Reparations for Historical Wrongs: From ad hoc Mass Claims Programs to an International Framework Program?

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Introduction

This paper outlines how international and national mass claims programs have been employed over the last two hundred years to redress the consequences of massive wrongs arising out of historical events such as wars, revolutions and other extraordinary incidents, and that have affected a large number of individuals in a similar manner. This paper will focus on the mechanisms used to facilitate financial compensation without considering whether this form of remedy is the most appropriate one from a policy point of view, or indeed from the point of view of the victims themselves. In addition, in terms of the specific consequences of wrongs, we will focus on one particular category of claims, namely those dealing with death and personal injury.[1]

While each of the mechanisms or processes considered here are *ad hoc*, *i.e.* established to deal with the consequences of certain specific historical wrongs or events, patterns emerge as to the manner in which claims concerning liability for death and personal injury have been dealt with. The question arises as to what extent such past programs might be referred to in addressing the consequences of any contemporary or future events or wrongs. To what extent should such programs be considered precedent or models? To what extent should they be adjusted to the particular circumstances of each individual case? While we do not propose to offer any ready-made solutions, as this would be outside the scope of this paper, we

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1 In the common law tradition, lawyers tend to use the terminology of "personal injury claims." The Black's Law Dictionary defines "personal injury" as follows: "*Torts.* 1. In a negligence action, any harm caused to a person, such as a broken bone, a cut, or a bruise; bodily injury. 2. Any invasion of a personal right, including mental suffering and false imprisonment." *See:* B.A. Garner (ed.), *Black's Law Dictionary*, Eight Edition, 2004.

do suggest that a careful analysis should be made of the relevant past and current programs when designing a novel mass claims process.

The paper will consider the evolution of compensation programs from a historical perspective, bearing in mind that these programs were originally established mainly to deal with property and financial issues arising out of wars, revolutions or other historical events (I). The novel trend of adjudicating death and personal injury claims by mass claims programs will then be investigated (II).

I. The Evolution of Compensation Programs for Property Issues: An Overview

Historically, compensation programs for property issues may be broken down into three relatively easily identifiable phases. From the Jay Treaty of 1794 until World War II, international claims commissions and mixed arbitral tribunals were predominant (A). Then, in the wake of World War II, these programs were "nationalized" and substituted by "lump-sum" settlement agreements, which were negotiated at an inter-governmental level (B). The creation of the Iran-U.S. Claims Tribunal, the end of the Cold War and the rise of information technology in the 1980s marked the rise of a wide variety of international and national mass claims programs (C).[2]

A. From the Jay Treaty of 1794 to World War II: The Age of Mixed Claims Commissions

Doctrine usually defines a "claims commission" as 1) an arbitration court 2) established by agreement of two or more states; 3) to adjust a class of claims within a specified competence; 4) brought or espoused by nationals of the parties; and 5) which, actually renders an award on some or all of those claims.[3] Typically, this "class of claims" would concern property and other economic rights to the exclusion of personal injury damage suffered by individuals.

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2 This periodisation of the law of international claims has been proposed by V. Heiskanen, " Virtue out of Necessity: International Mass Claims and New Uses of Information Technology," in The Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes, Innovative Responses to Unique Challenges*, Oxford: Oxford University Press, 2006, ss. 25-37.

3 *See:* D.J. Bederman, "The Glorious Past and Uncertain Future of International Claims Tribunals," in M.W. Janis (ed.), *International Courts for the Twenty-First Century*, Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992, p. 161.

It is widely recognized that the modern era of international arbitration, as one of the mechanisms for resolution of sensitive international disputes, finds its genesis in the Jay Treaty of 1794, which can also be viewed as the predecessor of international claims commissions.[4] The relative success of the arbitration established by the Jay Treaty was replicated in the Alabama arbitrations of 1872.[5]

Scores of claims commissions were subsequently established in the late 19th century and early 20th century to deal with the consequences of wars, revolutions and other conflicts.[6] The Boxer Commission, the United States-Mexican Claims Commissions of 1868 and of the 1920s and 1930s, and the United States-German Mixed Claims Commission[7] are among the best-

4 Treaty of Amity, Commerce and Navigation, 19 November 1994, U.S.-Great Britain, 8 Stat, 116, 119-20, 122 (hereinafter the "Jay Treaty"), also available at <http://www.earlyamerica.com/earlyamerica/milestones/jaytreaty/text.html>, in particular Art. VII (last visited on 3 November 2006). The Jay Treaty established commissions to resolve commercial disputes between the United States and Great Britain through the arbitration of claims by British creditors against U.S. nationals. With a potential war with Britain looming over the U.S. failure to compensate British creditors, the U.S. President, George Washington, commissioned Chief Justice John Jay to negotiate a compromise and conclude a political settlement. The Jay Treaty did not expressly state that the United States were responsible for the non-payment of British creditors. However, it obligated the United States to pay full compensation and to adjudicate these claims before a panel of five commissioners, two appointed by each country and the fifth by unanimous consent. When determining the disputes, the panel allocated liability on a case-by-case basis.

5 The Alabama arbitrations followed allegations that Great Britain had violated its neutrality between the United States Government and the Confederate Government, during the American civil war, by building and deliberately delivering a warship, the *Alabama*, to the confederate army. The Alabama captured more than 60 vessels and caused considerable damage to the Northern economy. After having first refused to submit the cases to arbitration, the British Government in 1871, worried by the worsening of the political situation on the Continent following the victory of the Germans against the French, wished to liquidate the remaining bones of contention with the United States. The United States and the British Government consequently signed, in 1871, the Washington Treaty, whereby the British Government expressed its apologies for the escape of the *Alabama*, and agreed to submit the ensuing monetary claims to arbitration. The Government of Great Britain acknowledged implicitly its responsibility in the treaty, and the scope of liability was later determined by the arbitral tribunals, on a case-by-case basis.

6 It is estimated that over sixty-five such mixed claims commissions were established over more than two centuries. *See:* D.J. Bederman, "The Glorious Past..., p. 161.

7 The language used in the United States - Mexican General Claims Convention and the United States - Mexican Special Claims Convention both of 1923 expressly refers to damage to property and damage suffered by persons. Similar language is included in the (Berlin) Treaty of Peace of 25 August 1921 between the United States and Germany; cited in *Lillian Byrdine Grimm v. Government of the Islamic Republic of Iran*, 2 Iran-U.S. C.T.R. 78. The scope of the class of claims adjudicated by these mixed claims commissions was broad and arguably encompassed

known examples, but numerous other mixed arbitral tribunals and claims commissions were also created during that era.[8]

One of the common features of the Jay Treaty, the Alabama arbitrations and the other international claims commissions was that private claims concerning property rights were submitted to a third party panel for resolution. These institutions rendered awards, which were seldom challenged on their merit.[9]

The key advantage of international claims commissions to resolve mass claims has been aptly described as follows:

"It makes for a superb face-saving device in the conduct of international relations. Contentious disputes are submitted to what appear to be a neutral authority which adjudicates them on the basis of a respect for law. The highly-charged political circumstances which gave rise to the claims – whether wars or political upheavals – are neutralized with (usually) years of dispassionate legal analysis and adjustment. If nothing else, international claims settlement is a superb political soporific."[10]

However, delay in processing the claims was also a common characteristic and the main drawback of claims commissions.[11] For example, the United States-Germany Mixed Claims Commission, one of the most successful claims programs in its time, spent some seventeen years in resolving approximately 20,000 claims. Thus, these delays are often cited as one of the reasons why international claims commissions "fell out of fashion."[12]

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personal injury claims. This was uncommon at the time since the instruments establishing the mixed claims commissions were usually silent on the issue.

8 The Paris Peace Treaties and other peace treaties concluded after World War I provided for the establishment of fifty-seven mixed arbitral tribunals and claims commissions. Thirty-eight of these tribunals and claims commissions were actually established. *See:* N. Wühler, "Mixed Arbitral Tribunals," in I.R. Bernhardt (ed.), Instalment 1, E.P.I.L., 1981, 143. For a discussion of the jurisprudence of the various early international claims commissions, *See:* M. Whiteman, *Damages in International Law*, 1943.

9 *See:* D.J. Bederman, "The Glorious Past...p. 168.

10 *See:* D.J. Bederman, "The Glorious Past...p. 166.

11 *See:* V. Heiskanen, "Virtue Out of Necessity..., p.25.

12 V. Heiskanen, "Virtue Out of Necessity..., citing D.J. Bederman, "The United Nations Compensation Commission and the Traditional Claims Settlement," New York Univeristy Journal of International Law and Policy, 27, 1994, p. 18 ("The phenomenon of delay was undoubtedly the primary cause of disaffection with the institu-

In the wake of World War II, a new mechanism for resolving mass claims disputes appeared: lump-sum settlements agreements. This mechanism was shaped at the governmental level and used not only to settle the traditional private claims to compensate victims of the war or revolution, but also to deal with claims arising out of nationalization and expropriation of foreign property.[13]

B. The Post World War II as the Lump Sum Agreements Era

A lump-sum settlement agreement can be defined as a scheme in which the compensating State pays to the claiming State a specific damage indemnity. The claiming State in turn - in lieu of submitting the private claims to arbitration - establishes a national claims commission to adjudicate private claims and allocate specific damage indemnity amongst successful claimants. With this new scheme, the determination of the private claims of individuals or companies was no longer dealt with by an independent *ad hoc* mixed arbitral tribunal or international claims commission, but by a body of the claimant State itself. The functions previously exercised by international claims commissions were "nationalized."

Lump-sum agreements became the preferred tool to settle political crisis after World War II and typically would deal exclusively with claims relating to property rights. Lump-sum agreements were typically part of any package put forward by would-be peace brokers.[14] According to some authors, there have been a total of one hundred and sixty-eight lump sum agree-

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tion of claims settlement by international tribunals.")

13 *See:* V. Heiskanen, "Virtue Out of Necessity..., p. 26; *See: also* R.B. Lillich, D.J. Bederman, B.H. Weston, *International Claims: Their Settlement by Lump Sum Agreements 1975-1995*, New York:Transnational Publishers, 1999.

14 For example, a lump-sum agreement was suggested in 1951 by the UN Conciliation Commission for Palestine (CCP) with respect to the Middle East refugees, to no avail. Likewise, the former UN Secretary General, Mr. Boutros-Ghali advocated the same principles to the governments involved in the Cyprus problem. *See:* Annex to the Report of the Secretary General to the Security Council, UN Doc. S/24472, Annex, 1992, 18, Arts. 76 and 77 ("76. Each community will establish an agency to deal with all natters related to displaced persons.
77. The ownership of the property of displaced persons, in respect of which these persons See:k compensation, will be transferred to the ownership of the community in which the property is located. To this end, all titles to properties will be exchanged on a global communal basis between the two agencies at the 1974 value plus inflation. Displaced persons will be compensated by the agency of their community from funds obtained from the sale of the properties transferred to the agency, or through the exchange of property. The shortfall in funds necessary for compensation will be covered by the federal government from a compensation fund.")

ments concluded between 1945 and 1988.[15] Remarkably, only six agreements included admission of liability.[16]

Some authors (and sometimes interested parties) advocate that there are clear advantages to lump sum agreements for the involved States. For the claimant State, lump sum agreements usually result in prompt payment, less costly procedures for distributing the funds and control over these procedures. For the paying State, the benefits include: (i) the State knows in advance the extent of its liability, without future increase; (ii) the saving of the high cost of a mixed claims commission; (iii) the possibility to compensate victims without admitting responsibility, and (iv) arguably, a favourable standard of compensation.

Indeed, with regard to the standard of compensation applied in lump sum settlement agreements, the principle which emerged in the post-war period was that of "adequate" compensation (and not full compensation).[17]

When questions of national honor intrude in the settlement negotiations and when there is no clear victorious State, it is sometimes contended to be difficult to secure the acceptance of a lump-sum agreement, and thus avoid the necessity of establishing an international institution of some sort and referring claims to a sort of third party arbitration. In other words, the conclusion of lump-sum agreements requires negotiating flexibility.

Two historical lessons arise. First, if claims commissions and lump sums agreements were the preferred instruments for dealing with claims arising out of wars or revolutions, both were not entirely satisfactory and the compensation of victims was not the principal concern of States. Second, the remedy granted by these institutions could only be financial compensation for damage to property or other economic interests. More recently, the

15 *See:* R.B. Lillich and B.H. Weston, "Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims," American Journal of International Law, 82, p. 69.

16 All of these six agreements referred to Japan's responsibility during the Second World War, all the others being silent on the issue of responsibility. *See:* D.J. Bederman, "The Glorious Past...

17 For example, following the unification of Germany, the German Constitutional Court considered that the standard of compensation for property expropriated between 1945 and 1949 in the former GDR need not be at full market value. *See:* E. Benvenisti and E. Zamir, "Private Claims to Property Rights in The Future Israeli-Palestinian Settlement," 89, American Journal of International Law 1995, p. 331.

available remedies have also included restitution of land, housing or property[18] and financial compensation for death or personal injury.

C. The Modern Age and the Rise of a Wide Variety of Mass Claims Programs

The next cornerstone in the historical evolution of international claims programs is undoubtedly the Iran-U.S. Claims Tribunal. The Tribunal was set up in 1981 by the Algiers Accords in order to arbitrate claims of nationals of the United States against Iran and of nationals of Iran against the United States, as well as certain intergovernmental claims. The Algiers Accords did not contain any recognition of legal liability by either side for claims falling under the Tribunal's jurisdiction, and liability issues were determined by the Tribunal on a case-by-case basis.[19]

The jurisdiction of the Tribunal covered a wide variety of claims, including those arising from "debts, contracts, expropriation or other measures affecting property rights" (Article II, paragraph 1 of the Claims Settlement Declaration). While it could be argued – and was argued – that "other measures affecting property rights" could cover claims for financial compensation by dependants of victims of tort, the Tribunal took the view that it had no jurisdiction to deal with personal injury claims such as physical and psychological harm suffered by the victim or its dependents.[20]

18 Historically, following a war or a civil war, there was no return of displaced population and refugees. Peace treaties containing a relocation agreement usually do not provide for the right of return and the right of expellees to regain the possession of their houses. For example, the Treaty of Neuilly of 27 November 1919, between Bulgaria and Greece, provided for the relocation of forty-six thousand Greeks from Bulgaria, and ninety-six thousand Bulgarians from Greece. In addition, in the wake of the Turkish-Greek war which ended in 1923, about two million Greeks who had formerly been Turkish citizens, and about five hundred thousand Turks who had formerly been Greek citizens, left or were forced to leave for Turkey. The properties left by the refugees were seized by the governments to accommodate their own incoming nationals. Moreover, mass transfers also occurred after World War II in similar circumstances: fifteen million Germans who had lived in Eastern Europe were relocated to Germany and lost title to property they had left behind; also millions or Hindus and Muslims were relocated during the partition of India in 1947. *See:* E. Benvenisti and E. Zamir, "Private Claims to Property..., pp. 321. 322.

19 The Tribunal's awards were enforceable under the New York Convention.

20 *See: Lillian Byrdine Grimm v. Government of the Islamic Republic of Iran*, 2 Iran-U.S. C.T.R. 78 (dismissing for lack of jurisdiction a claim of compensation for loss of support filed by a widow of a U.S. national assassinated in Iran on the ground that failure by Iran to provide security and protection to her husband was not a measure "affecting property rights." The Tribunal stated that "compensation for mental anguish, grief and suffering can obviously not be a property right." *See: also* the dissenting opinion of Judge Howard M. Holtzmann, who con-

The end of the Cold War in the 1980s, combined with several factors such as the rise of liberalism and the emergence of new information technologies contributed to the return of international claims commissions and the multiplication of international claims programs. This "come-back" was confirmed in the 1990s, during which a whole series of new special purpose institutions were established to deal with claims arising out of a variety of extraordinary events, including World War II and the Holocaust. Among the largest are the following:

* The United Nations Compensation Commission (the "UNCC"), which dealt with compensation for a wide variety of personal (including personal injury and death), property, commercial and environmental damage caused by the Iraqi invasion of Kuwait. The Commission was established by UN Security Council resolution 687 (1991), which held Iraq liable for any "direct damage, loss or injury" caused by the invasion.[21] The UNCC process is discussed below in further detail in section II A *infra*.

* Commission for Real Property Claims of Displaced Persons and Refugees (the "CRPC"), which dealt with claims for restoration of property rights and return of displaced persons and refugees in the aftermath of the dissolution of the former Yugoslavia and the civil war in Bosnia and Herzegovina. The CRPC was established by the Dayton Peace Agreement of 21 November 1995. While establishing the right of return of the refugees, the Agreement does not confirm the legal liability of any of the parties to the conflict for damages caused during the conflict. Accordingly, the Commission had no jurisdiction to deal with claims for financial compensation.[22]

* The Housing and Property Claims Commission in Kosovo (the "HPCC"), a claims processing facility established in 2000 by the UN administration in Kosovo to process claims for repossession of properties lost during the NATO air campaign in 1999 to expel Serb forces from Kosovo, and for

sidered that "Mrs. Grimm [had] a "property right" in the financial support of her deceased husband."

21 *See:, generally,* R.B. Lillich (ed.), *The United Nations Compensation Commission* (Thirteenth Sokol Colloquium), 1995; V. Heiskanen, *The United Nations Compensation Commission,* 2003, *Recueil des cours de l'Académie de La Haye,* Vol. 296, The Hague: Martinus Nijhoff Publishers, 2002.

22 Dayton Agreement, Annex VII, Chapter 1, Article 1(1), available at <http://www.nato.int/ifor/gfa/gfa-an7.htm>; See: *also* M. Cox & M. Garlick, "Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina," in S. Leckie (ed.), *Housing and Property Restitution Rights of Refugees and Displaced Persons, New York:* Transnational Publishers, Inc., 2003, p. 69.

restitution of properties lost as a result of discrimination during the Milosevic regime. The province had been previously, in June 1999, placed under an interim UN administration by UN Security Council Resolution 1244 (1999).[23] The UN administration passed two regulations, which established the institutional and legal framework (the Housing and Property Directorate and the Housing and Property Claims Commission).[24] Unlike Security Council resolution 687 concerning the consequences of Iraq's invasion and occupation of Kuwait, resolution 1244 did not establish the liability of any of the parties to the conflict for property damage or destruction.

* German Foundation "Remembrance, Responsibility and Future," a compensation fund established in 2000 by the German Government and industry to provide compensation to former slave and forced labourers and certain other victims of injustices committed during the Nazi regime. The fund was established by a law enacted by the Germen Government following a settlement agreement between the Federal Republic of Germany and the United States in which Germany acknowledged its liability in order to put an end to class action lawsuits in U.S. courts.[25] Two funds were also created *ex gratia* by the Austrian Government to compensate the victims of the Nazi regime in the territory of what is today Austria.

* Claims Resolution Tribunal for Dormant Accounts in Switzerland ("CRT"), a claims process established in two stages to restore bank accounts of victims of Nazi persecution which had lain dormant since World War II. The first stage of the process ("CRT-I") was established in 1997 by way of an agreement between the Swiss Bankers Association and certain Jewish organizations, whereas the second phase ("CRT-II") was established following a comprehensive audit of Swiss bank accounts and a settlement of class ac-

23 UN Security Council Resolution 1244 (1999), p. 1, reaffirmed the "right for all refugees and displaced persons to return to their homes in safety."

24 *See:* A. Dodson and V. Heiskanen, "Housing and Property Restitution in Kosovo," in S. Leckie (ed.), *Housing and Property Restitution Rights of Refugees and Displaced Persons*, 2003, 225-242. *See: also* J.R. Crook, "Mass Claims Processes: Lessons Learned Over Twenty-Five Years," in The Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes, Innovative Responses to Unique Challenges*, Oxford: Oxford University Press, 2006, p. 54.

25 *See:* N. Wühler, "German Compensation for World War II Slave and Forced Labour," in L.B. de Chazournes, J.-F. Quéguinier and S. Villalpando (eds.), *Crimes de l'Histoire et Réparations : les Réponses du droit et de la Justice*, Bruxelles: Editions Bruylant, 2004, pp. 163-175.

tion litigation against Swiss banks in U.S courts.[26]

*The Commission for Indemnification of Victims of Spoliations ("CISV") for indemnification of material damage (moral damage excluded) and bank related spoliations caused by anti-Semitic legislation in the context of World War II. On 16 July 1995, President Jacques Chirac publicly acknowledged the responsibility of the French State for the acts of the Vichy regime during the occupation and the deportation of 70,000 French Jews. The Commission was established by decree of 10 September 1999. The scope of the program was broadened following the conclusion of a settlement agreement on 18 January 2001 between France and the United States in order to settle a series of pending class action lawsuits initiated against French banks in the United States.[27] The agreement created two funds to indemnify the victims. The agreement does not contain any acknowledgement by the French of its liability.

* Compensation funds for Korean "comfort" women, who were used as sex slaves by Japan during World War II. Japan set up a public fund and encouraged domestic and international donors to give donations. Following an order of the State, these funds were unilaterally allocated to the Korean victims. The Japanese State recognized publicly its moral responsibility at several occasions, but has systematically refused to acknowledge its legal liability for the acts.[28]

The above list of claims programs arguably resembles an *inventaire à la Prévert.* Nonetheless, certain lessons may be drawn from these experiences. First, in the aftermath of armed conflicts one may note the increasing influence of the United Nations and other international organizations in the establishment of mass claims programs established as part of an international peace-building effort; these include programs such as the CRPC and the

26 *See:* V. Heiskanen, "CRT-II: The Second Phase of the Swiss Banks Claims Process," in L.B. de Chazournes, J.-F. Quéguinier and S. Villalpando (eds.), *Crimes de l'Histoire et réparations : les réponses du droit et de la justice*, Bruxelles: Editions Bruylant 2004, pp. 147-162.

27 Decree No. 2001-243 of 21 March 2001 encapsulates the Washington Agreement of 18 January 2001, available at <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MAEJ0130022D> (last visited on 10 November 2006).

28 *See:* K. Kikuchi, "Les 'femmes de réconfort' devant la juridiction japonaise," in L.B. de Chazournes, J.-F. Quéguinier and S. Villalpando (eds.), *Crimes de l'Histoire et Réparations : les Réponses du droit et de la Justice*, Bruxelles: Editions Bruylant 2004, pp.131-145.

HPCC, which involve property restitution designed to facilitate the return of refugees and internally displaced people.[29] Second, traditional inter-State settlement agreements continue to be used to establish international claims commission or tribunals (*e.g.*, the Iran-U.S. Claims Tribunal); however, there is an increasing tendency to use such agreements for the particular purpose of settling class action lawsuits brought in particular in U.S. courts (*e.g.*, the German Foundation "Remembrance, Responsibility and Future" and the CRT-II in Switzerland.) Third, in a globalised world, States are becoming increasingly sensitive to the pressure of international public opinion and may create compensation funds at their own initiative (*e.g.*, the fund in Japan to compensate the Korean "comfort women.") Fourth, whilst the claims programs considered above have dealt with a great variety of claims, the constituting treaties or instruments may or may not contain a recognition of liability of one of the parties. In most instances, there is at least an implied recognition in the sense that one of the parties agrees to provide financial compensation or another form of remedy. In one instance (the Iran-U.S. Claims Tribunal) there was not even implied recognition of liability, and liability issues were arbitrated on a case-by-case basis.

Following the ruling of the Iran-U.S. Claims Tribunal in 1983 in the *Grimm* case[30] and the creation of the UNCC some fifteen years ago, one can discern a new trend in which victims' needs and non-material damage are being given increasing consideration. Thus, victims of crimes arising out of historical events may now be given the option to bypass competent State courts and submit directly their personal injury claims to *ad hoc* mass claims programs.

II. The Novel Trend of Adjudication of Death and Personal Injury Claims by Mass Claims Programs

A. The United Nations Compensation Commission (UNCC) (1991)

1. An Overview

The United Nations Compensation Commission (the "UNCC") was estab-

29 Some endeavor to devise a similar scheme for East Timor. *See:* J. du Plessis, "Slow Start on a Long Journey: Land Restitution Issues In East Timor, 1999-2001," in S. Leckie (ed.), *Housing and Property Restitution Rights of Refugees and Displaced Persons,* New York: Transnational Publishers, 2003, pp.143-163.

30 *Lillian Byrdine Grimm v. Government of the Islamic Republic of Iran,* 2 Iran-U.S. C.T.R. 78.

lished in 1991 by Security Council resolution 687 in order to process claims and pay compensation for losses resulting from Iraq's invasion and occupation of Kuwait. The resolution clearly establishes Iraq's legal responsibility for such losses:

"Iraq ... is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait."

The UNCC is a subsidiary organ of the United Nations Security Council based in Geneva. Its structure includes a Governing Council, a secretariat and panels of Commissioners. It has jurisdiction over a wide range of claims: from issues of *personal injury and death, including mental pain and anguish claims*, evacuation and environmental damage, to claims for property damage and commercial and financial losses. Compensation is payable to successful claimants from a special fund that receives a percentage of the proceeds from sales of Iraqi oil.

Due to the volume of claims, it was necessary to adopt procedures to decide the claims within a reasonable period of time. Those procedures deviate considerably from the classical approach usually adopted by courts and arbitral tribunals.[31]

Claims must be submitted by governments on behalf of their nationals or residents on standardised claims forms. The Secretariat makes a preliminary assessment on whether the claims meet the formal requirements (Article 14) and reports to the Governing Council on the claims received and the legal and factual issues raised (Article 16). The Secretariat prepares the cases to be decided by the panels of Commissioners. The panels' reports and recommendations require approval by the Governing Council. Payments are not made to the individual claimants but to the relevant government which then distributes the payment on the basis of Governing Council guidelines. Altogether, over 2.6 million claims with an asserted value of over USD 300

31 The procedure followed is set out in the Provisional Rules for Claims Procedure adopted by the UNCC Governing Council in 1992. For a criticism of certain aspects of the UNCC system, *See:* M.E. Schneider, "How Fair and Efficient is the UNCC System? A Model to Emulate?," Journal of International Arbitration, 15, 1998, pp. 15-26.

billion have been filed with the UNCC.

Despite its function to resolve claims against Iraq, the UNCC is not a court or arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims."[32] The decision of the Commission does not qualify as an arbitral award and cannot be enforced under the New York Convention.

The UNCC mass claims program emphasized for the first time the need to handle carefully and comprehensively the victims' death and personal injury claims.

2. Personal Injury Claims

Four separate categories of claims for individuals were created by the UNCC: individual claims for departure-related losses (category "A");[33] claims for death and serious injury, including mental pain and anguish claims (category "B"); claims for individuals for damages up to USD 100,000 (category "C") and claims for individuals for damages above USD 100,000 (category "D"). Three categories of claims concern personal injury claims: categories "B," "C" and "D."

The Government Council's criteria for processing urgent category "B" and category "C" claims reflect a particular effort to address personal suffering, in priority over large individual, corporate and government claims.[34] This decision was based primarily on humanitarian and other policy considerations.[35]

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32 *See:* C. Alzamora, "The UN Compensation Commission: An Overview," in R.B. Lillich (ed.), *The United Nations Compensation Commission* (Thirteenth Sokol Colloquium), New York: Transnational Publishers, Inc., 1995, p.8.

33 Fixed payments of USD 2,500, backed by "simple documentation" were paid in compensation for departure from Iraq or Kuwait. Approximately 920,000 category "A" claims with a total asserted value of approximately USD 3.5 billion were filed with the Commission. *See:* V. Heiskanen, *The United Nations Compensation...,pp.*278, 279.

34 *Criteria for Expedited Processing of Urgent Claims.* S/AC.26/1991/1 (2 August 1991) (hereinafter "Decision No. 1"); *Criteria for Additional Categories of Claims.* S/AC.26/1991/7 (4 December 1991) (hereinafter "Decision No. 7.")

35 Most of the affected individuals came from developing countries such as Egypt, Jordan, Pakistan, Sri Lanka, Bangladesh and the Philippines. *See:* C. Alzamora, "The UN Compensation Commission..., p. 6. The policy

2.1 Category "B" Claims

Claims under category "B" could be submitted to the UNCC by individuals who had suffered a serious personal injury or whose spouse, child or parent had died as a result of the invasion and occupation. The Governing Council defined "serious personal injury" to cover the following:

(a) dismemberment;
(b) permanent or temporary significant disfigurement, such as substantial change in one's outward appearance;
(c) permanent or temporary significant loss of use or limitation of use of a body organ, function or system;
(d) any injury, which if left untreated, is unlikely to result in the full recovery of the injured body area, or is likely to prolong such full recovery.[36]

For purposes of recovery before the Commission, "serious personal injury" was also defined to include;

"instances of physical or mental injury arising from sexual assault, torture, aggravated physical assault, hostage-taking or illegal detention for more than three days or being forced to hide for more than three days on account of a manifestly well-founded fear for one's life or of being taken hostage of illegally detained."

In case of personal injury, a fixed amount of USD 2,500 was to be provided where there was simple "documentation of the fact and date of the injury." In case of death, "simple documentation of the death and family relationship" was required. Interestingly, documentation of the actual loss was not necessary. Where a claimant was entitled to recovery under both category "A" and category "B," cumulative claims could be made. However, a cap of USD 10,000 was set for personal injury claims with respect to one family.[37]

If the actual loss exceeded the fixed amount available under category "B," any payments made under this category were to be considered an interim

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was based on a recommendation made by the Secretary General in his report of 2 May 1991.

36 Personal Injury and Mental Pain and Anguish, S/AC.26/1991/3 (23 October 1991) (hereinafter "Decision No. 3.")

37 *Criteria for Expedited Processing of Urgent Claims.* S/AC.26/1991/1 (2 August 1991) (Decision No. 1), para. 12. Family was defined as consisting of "any person and his or her spouse, children and parents."

relief, and claims for additional amounts could be made under category "C" and other appropriate categories.[38]

Approximately 3,941 category "B" claims were awarded compensation, in the total amount of approximately USD 13.4 million.[39]

2.2 Category "C" Claims

For higher payments under personal injury claims, including mental pain and anguish claims, individuals had to claim their actual losses under category "C" claims (claims up to USD 100,000 per person.)

Category "C" claims cover comprehensively various types of losses that could be suffered by individuals, including, personal injury or death, including mental pain and anguish claims (if the actual costs incurred exceeded the fixed amounts available under category "B" or if other losses apart from those available under category "B" were also sustained by the claimant); personal property losses; bank accounts and securities; loss of income or support; real property losses: and business losses. The Governing Council defined the mental pain and anguish claims as follows:

"Compensation will be provided for pecuniary losses (including losses of income and medical expenses resulting from metal pain and anguish. In addition, compensation will be provided for non-pecuniary injuries resulting from such mental pain and anguish as follows:

(a) a spouse, child or parent of the individual suffered death;
(b) the individual suffered serious personal injury involving dismemberment, permanent or temporary significant disfigurement, or permanent or temporary significant loss of use or limitation of use of a body organ, member, function or system;
(c) the individual suffered a sexual assault or aggravated assault or torture;
(d) the individual witnessed the intentional infliction of events described in subparagraphs (a), (b) or (c) on his or her spouse, child or parent,
(e) the individual was taken hostage or illegally detained for more than three days, or for a shorter period in circumstances indicating an imminent threat to his or her life;

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38 *Criteria for Expedited Processing of Urgent Claims.* S/AC.26/1991/1 (2 August 1991) (Decision No. 1), para. 12.

39 *See:* the statistics provided on the UNCC website, available at <http://www2.unog.ch/uncc/>.

(f) on account of a manifestly well-founded fear for one's life or of being taken hostage or illegally detained, the individual was forced to hide for more than three days; or

(g) the individual was deprived of all economic resources; such as to threaten seriously his or her survival and that of his or her spouse, children or parents, in cases where assistance from his or her Government or other sources has not been provided."

Under category "C" claims, the standard of proof was higher. Claimants were required to document their claims "by appropriate evidence of the circumstances and the amount of the claimed loss." Such evidence would have to constitute the "reasonable minimum that is appropriate under the circumstances," while a lesser degree of documentary evidence "would ordinarily be required for smaller claims, such as those below USD 20,000."[40]

Approximately 672,823 category "C" claims were awarded compensation, in the total amount of approximately USD 5.2 billion.[41] It is unclear, however, what is the proportion of these sums which strictly corresponds to the compensation of personal injury claims.

Claimants seeking damages in excess of USD 100,000 were allowed to choose between filing a claim for the entire loss under category "D," or filing a claim for the first USD 100,000 under category "C" and a separate claim for the spillover under category "D."[42]

2.3 Category "D" Claims

Category "D" claims include those by individuals for damages above USD 100,000. Category "D" claims cover the same types of losses covered by category "C" claims.

As these claims were generally larger and more complex than claims under categories "B" and "C", compensation amounts were not fixed but subject to individualized, case-by-case determination by Commissioners panels.

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40 *Criteria for Expedited Processing of Urgent Claims.* S/AC.26/1991/1 (2 August 1991) (Decision No. 1), para. 15 (a).

41 *See:* the statistics provided on the UNCC website, available at <http://www2.unog.ch/uncc/>.

42 *Criteria for Expedited Processing of Urgent Claims.* S/AC.26/1991/1 (2 August 1991) (Decision No. 1), para. 15 (a).

The evidentiary standard was more stringent than that applicable to the urgent individual claims "B" and "C." Claims under category "D" "must be supported by documentary and other appropriate evidence sufficient to demonstrate the circumstances and the amount of the claimed loss."[43]

Approximately 10,349 claims have been resolved under category "D" claims. The total amount awarded stands at approximately USD 3.35 billion. Similarly, it is difficult to determine the proportion of these sums that corresponds to the compensation of personal injury claims.

B. Some Recent National Programs (2000-2006)

Three interesting claims programs were recently established at the regional level in different contexts, which deal, *inter alia*, with certain categories of personal injury claims: 1) the German foundation "Remembrance, Responsibility and Future", in 2000, to compensate certain categories of victims of the Holocaust, 2) the September 11th Victim Compensation Fund, in 2001, and 3) the Canadian Indian Residential Schools Settlement Agreement, set up in May 2006 to compensate the former Canadian Indians students for the physical abuses and other mistreatments that they incurred while they resided in Indian residential schools as far back as 1920.

1. The German Foundation "Remembrance, Responsibility and Future" (2000)

An Overview

On 12 August 2000, a German law, German Foundation Act,[44] came into force, creating a German Foundation entitled "Remembrance, Responsibility and Future," to provide financial compensation to more than 1 million former slaves and forced labourers and certain other Holocaust victims of National Socialist (Nazi) injustice. The funds for this German Foundation, a total amount of EUR 5.1 billion, were made available in equal parts by the German Government and German companies. This Act was passed following an international agreement between the Governments of Germany and the United States to put an end to class action lawsuits lodged by former victims in U.S. courts.[45]

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43 *Criteria for Additional Categories of Claims*. S/AC.26/1991/7 (4 December 1991) (Decision No. 7).

44 Federal Law on the establishment of a Foundation "Remembrance, Responsibility, and Future," German Federal Law Gazette (BGBI), vol. 2001-I, 2036 (hereinafter the "German Foundation Act.")

45 Agreement between the Government of the United States of America and the Federal Republic of Germany

Pursuant to the German Foundation Act, seven partner organizations, including the International Organization for Migration (IOM), processed claims for payment relating to Slave Labour, Forced Labour and Personal Injury (medical experiments, child lodged in a home for children of slave or forced labourers or death of a child in such children's homes).[46] The Foundation was devised as the "exclusive remedy and forum" for the resolution of all such claims.[47] For all claim categories under the German Foundation Act, the extended filing deadline expired on 31 December 2001.

Out of the sum of EUR 5.1 billion, only EUR 25.5 million were allocated to all the seven partner organizations to make payment for so-called "other personal injury claims."

Personal Injury Claims

The German Foundation Act created three broad categories of personal injury claims to attract as many claims as possible to the process. The categories were defined as follows:

Category I:

- *Victims of medical experiments. Such victims were abused by the Nazi regime for research purposes. This included, among other atrocities: the deliberate infection of open wounds to test the effectiveness of drugs, experiments to test the drinkability of sea water and the effects of negative pressure and hypodermia on the human body; and mass sterilisation.*
- *Parents of children who died in a home for children of slave or forced laborers...*
- *Children lodged in a home for children of slave or forced laborers who suffered severe physical or emotional damage [that] resulted in a total handicap of 60 to 80 percent.*

concerning the Foundation "Remembrance, Responsibility and Future," 17 July 2000, 39 I.L.M., 2000, 1298, (hereinafter the "U.S.-German Agreement.") In fact, the class action lawsuits were dismissed but there was no settlement agreement in the traditional sense. *See:* E. Kristjánsdóttir and B. Simerova, "Processing Claims for "Other Personal Injury" Under the German Forced Labour Compensation Programme," in The Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes, Innovative Responses to Unique Challenges*, 2006, 109-137, 111.

46 German Foundation Act, sections 9(3) and 11(1).

47 U.S.-German Agreement, Annex A.

Category II:
Victims who suffered extremely severe and lasting damage to their physical or emotional health, resulting in a permanent handicap of 80 per cent ... in connection with Nazi wrongs. Examples of extremely severe and lasting health damage include brain damage with seriously impeded performance, total paralysis of arms and legs, loss of both eyes, loss of both arms or legs or one of each and psychic trauma with severe disorder.

Category III:
Victims who suffered severe and lasting damage to their physical or emotional health, resulting in a permanent handicap of 60 to 80 per cent ... in connection with Nazi wrongs. Victims who suffered personal injury other than health damage are also eligible to claim under this category [provided it] constituted a personal injury and was linked to Nazi wrongs.[48] *(Emphasis added).*

The German Foundation Act made clear, however, that the sum of EUR 25.5 million allocated by the parties to cover personal injury claims would be used in priority to compensate first the victims falling within the category I claims, which were rightly or wrongly considered the most atrocious acts perpetrated by the Nazi regime. Due to the limited amount of resources, this resulted in a controversial outcome: all the claims falling within categories II and III were ultimately rejected for lack of funds, without full review.[49]

The processing of the category I claims was carried out on the basis of documents only, without a hearing. Relaxed standards of proof were adopted. In essence, any type of evidence was allowed that could demonstrate that the claimant's account was "more likely to be true than false."[50]
Out of the 42,000 claims received by the IOM for "other personal injury,"

48 Category III could thus theoretically have included compensation for the wrongful death of children or close family members in the Holocaust.

49 *See:* R. Bank, *The New Payments to Victims of National Socialist Injustice*, 44 German Y.B. Int'l L, 2001, 309, 330; *See: also* E. Kristjánsdóttir and B. Simerova, "Processing Claims for..., pp.115-117.

50 *See:* P. Van der Auweraert, "The Practicalities of Forced Labour Compensation: The Work of the International Organisation for Migration as one of the Partner Organisations under the German Foundation Law," in P. Zumbansen (ed.), *Zwangsarbeit im Dritten Reich: Erinnerung und Verantwortung: Juristische und Zeithistorische Betrachtungen*, 2002, pp. 304, 313.

only 1,570 victims were compensated.[51]

A more generous and effective scheme was devised in the United States in the context of the terrorist attack on the World Trade Centre in 2001.

2. Compensation of the Families and Victims of September 11th (2001)

An Overview

Following the terrorist attacks on the World Trade Centre in New York City on 11 September 2001, the U.S. Congress passed the Air Transportation Safety and System Stabilization Act[52] (the "Statute"). As part of this legislation, the U.S. Congress established the September 11th Victim Compensation Fund (the "Fund"), which was designed "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of [the terrorist attacks]."[53] In addition, the U.S. Attorney General appointed a Special Master to administer the Fund and promulgate all necessary rules and regulations.[54] The Fund was funded by the U.S. tax payers.

The Statute gave the option to the victims either to pursue a lawsuit in the competent U.S. court or to participate in a no-fault administrative compensation scheme, which would become their exclusive remedy for their personal injury claims.[55] The United States Government quickly acknowledged their duty to compensate the victims, but did not recognize any negligence or responsibility in connection with the terrorist attacks.

The Fund processed over 7,000 applications over three years. A sum in excess of

51 *See:* E. Kristjánsdóttir and B. Simerova, "Processing Claims for..., p.131.

52 Pub. L. No. 107-42, 155 Stat. 230 (codified at 49 U.S.C. §§ 40101 *et seq.*). Law, C.H.R. Res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11, 19 April 2005.

53 49 U.S.C. § 403. *See: generally* K.R. Feinberg, "Compensating the Families and Victims of September 11th: An Alternative to the American Tort System," in The Permanent Court of Arbitration (ed.), *Redressing Injustices Through Mass Claims Processes, Innovative Responses to Unique Challenges*, Oxford: Oxford University Press, 2006, pp. 235-242.

54 In particular, the Special Master was required to determine who would be eligible to receive compensation from the Fund and the amount of compensation to which an eligible claimant would be entitled, based on economic and non-economic factors.

55 Claimant appeals to the courts were not permitted. Ninety-seven percent of the families who lost a loved one did participate to the scheme and waived their rights to file a law suit in U.S. courts.

USD 7 billion was allocated to the victims and/or their families, including families of illegal immigrants who perished on that day.

Personal Injury Claims

The Fund compensated the victims or their family for "physical injury to the body" (excluding psychological injuries) or "death."

One of the interesting aspects of this scheme is its transparency and the methods used to quantify the injury. Indeed, the Fund not only published in advance the eligibility criteria but also set forth the presumptive economic methodology to be used to quantify the injury. Three straightforward criteria were defined to quantify the injury: 1) the age of the victim; 2) his or her sources of income; and 3) the number of dependents of the victim. On the basis of these elements of information, potential claimants had the possibility to obtain from the Fund a detailed approximation of their awards prior to opting in or out of the program.

Once a claimant had opted in, such claimant had the option to submit his or her claim either to Track A or Track B. Track A was the mass claims process based on the above described presumptive economic methodology. Track B was a more individualized process leading to an award (no presumptive methodology would be used in such a case). In both cases, claimants were entitled to a formal hearing if they wished.

3. The Canadian Indian Residential Schools Settlement Agreement (2006)

The Genesis

On 6 November 2003, the Government of Canada announced its National Resolution Framework to respond to claims of former Canadian Indian students for addressing the legacy of the "residential school system"[56] and to facilitate healing and reconciliation. Indeed, a large number of former students alleged that they had suffered neglect, sexual and physical abuse, forced assimilation and the systematic destruction of their cultural and family relationships while residing at Indian residential schools during the

56 The Government of Canada and churches operated residential schools in Canada from 1848 until the 1970s. Their objectives included separating aboriginal children from their traditional languages and cultures and their assimilation into the Canadian Society.

period from 1920 to 1996. The claimants were given the option either to participate in an alternative dispute resolution process or to seek an out-of-court settlement or go to trial.[57] Most claimants chose to pursue their claim through class action lawsuits in Canadian courts.

On 20 November 2005, the parties entered into an agreement in principle to settle the class action lawsuits and to establish a Truth and Reconciliation Commission. Finally, on 10 May 2006, following more than ten years of litigation, the Attorney General of Canada and the representatives of the former students of Indian Residential Schools, the churches involved in running those schools, the Assembly of First Nation and other aboriginal organizations signed the so-called Indian Residential Schools Settlement Agreement, which establishes a non-fault mass claim process and a more individualised process for more serious abuse referred to as the "Independent Assessment Process" (the "Settlement Agreement").[58]

On the same day, on 10 May 2006, the Government of Canada issued a press release declaring the immediate launch of an Advance Payment Program whereby the Government of Canada undertook to pay an advance payment of CD 8,000 for "eligible former Indian residents 65 years of age and older when the negotiations were initiated on 30 May 2005,"[59] being to any residential school survivor that was born before 1 June 1940.

The scheme is funded by the Canadian taxpayers[60] and the churches, and the Settlement Agreement put an end, in principle, to the class action lawsuits.[61] The beneficiaries of the program will have to waive their rights to

57 *See:* the information posted on the Indian Residential School Secretariat's website, available at <www.irsad-sapi.gc.ca/english/about_us.html> (last visited on 5 December 2005).

58 *See:* the final Indian Residential Schools Settlement Agreement, dated 10 May 2006, available at <www.thomsonrogers.com/Indian_Residential_Schools_Settlement_Agreement_05_06.pdf> (last visited on 5 December 2006).

59 *See:* the press release of the Government of Canada, dated 10 May 2006, available at <http://www.thomsonrogers.com/IRS_SA_News_Release.pdf> (last visited on 5 December 2006).

60 The Government of Canada undertook to fund the advance payment to any eligible student and transfer CD 125 million to the Aboriginal Healing Foundation. In addition, it undertook to provide CD 60 million for the establishment and work of a Truth and Reconciliation Commission. Settlement Agreement, Art. Three. *See: also* Art. 6.03(1).

61 Settlement Agreement, Preamble, F. ("The Parties... have agreed to settle the Class Actions upon the terms contained in this Agreement.")

seek further compensation from the Canadian State and other entities in the future.[62] Whilst the Government of Canada agreed to pay financial compensation to any eligible students, it is noteworthy that Canada did not acknowledge any responsibility in the running of the residential schools.[63] The Settlement Agreement was approved by the relevant State courts across Canada on 15 December 2006 and should be implemented shortly.[64]

Personal Injury Claims

The preamble of the Settlement Agreement refers to a broad category of personal injury claims covered by the program.[65]

As mentioned, the Settlement Agreement establishes in parallel a mass claim program and a more individualised adjudication process to determine additional compensation for those who suffered serious harms or abuse. The mass claims program is a non-fault administrative process, which provides for a lump sum payment (the Common Experience Payment)[66] to *all* the former Indian students who resided at any Indian Residential School prior to 31 December 1997 and who were alive on 30 May 2005 and who decide to participate to the program.[67] As of 15 December 2006, it was estimated that nearly 80,000 living residential school attendees would be entitled to

62 Settlement Agreement, Preamble, p. 8 ("the releases will have no further liability except as set out in this Agreement.")

63 Settlement Agreement, Preamble, H. ("This Agreement is not to be construed as an admission of liability by any of the defendants named in the Class Actions.")

64 *See:* http://www.thomsonrogers.com/Pressrelease(consortium)(Dec152006).pdf. Article 4.14 of the Settlement Agreement provides that the agreement will be "null and void" if more than 5,000 beneficiaries (Eligible CEP Recipients) decide to opt out of the program, unless the Government of Canada waives this provision (Art. 4.14 Opt Out Threshold).

65 Settlement Agreement, Preamble ("... certain harms and abuses were committed against those children.")

66 According to a press release from the National Consortium of Residential School Survivors' Counsel, "[t]he Common Experience Payment is meant to provide compensation for the common harms suffered by students at residential schools. This includes loss of language and culture.") The press release is available at <http://www.thomsonrogers.com/Settlement_Summary_Nov_23_2005.pdf> (last visited on 18 December 2006).

67 Pursuant to Article 5.02 of the Settlement Agreement, the amount of the financial compensation under the mass claims program will be of CD 10,000 to every eligible recipient who resided at an Indian school for one school year or part of the year, and an additional CD 3,000 for each subsequent school year or part thereof (less the amount of any advance payment).

this Common Experience Payment.[68] In addition, the estates of those who passed away after 30 May 2005 are also eligible for this payment.

Likewise, with respect to the more individualised adjudication process the scope of the Independent Assessment Process is broad. It benefits not only former students who are not resident in Canada but *also* the beneficiaries of the lump sum payments paid under the mass claim program.[69] It is an improved compensation program available for anyone who was sexually abused at the school, for anyone who was seriously physically abused at the school and for anyone who suffered serious harms as a result of their residential school experience. The claimants will have to submit an application within a period of time of five years as from the implementation of the Settlement Agreement.[70] Pursuant to this more conventional adjudication process, claims of eligible individuals will be quantified in the course of an adjudication process, and this will include a hearing before an adjudicator.

C. Future Program(s) of the International Criminal Court?

As "pure" criminal procedures dedicated to the retribution of the vanquished, the Nuremberg and Tokyo trials did not include the victims in the process, neither did the *ad hoc* tribunals for the former Yugoslavia and Rwanda.[71] When adopted in 1998, the Statute of the International Criminal Court (ICC) was praised for the place it reserved and the promises it made to victims of mass atrocities. However, the Statute of the ICC only establishes a general legal framework for providing reparations to victims

68 *See:* http://www.thomsonrogers.com/Pressrelease(consortium)(Dec152006).pdf.

69 *See:* the definition of "Eligible IAP Claimants;" *See: also* Settlement Agreement, Art. Six.

70 In case the eligible claimants do not submit their application within this specific period of five years as from the date of implementation of the Settlement Agreement, their claim will be "forever extinguished" (Art. 6.02(2)).

71 The only provision relating to victims in the ICTY Statute is Article 24, para. 3, which states "In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners". On the system of reparation applicable at the ICTY and ICC, *See:* I. Bottigliero, *Redress for Victims of Crimes Under International Law*, Leiden: Brill Academic Publishers, 2004, pp.193 *et seq.*; P Chifflet, "The Role and Status of the Victim," in G. Boas and W. Schabas, *International Criminal Law Developments in the Case Law of the ICTY,* Leiden: Martinus Nijhoff Publisers, 2003, pp. 75 *et seq.*, in particular 98 *et seq.*; S. Garkawe, "Victims and the International Criminal Court: Three Major Issues," 3 Int. Crim. L. R., 2003, 345-367; C. Jorda, J. de Hemptinne, "The Status and Role of the Victim," in A. Cassese, P Gaeta, J. Johnes (eds.), *The Rome Statute of the International Criminal Court,* Vol. II, 2002, pp. 1387-1419; I. Scomparin, "La victime du crime et la juridiction pénale internationale," in M. Chiavario (ed.), *La justice pénale internationale entre passé et avenir*, Paris, Milan: Dalloz-Guiffré, 2003, pp. 335-352.

of international crimes falling within the Court's jurisdiction. Article 75 of the Statute of the ICC provides that it is the Court which shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. It is also the Court which may, either upon request, or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting. Once the Court has established the principles governing the reparation proceedings and established the scope of "civil liability" of the accused, it retains discretion to delegate practical aspects of reparation claims to a subsidiary body such as the Trust Fund or, more appropriately, to a panel of experts. Nothing in the Statute requires the Court itself to process reparation claims, in particular where the number of claims or their complexity is such that the Court's ability to exercise its principal function – conducting criminal trials – would be at risk.

Art. 98(3) Rules of Procedure and Evidence states that collective awards should be dealt with by the Trust Fund "where the number of the victims and the scope, forms and modalities of reparations make a collective award more appropriate." The regulatory framework outlined in Article 79 was subsequently complemented by a Resolution of the Assembly of States Parties, which provided for a clearer, although by no means complete operational design for the Trust Fund.[72] The Resolution dictates the functioning and organization of the Trust Fund. It provides for the establishment of a five-member Board of Directors whose primary responsibility will be "to develop suggestions for further criteria for the management of the Trust Fund for consideration and adoption by the Assembly of States." More generally, the Board will be responsible for establishing and directing the activities and projects of the Fund "and the allocation of the property and money available to it, bearing in mind available resources and subject to the decisions taken by the Court."[73] A complementary step was taken when the Assembly of State Parties adopted the Regulations of the Trust Funds for Victims.[74]

72 Resolution ICC-ASP/1/Res.6, adopted at the 3rd plenary meeting on 9 September 2002 (by consensus), ICC-ASP/1/Res.6, *Establishment of a Fund for the Benefit of Victims of Crimes Within the Jurisdiction of the Court, and of the Families of Such Victims* ("ASP Resolution").

73 ASP Resolution, Annex, para. 7.

74 Resolution ICC-ASP/4/Res.3, 3 Dec 2005.

The Registrar of the Court is made responsible for providing the necessary assistance to the Board of the Trust Fund. The Resolution foresees that, as and when the workload of the Trust Fund justifies, an Executive Director may be appointed to ensure the proper and effective functioning of the Fund. The set up and composition of the Board of Directors suggests that the Trust Fund is intended to act as a financial administration organ rather than an operative body in charge of settling mass claims on behalf, and under the supervision and guidance of, the ICC.[75]

If the institutions have been set up to organize programs of reparations for victims of crimes falling within the jurisdiction of the ICC, the definition of the beneficiaries, the scope of the programs have not been established yet. In particular, the definition of "victims" at Rule 85(1) of Procedure and Evidence is too broad to be operational.[76] Moreover, the Statute of the ICC does not provide any specific guidance as to the damage, loss or injury for which reparation claims may be made. Thorny issues such as the scale of reparation proceedings, the number of claimants, the adaptation of reparations to meet the available funding and resources have not yet been considered by the organs of the ICC. There is therefore uncertainty as to the future shape of the program(s) of the International Criminal Court.

Conclusian

An appropriately designed and established mass claims program is an effective tool to deal with victims' claims, as it not only does justice to the victims but also prepares the ground for the normalisation of the relations between the parties involved. Indeed, mass claims programs can often be considered as a tool of peace-building to be used by the international community in the aftermath of international crises. However, there is no magic formula for the design of such programs, and in practice their scope and nature has varied widely and they have been as diverse as the situations which triggered their creation. The principal lesson to be drawn from these experiences appears to be that an international claims program must be customized to reflect the situation and the claims that it is intended to deal with. This does

75 *See:, generally, Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the Period 16 July 2004 to 15 August 2005*, ICC-ASP/4/12, 29 September 2005.

76 Rule 85 defines victims as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court."

not mean that there are no "best practices" of international mass claims processing; there are, and efforts are underway to record these.[77]

Out of all the programs considered in this paper, some appear to have served as precedent, or at least as a source of inspiration for other such programs. Thus, the Iran-U.S. Claims Tribunal and the UNCC appear to have paved the way for several other programs in the modern era. International mass claims programs may also have influenced the adoption of Article 75 of the Rome Statute of the ICC,[78] which establishes an institutional framework for the adjudication of personal injury claims arising out of the gravest crimes falling within the jurisdiction of the Court, *i.e.* genocide, crimes against humanity and war crimes.[79] However, neither the Statute of the ICC nor the Rules of Procedure and Evidence give the Court and the Trust Fund clear guidance on how to organize and implement mass reparation programs. This lack of direction may be a disadvantage in that it may create a state

77 *See:, e.g.,* Howard M. Holtzmann & Edda Kristjansdottir (eds), *International Mass Claims Processes: Legal and Practical Perspectives*, Oxford: Oxford University Press, 2007 (forthcoming).

78 The Rome Statute of the International Criminal Court is available at <http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf>. Article 75 titled "Reparations to victims" provides that:
"1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. 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.
Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.
3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to See: k measures under article 93, paragraph 1.
5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.
6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law." In accordance with its terms, the Rome Statute entered into force on 1 July 2002, once 60 States had become Parties. Today, 103 States have become Parties to the Statute.
See: <www.icc-cpi.int/about/ataglance/establishment.html>.

79 *See:, e.g.,* M. Henzelin, V. Heiskanen and G. Mettraux, "Reparations to Victims before the International Criminal Court," *Criminal Law Forum*, 17, 2006 (forthcoming).

of uncertainty for the victims, an absence of incentive for States or other donors and, eventually, a lack of interest in establishing victims programs in general.

Time will tell how successful the ICC will be in managing mass claims processes and in ensuring adequate compensation to victims. It may be expected that, in the first phase, the ICC will proceed to establish a framework program, which may then be adapted and adjusted depending on the context in which it will be deployed. Such a framework program is expected to take into account and reflect the lessons learned from mass claims programs established in the past. As noted above, the design of such earlier *ad hoc* programs cannot simply be copied since they were, precisely, *ad hoc* programs created in, and adapted to, certain historical and political circumstances.

Perhaps the principal lesson to be learned from past international claims programs is that they effectively allow the settlement of complex and deep-seated disputes on a without prejudice basis. In other words, they allow the party that is accused of having committed a historic wrong to agree to a settlement of the dispute and to establishing a claims process without thereby recognizing its international legal liability. At the same time, this limitation on legal liability has not prevented these programs from providing substantial justice to victims in the form of compensation or another appropriate remedy. This combination of without prejudice settlement and substantial justice may well be the subtle secret of their success.*

* For abstract and selected bibliography refer to Turkish translation.