

Annex B

Reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law

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I. Introduction

1. The topic of reparation to individuals for damage caused by gross violations of international human rights law¹ (“IHRL”) and serious violations of international humanitarian law² (“IHL”) has featured increasingly in the practice of States, international organizations, and international tribunals during recent decades, reflecting the evolving status of the individual under international law, especially since World War II.³ However, the availability of international and domestic forums to address violations of individual rights has existed in various forms since the early 1900s.⁴

2. It is a principle of international law that the breach of an international obligation involves an obligation to make reparation in an adequate form.⁵ In 1928, in the *Case Concerning the Factory at Chorzow (Chorzow Factory Case)*, the Permanent Court of International Justice (“PCIJ”) clearly articulated the content of this general obligation, stating “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.”⁶

¹ The term “gross” violations of IHRL is used to properly narrow the scope of this text, for its content see Academy Briefing No. 6, *What amounts to ‘a serious violation of international human rights law’? An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty*, Geneva Academy of International Humanitarian Law and Human Rights, August 2014 at p. 10.

² The term serious violations and grave breaches of IHL have been used interchangeably; however, the syllabus employs the term “serious”, among other reasons, to promote consistency with the language of the General Assembly. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly Resolution, UN Doc. A/RES/60/147, Principle 2(c) (Mar. 21, 2006). Additionally, it aligns the text with the view of the International Committee of the Red Cross that has explained that “Serious violations of international humanitarian law are: grave breaches as specified under the four Geneva Conventions of 1949 (Articles 50, 51, 130, 147 of Conventions I, II, III and IV respectively) [...], grave breaches as specified under Additional Protocol I of 1977 (Articles 11 and 85) [...], war crimes as specified under Article 8 of the Rome Statute of the International Criminal Court [...], and other war crimes in international and non-international armed conflicts in customary international humanitarian law [...]. See Explanatory Note, *What are ‘serious violations of international humanitarian law’?*, International Committee of the Red Cross, 2012, available at <https://www.icrc.org/en/doc/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf>.

³ Other topics relating to the individual have also been discussed in the work of the International Law Commission, such as the topics of “State responsibility of internationally wrongful acts,” “Diplomatic protection,” “Position of the individual in international law,” “Nationality including statelessness,” and “Protection of persons in the event of disasters.”

⁴ For instance, the Central American Court of Justice, created in 1907 and recognizing the procedural capacity of individuals to bring claims against States; the International Prize Court, created in 1907 and allowing individuals to bring claims against foreign States; the Treaty of Versailles of 1919, which allowed nationals of the Allied and Associated Powers to bring claims against Germany; and the PCIJ decision in the *Case Concerning Jurisdiction of the Courts of Danzig*, which declared that individuals may have the right to bring international claims before national courts.

⁵ *The Case Concerning the Factory at Chorzow*, Claim for Indemnity (1927) P.C.I.J. Series A, no. 9, 21.

⁶ See the *Case Concerning the Factory at Chorzow (Germ. V. Pol.)*, J. (1928) P.C.I.J. Series A, no. 17, 125 (elaborating further that “[r]estitution in kind, or, if this is not possible, payment of a sum

3. The general rule articulated by the *Chorzow Factory Case* has been widely cited and reaffirmed in several judgments of the International Court of Justice (“ICJ”), including the *Case Concerning Armed Activities on the Territory of the Congo*. In that judgment, which dealt with violations of IHL and IHRL, inter alia, the Court recognized that the injury caused to individuals was relevant in assessing the scope of reparation owed by Uganda.⁷ The ICJ has explicitly confirmed that a State that has violated a rule of international law causing damage to persons has “the obligation to make reparation for the damage caused to all the natural or legal persons concerned.”⁸ In the context of Diplomatic Protection, in the case of *Ahmadou Sadio Diallo*, the ICJ also stressed the importance of providing reparation for the injury suffered by Mr. Diallo in breach of international law.⁹

4. The practice of States and international organizations, and the case-law of international tribunals, show that the principle of reparation has been extensively applied in the fields of IHRL and IHL. Practice reflects that the content and form of reparation has adjusted to the nature of these specific areas of law. The most relevant sources of practice include treaty provisions regarding reparation to individuals, the establishment of permanent or ad hoc procedures open to individuals, and the creation of specific programmes concerning reparation.

5. Current practice reveals there are three levels enabling individuals to obtain reparation for violations of IHRL and serious violations of IHL. Opportunity to receive reparation at the inter-State, international, and domestic levels is discussed below.

6. At the inter-State level, reparation to individuals is sought through the traditional process of diplomatic protection, a topic that was comprehensively studied by the International Law Commission (“ILC”) in its Draft Articles on Diplomatic Protection.¹⁰ However, resort to this means of reparation is a right of States. The topic covered by this syllabus would complement the work of the Commission on the topic of Diplomatic Protection by focusing on reparation to individuals at the international and domestic levels.

7. Reparation at the international level includes international and regional tribunals as well as treaty bodies, which allow individuals to bring complaints against States for violations of IHRL and in certain cases for IHL. Through these mechanisms, individuals seek an objective finding of wrongdoing and an authoritative statement on the appropriate reparation that should be issued, either in the form of a judgment, recommendations, or friendly settlement.¹¹

8. At the domestic level, individuals may bring claims for the violation of IHRL or IHL before the domestic courts of a State, usually the State allegedly responsible for the violation. To comply with the relevant rules of international law, domestic mechanisms are supposed to provide an effective remedy for affected individuals, including appropriate reparation if the violation is proven. On the other hand, access to international procedures also needs to comply with certain requirements, such as the exhaustion of local remedies, to

corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by the restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law”).

⁷ See *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, J., I.C.J. Rep. 2005 (Dec. 19), p. 257, para. 259.

⁸ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Op., I.C.J. Rep. 2004 (July 9), p. 136, 193–94, 198.

⁹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, J. on Compensation, I.C.J. Rep. 2012 (June 19), p. 324, para. 57; see also *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, J. on Compensation, I.C.J. Rep. 2012 (June 19) Separate Opinion of J. Cañado Trindade, p. 361, para. 35 (“the reparations are owed by the responsible State concerned to the individuals victimized”).

¹⁰ Draft Articles on Diplomatic Protection, with commentaries, United Nations International Law Commission, *Yearbook of the International Law Commission*, 2006, vol. II, Part Two, UN Doc. A/CN.4/SER.A/2006.

¹¹ See e.g. the friendly settlement process offered by the Inter-American Commission on Human Rights that allows States and aggrieved individuals the opportunity to find a mutually agreeable solution to a human rights violation without resorting to a contentious proceeding.

avoid the misuse of international mechanisms and respect the principle of subsidiarity. International and domestic mechanisms may complement each other.

9. Important human rights instruments address reparation to individuals for violations of IHRL by focusing on the right to an *effective* remedy, a broader concept that encompasses both access to justice and the issue of reparation. The Universal Declaration of Human Rights dealt with this matter in article 8, which asserts “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

10. Article 2(3) of the International Covenant on Civil and Political Rights also establishes the right to an effective remedy, and many multilateral conventions addressing human rights contain similar provisions. Examples include article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment, and article 24 of the International Convention for the Protection of All Persons from Enforced Disappearance. The Commission, in its draft articles on Crimes Against Humanity, has also adopted a provision on reparation owed to individuals, draft article 12, paragraph 3.

11. Regional conventions on human rights also establish the right to an effective remedy and have regulated the issue of reparation to individuals. Indeed, the American Convention on Human Rights and the European Convention on Human Rights contain specific provisions regulating these matters. The international tribunals established to enforce these conventions have developed several criteria to determine what constitutes full and appropriate reparation, depending on the circumstances of the case. Other regional instruments and mechanisms may offer similar guidance, such as the African Charter on Human and Peoples’ Rights,¹² the Association of Southeast Asian Nations’ Intergovernmental Commission on Human Rights,¹³ and the Arab Charter on Human Rights.

12. The decisions of several treaty bodies, such as the Human Rights Committee and the Committee Against Torture, also provide useful guidance to assess the parameters and appropriate scope of reparation to be granted, based on the relevant instrument.¹⁴

13. Domestic laws and national judicial decisions are also relevant to this topic to the extent they may also regulate the issue of reparation owed to individuals for violations of international law. In this sense, domestic programmes concerning reparation to victims of IHRL violations are also relevant. These programmes may be built upon the work of “truth commissions”, used especially in Latin America and Africa.

14. Concerning violations of IHL, one of the main challenges for victims is that there is not a specialized forum to bring claims against the responsible State. However, victims of violations of IHL may be able to bring claims for violations of IHRL that occurred in the context of an armed conflict or emergency situations before competent IHRL mechanisms. In such instances, these bodies may apply the relevant rules of IHL as the *lex specialis*.

15. Furthermore, in many peace treaties, the injured State receives a lump sum payment from the wrongdoing State for the purpose of distributing it among those of its nationals affected by violations of IHL or other areas of law. Ad hoc bodies have also been created to decide these kinds of cases, typically in the form of mixed-claims commissions. Recent examples include the Eritrea-Ethiopia Claims Commission and the United Nations

¹² Article 7, paragraph 1 reads, “the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force”.

¹³ See *ASEAN Intergovernmental Commission on Human Rights*, Human Rights in ASEAN (last accessed June 2, 2019 at 4:53 PM), available at <https://humanrightsinasean.info/asean-intergovernmental-comission-human-rights/about.html> (explaining that although the ASEAN Intergovernmental Commission on Human Rights’ mandate does not explicitly authorize receipt and investigation of complaints for human rights violations, the intergovernmental body seems to be moving in the direction of investigations, based on the fact that six complaints have been accepted since 2012).

¹⁴ The reasoning of these bodies is important to the formation of general principles regarding the contours of specific human rights, especially in the absence of applicable treaties or domestic law.

Compensation Commission, a subsidiary organ of the UN Security Council tasked with deciding claims arising from Iraq's unlawful invasion of Kuwait, including those brought by individual persons.

16. This project will examine also the relevant differences existing within the scope of reparations between IHRL and IHL. This includes *inter alia* state practice, treaties, decisions, recommendations by international organizations, courts and various supervisory organs concerning IHL and IHRL in particular in areas related to emergency situations. This summary of practice related to reparation to individuals shows not only its increasing importance, but also the many different ways States and relevant adjudicating bodies have addressed the issue of reparation to individuals for violations of IHL and IHRL. The Commission's consideration of this topic would therefore have a solid foundation in existing practice in order to provide useful guidance for States and adjudicating bodies, by distilling general principles, aimed at providing further consistency and legitimacy in this area.

II. Scope of the topic

17. Considering the different and varied sources of practice available, it could be useful to provide guidance to States in the field of reparation to individuals for damage caused by violations of IHRL and IHL. The scope of the proposed topic does not aim to address primary rules of international law or address which acts constitute violations of international obligations. Rather, the proposed topic seeks to address secondary rules of international law, namely, the consequences of violations of primary rules and which criteria should be considered to provide appropriate reparation to individuals. The distinction between primary and secondary rules is not alien to the Commission in the area of State responsibility, in particular the Articles on State Responsibility for Internationally Wrongful Acts ("Articles on State Responsibility") which is an essential reference for this topic, see *infra* paragraphs 19 and 20. However, when relevant to the topic, the interconnectedness of primary and secondary rules will be considered.

18. The scope of this topic is limited to reparation owed to individuals, or groups of individuals,¹⁵ for injury caused by violations of IHRL and serious violations of IHL, and does not address the topic of reparation to corporations or other legal persons. However, this does not mean that the standards identified by the Commission in the course of its work on the topic of reparation to individuals in these areas could not be useful to other topics in the future.¹⁶

19. The topic will mainly address the issue of reparation from the perspective of State responsibility, and will not focus on the responsibility that other actors may have at the domestic or international level. An essential basis is found in the Articles on State Responsibility adopted by the Commission in 2001.

20. However, although the Articles on State Responsibility reflect the duty of full reparation in article 34¹⁷, the issue of reparation to individuals was not addressed by the

¹⁵ The possibility of collective reparation has been envisaged in the Inter-American System of Human Rights, for example, in the *Case of the Awas Tingni Mayagna (Sumo) Community v. Nicaragua* (Merits, Reparations, and Costs), Inter-American Court of Human Rights (2001), available at www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf; see also Rules of Procedure and Evidence of the International Criminal Court, whose article 97 provides that "the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both"; 2005 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, also recognize the possibility of collective reparation in its paragraph 13.

¹⁶ Although the proposed topic is limited to obligations resulting from violations of international human rights law and serious violations of international humanitarian law, the result of the Commission's work on this subject may influence other areas of international law where violations of the rights of individuals invoke State responsibility to make reparation, such as: international investment law, international environmental law, and international trade law.

¹⁷ See *id.* at art. 34 ("Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter").

Commission in that topic. It is important to note that article 33 referred to the content of State responsibility in paragraph 2 where it explicitly states that Part Two of the Articles is “without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”. Thus, while that topic did not examine the reparation which may be owed directly to individuals due to violations of international law, it recognized that Part Two was without prejudice to reparation owed to individuals. Accordingly, this topic would be complementary to the work undertaken by the Commission in the Articles on State Responsibility.¹⁸

21. The inclusion of this topic in the programme of work of the Commission would offer an opportunity for both the codification and the progressive development of international law. In particular, it would allow the Commission to analyze how the issue of reparation to individuals has been addressed by States, international organizations, and international tribunals, as well as the rules and principles they follow to make their determinations. Accordingly, to pursue its work on the topic, the Commission would have to examine relevant treaty provisions and rules of customary international law and how they have been interpreted and implemented in practice. It could also enable the Commission to identify the best and most accepted methods of reparation to individuals in order to provide useful guidance to States in this regard. Needless to say, proposals of progressive development would only have a prospective character, and would not reflect legal obligations. Moreover, this project concerns secondary rules of law, and would only address primary rules if required. Accordingly, this topic will not question the principle of the intertemporal application of the law. It is important to note that the duty of reparation to individuals, and its scope, is contingent upon the existence of a valid legal rule generating such duty and its content.

22. A comprehensive analysis would also provide an overview of existing rules, and help identify the main problems that arise in their implementation, the limitations that States face in this area, and the different methods States have developed in order to provide reparation to individuals. In this sense, the outcome of the topic would provide a good opportunity to codify existing rules, and also make proposals for the progressive development of the law. The work of the Commission on this topic is without prejudice to any more favorable legal regimes on reparations established at the national, regional or international level.

III. Possible issues to be addressed

23. As explained in the foregoing paragraphs, this topic focuses on the secondary rules related to the provision of reparation to individuals for violations of IHL and IHRL. Accordingly, the Commission could address, inter alia, the following specific issues:

- (a) The different forms of reparation (e.g. restitution, compensation and satisfaction, guarantees of non-repetition, etc.), their definition, and their main purposes;
- (b) The degree of flexibility that States have when choosing between different forms of reparation;
- (c) The appropriateness of certain forms of reparation, depending on the circumstances;

¹⁸ At the Commemoration of the 70th Anniversary of the Commission, the President of the ICJ, Mr. Abdulqawi Ahmed Yusuf, noted the need to address more comprehensively the situation of the individual in international law. He recognized that whilst “certain elements of the ILC’s work recognize the ability of individuals to hold rights under international law, such as Article 33(2) of the Articles on State Responsibility, the Commission has only acknowledged as recommended practice, under the Articles on Diplomatic Protection, the important fact that reparation should accrue to an aggrieved individual in cases where their rights are breached”. See Abdulqawi A. Yusuf, Keynote Address at the 70th Anniversary of the International Law Commission, Geneva, Switzerland (July 5, 2018), available at http://legal.un.org/docs/?path=../ilc/sessions/70/pdfs/english/key_note_address_5july2018.pdf&lang=E.

- (d) The relevant circumstances that should be considered when determining the kind of reparation to be provided;
- (e) The role played by the principle of proportionality in determining the type and scope of reparation;
- (f) The appropriateness of individual and/or collective reparation;
- (g) The principle of subsidiarity of international mechanisms and the procedural obligations of States, for example, the establishment of complaint mechanisms open to individuals at the domestic level, and the provision of effective procedural guarantees;
- (h) The establishment of ad hoc systems of reparation and friendly settlements.

IV. Outcome

24. Concerning the possible outcomes of this topic, the options of presenting the findings as “draft guidelines” or “draft principles” would be especially appropriate, as this would allow the Commission to identify and apply existing rules and consider progressive development, as well as propose best practices in light of the existing challenges.

25. Draft guidelines are appropriate for a non-binding series of rules or recommended practices. In this context, the Commission has explained that the word “guidelines” is used when the work on the topic does not intend to produce a binding instrument, but instead, a toolbox where States may find answers to practical questions.¹⁹ Therefore, the use of draft guidelines in this topic would be appropriate, since it will be aimed at clarifying secondary rules and also proposing best practices, when appropriate.

26. Draft principles have also been understood by the Commission as encompassing non-binding provisions, which are also general in character. In this sense, if the Commission prefers to choose draft principles as the outcome of this topic, it would be helpful to identify a set of general standards and common norms along with a measure of progressive elements.

27. Nevertheless, other forms of final outcomes could also be considered depending on the views of the Commission and also on the suggestions and arguments presented by States within the Sixth Committee of the General Assembly.

V. Conclusion

28. On the selection of new topics in its long-term programme of work, the Commission is guided by the following criteria, which it agreed upon at its fiftieth session (1998), namely that the topic: (a) should reflect the needs of States in respect of the progressive development and codification of international law; (b) should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; (c) should be concrete and feasible for progressive development and codification; and (d) that the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.²⁰

29. The topic of reparation to individuals for gross violations of international human rights law and serious violations of international humanitarian law satisfies the conditions for the selection of a new topic in the long-term programme of work. As outlined above, there is considerable State practice and a set of norms and principles that have emerged through judicial, ad hoc, and treaty bodies. However, there is a need for codification and progressive development of these practices to provide guidance to the international community about the principles, content, and procedures related to reparation owed to individuals for violations of international law. Due to the important amount of State practice and judicial decisions available, the topic of reparation for individuals for

¹⁹ United Nations International Law Commission. “Methods of work”, *available at* <http://legal.un.org/ilc/methods.shtml> (last accessed 30 May 2019).

²⁰ *Yearbook of the International Law Commission*, 1997, vol. II, Part Two, 72, para. 238.

violations of international law is ripe and appropriate for progressive development and codification.

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