

The Principle of Reparation in International Law and the Rights of the victims of the Iraq war 2003 and its aftermath

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Ladies and gentlemen

I should like to speak in my capacity as Professor of international law and international humanitarian law, and as a citizen of the United States of America, which bears the primary responsibility for the humanitarian catastrophe that followed the breach of the peace committed by the “coalition of the willing” in March 2003, accompanied by grave violations of the Geneva Conventions of 1949 and the 1977 Protocols. As every international wrongful act entails the obligation to make reparation, I will outline the legal basis of such reparation, which may take the form of a combination of restitution, compensation, rehabilitation of the victims, investigation of the disappearance of persons, and punishment of those found guilty of crimes, as well as an official apology.¹

In this conference we have learned about manifold violations of the UN Charter, of international law, international human rights law and international humanitarian law that occurred during the war on Iraq 2003 and during the subsequent occupation. As most international law professors agree, the war entailed a flagrant violation of numerous provisions of the UN Charter and was accompanied by violations of the Hague Regulations on Land Warfare, notably articles 42-56, multiple violations of the 1949 Geneva Red Cross Conventions and its 1977 Protocols, including indiscriminate attacks, the use of prohibited weapons and methods of warfare in Fallujah² and elsewhere, including white phosphorus and radioactive weapons that have significantly polluted the environment and continue to have deleterious consequences for the populations concerned.

There have also been grave violations of the International Covenant on Civil and Political Rights, International Covenant on Economic Social and Cultural Rights, the Convention Against Torture and other Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child. Arbitrary detention in secret detention centres, extra judicial executions and torture in Abu Ghraib and other detention centres have been documented by many independent experts and non-governmental organizations³. The

¹ See my op ed article in Die Welt, 20 March 2003. <http://www.welt.de/print-welt/article495133/Dieser-Krieg-ist-voelkerrechtswidrig.html>

² <http://www.independent.co.uk/news/world/middle-east/toxic-legacy-of-us-assault-on-fallujah-worse-than-hiroshima-2034065.html>

³ <http://www.hrw.org/reports/2004/06/08/road-abu-ghraib>

violations are too numerous to list here. Judicial determination of the facts and the responsibilities must still be undertaken.

All victims of violations of human rights and international humanitarian law are entitled to rehabilitation and reparation. Many individuals in Iraq have legitimate entitlements to compensation and restitution of cultural property stolen or lost during the armed conflict. They are also entitled to a measure of satisfaction in the form of an official apology from the Governments of the States that participated in the so-called “coalition of the willing”, as well as compensation for the material and moral injury caused by the invasion and occupation of their country, a war which Secretary General Kofi Annan repeatedly declared to be an illegal war in contravention of article 2, paragraph 4, of the UN Charter⁴. This has been confirmed by the documents released during the British and Dutch inquiries into the illegality of the war⁵, which aimed at “regime change” in violation of the sovereignty and territorial integrity of the State of Iraq.

The norms of international law, outlined here, are fairly clear. Nevertheless, these norms are not self-executing and may require legislative action in order to identify the specific legal basis and establish the proper forum where claims for restitution and reparation may be adjudicated. What is most needed is the political will of governments throughout the world to ensure that appropriate legislative and judicial measures are taken in order to implement the applicable norms of international law. For this political will to materialize, it is necessary to mobilize civil society in all countries, to educate through the universities, high schools and the media, and to appeal to the overarching principle of human dignity from which all human rights derive. To ignore these grave violations, to excuse them or to discriminate among victims of gross violations of human rights is unacceptable and would entail a separate and distinct violation of human dignity.

The Principle of Reparation for violations of international law is not a new normative development attributable to the work of the League of Nations, or of the United Nations or of the International Law Commission. The obligation to make reparation for violations of international law is a *general principle of law* as referred to in article 38, paragraph 1c of the Statute of the International Court of Justice. Already Article III of the 4th Hague Convention of 1907 established the principle of State responsibility for violations of the Hague Regulations on Land Warfare. Moreover, in 1928 the Permanent Court of International

⁴ <http://news.bbc.co.uk/2/hi/3661134.stm>

⁵ Unfortunately, there was considerable lack of transparency and cover-up. For instance, in July 2012, the British Attorney General vetoed the release of documents detailing minutes of Cabinet meetings in the days leading up to the war on Iraq. Moreover, the Foreign Office prevented the disclosure of extracts of an exchange between Bush and Blair days before the invasion. In a submission to the inquiry, Professor Philippe Sands (University College London) noted that an independent Dutch Inquiry had unanimously concluded that the war was not justified under international law. The Dutch inquiry Committee was presided by former President of the Dutch Supreme Court W.J.M. Davids.
<http://news.bbc.co.uk/2/hi/europe/8453305.stm>

Justice stated in its Judgment in the *Chorzow Factory Case*:

“It is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation.”

Similarly, article 31 of the Draft Articles on State Responsibility, which essentially reflect pre-existing international law, stipulates that “the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.”

Article 34 stipulates further that “full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation or satisfaction, either singly or in combination.”

Among other general principles of law that apply in the context of the obligation to make reparation are the principle of “good faith”, the prohibition of “unjust enrichment” the rules on “estoppel”, the principle “*ex injuria non oritur jus*”, which provides that no rights can be derived from a prior violation of law. Bearing in mind that according to the Nuremberg Judgment and the Nuremberg Principles the crime against peace is the most grievous offence against international law, as it invariably ushers in war crimes and crimes against humanity, it follows that international *ordre public* or public order imposes both State responsibility to grant reparation and an individual penal liability.

However, as we all know, law is not mathematics. And the norms – as good as they may look on paper – are certainly not equivalent to their enforcement. On the other hand, the non-enforcement of norms, even for a prolonged period of time, does not detract from their validity.

Among the many measures required for adequate reparation, a clean-up of the environment is imperative, so as to remove all toxins from the ground and radioactive sequels for the war, notably caused by the use of depleted uranium weapons.⁶ Many historical buildings that were destroyed should be rebuilt. And a concerted effort must be made to recover the priceless object stolen from the Baghdad archaeological museum.⁷

As far as compensation is concerned, Article 36 of the Articles on State Responsibility stipulates the obligation of a State “to compensate for the damage caused ... insofar as such damage is not made good by restitution.”

As far as satisfaction is concerned, Article 37 stipulates “The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by the act insofar as its obligation cannot be made good by restitution or compensation. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a

⁶See statements of US expert Dr. Doug Rokke, former head of the Pentagon's Depleted Uranium Project.
<http://www.informationclearinghouse.info/article4439.htm>
<http://www.youtube.com/watch?v=e-VkpR-wka8>

⁷ <http://www.baghdadmuseum.org/index2.htm>

formal apology or another appropriate modality.”

In this connection it is useful to recall that in 1993 President Bill Clinton issued an apology to the people of Hawaii for the crimes and abuses committed in connection with the overthrow of the legitimate government of the Hawaiian Queen one hundred years earlier, in 1893. Similarly, on 13 February 2008 the Prime Minister of Australia Kevin Rudd issued an apology to the Aborigines of Australia for the injustices visited upon them. It should be noted that title to huge areas of Australia has been returned to the Aborigines, who are now administering these territories in cooperation with Australian authorities. On 19 December 2009 President Barak Obama issued an Apology to the First Nations of the United States of America, the natives of the continent whom we disrespectfully refer to as “Indians”⁸. Thus, even “historical inequities” can be partly redressed provided that there is a modicum of good will. Indeed, over the past decades the various governments of Germany have issued countless apologies to the governments and peoples of Israel, Poland, Czechoslovakia, Belgium, the Netherlands, France, etc. in connection with the crimes of the Second World War and the Holocaust. Germany has also made meaningful reparation in the form of both restitution and compensation to the survivors of the victims of the genocide. An apology to the Iraqi people by all the Governments that participated in the so-called “coalition of the willing” is overdue.

In obtaining reparation the Iraqis should also appeal to international solidarity and to the *erga omnes* obligation not to recognize the effects of war crimes and crimes against humanity. Article 10 of the United Nations Draft Declaration on the Illegality of population transfers of August 1997 stipulates:

“Where acts or omissions prohibited in the present Declaration are committed, the international community as a whole and individual States, are under an obligation: (a) not to recognize as legal the situation created by such acts; (b) in ongoing situations, to ensure the immediate cessation of the act and the reversal of the harmful consequences; (c) not to render aid, assistance or support, financial or otherwise, to the State which has committed or is committing such act in the maintaining or strengthening of the situation created by such act. “

Of particular relevance to the Iraqis are 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, adopted by the General Assembly in its Resolution 60/147 of 16 December 2005. Section VII, paragraph 10 of the Basic principles stipulates: “Remedies ... include the victim’s right to the following as provided for under international law:

“(a) Equal and effective access to justice

(b) Adequate, effective and prompt reparation for harm suffered,

⁸ <http://indiancountrytodaymedianetwork.com/opinion/a-tree-fell-in-the-forest%3A-the-u.s.-apologized-to-native-americans-and-no-one-heard-a-sound-65750>

<http://www.nativenewsnetwork.com/apology-to-american-indians-unacceptable.html>

(c) access to relevant information concerning violations and reparation mechanisms.”

Section IX, paragraph 15 stipulates:

“Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. “

Paragraph 16 stipulates:

“States should endeavour to establish national programmes for reparation and other assistance to victims.”

Paragraph 17 stipulates:

“States shall, with respect to claims of victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgments”

Paragraph 19 stipulates:

“Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. “

Paragraph 20 stipulates:

“Compensation should be provided for any economically assessable damage as appropriate and proportional to the violation and the circumstances of each case... such as “(a) physical or mental harm, (b) lost opportunities, including employment, education and social benefits, (c) material damages and loss of earnings, including loss of earning potential; (d) moral damage; (e) costs required for legal or expert assistance, medicine and medical services and psychological and social services.”

Section XI is of particular relevance. Paragraph 25 stipulates “the application and interpretation of these Basic Principles and guidelines must be consistent with international human rights law and be without any discrimination of any kind or on any ground, without exception.”

One can continue citing norms of hard law and soft law that apply to or are of particular relevance to the case of the victims of the 2003 war against the Iraqi people. Suffice it to say that international law is on the side of the Iraqi victims.

Another issue is that of implementation. This requires political will by governments – and for the victims it necessitates access to pluralistic and reliable information, in particular the right to truth, including historical truth. This important right is considered by some *de lege*

ferenda, but it is a right that can be invoked in the form of pertinent United Nations resolutions and since 2012 there is a UN Special Rapporteur on the Promotion of Truth, Justice and Reparation, my colleague Pablo de Greif⁹. This new mandate allows victims to send communications to the Special Rapporteur and request his assistance in obtaining reparation.

One should not underestimate the obstacles that continue to delay reparation for the injuries suffered in connection with the Iraqi war. Thus far there has been widespread impunity for the crimes committed by the “coalition of the willing” and there has been no reparation. One problem is that of non-self-executing international norms. This is why Austria and Germany have adopted laws related to the restitution of stolen objects to victims, as has the United States in the form of its Law on Restitution for the World War II Internment of some 120,000 Japanese-Americans and Aleuts. Special legislation should be adopted in all countries of the “collation of the willing” so as to allow the victims their day in court. It is the responsibility of politicians to propose such legislation in parliaments, e.g., to make claims by Iraqi victims justiciable in local courts. For instance, the United States has adopted the Federal Alien Tort Claims Act pursuant to which Jewish claimants have been able to obtain redress. This Act may also provide some opportunity for Iraqi claimants.

My colleague Ben Emerson¹⁰ presented last week his report to the Council, entitled “Framework Principles of securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives”. This report is of great relevance in the context of the culture of impunity that has reigned in connection with the Iraq war of 2003. Emerson regrets that to this day the United States and the vast majority of the other governments concerned have refused to compensate the victims or hold accountable those responsible for the grave violations of human rights perpetrated on the victims of the so-called war on terror. Gradually, however, the European Court of Human Rights and other instances¹¹ have commenced to study the practices of extraordinary rendition, indefinite detention and torture associated with the war on terror. On 13 December 2012 the Court held that Macedonia had violated the rights of Khaled El-Masri, a German national, who was seized by Macedonian security and handed over to the CIA for severe beatings and torture. He was flown to Kabul and locked up in a secret prison.

Professor Jose Luis Gomez del Prado mentioned the UN treaty bodies such as the Human Rights Committee and the Committee Against Torture. Both of these Committees examine State party reports and will be examining the reports of the United States and the reports of Iraq in the coming years. This is an opportunity for Iraqi victims to make their voices heard when the list of questions is established and should brief the members of the expert Committees on the consistent pattern of gross and reliably attested violations of human rights endured by the Iraqi people.

⁹ <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Index.aspx>

¹⁰ <http://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx>

¹¹ Open Society Justice Initiative : Globalizing Torture : CIA Secret Detention and Extraordinary Rendition. <http://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition>

In Conclusion, allow me to formulate some preliminary recommendations.

1. As has been mentioned by other speakers, the Human Rights Council should consider the appointment of a Special Rapporteur on Iraq.
2. In the meantime, the other Special Procedures of the Human Rights Council should be utilized, including the Working Group on Arbitrary Detention, the Working Group on Enforced Disappearances, the Special Rapporteur on Torture, the Special Rapporteur on Summary or Arbitrary Executions, etc.
3. All countries, including the United States and the United Kingdom, should ratify the Optional Protocol to the International Covenant on Civil and Political Rights¹², as well as other individual complaint procedures.
4. All countries, including the United States, should ratify the Statute of the International Criminal Court. Serious cases should be referred to the Court for investigation and prosecution.
5. The principle of universal jurisdiction should also be applied in prosecuting persons suspected of having committed grave human rights violations. States must not invoke national security and state secrets doctrine to frustrate the legitimate claims of victims of grave violations of human rights.
6. An Environmental clean-up must be undertaken and financed by the coalition of the willing that is responsible for the use of depleted uranium and other toxic agents.
7. A Human Rights Chamber for Iraq, modelled on the Human Rights Chamber for Bosnia and Herzegovina¹³, created pursuant to the Dayton Accords, should be established in order to facilitate the investigation of cases and adequate reparation, compensation and rehabilitation to the victims
8. A United Nations Compensation Commission for Iraqi victims should be established, or at least a special fund that could be administered by the Office of the High Commissioner for Human Rights. Already the High Commissioner administers several funds, e.g. for the Victims of Torture, and this experience would provide a blueprint for an Iraqi United Nations Fund.

Allow me one last word – not as Professor, not as Independent Expert, not even as an American – but as a human being. What happened in Iraq was a tragedy of prodigious proportions, a crime against all of humanity, a betrayal of the values we hold dear, a deliberate assault on the authority of the United Nations, a revolution against decency and the rule of law, an attempt to dismantle international law. I pray to God that these injustices will be redressed.

I thank you for your attention.

¹² Jakob Th. Möller and Alfred de Zayas, *United Nations Human Rights Committee Case Law*, N.P. Engel Publisher, Kehl and Strasbourg 2009.

¹³ Human Rights Chamber for Bosnia and Herzegovina. *Digest of Decisions on Admissibility and Merits 1996-2002 with an introduction by Manfred Nowak*, N.P. Engel Publisher, Kehl and Strasbourg 2003.



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