- i) the standards of proof and required evidence; lack of hearings or ability to testify or question witnesses;
- ii) fairness of deadlines imposed;
- ii) appropriateness of mass claims techniques such as statistical sampling and grouping of claims;
- iii) rules applicable to legal successors and heirs;
- iv) appointment and identity of the decision-makers;
- v) ability of victims to participate in the process;
- vi) ability of the responsible party to participate in the process;
- vii) availability of appeal;
- viii) other bases.

⁴⁶ In other words, if the aim is a tort-type liability, why do victims have to prove membership in a targeted group? Offering reparation only to victims who were deliberately targeted may mix tort and crime objectives: on one hand, legal peace from litigation is more likely to be achieved if all similarly harmed victims are included (tort approach); on the other hand, if the perpetrators' guilt is the central criterion, only intentionally wronged victims recover (criminal intent). The latter approach has characterized most international MCPs, but excluded victims may then turn to domestic courts.

Third, WP7 will note whether any MCPs were challenged for the manner in which they were carried out, including:

- i) outreach efforts and publicity before claims were collected;
- ii) transparency and user-friendliness of the process—including publication of decisions and procedural rulings; effective communication with the claimants (including attention to cultural, gender, or age sensitivity); language or translation issues, physical location of the claims process, etc;
- iii) the time it took to process claims (speed being of the essence);
- iv) consistency of decisions of different panels or decision-makers (quality-control, equal treatment, rate of errors);
- v) the costs of administering the process (overall budget; fees to lawyers and judges);
- vi) protections against fraud;
- vii) other bases.

Conclusion

‘One death is a tragedy, a million a statistic’ the saying goes. But in response to humanity’s basest tendencies, human ingenuity has responded with some of its best qualities, with the result that there is now technology and know-how available for doing what was until recently impossible in international law, namely speedy individualized review of claims by victims of mass atrocities. The experience of mass claims processes has had a significant impact on international and domestic procedures, and it has the potential to influence them further. For legal practitioners, the matter is relatively straight forward: if given a mandate (if there is a will), they can carry out the tasks (there is a way). The harder question is to whose will the international law on reparations should respond. That is a question for a broader community to answer. If access to court is what is sought, then standing in itself is victory whether the actual claim for reparation is denied or upheld. Access to court does not guarantee reparation; this is inherent in a court of law. If the goal is a speedy, favourable, and non-adversarial outcome, a politically negotiated process may be more appropriate. Not all victims and policy makers share the same objectives and more voices need to join this discourse clearly and critically. WP7 takes as its starting point the dialogue that victims have initiated by petitioning courts to review the work of mass claims processes.
