

## Should states and private parties be entitled to recover reparations from aggressor states, and if so, how?

On December 19, 2005, the Eritrea-Ethiopia Claims Commission (EECC), established after the war between Eritrea and Ethiopia, ruled that Eritrea violated Article 2 (4) of the UN Charter by ‘resorting to armed force on May 12, 1998’ to ‘attack and occupy’ Ethiopian territory.<sup>1</sup> Even though the commission lacked jurisdiction for this judgement under the *Algiers Agreement*<sup>2</sup>, Eritrea became liable to pay reparations for its violation of international law. The decision re-escalated the conflict, allowing Ethiopian officials to claim that ‘the award made clear that Eritrea is the culprit, the cause of the war and invaded Badme, which was and still is part of Ethiopia’.<sup>3</sup> A border war ensued between Eritrea and Ethiopia for another 13 years.

As a consequence of the Eritrean-Ethiopian War, an estimated 50,000-100,000 people were killed and almost a million displaced by force.<sup>4</sup> Yet barely any individuals could submit claims to the commission: the states submitted most claims for civilian damage on their behalf.<sup>5</sup> Later on, reparations to individual victims were barely paid out.<sup>6</sup>

The EECC’s example teaches two lessons about recovering post-war reparations. Firstly, decisions on state aggression and reparations could endanger peace. Secondly, the traditional approach of states claiming reparations on behalf of individuals is inadequate.

Nevertheless, the right of states to recover reparations from aggressor states is a well-established principle in international law. The International Law Commission’s (ILC) Article 31 (1) on State Responsibility asserts that a ‘responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act’.<sup>7</sup> In this case, there

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<sup>1</sup> United Nations, ‘Partial Award, Jus Ad Bellum—Ethiopia’s Claims 1-8, Decision of 19 December 2005’, in *Reports of International Arbitral Awards, Vol. XXVI* (United Nations, 2009), p. 469.

<sup>2</sup> Christine Gray, ‘The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?’, *European Journal of International Law* 17, no. 4 (1 September 2006): p. 704.

<sup>3</sup> News24, ‘Ethiopia Demands Millions’, (22 December, 2005) available at <https://www.news24.com/news24/ethiopia-demands-millions-20051221> [accessed 15 January 2023].

<sup>4</sup> Hannah R. Garry, Morgan Brock-Smith, Nicholas Maisel, ‘The Eritrea Ethiopia Claims Commission: at the Intersection of International Dispute Resolution and Transitional Justice for Atrocity Crimes?’ in *By Peaceful Means: Adjudication and Arbitration of International Disputes* (Oxford University Press, June 2022), p. 9.

<sup>5</sup> Sean D. Murphy, Won Kidane, and Thomas R. Snider, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (Oxford University Press, 2013, p. 61).

<sup>6</sup> Hannah R. Garry, Morgan Brock-Smith, Nicholas Maisel, ‘The Eritrea Ethiopia Claims Commission: at the Intersection of International Dispute Resolution and Transitional Justice for Atrocity Crimes?’, p 14.

<sup>7</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, (November 2001), Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <https://www.refworld.org/docid/3ddb8f804.html> [accessed 15 January 2023].

cannot be an *obligation* to pay reparations without the corresponding *right* to receive them.<sup>8</sup> Both are ways of describing responsible state's behaviour towards an injured state.<sup>9</sup>

By contrast, customary international law does not explicitly recognise individual rights to recover reparations from the aggressor state. The general state practice has been domestic courts overruling individual reparations claims. For example, in the 1963 *Shimoda case*, Tokyo District Court ruled against a damage claim for the American bombing of Hiroshima and Nagasaki. The judges reasoned that sovereign immunity precludes judging another state in foreign courts and judging any state in its own courts.<sup>10</sup>

On the other hand, judgements like this do not rule out the existence of an individual right to reparations. They merely affirm that it is impossible to claim reparations in national courts. In fact, individuals have long been recognised in other subfields of international law.<sup>11</sup> For example, various Human Rights Treatises give individuals a right to claim reparations<sup>12</sup>, just like International Criminal Law.<sup>13</sup> More importantly, the United Nations Compensation Commission (UNCC) allowed 2.7 million individuals to submit reparations claims for Iraq's aggression towards Kuwait.<sup>14</sup> The commission is an important precedent in international law because the Security Council established it in 1991.<sup>15</sup>

Thus, individuals should no longer be neglected in future reparations awards. There may not be an established individual right to reparation, but developments should be made to recognise it. Especially since states can be reluctant to distribute reparations to individuals, as was the case after the EECC.

In truth, individual rights to reparations can be recognised and implemented by future compensation commissions. Indeed, Ukraine already suggested creating such a

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<sup>8</sup> Letizia Lo Giacco, 'In the Midst of Reparation: On the Correlation between Individual Rights and State Obligations' in *Reparation for Victims of Armed Conflict: Impulses from the Max Planck Trialogues* (September 10, 2018). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2018-19, p.36.

<sup>9</sup> David Lyons, 'The Correlativity of Rights and Duties', *Noûs* 4, no. 1 (1970): p. 48.

<sup>10</sup> Richard A. Falk, 'The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki', *The American Journal of International Law* 59, no. 4 (1965): p.778.

<sup>11</sup> Rainer Hofmann, 'The 2010 International Law Association Declaration of International Law Principles on Reparation for Victims of Armed Conflict' in *Reparation for Victims of Armed Conflict: Impulses from the Max Planck Trialogues* (September 10, 2018), p. 33.

<sup>12</sup> International Covenant on Civil and Political Rights, Article 2(3); European Convention on Human Rights, Article 13.

<sup>13</sup> Rome Statute of the International Criminal Court, Article 75.

<sup>14</sup> Mojtaba Kazazi, 'United Nations Compensation Commission and Liability for Use of Force' in *Reparation for Victims of Armed Conflict: Impulses from the Max Planck Trialogues* (September 10, 2018), p.79.

<sup>15</sup> United Nations Security Council (UNSC) Res 687 (8 April 1991) UN Doc S/RES/687.

commission.<sup>16</sup> New permanent reparations mechanism will not greatly change the status quo. Many states will be unwilling to subscribe to the jurisdiction of a permanent legal body, just like many are unwilling to recognise ICJ's compulsory jurisdiction. By contrast, compensation commissions do not involve long-term state obligations, which could incentivise aggressors to participate. Unlike the UNCC, these commissions must have explicit jurisdiction to determine state aggression. In UNCC's case, the Security Council determined Iraq's liability<sup>17</sup> and Russia's recent invasion of Ukraine shows why such an approach is inadequate. If a permanent member of the Security Council is at war, it could simply veto its liability. Consequently, future compensation commissions should be a form of an international tribunal with states granting it jurisdiction to determine the aggressor.

Future commissions must also have an independent judiciary and legal representation for both sides. Such a structure will incentivise the aggressor states to participate as they would take part in a nonpartial international tribunal with agreed rules. Equally, it will help to consider each conflict's complexity and ensure an equitable decision is given. This will help to avoid the initial mistakes of the EECC that determined Eritrea's full liability for starting the war but ignored the fact that in May 2000, Ethiopia re-ignited and escalated the conflict by capturing vast amounts of Eritrean territory.<sup>18</sup>

Moreover, unlike the EECC, future compensation commissions should allow individual victims of aggression to make claims. However, full individual reparations could over-inflate the reparations bill, deterring the aggressor from negotiations, and endangering peace. Instead, reparations should not be full but significant and effective in wiping out the 'consequences of the illegal act'.<sup>19</sup> For example, they may replace civilian housing destroyed in the war, as was done in Bosnia.<sup>20</sup> Also, individual reparations must involve satisfaction in the form of persecution of wrongdoers, acknowledgement of wrongdoing, and assurance of non-repetition. Lastly, the commissions must establish clear boundaries between state and civilian injury. For example, states could be compensated for infrastructure damage while individuals could be for loss of life, property and moral damage.<sup>21</sup>

Paying reparations must naturally be the responsibility of the aggressor state, but it must involve its consent. It is illegal for other states to seize the aggressor state's overseas

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<sup>16</sup> Chiara Giorgetti, Patrick Pearsall, Markiyani Kliuchkovsky, 'Launching an International Claims Commission for Ukraine', *Just Security*, (20 May 2022), available at: <https://www.justsecurity.org/81558/launching-an-international-claims-commission-for-ukraine/> [accessed 15 January 2023].

<sup>17</sup> United Nations Security Council (UNSC) Res 687.

<sup>18</sup> Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?', p. 715.

<sup>19</sup> Shuichi Furuya, 'Waiver or Limitation of Possible Reparation Claims of Victims' in *Reparation for Victims of Armed Conflict: Impulses from the Max Planck Trialogues* (September 10, 2018), p.71.

<sup>20</sup> The Bosnia-Herzegovina Commission for Real Property Claims of Displaced Persons and Refugees.

<sup>21</sup> Christian Marxsen, 'Unpacking the International Law on Reparation for Victims of Armed Conflict' in *Reparation for Victims of Armed Conflict: Impulses from the Max Planck Trialogues* (September 10, 2018), p.2.

property and award it to victims.<sup>22</sup> Firstly, for the reasons of sovereign immunity. Secondly, seizing and vesting the aggressor's property in response for its wrongful act is illegal because countermeasures must be reversible and temporary.<sup>23</sup> If this property is awarded to individual victims, countermeasures can no longer be reversed.

To avoid the EECC's fateful decisions and their consequences, any future reparation mechanism must be pragmatic and consider individual victims. It must negotiate with and not overburden the aggressor while ensuring adequate individual remedies. Being overly rigid about reparations could deter aggressors from entering peace negotiations, thus prolonging human suffering.

(997 words)

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<sup>22</sup> Scott R. Anderson and Chimène Keitner, 'The Legal Challenges Presented by Seizing Frozen Russian Assets', *Lawfare*, (26 May 2022), available at: <https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets>. [accessed 15 January 2023].

<sup>23</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Article 49.