

AD HOC REPARATION MECHANISMS

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I. INTRODUCTION—THE IMPORTANCE OF NATIONAL LEGAL FRAMEWORKS AND SPECIFIC MECHANISMS FOR ENSURING INDIVIDUALS’ ACCESS TO REPARATION

A State’s obligation to make reparations for international law violations is a recognized general principle¹ found in specific provisions of international humanitarian law instruments.² However, in the absence of appropriate national legal frameworks and reparation mechanisms, national courts have generally rejected individual claims for redress for violations of international humanitarian law.³

The recognition of a State’s direct liability vis-à-vis individuals for violations of international humanitarian law in national courts has both substantive and procedural obstacles.⁴

1. See Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/56/49 (Vol. I)/Corr.4, art. 31 (Dec. 12, 2001) (“The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.”).

2. See Hague Convention IV—Laws and Customs of War on Land art. 3, Jan. 26, 1910, 36 Stat. 2277, 1 Bevans 631 (“A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation.”); First Additional Protocol to the 1949 Geneva Convention, and Relating to the Protection of Victims of International Armed Conflicts art. 91, Jun. 8, 1977, 1125 U.N.T.S. 3, at 45 (“A Party to the conflict which violates the provisions of the Conventions or of this Protocol . . . shall be responsible for all acts committed by persons forming part of its armed forces.”); Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 38, Mar. 26, 1999, 38 I.L.M. 769 (“No provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation.”).

3. See Emanuela Chiara Gillard, *Reparations for Violations of International Humanitarian Law*, 85 INT’L REV. OF THE RED CROSS 529, 537 (2003) (discussing *inter alia* how claims of violations of international humanitarian law brought in certain states, most notably Japan and the United States, have been rejected on the grounds of sovereign immunity or a finding that “international humanitarian law instruments did not give individuals the necessary standing to pursue their claims directly before domestic courts”).

4. *Id.* at 539; see Rainer Hofmann, *Compensation for Victims of War: Substantive Issues—Do Victims of Armed Conflicts Have an Individual Right to Reparation?*, INT’L L. ASS’N TORONTO CONF. ON COMPENSATION FOR VICTIMS OF WAR 4, 13–15 (2006) [hereinafter Hofmann, *Individual Right*] (discussing substantive issues with the recognition of an individual right to reparation in the international order). See also RAINER HOFMANN & FRANK RIEMANN, INT’L LAW ASS’N COMM. ON COMPENSATION FOR

When rejecting cases for substantive reasons, national courts have told claimants that the right to reparation as found in international humanitarian law was not self-executing, and therefore, only the home States of the victims were directly entitled to this right.⁵ This rationale was referred to again recently in the judgment of the International Court of Justice (ICJ) *Jurisdictional Immunities of the State (Germany v. Italy)*;⁶ the Court noted:

[A]gainst the background of a century of practice in which almost every peace treaty or post-war settlement has involved either a decision not to require the payment of reparations or the use of lump sum settlements and set-offs, it is difficult to see that international law contains a rule requiring the payment of full compensation to each and every individual as a rule accepted by the international community of States as a whole as one from which no derogation is permitted.⁷

This observation of the Court also recalls another rationale that has been put forward by national courts for rejecting individuals' claims grounded on alleged violations of the laws of armed conflict, namely the existence of peace agreements interpreted as precluding these claims.⁸

When national courts have rejected claims on procedural grounds, they have almost consistently deemed that the rule of State immunity excluded acts committed by the armed forces of

VICTIMS OF WAR, COMPENSATION FOR VICTIMS OF WAR—BACKGROUND REPORT 13–14, 48 (2004) (discussing a historical overview of the 1949 Geneva Convention).

5. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 15, 2006, 2 BvR 1476/03, ¶ 21 (Ger.), available at http://www.bundesverfassungsgericht.de/entscheidungen/rk20060215_2bvr147603.html; Markus Rau, *State Liability for Violations of International Humanitarian Law—The Distomo Case Before the German Federal Constitutional Court*, 7 GER. L.J. 701, 708–09 (2005) (providing an analysis of BVerfG's understanding of Article 3 of the Hague Convention IV).

6. *Jurisdictional Immunities of the State (Ger. V. It.)*, 2012 I.C.J. 143, 143 (Feb. 3) (with Greece intervening).

7. *Id.*

8. Dinusha Panditaratne, *Rights-Based Approaches to Examining Waiver Clauses in Peace Treaties: Lessons from the Japanese Forced Labor Litigation in Californian Courts*, 28 B.C. INT'L & COMP. L. REV. 299, 328–32 (2005).

a foreign State during wartime from their jurisdiction (*ratione materiae*).⁹ State immunity, “adopted as a general rule of customary international law solidly rooted in the practice of States[,]”¹⁰ obliges States to “refrain from exercising jurisdiction in a proceeding before [their] courts against another State.”¹¹ The scope and source, hence the legal regime, of this procedural rule in the international order, is still at the centre of debates among scholars and jurists. At stake is notably the applicability of (or the possibility for the forum State to waive) State immunity in case of alleged grave violations of international humanitarian and human rights law.¹² For the purpose of these introductory remarks, I will simply observe that the scope of State immunity in current international customary law, based on a tentative lowest common denominator of very heterogeneous national practices, remains broad and uncertain. International doctrine and States’ practice made State immunity applicable only to acts of sovereign power (*acta jure imperii*), by opposition to acts of management carried out by a State acting as a private person (*acta jure gestionis*), but this

9. See Shuichi Furuya, *State Immunity: An Impediment to Compensation Litigation Assessment of Current International Law*, INT’L L. ASS’N TORONTO CONF. ON COMPENSATION FOR VICTIMS OF WAR 16–17 (2006).

10. 1980 Y.B. INT’L L. COMM. 147, at para. 26.

11. United Nations Convention on Jurisdictional Immunity of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/Res/59/49 (Dec. 2, 2004), at art. 6.

12. See Sévrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 NW. J. INT’L HUMAN RIGHTS 149, 150–83 (2011) (detailing the potential legal consequences on State immunity of a recognition of the *jus cogens* nature of certain norms of international humanitarian and human rights law); Lee M. Caplan, *State Immunity, Human Rights and Jus Cogens: a Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741, 741–81 (2003) (arguing that the qualification of certain norms of international humanitarian and human rights law as *jus cogens* would not only be potentially devoid of any effect on the applicability of State immunity, but would also be based on a flawed assumption that State immunity derives from the principle of sovereign equality, while the author seeks to demonstrate that it must be viewed as an international customary law exception to the principle of exclusive territorial jurisdiction, originating in State’s practice of reciprocal courtesy in a few, clearly limited domains, for the sake of mutual interest only); Jasper Finke, *Sovereign Immunity: Rule, Comity or Something Else?*, 21 EUR J. INT’L L. 853 (2010) (upholding that State immunity is not a rule of customary law, but a principle of international law, allowing States to define its regime within the loose limits imposed by international law).

distinction itself has proven to be problematic.¹³ Moreover, developments in national laws and international instruments have questioned the relevance of this distinction as the main criterion for the application of State immunity.¹⁴ Indeed, several national laws as well as the European Convention on State Immunity (ECSI)¹⁵ and the UN Convention on Jurisdictional Immunity of States and Their Property (UNCJIS),¹⁶ exclude State immunity in case of death, personal injury or damage to property allegedly caused on the territory of the forum State by a foreign State (the so-called “tort exception”), without referring to the *acta jure imperii/acta jure gestionis* distinction. However, as the ICJ recalled in *Germany v. Italy* case,¹⁷ these evolutions have not affected the applicability of the customary international rule of State immunity in case of “torts allegedly committed on the territory of another State by armed forces and other organs of State in the course of conducting an armed conflict[.]”¹⁸ First, the Court considered that the acts subject to the proceedings (which were, in the ICJ’s own terms, “serious violations of the law of armed conflict amounting to crimes under international law”) constituted *acta jure imperii*, thus falling within the scope of State immunity.¹⁹ Secondly, the Court observed that several national laws as well as the ECSI expressly excluded acts of a State’s armed forces from the scope of the “tort exception”, and concluded that customary law still requires the application of State immunity to such acts, notwithstanding the possible qualification of the “tort exception” itself as customary rule of international law.²⁰ Thirdly, the Court ruled that, under customary law as it currently stands,

13. See Finke, *supra* note 12, at 858–61.

14. Furuya, *supra* note 9.

15. Entered into force on June 11, 1976 and signed by nine States and ratified by eight States as of November 2012.

16. United Nations Convention on Jurisdictional Immunity of States and Their Property, *supra* note 11, at art. 30. As of November 2012, only 28 States had signed the Convention, of which 13 had ratified it.

17. *See id.*

18. Jurisdictional Immunities of the State (Ger. V. It.), 2012 I.C.J. 143, 143 (Feb. 3) (with Greece intervening).

19. *Id.*

20. *Id.*

neither the particular gravity of the violations, nor the legal nature of the violated norms (in particular their possible qualification as *jus cogens*), can justify that State immunity be waived by a national jurisdiction for claims grounded on losses and damages caused by the armed forces of another State.²¹ Lastly, the ICJ noted that such a waiver was contrary to international customary law even though the application of State immunity would leave individual victims without any jurisdictional mean to obtain reparation:²²

[T]he Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress.²³

The procedural and substantive legal arguments outlined above, despite being increasingly challenged by scholars and international bodies,²⁴ still largely correspond to the *lex lata* of international humanitarian law.²⁵

Besides procedural and substantive barriers in national courts that block the recognition of the existence of an individual right to directly obtain reparation for violations of international humanitarian law, subsidiary issues would jeopardize the effectiveness of this right.²⁶ These other crucial issues include

21. *Id.*

22. *Id.*

23. *Id.*

24. Rainer Hofmann, *Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict*, INT'L L. ASS'N HAGUE CONF. ON REPARATION FOR VICTIMS OF ARMED CONFLICT 3, 14 (2010) (discussing the growing recognition of an individual right to reparation for violations on international humanitarian law). *See also* Furuya, *supra* note 9 (debating the relevance of the *acta jure imperii/acta jure gestionis* distinction as a criterion for the application of State immunity today and criticizing the applicability of the rule of State immunity for violations of international humanitarian law, and concluding that the rule is still relevant despite recent evolutions). For a criticism of the actual law of State immunity, see Caplan, *supra* note 12, and Finke, *supra* note 12.

25. *Id.* at 21.

26. Shuichi Furuya, *A Model Statute of an Ad Hoc Compensation Commission: Preliminary Analysis of Some Issues to be Addressed*, INT'L L. ASS'N TORONTO CONF. ON COMPENSATION FOR VICTIMS OF WAR 22–24 (2006) [hereinafter Furuya, *Model Statute*] (discussing other issues involved with establishing a commission to identify and uphold

legal questions of defining victim status and determining the existence of an obligation to make reparation for non-State armed groups.²⁷ For instance, as Emanuela Gillard notes, should the recognition of the position of victim be conditioned by the characterization of a violation of international humanitarian law as a source of loss, this would lead to situations whereby certain losses caused by hostilities in a situation of armed conflict would give rise to a right to reparation, while other comparable losses would not, depending on factual circumstances.²⁸ Practical problems, such as the capacity of national legal systems to deal with the consequences of large-scale hostilities on an individual basis, are also an issue.²⁹ States would need to adapt national legislation and establish special procedures to give individuals effective access to reparation for violations of international humanitarian law or, more broadly, for harm and losses suffered in relation to a situation of armed conflict.³⁰

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” (“Basic Principles on the Right to Reparation”), annexed to United Nations’ General Assembly Resolution 60/147 adopted in December 2005, reflect one attempt to reconcile these issues.³¹ Without creating any new international obligation, this nonbinding instrument reiterated the obligation of member States to implement international humanitarian and human rights law through national legislation.³² It also focused on member States’ role in

individual rights to reparation apart from challenge with State immunity).

27. See Gillard, *supra* note 3, at 534–35.

28. See *id.* (suggesting that the right to reparation be recognized to all victims of a violation of *jus ad bellum*, in other words, to all persons adversely affected by an illegally engaged armed conflict); HOFMANN & RIEMANN, *supra* note 4, at 6 (noting that extending the right to reparation to victims of *jus ad bellum* “would leave citizens of the State who violated the *jus ad bellum* unprotected”).

29. HOFMANN & RIEMANN, *supra* note 4, at 32.

30. See *id.* at 31 (explaining that, without comprehensive national legislation on reparation, individual claims will remain unsuccessful).

31. G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

32. *Id.* at 2, 4.

“making available adequate, effective, prompt and appropriate remedies, including reparation [to victims].”³³

A later agreement, Article 24 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance,³⁴ was largely influenced by the Basic Principles on the Right to Reparation.³⁵ Professor Theo Van Boven referred to Article 24 as “more elaborate and specific about the victims’ right to obtain reparation than any previous international human rights treaty.”³⁶

Article 24 requires parties to implement a national legal framework that ensures victims’ right to obtain “prompt, fair and adequate compensation” and, as appropriate, other forms of reparation,³⁷ such as (1) restitution to bring the victim back to their original position, (2) satisfaction for nonmaterial injury that amounts to an affront to the injured State or person, (3) rehabilitation provided in the form of medical care and legal and social services, and (4) guarantees of non-repetition to prevent future violations from occurring.³⁸

II. THE DEVELOPMENT OF *AD HOC* REPARATION MECHANISMS AS A PARTIAL REMEDY TO HARM AND LOSSES RELATED TO A SITUATION OF ARMED CONFLICT

Treaties,³⁹ the United Nations Security Council,⁴⁰ and

33. *Id.* at 4.

34. International Convention for the Protection of All Persons from Enforced Disappearance, G.A. Res. 61/177, at 10, U.N. Doc. A/Res/61/177 (Dec. 20, 2006).

35. Theo van Boven, *The United Nations 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. AUDIOVISUAL LIBR. OF INT’L L., 2010, at 5, available at http://untreaty.un.org/cod/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf (“A highly notable impact of the Principles and Guidelines . . . can be found in the International Convention for the Protection of All Persons from Enforced Disappearances.”).

36. *Id.*

37. G.A. Res. 61/177, *supra* note 34, at 10.

38. Van Boven, *supra* note 35, at 4–5.

39. See Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eri.-Eth., art. 5 Dec. 12, 2000, 40 I.L.M. 260, available at http://www.pca-cpa.org/showfile.asp?fil_id=122 (setting up a Claims Commission to decide through binding arbitration all claims, including individuals’ claims, for loss, damage or injury caused by violations of international

individual States⁴¹ have increasingly established *ad hoc* mechanisms allowing individuals to obtain various forms of reparation for harm and losses caused by a conflict situation.⁴² According to some authors, such *ad hoc* mechanisms may be the most appropriate way to bring justice to victims, especially considering the above-mentioned obstacles to direct implementation by national courts of an individual right to reparation based on international humanitarian law.⁴³ However, *ad hoc* reparation mechanisms only allow victims to obtain some specific forms of reparation.⁴⁴ These mechanisms generally do not involve making any determinations about whether there has been a violation of international humanitarian law, and, in any case, they make no decision on the criminal liability of individuals and States.⁴⁵ *Ad hoc* reparation mechanisms thus cover only one aspect of a potentially more comprehensive post-conflict justice process.⁴⁶

III. THE EXAMPLES OF KOSOVO AND BOSNIA & HERZEGOVINA

This section outlines the two quasi-judicial mechanisms that were both established in former Yugoslavia for the purpose of adjudicating individual claims to property or occupancy rights in the wake of armed conflict:

a) The Commission for Real Property Claims of

humanitarian law during the conflict).

40. See S.C. Res. 687, ¶¶ 16, 18, U.N. Doc. S/RES/687 (Apr. 3, 1991) (creating the U.N. Compensation Commission responsible for compensating losses resulting from Iraq's invasion and occupation of Kuwait).

41. Gillard, *supra* note 3, at 529.

42. See generally Furuya, *Model Statute*, *supra* note 26, at 22–23 (listing and comparing several recent *ad hoc* compensation mechanisms with an aim to develop a model statute establishing a single, permanent international compensation commission).

43. Rau, *supra* note 5, at 720; Hofmann, *Individual Right*, *supra* note 4, at 9 (“Claims Commissions have traditionally been a more successful way for individuals to assert their claims for compensation than other international *fora* or national courts.”).

44. See generally Furuya, *Model Statute*, *supra* note 26, at 25.

45. Claims before these bodies must generally be grounded on a loss directly related to a situation of conflict—there is no need to characterize a violation of international humanitarian law (with the notable exception of the Eritrea-Ethiopia Claims Commission), but in practice many of the losses and claims may arise from violations of international humanitarian law. Gillard, *supra* note 3, at 534.

46. *Id.* at 549.

Displaced Persons and Refugees (“Bosnia Commission”) established by article VII of Annex 7 to the General Framework Agreement for Peace in Bosnia-Herzegovina and the former Republic of Yugoslavia (“Dayton Accord”);⁴⁷ and

- b) The Kosovo Housing and Property Claims Commission (“Kosovo HPCC”) established by UNMIK regulation 1999/23,⁴⁸ replaced in March 2006 by the Property Claim Commission (PCC),⁴⁹ which has operated since December 2008 under a law passed by the Assembly of Kosovo.⁵⁰

Both Commissions were full-time quasi-judicial bodies giving individuals the right to file claims directly.⁵¹ In that

47. Bosnia and Herzegovina-Croatia-Yugoslavia: General Framework Agreement for Peace in Bosnia and Herzegovina Annex 7 art. VII, Dec. 14, 1995, 35 I.L.M. 75, 139 [hereinafter Dayton Accord]; Madeline Garlick, *Protection for Property Rights: A Partial Solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina*, 19 REFUGEE SURV. Q. 64, 64 (2000). The mandate of the Bosnia Commission expired in December of 2003. COMMISSION FOR REAL PROPERTY CLAIMS OF DISPLACED PERSONS AND REFUGEES: END OF MANDATE REPORT (1996–2003), PROJECT ON INT’L COURTS AND TRIBUNALS 16, <http://www.pict-pcti.org/publications/Bibliographies/EMR-Part1-CoverExec1-Summary-EMR.pdf> [hereinafter CRPC END OF MANDATE REPORT].

48. On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission, UNMIK Reg. No. 1999/23, UNMIK, § 2, U.N. Doc. UNMIK/REG/1999/23 (1999) [hereinafter UNMIK Reg. No. 1999/23]; FINAL REPORT OF THE HOUSING AND PROPERTY CLAIMS COMM’N, HOUSING AND PROPERTY CLAIMS COMM’N 9 (2007), available at http://www.pca-cpa.org/showfile.asp?fil_id=626 [hereinafter HPCC, FINAL REPORT].

49. On the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property, UNMIK Reg. 2006/10, UNMIK, §§ 2, 16, 19, U.N. Doc. UNMIK/REG/2006/10 (2006) [hereinafter UNMIK Reg. No. 2006/10]; HPCC, FINAL REPORT, *supra* note 48, at 30 n.97. Resolution 2006/10 established the Kosovo Property Agency (KPA), which consisted of a Supervisory Board, Executive Secretariat, and a Property Claims Commission (PCC). UNMIK, Reg. No. 2006/10, § 3. It was further refined by Resolution 2006/50 in October 2006. On the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property, UNMIK Reg. 2006/50, UNMIK, § 1, U.N. Doc. UNMIK/REG/2006/50 (2006) [hereinafter UNMIK Reg. No. 2006/50].

50. Amending UNMIK Reg. 2006/50 on the Resolution of Claims Relating to Private Immovable Property, Including Agricultural & Commercial Property (Law No. 03/L-079) (Kos.).

51. See Leopold von Carlowitz, *A Universal Human Right of Property for Refugees and Displaced Persons? On the Development of Property-Related Customary*

respect, they were an innovative approach to property restitution. The Commissions had jurisdiction over identified categories of claims resulting from ethnic discrimination and conflict, in contexts where exacerbated tensions between communities and weakened judicial systems would have prevented an impartial functioning of national courts.⁵² The composition of both Commissions was designed to guarantee their impartiality.⁵³ The Bosnia Commission was composed of nine members, three appointed by the President of the European Court of Human rights, and six appointed by the Croat, Bosnian and Serb portions of Bosnia-Herzegovina.⁵⁴ Both the Kosovo HPCC and PCC consisted of two international members and one local member appointed by the United Nations Special Representative of the Secretary-General.⁵⁵

A. Mandates and Powers of the Commissions

1. Scope of the mandates

The scope of the mandate of the Bosnia Commission was particularly broad.⁵⁶ Article XI of Annex 7 of the Dayton Accord provided that “[t]he Commission shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property.”⁵⁷ This formulation did not require

International Law by the International Administrations in Bosnia and Herzegovina and Kosovo, IRMGARD CONINX FOUNDATION (July 4, 2005), http://www.irmgard-coninx-stiftung.de/fileadmin/user_upload/pdf/archive/118%20Carlowitz.pdf [hereinafter von Carlowitz, *Universal Human Right*]; see also HPCC, FINAL REPORT, *supra* note 48, at 9 (noting the quasi-judicial Housing and Property Claims Commission has helped property holders regain possession of their homes).

52. HPCC, FINAL REPORT, *supra* note 48, at 19.

53. Hans van Houtte & Iasson Yi, *Due Process in International Mass Claims*, 1 ERASMUS L. REV. 63, 78–80 (2008).

54. *Id.* at 78.

55. UNMIK Reg. No. 1999/23, *supra* note 48, § 2.2; UNMIK Reg. No. 2006/10, *supra* note 49, § 6.2; UNMIK Reg. No. 2006/50, *supra* note 49, § 7.2; van Houette & Yi, *supra* note 53, at 78–79.

56. Garlick, *supra* note 47, at 70–71.

57. Dayton Accord, *supra* note 47, art. XI.

the claimant to establish that the alleged dispossession was caused by conflict⁵⁸ or establish a deadline for the submission of claims,⁵⁹ although an implicit deadline existed because the Bosnia Commission was originally limited to a period of five years (later extended by two years).⁶⁰

The Kosovo HPCC was originally mandated in 1999 to decide three types of claims.⁶¹ These claims were related not only to the armed conflict but also to the complex history of ethnic discrimination in the region, specifically against Albanian-Kosovars, Serbian-Kosovars, and minorities.⁶² The Kosovo HPCC's competence was first redefined in March 2006 by UNMIK regulation 2006/10,⁶³ and again by the October 2006 UNMIK regulation 2006/50.⁶⁴ The October 2006 resolution mandated the PCC to resolve claims that were "directly related to or resulting from the armed conflict that occurred between 27 February 1998 and 20 June 1999," and were related to the right of ownership or use of private immovable property, including agricultural and commercial property.⁶⁵ The deadline for

58. See Garlick, *supra* note 47, at 73 (describing the claims process as requiring extensive property details but not the cause of losing the property).

59. *Id.* at 73–74 (noting the several month delays in processing the claims but not mentioning any deadline for filing claims).

60. CRPC END OF MANDATE REPORT, *supra* note 47, at 4. See also Garlick, *supra* note 47, at 68 (explaining that Annex 7 was originally intended to continue operation in its initial form for the first five years after Dayton, but that experience ultimately showed more time would be required).

61. See UNMIK Reg. No. 1999/23, *supra* note 48, § 1.2(a)–(c) (detailing these three types of claims, namely claims by natural persons (a) whose rights to residential real property were revoked on the basis of discriminatory legislation, (b) who entered into informal transactions of residential property after 23 March 1999, or (c) who owned property prior to March 24, 1999 and involuntarily lost possession of the property).

62. See *id.*; Leopold von Carlowitz, *Settling Property Issues in Complex Peace Operations: The CRPC in Bosnia and Herzegovina and the HPD/CC in Kosovo*, 17 LEIDEN J. INT'L L. 599, 605–07 (2004) [hereinafter von Carlowitz, *Settling Property*] (describing years of ethnic discrimination before NATO intervention).

63. See UNMIK Reg. No. 2006/10, *supra* note 49, § 2, (granting the Kosovo Property Agency the authority to resolve ownership claims and claims involving property use rights resulting from the conflict).

64. See UNMIK Reg. No. 2006/50, *supra* note 49, § 1 (suspending UNMIK Reg. No. 2006/10).

65. *Id.* § 3.1.

receiving claims expired on December 3, 2007.⁶⁶ Claims filed since that date fall within Kosovo's court jurisdiction.⁶⁷

2. *Investigations and proceedings*

The Bosnia Commission established its own rules and regulations based on its mandate, including a timeframe for filing every type of claim.⁶⁸ Claims could be examined even in the absence of written evidence submitted by the claimant, who only had to establish his/her identity and legal interest during an interview.⁶⁹

The Bosnia Commission then initiated verification procedures and evidence collection.⁷⁰ For this purpose, the Bosnia Commission was given wide-ranging powers that included unrestricted access to all property records in Bosnia and Herzegovina.⁷¹ In order to resolve property claims falling under its competence, the Bosnia Commission was vested with the authority to declare invalid any property transfer which was made under duress or that was otherwise made in connection

66. ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE: OSCE MISSION IN KOSOVO, DEPARTMENT OF HUMAN RIGHTS AND COMMUNITIES LEGAL SYSTEM MONITORING SECTION, CONFLICTING JURISDICTION IN PROPERTY DISPUTES: MONTHLY REPORT—APRIL 2009 2 (2009) [hereinafter OSCE APRIL REPORT], *available at* <http://www.osce.org/kosovo/37717>.

67. *Id.* at 2–3.

68. Dayton Accord, *supra* note 47, art. XV (providing that “[t]he Commission shall promulgate such rules and regulations, consistent with this Agreement, as may be necessary to carry out its functions”); *see also* von Carlowitz, *Settling Property*, *supra* note 62, 601–02 (describing the mandate of the CPRPC in the Dayton Accord and giving an overview of the CRPC procedures regarding property restoration); On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission, UNMIK Reg. No. 2000/60, UNMIK, § 3.2(b), U.N. Doc. UNMIK/REG/2000/60 (2000) [hereinafter UNMIK Reg. No. 2000/60] (establishing that the commission may “provide different deadlines for different categories of claims”).

69. *See generally* Garlick, *supra* note 47, at 73–74 (summarizing the CRPC's interview procedures and noting that the CRPC had the responsibility to gather as much evidence as feasible, in situations where the claimant was unable to support their case or prove their rights).

70. *See* Dayton Accord, *supra* note 47, art. XII (granting the Commission access to any and all property records in Bosnia and Herzegovina for purposes of inspection, evaluation, and assessment related to consideration of a claim).

71. *Id.*

with ethnic cleansing.⁷²

The Kosovo HPCC utilized a similar “inquisitorial in nature” procedure that was based on interviews with claimants and thorough investigations of claims.⁷³ These investigations were conducted by the Housing and Property Directorate, which was created to collect claims, mediate disputes before they were submitted to the Kosovo HPCC, and provide the Kosovo HPCC with administrative and legal support.⁷⁴ Both the Kosovo HPCC and the Directorate were given “free access to any and all records in Kosovo.”⁷⁵ The Kosovo HPCC had the legal authority to conduct searches *ex officio* and “obtain evidence relevant to a claim from any record held by a public body, corporate or natural person.”⁷⁶

Both Commissions insisted on the importance of these extensive investigative powers in instances where local practices and conflict had led to the destruction of a substantial amount of existing records.⁷⁷

3. *Decisions: restitution rather than compensation*

The Bosnia Commission had the legal authority to grant compensation upon request by the claimant in situations where property had been damaged or destroyed.⁷⁸ In practice, however,

72. *Id.*

73. HOUSING AND PROPERTY CLAIMS COMMISSION, FINAL REPORT 43–44 (2007) [hereinafter KOSOVO COMMISSION, FINAL REPORT], available at http://www.pca-cpa.org/showfile.asp?fil_id=626.

74. See UNMIK Reg. No. 1999/23, *supra* note 48, § 1 (“[T]he Directorate shall . . . [p]rovide guidance to UNMIK . . . on specific issues related to property rights” and seek to mediate claims disputes if appropriate).

75. *Id.* § 2.4; see also UNMIK Reg. No. 2000/60, *supra* note 68, § 10.2.

76. UNMIK Reg. No. 2000/60, *supra* note 68, § 10.2 (stating the directorate “may investigate a claim, and obtain evidence relevant to a claim from any record held by a public body, corporate or natural person.”); KOSOVO COMMISSION, FINAL REPORT, *supra* note 73, at 44.

77. See CRPC END OF MANDATE REPORT, *supra* note 47, at 16 (stating the “CRPC’s rules allowed for claims to be submitted even if claimants had no evidence proving their rights to their pre-war property”); KOSOVO COMMISSION, FINAL REPORT, *supra* note 73, at 44–46 (explaining issues regarding access to property records and verification of documents within the territory of Kosovo).

78. See Dayton Accord, *supra* note 47, art. XI (stating that the “Commission shall receive and decide any claims for real property . . . [and that] [c]laims may be for return

both Commissions awarded damages in the form of restitution rather than compensation for lost property.⁷⁹ This was consistent with the political goal of privileging the return of those who had been displaced as a result of the conflict to their place of origin over other durable solutions.⁸⁰ Additionally, in the case of Bosnia and Herzegovina, the trust fund established to finance a compensation scheme was never adequately funded, and therefore, remedy by means of compensation was not utilized.⁸¹

In regards to Kosovo, compensation could only be ordered when a holder of occupancy or property rights that had been revoked on an ethnic basis claimed restitution while another person had legally acquired the ownership of the property in the meantime.⁸² The Kosovo HPCC did not have the power to award compensation for the damage or destruction of residential property, as section 2.6 of UNMIK Regulation 2000/60 expressly proscribed against the Kosovo HPCC receiving claims for damaged or destroyed property.⁸³

4. *Authority of the Commissions' Decisions*

Contrary to the Bosnia Commission, which represented an alternative to existing “first-instance bod[ies]” and administrative remedies,⁸⁴ the Kosovo HPCC had exclusive jurisdiction over the categories of claims that fell under its

of the property or for just compensation in lieu of return”).

79. UNMIK Reg. No. 2000/60, *supra* note 68, §§ 3, 4.

80. Dayton Accord, *supra* note 47, art. I.1 (“[t]he early return of refugees and displaced persons [a]s an important objective of the settlement of the conflict in Bosnia and Herzegovina.”). *See also* S.C. Res. 1244, ¶¶ 9(c), 11(k), U.N. Doc. S/RES/1244 (June 10, 1999) (listing “establishing a secure environment in which refugees and internally displaced persons can return home in safety” and “assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo” as objectives).

81. Dayton Accord, *supra* note 47, art. XIV; Garlick, *supra* note 47, at 80 (“[N]o compensation scheme was implemented under the Annex 7 proposal.”).

82. UNMIK Reg. No. 2000/60, *supra* note 68, § 3.3.

83. *Id.* § 2.6.

84. COMM’N FOR REAL PROP. CLAIMS OF DISPLACED PERSONS & REFUGEES, BOOK OF REGULATIONS ON CONFIRMATION OF OCCUPANCY RIGHTS OF DISPLACED PERSONS AND REFUGEES (CONSOLIDATED VERSION) 4 (2002), *available at* <http://www.imldb.ionm.int/viewDocument.do?id={6AEE6A7A-AA05-449F-ACDA-882CEF17060B}>.

mandate.⁸⁵ However, local courts retained jurisdiction to adjudicate any legal issue not decided by the Kosovo HPCC, and the Kosovo HPCC referred issues that were connected to a claim but did not fall within its own jurisdiction to local courts.⁸⁶

While it was provided that the decisions of both Commissions were legally binding in national courts and would prevail over inconsistent findings of these courts as well as those of local administrations, there were numerous instances in which the Commissions' competency and decisions were disregarded by national authorities.⁸⁷

5. *Implementation of the Commissions' Decisions*

One of the main differences between the two Commissions is that the Kosovo HPCC had exclusive jurisdiction to implement property decisions,⁸⁸ while the Bosnia Commission relied on national enforcement bodies.⁸⁹ The Kosovo HPCC was able to ensure the removal of persons illegally occupying property by relying on enforcement through the UNMIK Police and the Kosovo Police Force.⁹⁰ In contrast, the Bosnia Commission relied on the national enforcement bodies placed under the authority of the Parties to the Dayton Accord.⁹¹ Despite the latter's obligation to "cooperate with the work of the Commission and . . . respect and implement its decisions expeditiously and in

85. UNMIK Reg. No. 1999/23, *supra* note 48, at § 2.

86. *Id.*

87. See EDWARD TAWIL, INT'L CTR. FOR TRANSITIONAL JUSTICE, PROPERTY RIGHTS IN KOSOVO: A HAUNTING LEGACY OF A SOCIETY IN TRANSITION 29–30 (2009), available at <http://ictj.org/sites/default/files/ICTJ-FormerYugoslaviaKosovo-Legacy-2004-English.pdf> (providing examples of national authorities disregarding commissions); OSCE APRIL REPORT, *supra* note 66, at 3–6 (describing instances where the regional courts have annulled and ignored Kosovo HPCC rulings that were final and enforceable, as well as presided over cases within the exclusive jurisdiction of the Kosovo HPCC).

88. UNMIK Reg. No. 1999/23, *supra* note 48, at §§ 2.1, 2.5.

89. See Garlick, *supra* note 47, at 76–79 (noting that the implementation of the Bosnia Commission's decisions relied on "domestic legal organs").

90. See TAWIL, *supra* note 87, at 33–37 ("[The Commission has] relied on the police to assist in carrying out evictions and to prevent the further illegal occupation of properties.").

91. Dayton Accord, *supra* note 47, Annex 11, art. I–III.

good faith,”⁹² the lack of clear enforcement mechanisms for the Bosnia Commission’s decisions represented a major obstacle to its efficiency.⁹³ Fortunately, this was improved with the passage of the Law on Implementation of CRPC Decisions in October 1999.⁹⁴ The CRPC End of Mandate Report called the passage a “catalyst” for the widespread implementation of Bosnia Commission decisions.⁹⁵

More generally, in spite of the extensive powers given to both Commissions, the role of other national and municipal authorities remained crucial to the ability of these Commissions to carry out their mandates and represented significant obstacles to the enforcement of their decisions.⁹⁶

B. Successes and challenges

Observers of the two Commissions have noted their lack of effective compensation schemes and their focus on restitution,⁹⁷ each of which can be criticized from both a transitional justice and a humanitarian perspective. From a transitional justice perspective, the absence of an alternative to restitution leads to an unfair situation whereby reparation is only granted to those victims whose property was not damaged or destroyed.⁹⁸ From a

92. *Id.* at Annex 7, art. VIII.

93. See CRPC END OF MANDATE REPORT, *supra* note 47, at 7 (stating that the “lack of enforcement abilities in the mandate” led to the “disillusionment of the general public with the value of CPRC decisions . . . as the domestic authorities failed to implement them.”).

94. *Id.*

95. *Id.*

96. See *id.* at 6–7 (“Discriminatory domestic legislation and administrative decisions . . . made the implementation of CRPC decisions problematic or impossible unless the domestic legislation was repealed.”).

97. See INT’L ORG. FOR MIGRATION, PROPERTY RESTITUTION AND COMPENSATION: PRACTICES AND EXPERIENCES OF CLAIMS PROGRAMMES 16, 18–20 (2008), *available at* http://www.iom.int/jahia/webdav/site/myjahiasite/share/shared/mainsite/published_docs/books/Property_Restitution_and_Compensation.pdf (noting that the compensation portion of the mandate was never implemented and that a major focus of the mandate was on restitution).

98. RHODRI C. WILLIAMS, INT’L CTR. FOR TRANSITIONAL JUSTICE, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE, THE CONTEMPORARY RIGHT TO PROPERTY RESTITUTION IN THE CONTEXT OF TRANSITIONAL JUSTICE 48 (2007), *available at* <http://ictj.org/sites/default/files/ICTJ-Global-Right-Restitution-2007-English.pdf>

humanitarian perspective, no restitution mechanism is sufficient, in itself, to achieve the political objective of returning large numbers of displaced people to their place of origin.⁹⁹ There is a need, not only to address other critical issues—such as reconciliation, the provision of basic services, and the restoration of security conditions conducive to return—but also to consider the full range of durable solutions, the achievement of which could be facilitated by a consistent financial compensation scheme.¹⁰⁰

Assessing the Commissions' achievements more narrowly and exclusively against their mandates leads to more positive conclusions.¹⁰¹ According to its End of Mandate Report, the Bosnia Commission adopted some 311,000 final and binding decisions confirming property rights by the end of December 2003.¹⁰² Additionally, close to ninety percent of the Bosnia Commission's decisions on property rights have been implemented.¹⁰³

Furthermore, the acts of the Bosnia Commission contributed to the restitution of property to approximately one million displaced persons.¹⁰⁴ Today, observers consider Bosnia and

[hereinafter WILLIAMS, CONTEMPORARY RIGHT] (“A consequent risk is that restitution programs . . . arbitrarily privileg[e] victims whose suffering took the form of dispossession of recoverable assets.”).

99. *See id.* at 50 (noting that restitution from a political perspective is likely to be disappointing because beneficiaries will choose to remain in their new place of residence instead of returning home).

100. *See id.* at 48 (explaining that additional restitution process should be adopted to complement efforts to end conflicts over land). *See also* Rhodri C. Williams, Post Conflict Property Restitution in Bosnia: Balancing Reparations and Durable Solutions in the Aftermath of Displacement, Speech at the TESEV International Symposium on Internal Displacement in Turkey and Abroad (Dec. 5, 2006), available at http://www.brookings.edu/~media/Research/Files/Speeches/2006/12/05property/200612_rcw_TESEVpresentation.pdf (last visited Oct. 5, 2012) (stating that victims' individual circumstances should be taken into account when determining the form of reparations to be made and listing four principal forms of reparations: “restitution, compensation, rehabilitation, and ‘satisfaction and guarantees of non-repetition’”).

101. CRPC END OF MANDATE REPORT, *supra* note 47, at 4 (listing the Commission's accomplishments).

102. *Id.*

103. *Id.* (noting property law implementation rates of ninety-two percent by November 2003).

104. *Id.* at 1.

Herzegovina as “the first example of a successfully implemented mass [property] restitution in the wake of a full-blown conflict.”¹⁰⁵ Although the activity of the Kosovo HPCC met with more limited success, as of December 2007, it had decided approximately 29,000 property disputes and approximately ninety-eight percent of its decisions had been implemented in favor of property right holders.¹⁰⁶

However, the examples of those Commissions also demonstrate the challenges faced by quasi-judicial commissions in providing effective reparations.¹⁰⁷ It is of particular interest to note that, in its End of Mandate Report, the Bosnia Commission underscored that its work only began to succeed when performed in conjunction with lobbying efforts taken to pass executing domestic legislation compelling municipal housing bodies to implement the Bosnia Commission’s decisions.¹⁰⁸

In Kosovo, while the Kosovo HPCC had more power to implement its decisions,¹⁰⁹ challenges arose from a number of national and local stakeholders, including local administrations in Serbia.¹¹⁰ Serbian administrators denied access to cadastral registers until the signing of an agreement in December 2002.¹¹¹ Also, administrative and other local law enforcement personnel showed extreme reluctance to prevent the re-occupation of property by those who had been evicted pursuant to a decision of

105. WILLIAMS, CONTEMPORARY RIGHT, *supra* note 98, at 33.

106. HPCC, FINAL REPORT, *supra* note 48, at 9.

107. *See id.* at 72 (discussing the challenges encountered by displaced persons due to concerns about security and the political environment); CRPC END OF MANDATE REPORT, *supra* note 47, at 2 (noting that property records had been destroyed or lost and were inaccessible to claimants).

108. CRPC END OF MANDATE REPORT, *supra* note 47, at 37–39.

109. *Compare* HPCC, FINAL REPORT, *supra* note 48, at 14–15 (showing broad powers given to Kosovo HPCC), *with* CRPC END OF MANDATE REPORT, *supra* note 48, at 23 (“Annex 7 of the Dayton [Accord] did not give the CRPC the power to implement its decisions. Implementation of CRPC decisions rested squarely with the domestic authorities.”).

110. *See* TAWIL, *supra* note 87, at 32 (discussing the tension between the Serbian government and the Kosovo Property Agency regarding the property rights of Serbian citizens).

111. HPCC, FINAL REPORT, *supra* note 48, at 44.

the Kosovo HPCC.¹¹² Additionally, local courts reached conclusions on extraneous issues that competed with the Kosovo HPCC's findings or disregarded the jurisdiction or previous decisions of the Kosovo HPCC.¹¹³ Consequently, observers recognized the need for training of lawyers and judicial and law enforcement personnel,¹¹⁴ as well as the importance of establishing credible guarantees of independence from pressures that could be exerted by clan members and ethnic communities.¹¹⁵

IV. CONCLUSION

In situations where national judicial systems lack capacities and are still weakened by conflict, *ad hoc* quasi-judicial mechanisms appear to be an appropriate, if not necessary, solution to deal impartially with an influx of claims related to conflict and provide individuals with access to certain forms of reparation.¹¹⁶ One of the lessons learned from the experiences of the Bosnia Commission and the Kosovo HPCC is that a holistic approach is necessary in order to ensure an efficient reparation process.¹¹⁷ Efforts must be made from the outset to ensure coordination with enforcement bodies and other national authorities,¹¹⁸ develop appropriate national legal frameworks,¹¹⁹

112. See TAWIL, *supra* note 87, at 24, 36 (noting police reluctance to assist in evictions and lax enforcement of re-evictions).

113. OSCE APRIL REPORT, *supra* note 66, at 3–5.

114. *Id.* at 6–7; TAWIL, *supra* note 87, at 62.

115. TAWIL, *supra* note 87, at 59 (explaining that clan ties could undermine fair application of laws).

116. See *id.* at 31 (explaining that a quasi-judicial mechanism, like the Property Claims Commission, has the proper tools to efficiently deal with the voluminous caseload).

117. See also CRPC END OF MANDATE REPORT, *supra* note 48, at 37–39 (listing eighteen “Lessons Learned” that deal with the issue of property restitution and claims for a wide, all-encompassing angle, focusing on legislative issues, IGO and NGO support, judicial mechanisms, as well as various funding options).

118. *Communication from the Commission to the European Parliament and the Council Kosovo 2010 Progress Report*, at 11, SEC (2010) 1329 (Nov. 9, 2010), available at http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/ks_rapport_2010_en.pdf.

119. LEOPOLD VON CARLOWITZ, GENEVA CENTER FOR THE DEMOCRATIC CONTROL OF ARMED FORCES (DCAF), LOCAL OWNERSHIP IN PRACTICE: JUSTICE SYSTEM REFORM IN

and enhance the capacity of the judicial and law enforcement systems.¹²⁰

More fundamentally, it is crucial to keep in mind that, as efficient as they can be, *ad hoc* reparation mechanisms only cover specific aspects of transitional justice processes, and must therefore be conceived as one part of a global response aimed at bringing justice to those who suffered harm and losses in situations of armed conflict.¹²¹ Respect for the victims of such conflicts also requires a proper judicial process recognizing their rights and determining responsibilities, as well as a strong political initiative to achieve reconciliation and create durable solutions for displaced persons.¹²²

KOSOVO AND LIBERIA 12 (2011), available at <http://www.dcaf.ch/content/download/35955/527127/file/OP23.pdf>.

120. See CRPC END OF MANDATE REPORT, *supra* note 48, at 37 (“Laying the basis for rule of law in the aftermath of a conflict such as the one in BIH calls for closer attention to the building of state authority and capacity at local levels.”).

121. Gillard, *supra* note 3, at 549, 552.

122. See TAWIL, *supra* note 87, at 46–48, 56, 60–61 (describing the difficulty of preserving the property rights of Kosovar minorities while also making progress toward reconciliation).