"Compensation in case of violations of International Law of Peace and Security and of International Law of Armed Conflicts"

Saba Pipia

1. The right to reparation as a principle under international law

The right to reparation is a well-established principle of international law. As stated in the Chorzow Factory case of the Permanent Court of International Justice: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form." [114]

The International Law Commission affirmed this principle in its 53rd Session when it adopted the Articles on responsibility of States for internationally wrongful acts. Additionally, the right to reparation is firmly embodied in international human rights treaties and declarative instruments.[115] It has been further refined by the jurisprudence of a large number of international and regional courts, as well as other treaty bodies and complaints mechanisms. Additionally, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law constitute a significant contribution to the codification of norms relating to the right to reparation.

The legal consequences of an internationally wrongful act of a state are governed by Part Two of the International Law Commission (ILC) Articles on State Responsibility. The core legal consequences of an internationally wrongful act set out in this Part are the obligations of the responsible state to cease the wrongful conduct, and to make full reparation for the injury caused by the internationally wrongful act, as provided in articles 30-31.[116]

Chapter II of Part Two deals with the forms of reparation for injury, spelling out in further detail the general principle stated in article 31. The forms of reparation dealt within Chapter II of Part Two represent ways of giving effect to the underlying obligation in article 31 and must be seen against this background. It is for this reason that the ILC points out that some flexibility is shown in practice in terms of the appropriateness of requiring one form of reparation rather than another, subject to the requirement of full reparation for the breach in accordance with article 31.[117] In other words, Chapter II provides a flexible system for implementing the obligation to make full reparation.

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[114] Permanent Court of International Justice, *Factory at Chorzow* (Claim for Indemnity) case, (Germany v. Poland), (Merits), PCIJ (ser. A) No. 17, 1928, p. 29.

[115] For example, the Universal Declaration of Human Rights (Art. 8); the International Covenant on Civil and Political Rights (art.2 (3), art 9(5) and 14(6)); the International Convention on the Elimination of All Forms of Racial Discrimination (art 6); the Convention of the Rights of the Child (art. 39); the Convention against Torture and other Cruel Inhuman and Degrading Treatment (art. 14) and the Rome Statute for an International Criminal Court (art. 75). It has also figured in regional instruments, e.g. the European Convention on Human Rights (art 5(5), 13 and 41); the Inter-American Convention on Human Rights (arts 25, 68 and 63(1)); the African Charter on Human and Peoples' Rights (art. 21(2)). See also, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985; Declaration on the Protection of all Persons from Enforced Disappearance (art 19), General Assembly resolution 47/133 of 18 December 19 92; Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions (Principle 20), recommended by Economic and Social Council resolution 1989/65 of 24 May 1989; and Declaration on the Elimination of Violence against Women.

[116] Marten Coenraad Zwanenburg, Accountability under International Humanitarian Law for United Nations and North Atlantic Treaty Organization Peace Support Operations (doctoral dissertation), Ch. 4.

[117] Report of the International Law Commission on the work of its fifty-third session, 23 April – 1 June and 2 July – 10 August 2001 (A/56/10), at 237.

The standing of victims of international crimes to seek and obtain effective remedies for the harm suffered has received special attention in human rights treaties and instruments, as well as in international humanitarian law.[118] In criminal proceedings, the standing of victims to seek reparation has been largely limited to the domestic sphere. Unlike the Yugoslav and Rwanda tribunals, the Rome Statute of the International Criminal Court recognises the standing of victims of crimes under the jurisdiction of the Court to seek reparation and stipulates in Article 75 Paragraph 2 of the Statute that the "Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation."[119] While recognizing that the jurisdiction of the Statute is restricted to adjudging the crimes of individuals, Paragraph 6 of Article 75 notes that "[n]othing in this article shall be interpreted as prejudicing the rights of victims under national or international law." The process of seeking reparation should be "expeditions, fair, inexpensive and accessible,"[120] though it is difficult to conceive of how this might be achieved in the context of mass atrocity.

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 IHL

On 13 April 2005, the Commission on Human Rights at its 61st session in Geneva adopted the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*[121], subsequent to a vote of (40) Yes, (0) No, and (13) abstentions.[122] The adoption of the *Basic Principles and Guidelines* represents the first comprehensive codification of the rights of victims of international crimes to reparations, remedies, and access to systems of justice. The *Basic Principles and Guidelines* "do not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms."[123]

The *Basic Principles and Guidelines* developed out of the 1985 Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and drafted at a regional meeting held in Ottawa, Canada. Although the issue of victim reparation had been addressed piecemeal in various international human rights and international humanitarian law instruments, the Basic Principles of Justice was the first to articulate in one document the rights of victims to have access to justice and the right to reparation for their injuries,

[118] See, for example, Art. 3 of the Hague Convention regarding the Laws and Customs of Land Warfare, 1907 Hague Convention IV; Article common to the four Geneva Conventions 1949 (I: Art. 51; II: Art. 52; III: 131; IV: Art. 148); Article 91 of the 1977 Additional Protocol I.

[119] Rome Statute of the International Criminal Court, UN Doc. A/Conf. 183/9th of 17 July 1998.

[120] Principle 5, The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by UN General Assembly Resolution 40/34 of 29 November 1985. (the Victims Declaration).

[121] *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*, U.N. Doc. E/CN.4/2005/L.48 (13 April 2005), *preamble*.

[122] The countries that voted in favor were Austria, Argentina, Armenia, Belgium, Bolivia, Brazil, Burkina Faso, Chile, Congo, Costa Rica, Cyprus, Czech Republic, Dominican Republic, Ecuador, Estonia, Finland, France, Greece, Guatemala, Hungary, Ireland, Italy, Japan, Latvia, Mexico, Netherlands, Nigeria, Norway, Paraguay, Peru, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, Uruguay, and Venezuela. Those that abstained were Australia, Egypt, Eritrea, Ethiopia, Germany, India, Mauritania, Nepal, Qatar, Saudi Arabia, Sudan, Togo and United States.

[123] Basic Principles and Guidelines, preamble.

albeit aimed at victims of domestic crime.[124] The chair of the drafting committee at the Ottawa meeting was Professor M. Cherif Bassiouni, who later became the Independent Expert that drafted the *Basic Principles and Guidelines*, originally presented to the Commission on Human Rights in 2000.[125] After the submission of that draft, the Commission, rather than bringing the *Basic Principles and Guidelines* to a vote for adoption, instead placed the text in consultation with interested governments, NGOs, and IGOs. There was speculation at the time that certain governments were interested in keeping the *Basic Principles and Guidelines* from being adopted before the United Nations World Conference on Racism, Racial Discrimination, Xenophobia, and Other Related Intolerance was held in Durban, South Africa in September 2001. More important, however, was United States' opposition to the *Basic Principles and Guidelines* on the grounds that they included the right to victim compensation for violations of international humanitarian law (hard law), as opposed to being limited simply to violations of human rights law (soft law). This position was successfully disputed, however, by both scholars and government representatives alike, as international humanitarian law and human rights law largely overlap.

Furthermore, in 2004, the International Court of Justice concluded in an Advisory Opinion in the case of the construction of a wall in the occupied Palestinian territory[126] that the two regimes complement one another, and that despite their different legal sources, distinctions between the two should not be made. Both international humanitarian law and human rights law are the product of treaties and customary international law, as well as of general principles of law – all of which are sources of international law.

It was also noted during the debates that since the 1907 Hague Convention, international humanitarian law has included the right to compensation, even if it has not included all of the victims' rights of redress contained in the *Basic Principles and Guidelines*. Nevertheless, national legal systems have evolved with respect to the recognition of the rights of victims, and the notion of restorative justice is fairly well established in a large number of national legal systems. Thus, to extend such concepts of victims-oriented justice at the international level is a step in keeping with the advancement of the field of human rights, which has been consistently developing since the creation of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

Other governments opposed the *Basic Principles and Guidelines* because they provided a right to collective action or class action civil suits, which are not known in the Civilist legal systems, while some representatives of Common Law systems objected to the "partie civile" (civil party) to be included in criminal proceedings because it is a practice in Civilist countries unknown to Common Law countries. The *Basic Principles and Guidelines* ultimately blend a variety of techniques from the Common Law, Civilist, and Islamic legal systems, which represents a particularly interesting development in comparative criminal law and procedure. This was justified on the basis that the *Basic Principles and Guidelines* are premised on the rights of victims, and are therefore not bound by traditional legal orthodoxy dividing Civilist, Common Law, and Islamic legal traditions.

2. Essence of Reparation

The latter half of the twentieth century witnessed unprecedented development and codification of international legal standards for the protection of individuals. These include numerous universal and regional human rights instruments, the 1949 Geneva Conventions and their Additional Protocols of 1977 and the various instruments of refugee law. Despite

[124] Kelly Mccracken, Commentary on The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law **,** *International Review of Penal Law* (Vol. 76), p.77.

[125] M. Cherif Bassiouni, The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, U.N. Doc. E/CN.4/62 (18 Jan. 2000).

[126] International Court of Justice Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 (9 July).

this indispensable step forward in the protection of the individual, the reality today is that individuals continue to suffer at the hands of abusive governments and in situations of armed conflict.[127]

Of course, the making of reparation is also extremely important *per se* for very practical reasons, particularly for individuals who have been victims of violations of international humanitarian law. Even once the immediate consequences of the violation have been dealt with, such persons remain extremely vulnerable. They may need long-term medical care, may no longer be able to earn an income and are likely to have lost home and belongings. It would be callous and naive to think that an award of compensation, for example, would restore victims to the situation they were in prior to the violation — re-establish the *status quo ante* as required by international law. Nevertheless, the receipt of timely and adequate compensation is an important element in enabling victims to try to rebuild their lives.

It has been already mentioned that any wrongful act - i.e. any violation of an obligation under international law - gives rise to an obligation to make reparation, aim of which is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed.

These same general principles apply to violations of international humanitarian law. This was expressly laid down as long ago as 1907 in the Hague Convention (IV) respecting the Laws and Customs of War on Land, Article 3 of which stipulates that:

"[a] belligerent Party which violates the provisions of the (...) Regulations [respecting the Laws and Customs of War on Land] shall, if the case demands, be liable to pay compensation…"

A similar requirement to pay compensation for violations of international humanitarian law is expressly reiterated in Article 91 of Additional Protocol I. Despite this explicit language, it should be noted that the obligation to make reparation arises *automatically* as a consequence of the unlawful act, without the need for the obligation to be spelled out in conventions. Although the Hague Convention and Additional Protocol I speak only of compensation, reparation for violations of international humanitarian law can take various forms, discussed below.

Acceptance of a duty to make reparation is also often found in treaties concluded between belligerents at the end of hostilities.[128] However, this obligation is frequently not expressly related to violations of international humanitarian law but rather to violations of the prohibition of the use of force, or treaties merely speak even more vaguely of "claims aris-

[127] See Emanuela-Chiara Gillard, Reparation for violations of IHL, IRRC September 2003 Vol. 85 No 851, p. 529.

[128] By way of example, see the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation between the United Kingdom of Great Britain and Northern Ireland, France, the United States of America and Germany in which, *inter alia*, Germany acknowledged: "the obligation to assure … adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions or economic prospects (excluding identifiable property subject to restitution). Furthermore, persons persecuted by reason of nationality, in disregard of human rights, who are now political refugees and no longer enjoy the protection of their former home country shall receive adequate compensation where permanent injury has been inflicted on their health."

(Article 1(1), Chapter Four) (*United Nations Treaty Series,* Vol. 219, No. 4762).

In the 1959 Agreement concerning Payments on behalf of Norwegian Nationals Victimized by National Socialist Persecution between the Federal Republic of Germany and Norway, the Federal Republic of Germany agreed to: "pay the Kingdom of Norway 60 million Deutsche Mark on behalf of Norwegian nationals who were victimized by National Socialist persecution because of their race, beliefs or opinions and whose freedom or health was in consequence impaired, and also on behalf of the survivors of persons who died as a result of such persecution." (Article 1(1)) (*United Nations Treaty Series*, Vol. 222, No. 5136)

ing out of the war".[129] While many of the losses and claims may, in practice, arise from violations of international humanitarian law, there is no need for a determination of a violation to be made. One recent and notable exception in this respect is the peace agreement of December 2000 between Ethiopia and Eritrea.[130] *Inter alia*, this establishes a neutral Claims Commission charged with deciding, through binding arbitration, all claims between the two governments and between private entities for loss, damage or injury related to the conflict and resulting from violations of international humanitarian law or other violations of international law. This Commission is an exception inasmuch as it is expressly tasked with awarding compensation for violations of international humanitarian law.[131]

Reparation may take a number of forms, including: 1) restitution, 2) compensation, 3) rehabilitation, and 4) satisfaction and guarantees of non-repetition. While it is recognized that it is generally not possible to restore victims to their original situation before the violations occurred, particularly in respect of human rights violations that constitute international crimes, restitution may also include restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property. Compensation is understood to include any economically assessable damage resulting from the crime, including "physical or mental harm, including pain, suffering and emotional distress; lost opportunities, including education; material damages and loss of earnings, including loss of earning potential; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services."[132]

As already noted, article 31 of the ILC articles on state responsibility codifies the obligation of reparation. This article, as well as the articles describing specific forms of reparation, is formulated as an obligation of the responsible state. In contrast, the 1996 ILC articles formulated reparation as a right of the injured state.[133] The immediate reason for the change is the bifurcation in the 2001 draft articles between the injured state and the state that has a legal interest in invoking responsibility. There is also a more fundamental policy choice behind it that reflects the function of state responsibility of upholding the international rule of law. Formulating reparation as a right of the injured state implies that that state can choose not to ask for reparation, and this is not in the interest of the international rule of law. In contrast, the ILC commentary maintains that the obligation of reparation is the immediate corollary of a state's responsibility. This is in conformity with the PCIJ's findings in the *Chorzów Factory* case. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."[134]

The article on reparation is but one of a number of articles in which the ILC has had difficulty in maintaining the strict separation between primary and secondary obligations.

[129] See, for example, Article 14(a) of the 1951 Treaty of Peace between the Allied Powers and Japan, San Francisco, 8 September 1951, in which Japan undertook to "pay reparations to the Allied Powers for the damage and suffering caused by it during the war".

[130] Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, 12 December 2000, Article 5, *International Legal Materials*, Vol. 40, 2001, p. 260.

[131] See, Won Kidane, Civil Liability for Violations of IHL: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in the Hague**,** Wisconsin International Law Journal **,** Vol. 25, #1, p. 23.

[132] E/CN/4/2000/62, para 24. See also, Principles 8 - 10 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by General Assembly resolution 40/34 of 29 November 1985.

[133] See also F. Mann, *The Consequences of an International Wrong in International and National Law*, 48 British Yearbook of International Law 1 (1976), at 10; R. Jennings & A. Watts, Oppenheim's International Law, Vol. 1, at 528 (1992).

[134] Factory at Chorzów (*Germany* v. *Poland*), Jurisdiction, 1927, P.C.I.J. Series A, No. 9, at 21.

The commentary acknowledges that the definition of injury in article 31 leaves it to the primary obligations to specify what is required in each case.

3. Legal Nature of Compensation

Where restitution is not provided or does not fully eliminate the consequences of the injury, the responsible state must make compensation, as provided in article 36 of the ILC articles. In state practice, compensation is the form of reparation that is most frequently asked and given: it is the usual standard of reparation.[135] It may be noted that the jurisprudence of the Iran – United States Claims Tribunal has made a particular contribution to the law on compensation.[136] The function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. The ILC defines the actual losses as 'financially assessable damage'. Financially assessable damage is contrasted with what is sometimes referred to as 'moral damage' to the state, *i.e.* the affront or injury caused by a violation of rights not associated with actual damage to property or persons. This may lead to confusion because in national systems non-material damage such as loss of loved ones, pain and suffering are referred to as 'moral damage'. Under international law such damage is compensable and must be distinguished from moral damage to the state.

As noted above, article 43 provides that a state invoking responsibility can legitimately prefer compensation to restitution, but this freedom is not unlimited. The ILC commentary states that there are cases where a state may not, as it were, pocket compensation and walk away from an unresolved situation, for example one involving the life or liberty of individuals or the entitlement of a people to their territory or to self-determination. The first situation seems to be characterized by the *LaGrand* case, in which Germany renounced its right to material compensation. Though this was never expressly stated by Germany during the proceedings, its decision seems to have been related to its contention that the rights at issue constituted individual rights of foreign nationals and are to be regarded as human rights of aliens.[137] The ILC commentary does not provide guidance concerning other situations in which a state would not be entitled to prefer compensation, but it may be noted that the common element in the examples it gives is that the rights in question are owed to individuals or peoples. If the ILC intended this fact to have consequences for the choice between restitution and compensation, states are not free to prefer compensation in case of certain breaches of international humanitarian law, even if they do not involve the life or liberty of individuals.

As mentioned above, prior practice firmly supports the rule that Compensation by responsible State for any financially assessable damage, including loss of profits, that its wrongful act caused the injured state or its nationals comes into play where restitution is not provided or does not fully eliminate the consequences of the harm. In the case of the *Gabcíkovo-Nagymaros Project*, for example, the ICJ declared it to be "a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it." Future litigation will undoubtedly wrestle with the scope of damages, particularly the definition of "material" damage to property or other interests of the state and its nationals that

[135] C. Eagleton, The Responsibility of States in International Law 189 (1929).

[136] See R. Lillich & D. Magraw (Eds.), The Iran – United States Claims Tribunal: Its Contribution to the Law of State Responsibility (1998).

[137] Though it is implicit in the following statement by Simma on behalf of Germany made during the oral proceedings: ,,Turning to compensation, Germany has decided not to raise a claim in this regard because the policy it pursues in lodging the present Application is to ensure that German nationals will be provided with adequate consular assistance in the future, and thus be protected against the fatal consequences following from breaches of Article 36 in circumstances like those leading to the death of the brothers LaGrand. CR 2000/27, 13 November 2000, para. 14.

are "assessable in financial terms."[138] The concept of financially assessable damage is an evolving one, because the determination whether something is "capable of being evaluated in financial terms" shifts as markets develop and economic analysis designs new methods of valuation. While there is considerable international jurisprudence on some headings of damages, litigants and judges are also likely to turn to comparative law, and economic theory and practice, to determine what other claims are capable of being financially assessed, because new issues often develop in doctrine and national practice before being presented to an international tribunal. The rules themselves are very concise on the issue of compensation. Although the stated goal is full reparation, the commentary suggests that it may take different forms according to what is appropriate in the particular case, in order to ensure compliance with international law by the responsible state while affording justice to any injured state. The commentary to several articles makes clear that the notion of proportionality or equity plays a role with respect to the different forms of reparation, including compensation. The commentary to Article 36 itself states that the appropriate heads of compensable damage and the principles of assessment to be applied in quantification will vary, "depending upon the content of particular primary obligations, an evaluation of the respective behavior of the parties and, more generally, a concern to reach an equitable and acceptable outcome."[139]

The extent to which a court may adhere to a strict hierarchical approach to reparations and require full compensation for all assessable injuries not redressed by restitution—as opposed to reserving some matters for nonmonetary satisfaction—may depend not only upon the factors cited in the commentary, but upon whether the court in question views its primary role as inducing compliance with a legal regime, deciding cases, or settling disputes. Settling a dispute in a manner that lessens the likelihood of future conflicts or disputes between the parties may or may not conform with the goal of full reparations for the injured state, but some international tribunals may consider it as important a value as upholding the international rule of law, and as more important than ensuring fulfillment of all claims of reparations. While the articles constrain discretion, they do not eliminate it. Although the articles provide only general guidance on the assessment of compensation, the commentary includes an important and comprehensive discussion of precedents indicating the range of compensable losses, headings of damage, and methods of quantification.[140]

Many legal advisers and practitioners will find this analysis particularly useful in illustrating developments and variations in the awards of compensation. Replacement costs for destroyed property, costs of repairing damaged property, and lost profits are all discussed, as are the kinds of harm that are more difficult to measure financially, such as loss of life, arbitrary detention and other personal injury, and environmental damage. Prior practice demonstrates that these losses while difficult to quantify, are nonetheless financially assessable. The commentary approvingly cites the formula Umpire Parker used in the *Lusitania* cases to calculate damages for wrongful death and refers to the use of per diem amounts to compensate for unlawful detention. The formula for compensating for wrongful death has been utilized as the basis of both human rights and diplomatic protection claims.

In its analysis of property claims, the commentary reflects the global triumph of Western market economies. It seems clear that the lack of a viable alternative economic model and the growing jurisprudence of tribunals such as the Iran-U.S. Claims Tribunal, the UN Compensation Commission, and human rights bodies have helped build a more coherent framework for the assessment of compensation for property losses. The com-

[138] Dinah Shelton, Reparations in the Articles on State Responsibility, Symposium: The ILC's State Responsibility Articles, 2002, p. 851.

[139] Commentaries, Art. 31, para. 14; Art. 35(b), paras. 7–11; Art. 37(3), para. 8; Art. 39, para. 2; Art. 36, para. 7.

[140] Commentaries, Art. 36, paras. 8–34.

mentary notes that awards for property claims are based upon general principles that help to assess "(i) compensation for capital value, (ii) compensation for loss of profits, and (iii) incidental expenses." The commentary finds that "fair market value" is the method most generally used to determine the capital value of property taken or destroyed, but notes that fair market value can be determined by various means, especially where the property interests are unique or unusual. Alternative valuation methods are also discussed and precedents using them are cited: net book value, liquidation or dissolution value, and discounted cash flow are all mentioned, with some helpful indication of the circumstances that might favor use of one method over another. The articles also make clear that lost profits are not necessarily to be compensated for, but such awards may be made where appropriate. Lost-profits claims may be excluded when too speculative or not sufficiently established as reflecting a legally protected interest. Reasonably incurred incidental expenses are also compensable.

Lex specialis

Chapter II of the ILC articles on state responsibility is intended to provide for the legal consequences of all internationally wrongful acts of states. However, article 55 provides that they do not apply where the content of international responsibility is governed by special rules of international law. This provision recognizes the residual character of the Articles. In principle states are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences and thereby to exclude the ordinary rules of responsibility. With regard to the legal consequences of an internationally wrongful act *lex specialis* can have two effects. One is to exclude one or more of the legal consequences provided in Chapter II. The other is to change the content of one or more particular consequences provided in Chapter II without affecting the other consequences. Whether there is *lex specialis* with regard to the legal consequences of violations of international humanitarian law will be discussed below.

***Lex specialis* in the IHL**

There are several provisions in conventional international humanitarian law that concern legal consequences of a violation of a primary rule, which could operate as *lex specialis* in the sense of article 55. For the *lex specialis* principle to apply, it is not enough that the same subject matter is dealt with by two provisions. There must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other. In other words, it will depend on the special rule to establish the extent to which the more general rules on state responsibility as set out in the ILC Articles are displaced by that rule.

1) One special rule on the legal consequences of a breach of international humanitarian

law is Article 3 of 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land. This article provides that a belligerent party which violates the provisions of the Regulations annexed to the Convention shall, if the case demands, be liable to pay compensation. The article appears to be consistent with article 36 of the ILC Articles, although the meanings of the phrase 'if the case demands' is not immediately clear.[141] The phrase was not included in the original German proposal for the article. A number of commentators interpret the phrase as excluding from compensation damage that is not financially assessable. A Greek court also found that the provision in Article 3 according to which the belligerent party shall pay compensation if the case demands specifically underline that financially assessable damage must have been caused as a result. This interpre-

[141] M. Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 International Review of the Red Cross 401 (2002), at 418.

tation is consistent with article 36 which covers any financially assessable damage including loss of profits in so far as this is established in the given case.[142]

Article 3 does not exclude other legal consequences than an obligation of compensation as arising from of a violation of the Hague Regulations. The contrary is suggested by a statement of the president of the subcommittee of the Second Hague Peace Conference, suggesting that the German proposal was of great interest because it attached a sanction to rules, for which there was not yet a sanction in place. Kalshoven submits: It may be the case, though, that at the time of the Second Hague Peace Conference the general rules were of little practical import in relation to the problem the delegates sought to solve, so that in tackling it they were more or less oblivious of such general rules. At any rate, the rule they purported to lay down in Article 3, with its special characteristics adapted to the perceived needs of the situation, even today is entirely capable of coexisting with, and supplementing, the general rules on State responsibility.[143]

2) Another special rule on the legal consequences of a breach of international humanitarian

law is Article 51/52/131/148 of the 1949 Geneva Conventions.[144] There is no inconsistency between this article and article 36 of the ILC Articles. The article reaffirms article 36 by excluding any contractual exemption from claims for compensation by a vanquished state. With regard to the question whether the article excludes other legal consequences of an internationally wrongful act, the *travaux préparatoires* make clear that compensation was only considered as one of different legal consequences. The report of the Committee that drafted Article 51/52/131/148 states: The State remained responsible for breaches of the Convention and could not refuse to recognize its responsibility on the ground that individuals concerned have been punished. There remained, for instance, the liability to pay compensation.[145]

3) A third special rule with regard to legal consequences for violation of international

humanitarian law is Article 91 of Additional Protocol I. The preparatory work of the article indicates that it was intended to have the same meaning as Article 3 of 1907 Hague Convention IV. This was stated among others by the delegation of Viet Nam when it introduced the article.[146] There is neither actual inconsistency between Article 91 and article 36 nor a discernible intention that the provision is to exclude other legal consequences.

4) A final *lex specialis* in international humanitarian law is Article 1, paragraph 3, of

Protocol I to the Hague Convention on Protection of Cultural Property in the Event of Armed Conflict. This paragraph obliges state parties to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in their territory, if such property has been exported by the occupying power. This rule limits the freedom of the state invoking international responsibility to prefer compensation in lieu of restitution.

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[142] Sassòli gives another interpretation. He states that the 'if the case demands' refers to the subsidiary character of compensation. Only if restitution in integrum is not possible is compensation in order. *Ibid* at 418.

[143] F. Kalshoven, State Responsibility for Warlike Acts of the Armed Forces: From Article 3 of the Hague Convention IV of 1907 to Article 91 of Additional Protocol I of 1977 and Beyond, 40 International & Comparative Law Quarterly 827 (1991), at p. 838.

[144] These Articles provide: No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.

[145] Fourth Report drawn up by the Special Committee, 12 July 1949, Final Report, Vol. IIB, at 118.

[146] Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-1977) (Official Records), Vol. 9, at 355 (CDDH/I/SR.67, paras. 67, Mr. Van Luu).

As a matter of principle the legal consequences of an internationally wrongful act arise automatically from the wrongful act itself. In other words, their coming into existence does not depend on a claim being pressed. The new legal relationship created by the internationally wrongful act comes into existence before any injured subject would press a claim for reparation.[147] The coming into existence of the obligation to make full reparation for the injury caused by the internationally wrongful act can *a fortiori* not depend on the admission of responsibility by the responsible entity. The automatic coming into existence of legal consequences is underlined by the wording of article 28 of the ILC articles on state responsibility. In practice, however, it is difficult to conclude that a specific measure is a legal consequence of an internationally wrongful act unless the responsible entity states that it is, or the measure is imposed by an international tribunal.

The ILC does state in its commentary to article 34 of the articles that the "primary obligation breached may also play an important role with respect to the form and extent of reparation"[148]

It has already been established that the provisions in international humanitarian law on the legal consequences of a breach of its rules are consistent with the general principles concerning legal consequences of an internationally wrongful act. It seems that the legal consequences of a breach of international humanitarian law would not necessarily have been different from the legal consequences of the breach of another international obligation.

4. Conclusion

In the concluding part of report I would like to review the idea towards creating a Permanent International Claims Commission (PICC) for Victims of Violations of International Humanitarian Law shortly.[149]

Basic Principles and Guidelines adopted by the UN Commission on Human Rights at its 2005 session are a welcome addition to the arsenal of international human rights instruments because they offer a much needed comprehensive codification of the rights of victims of gross violations of human dignity. But the Principles focus on questions of substantive law only. They do not suggest which kind of institutions would help ensure the effective exercise of remedies. Nevertheless, without such institutions the Principles are unlikely to have the intended effect. So number of Scholars tries to take the *Basic Principles* a step further by proposing the establishment of a new, permanent international body that would have the competence to award monetary compensation and restitution of property to victims of violations of international humanitarian law. One of the main directions is of course compensation and restitution of property issue.

Professor Kamminga[150] considers that during the past 25 years considerable experience has been gained with various types of ad hoc international claims bodies designed to perform this function. The three most notable ones are the Iran-United States Claims Tribunal, the United Nations Compensation Commission and the Eritrea-Ethiopia Claims Commission. A quick overview of the role played by these three bodies offers an interest-

[147] See F. Mann, *The Consequences of an International Wrong in International and National Law*, 48 British, Yearbook of International Law 1, (1976-77), at 14.

[148] See also I. Brownlie, System of the Law of Nations: State Responsibility, Part I, at 236 (1983).

[149] See, Kamminga, Towards a Permanent International Claims Commission for Victims of Violations of IHL.

Also, Jann K. Kleffner, 'Improving Compliance with International Humanitarian Law Through the Establishment of an International Complaints Mechanism', 15 *Leiden Journal of International Law* (2002), p. 237-250; and Jann K. Kleffner and Liesbeth Zegveld, 'Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law', in 3 *Yearbook of International Humanitarian Law* (2000), p. 381-401; For Claim Commissions See Liesbeth Zegveld, Remedies for victims of violations of international humanitarian law, IRRC, September 2003 Vol. 85, No 851, p.521-525.

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ing picture of accumulated experience since each mechanism has been a conscious attempt to overcome the perceived disadvantages of its predecessor.

A significant side effect of the establishment of a PICC would be the authoritative case law that would be produced by the commissions set up under its auspices. Jurisprudence emanating from ad hoc bodies with a peculiar one off mandate, such as the UNCC, can easily be discounted because of the unique circumstances under which they were operating. Case law produced under the auspices of the PICC, on the other hand, would carry the stamp of authority. Establishment of the PICC is thus likely to help resolve some of the substantive legal questions concerning the rights of individuals under international humanitarian law raised in this volume. As experience with regional human rights courts and the ad hoc international criminal tribunals has shown, some of the more intricate questions concerning the status of individuals in international law are more likely to be resolved by international case law than by international legislation.

The idea of a Permanent International Claims Commission may appear far-fetched at a time when the world's only superpower is working hard to frustrate the work of the International Criminal Court (ICC) and increasing its pressure on the ad hoc international criminal tribunals to close down their operations as soon as possible. But, of course, 'fancy' and 'far-fetched' are precisely the labels that were given to the initial proposals to establish for example an ICC itself or the post of UN High Commissioner for Human Rights. When the political climate is ripe even the most radical proposals may suddenly gain momentum.

On the basis of these fragmentary considerations, the conclusion is justified that few examples exist where victims are endowed with a right of their own to a remedy for violations of international humanitarian law. While developments at the national level in the Netherlands and in the United States under the Alien Tort Claims Act and the Torture Victims Protection Act are promising, many cases in which individuals have brought claims under Article 3 of the 1907 Hague Convention before national courts have failed because the courts did not recognize that individuals have standing against the State. They regarded the right in that article as one that only States can exercise on behalf of individuals. At the international level, there has been some progress in the means open to victims for the defense of their rights before international bodies, but the practice of international bodies providing remedies to victims of violations of IHL is *ad hoc* and is not organized. There is no general mechanism that would allow victims to assert their rights under IHL.[151]

At the same time, to say that victims have no individual legal standing in IHL would not be a correct description of the actual state of affairs. Although States are still the traditional subjects of IHL, victims have also, in an increasing number of cases, achieved recognition as subjects of IHL. In the years to come, the UN *Principles on the Right to a Remedy* will undoubtedly lead to greater attention to application of IHL in domestic and international courts, and thus to an injection of IHL norms in the approach to individual remedies. The UN document is a welcome move towards bringing about remedies for victims of violations of IHL. It still has nonbinding status. However, this does not necessarily negate its potential influence, for there are many examples of similar documents exerting influence in litigation.

As Sassòli notes, States are less and less the sole players on the international scene, and even much less so in armed conflicts.[152] Rules on State responsibility, in particular as codified by the ILC, are exclusively addressed to States individually and as members of the international society. Their possible impact on better respect for international humanitarian law should therefore not be overestimated, especially not when compared to the preventive and repressive mechanisms directed at individuals. The ILC Articles and their Commentary do clarify, however, many important questions concerning implementation of

[151] See Liesbeth Zegveld, Remedies for victims of violations of international humanitarian law, IRRC, September 2003 Vol. 85, No 851.

[152] Marco Sassòli, Responsibility for violations of ihl, IRRC June, 2002, Vol. 84 No 846, p. 418.

international humanitarian law and may therefore help to improve the protection of war victims by States, for in the harsh reality of many

present-day conflicts States continue to play a major direct or indirect role, particularly if they are not allowed to hide behind the smokescreen labels of “globalization”, “failed States” or “uncontrolled elements”. They are responsible, under the general rules on attribution of unlawful acts, much more often than they would wish. Furthermore, violations do have consequences, not only humanitarian consequences for the victims but also legal consequences for the responsible State. Finally, through the combined mechanisms of international humanitarian law and of the general rules on State responsibility, all other States are able and are obliged to act when violations occur. Ideally, they should do so through universal and regional institutions, an aspect perhaps neglected by the ILC. Recent events show, however, a certain return to unilateralism once a situation really matters. The Articles on State responsibility, applied to IHL violations, remind us that all States can react lawfully and clarify to a certain extent what States should do. This may be the most important message of the foregoing analysis. Although there unquestionably has to be the necessary political will, the need to respect and ensure respect for international humanitarian law is not a matter of politics, but rather a matter of law.

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