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Sketches for a Reparation Scheme: How Could a German-Italian Fund for the IMIs Work?



Filippo Fontanelli

Abstract Given the deadlock in the current negotiations between Germany and Italy and the unavailability of judicial remedies for the victims, the two states could set up a reparation scheme. This chapter sketches some of the main features of such a hypothetical scheme, considering existing internal or international arrangements in the context of transitional justice (the Foundation ‘Remembrance, Responsibility and Future’ (*Erinnerung, Verantwortung und Zukunft*) scheme; the Australian DART scheme; the deal between Japan and South Korea on reparations to ‘comfort women’; the US/French schemes for reparations and restitution to holocaust victims; the Eritrea/Ethiopia reparations scheme; and the Iraq/Kuwait scheme). In particular, the emphasis is on the system of identification of the eligible victims, the question of financing and the fate of pending and future judicial claims. Assuming the states’ willingness to explore this project, the chapter outlines some of the ways the scheme could operate in practice, drawing from existing models.

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I. Introduction

Should Germany and Italy decide to set up a joint compensation (or reparation)¹ fund for Italian Military Internees (IMIs) and other victims of Nazi crimes (referred to, when taken together, as the ‘Italian victims’) who have yet to obtain any reparation,² what would this fund look like? This chapter’s analysis takes for granted some of the conclusions and findings explored more fully in the other chapters in this volume. It therefore does not seek to determine whether the two states—as a matter of law, comity or pragmatism—must, should, or even could³ accept the establishment of a joint fund.⁴ The working assumption here is that there nevertheless exists the political will to make such a choice.⁵ Arguably, this resolution would constitute an elegant way to cut the Gordian knot of the immunity deadlock and grant overdue reparation to the victims. It might also be that the operation of such a fund could suffice for the Italian Constitutional Court (ItCC) to revise its stance on the granting of immunity to Germany in civil proceedings before Italian courts. This prospect remains subject to speculation, and is more fully explored by Paolo Palchetti and Riccardo Pavoni in their respective chapters.⁶ Furthermore, this chapter will also not

¹Words matter, and in this case the reference to reparation rather than compensation might be appropriate, both to second Germany’s inclination to consider any payment made as a matter of comity rather than obligation, and to account for the lump-sum nature of any potential payment (as opposed to payments measured upon the actual extent of damage suffered by each victim). A similar switch is discernible, for instance, in the formulation of the Australian Defence Abuse Response Taskforce (DART) scheme, which was envisioned as a compensation scheme but ended up being officially labelled as a reparation scheme. See, for more details, Simone Degeling/Kit Barker, ‘Private Law and Grave Historical Injustice: The Role of the Common Law’, *Monash University Law Review* 41 (2015), 377-413, at 380 et seq, in particular note 9.

²Alongside IMIs, who are the majority of potential applicants, other groups could be covered by the compensation scheme, including civilians subjected to forced labour and victims of mass killings.

³On the legal regime on the granting of compensation under German law, see Andreas von Arnould, ‘Damages for the Infringement of Human Rights in Germany’, in Ewa Bagińska (ed), *Damages for Violations of Human Rights* (Heidelberg: Springer 2016), 101-136.

⁴In short, whether Germany owes such reparation as a matter of law is disputed. The ICJ decided not to admit Italy’s counterclaim in the *Jurisdictional Immunities* dispute and, therefore, has not addressed the issue. Germany claims that compensation for the IMIs was already included in the sums paid under the bilateral treaty of 2 June 1961.

⁵On the political opportunity of reparation movements, and how it affects their rate of success, see Stephanie Wolfe, *The Politics of Reparations and Apologies* (Heidelberg: Springer 2014), 11-12.

⁶See Riccardo Pavoni, chapter ‘A Plea for Legal Peace’, in this volume, who notes that ‘[t]here are sound reasons for believing that the setting up of a meaningful compensatory procedure would lead to the suspension or termination of the remaining cases pending against Germany before Italian courts’, at 94. On this point, see also Paolo Palchetti, ‘Italian Concerns after Sentenza 238/2014: Possible Reactions, Possible Solutions’, *VerfBlog*, (11 May 2017), available at <https://verfassungsblog.de/italian-concerns-after-sentenza-2382014-possible-reactions-possible-solutions/>: ‘[A] political initiative involving Germany and Italy and aimed at establishing a mechanism for addressing the reparation claims of the victims might be regarded by the Constitutional Court as an adequate alternative route for providing protection to the rights of the victims, thereby justifying a limitation to the right of access to court and the recognition of Germany’s immunity’. In the chapter

address the chronological conundrum regarding the victims' characterization under international humanitarian law.⁷ Instead, it will be assumed that, under the prevailing approach, Italian victims should receive some reparation irrespective of the legal characterization of Germany's conduct at that time.

In light of these assumptions, the narrow focus of this chapter will be on certain practical features and arrangements of the possible joint scheme to come (the 'Joint Scheme'). Selected matters will be addressed, such as the funding of the Joint Scheme, procedures for the distribution of compensation (including the criteria of eligibility and the appointment of a competent authority for the review of individual applications), and the waiver of judicial claims.

An attempt is made to draw on extant schemes without presuming any significant similarity between them. Quite simply, the idea is to look at existing solutions and provide the architects of the Joint Scheme with a range of options that could be utilised alongside a handful of warnings. As this chapter ends the substantive section of this volume, it marks an opportune moment to point the way (or ways) ahead for the Italian and German authorities.

Sections II and III concern two domestic schemes implemented by Germany and Australia respectively. Section IV addresses selected payment schemes established at the interstate level. Section V concludes the chapter by drawing the threads together and sketching some features of the Joint Scheme. Although section V provides a distilled checklist, the intermediate sections account for its composition.

This chapter's intention is to identify some valid principles that could inform the Joint Scheme's construction and compose a roadmap. Ultimately, however, the conviction is that a Joint Scheme for reparations, whatever its make-up, is preferable to none. This chapter builds on both these intuitions, which Adrian Vermeule effectively juxtaposed when concluding upon the desirability of less-than-perfect reparation schemes:

Viewed in the concrete, both transitional and nontransitional programs or awards of compensation are often disastrously unprincipled. We must step back a mile or three, to reflect that in many cases the only other option not ruled out by political constraints—doing nothing at all—would be even worse.⁸

A Joint Scheme would be, therefore, a vessel of 'rough justice', a device preferable to inaction albeit inevitably flawed under the prevailing standards of

⁷'Right of Access to (Italian) Courts *über alles?*', of this volume, Palchetti reiterates the underlying question: 'It is not clear (. . .) whether an interstate agreement on compensation might be regarded by the ItCC as an adequate alternative route for providing protection to the rights of the victims, thereby justifying a limitation to the right of access to court and the recognition of Germany's immunity', at 50. This question raises the issue of Italian constitutional law, which exceeds the scope of this chapter.

⁷Their status as victims of war crimes was recognized after the conduct took place, in the III and IV Geneva Conventions of 1949. See also Andreas von Arnould, chapter 'Deadlocked in Dualism', in this volume.

⁸Adrian Vermeule, 'Reparations as Rough Justice', *University of Chicago Public Law & Legal Theory Working Paper* 105 (2005), 1-18, at 15.

justice.⁹ While roughness is both inevitable and acceptable, the Joint Scheme should not be unprincipled. This chapter gathers, and expatiates on, the appropriate principles. While designed to address the unresolved status of IMIs, this chapter could as well work as blueprint for any mechanism of financial reparations in the wake of historical injustice, *mutatis mutandis*.

In particular, the Decalogue-redolent list of section V does not lay the ground rules for a reparation scheme (for IMIs), but for any reparation scheme.

II. Next of Kin: The RRF Foundation

A useful template to shape the Joint Scheme is the law establishing the Foundation ‘Remembrance, Responsibility and Future’ (*Erinnerung, Verantwortung und Zukunft*) (RRF).¹⁰ Germany entrusted the RRF with the payment of compensation to applicants who were victims of forced labour and other ‘injustices’ perpetrated by the Nazi regime.¹¹ IMIs were unable to obtain compensation under this law, which expressly excluded prisoners of war from its application.¹² Other victims of Nazi crimes, including the victims of mass killings, were altogether outside the scheme’s reach. The point here is not to question the Foundation’s decision to reject the IMIs’ applications or the scope of application of the RRF but rather to consider the functioning of the compensation system established under the RRF Law. It is quite detailed and might serve as a model for the Joint Scheme’s machinery.

The financing for the RRF fund was provided by the German federal government and a consortium of German companies.¹³ The government and German industry each made a one-off contribution to the RRF fund of DM (*Deutsche Mark*) five

⁹Ibid, describing rough justice as ‘the intuition that sometimes it is permissible, even mandatory, to enact a scheme of compensatory reparations that is indefensible according to any first-best criterion of justice. Rough justice is indefensible; it seems attractive only when compared to no justice—when it is recognized that the status quo of inaction is also a proposal, one that may fare even worse, according to the same criteria that would condemn the relevant reparations proposals’.

¹⁰German Law Instituting the Foundation ‘Remembrance, Responsibility and Future’ (*Erinnerung, Verantwortung und Zukunft*) of 2 August 2000, *Bundesgesetzblatt* I 11 August 2000, 1263. For a commentary, see Bardo Fassbender, ‘Compensation for Forced Labour in World War II: The German Compensation Law of 2 August 2000’, *Journal of International Criminal Justice* 3 (2005), 243–252. See also Peer Zumbansen (ed), *Zwangsarbeit im Dritten Reich: Erinnerung und Verantwortung—NS-Forced Labor: Remembrance and Responsibility* (Baden Baden: Nomos 2002).

¹¹RRF Law, 2000 (n 10), Art 2, para 1.

¹²Ibid, Art 11, para 3. On the application of this carve-out, see ICJ, *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99, para 26. The commentary to the law specified that ‘the rules of international law allowed a detaining power to enlist prisoners of war as workers’.

¹³RRF Law, 2000 (n 10), Art 3, para 1.

billion.¹⁴ A board of trustees, composed of 27 members, obtained responsibility for its management. These included, besides a number of German officials, one representative for each country, ethnic or national group amongst the prospective applicants (namely Israel, the US, Poland, Russia, Ukraine, Belarus, the Czech Republic, Roma and Sinti, and Jews) and other institutional members (from the UN and other international institutions).¹⁵

The Foundation did not directly carry out the distribution of compensation. The funds were made available to a series of non-profit ‘partner organizations’, each responsible for receiving claims from a specific group of applicants. These organizations were tasked with the liquidation of successful claims¹⁶ and with the establishment of an appeal process for the review of first instance determinations.¹⁷

Specific provisions required payments to be suspended or only partially made until the exhaustion of applications, in order to prevent the Fund from depleting its resources and becoming insolvent, thus failing to satisfy all eligible applications after paying out early processed claims.¹⁸ For instance, the maximum payable amount to each applicant eligible as ‘slave labourer’ was set initially at 50% of the amount owed. The outstanding portion was paid out ‘after conclusion of the processing of all applications pending before the respective partner organization, to the extent possible within the framework of the available means.’¹⁹

The RRF Law contained a specific provision detailing the eligibility of applicants for compensation.²⁰ It covered persons subjected by German authorities or commercial companies to forced labour, and subjected to detention or harsh living conditions.²¹ It also stipulated the possibility of compensating property losses if the applicants had been unable to seek compensation under previous schemes.²² The burden of demonstrating eligibility lay primarily with the applicants, although the competent partner organization would normally provide and consider available

¹⁴Ibid, Art 3, paras 2 and 3. The current value of this 2001 donation, adjusted for inflation, would be in the area of €2.64 billion.

¹⁵Ibid, Art 5.

¹⁶Ibid, Art 9.

¹⁷Ibid, Art 19.

¹⁸Ibid, Art 9, paras 9-10.

¹⁹Ibid, para 9. The clause also requires that 5% of the monies allocated be set aside as a financial reserve for appeals, and that the second round of payments be made only after such reserve has been set up.

²⁰Ibid, Art 11. In other words, the Law made hardship a necessary requirement for compensation alongside that of forced labour. See Fassbender, ‘Compensation’ 2005 (n 10), 249: ‘Parliament’s attention focused on persons detained in concentration camps on the one hand and deportees on the other—and not on forced labourers as such.’

²¹RRF Law, 2000 (n 10), Art 11, para 1, numbers 1 and 2.

²²Ibid, Art 11, para 1, number 3. Liquidation of these claims was only residually possible, that is, ‘only after all applications pending before the competent commission have been processed’.

aggregate information to complement the evidence provided by the individuals.²³ The competent organization was authorized to accept, on a case-by-case basis, applications deprived of supporting documentation. For the most part, claims were strictly personal and, if the application related to the loss of property, heirs could bring it only if the victims had died after February 1999.²⁴

As for the amount of compensation granted to successful applicants, the RRF Law set a cap of DM15,000 (approximately €7,600) for internees in concentration camps ('slave labourers')²⁵ and DM5,000 (approximately €2,530) for applicants who, *outside* of concentration camps, were subjected to other forms of harsh treatment, confinement and detention ('forced labourers').²⁶ A total of DM8.1 billion was ear-marked for compensating slave (and forced) labour, with DM50 million and DM1 billion budgeted, respectively, to compensate other personal injuries and property losses.²⁷ DM700 million were instead reserved for separate projects of the Foundation other than compensation.²⁸

The transfer of funds awarded under the compensation scheme was conditional on a previous declaration of 'legal peace' made by the German parliament, certifying the dismissal of all lawsuits pending abroad.²⁹ The Law also prescribed that compensation claims could only be brought under the procedures established thereunder, to the exclusion of all other claims.³⁰ Applicants would waive all other avenues of redress, and the waiver would take effect at the moment of payment.³¹ To endorse the unilateral preclusion of other claims effected by Germany, the US government issued a statement of interest in every dispute brought before US courts—effectively validating the choice of forum made in the Law and requesting that the individual claim be redirected to the RRF.³²

To ascertain the viability of adopting similar solutions in a Joint Scheme, a few essential traits of this compensation scheme should be isolated. Some elements seem

²³Ibid, Art 11, para 2: 'Eligibility shall be demonstrated by the applicant by submission of documentation. The partner organization shall bring in relevant evidence. If no relevant evidence is available, the claimant's eligibility can be made credible in some other way.'

²⁴Ibid, Art 13, para 1.

²⁵This terminology is employed in Libby Adler and Peer Zumbansen, 'The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich', *Harvard Journal on Legislation* 39 (2002), 1-62, at 2.

²⁶RRF Law, 2000 (n 10), Art 9, para 1.

²⁷Ibid, Art 9, paras 2-4.

²⁸Ibid, Art 9, para 7. The Foundation has carried out several 'Funding Activities', especially in the field of historiography and the remembrance of victims, through the building of an online database, the organization of encounters with former forced labourers and other victims, the funding of educational projects, etc. See 'Funding Programmes of the Foundation EVZ', available at www.stiftung-evz.de/eng/funding/.

²⁹RRF Law, 2000 (n 10), Art 17, para 2.

³⁰Ibid, Art 16.

³¹Ibid, Art 2.

³²See Adler and Zumbansen, 'The Forgetfulness' 2002 (n 25), 4.

fit for transplant: the *quid pro quo* nature (dismissal and waiver of lawsuits in exchange for compensation), the administrative process of claims liquidation, the intentional ambiguity regarding the legal basis for addressing injustices, entrusting the governance of payment processes to non-profit organizations, the flexible evidentiary principles, and the prescription of a possibility to challenge liquidation decisions and obtain their review.

Other elements of the RRF scheme appear less appropriate. The non-eligibility of heirs would frustrate the effectiveness of the Joint Scheme, given the timeframe of the crimes for which reparation is due. Some commentators criticized the Law for showing, on the part of Germany, ‘no remorse, no confession, and no sense of debt for the merciless treatment’ of the victims.³³ The quantification of compensation caps is also an obviously delicate matter. Forced labourers employed outside concentration camps (non-slave labourers) received a sum that could be considered low against several plausible baselines (for instance, the DM5,000 cap meant, for most applicants, that the amount awarded was lower than what they would have received had they been paid the minimum wage for the labour service supplied at that time).

III. DART: The Australian Solution

Since 2011, Australia has been coping with a barrage of individual complaints relating to sexual and other forms of abuse allegedly perpetrated by personnel of the Australian Defence Force.³⁴ After evidence emerged of systemic problems, the government established the Defence Abuse Response Taskforce (DART), which was to assess individual complaints and determine the appropriate response thereto.³⁵

A range of possible responses were offered, including restorative justice/conferencing processes, counselling, compensation capped at A\$ (*Australian Dollars*) 50,000,³⁶ and the referral of matters to criminal prosecution and/or the military

³³Ibid, 5-6.

³⁴The cut-off date for the alleged actions was 11 April 2011, when the law firm DLA Piper, upon the government’s commission, completed an investigation into the matter, see Garry A Rumble/Melanie McKean/Dennis Pearce, *Report of the Review of Allegations of Sexual and Other Abuse in Defence: Facing the Problems of the Past, Volume—General Findings and Recommendations* (Canberra: DLA Piper 2011).

³⁵For a positive assessment of DART, see Alikki Vernon, ‘The Ethics of Appropriate Justice Approaches: Lessons from a Restorative Response to Institutional Abuse’, *Law in Context* 35 (2017), 139-158.

³⁶Approximately €32,700 at the rate prevailing at the time of writing.

justice system.³⁷ Nearly all applicants requested monetary reparation.³⁸ The focus of this study will only be on the monetary reparation system. Nonetheless, the scheme was remarkable for providing a diverse set of remedies. In particular, the DART process acknowledged the need for victims to have their complaints heard and their grievances accepted by the Australian Defence Force, while also devising a specific engagement procedure to that effect.³⁹

It is important to note that although DLA Piper (the law firm tasked with carrying out the initial investigation) recommended establishing a ‘compensation’ plan and the ministry initially agreed, the resulting plan was re-branded as a ‘reparation’ scheme. As it is expressly stated in the reparation guidelines, payments made should not be understood to represent compensation, nor to imply an assumption of state liability.⁴⁰ Moreover, participation in the reparation scheme does not foreclose the right to resort to domestic courts. Tribunals are merely reminded to take into account the amount of reparation granted under the DART scheme to liquidate damages in tort or statute.⁴¹

The DART reparation scheme was handled as a purely administrative process.⁴² Eligible applicants were all persons who were employed in the Australian Defence Force and alleged to have suffered abuse effected by Defence Force personnel, subject to certain deadlines for the presentation of the complaint.⁴³ Applications consisted of a reparation form, a personal account of the alleged abuse (and any related follow-up procedure exhausted within the Defence Force), and proof of

³⁷See Australian Senate Foreign Affairs, Defence and Trade References Committee, ‘Report of the DLA Piper Review and the Government’s Response’, (27 June 2013), available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Completed_inquiries/2010-13/dlapiper/report/index, para 2.50, referring to an action plan announced on 26 November 2012 by the Minister for Defence, the Honourable Stephen Smith MP, in response to the DLA report.

³⁸The breakdown of remedies granted is as follows (out of 1,751 processed complaints): ‘[A] reparation payment (1,723 complainants at a total cost of US\$66.63 million); counselling (577 complainants); participation in the Restorative Engagement Program (715 complainants); referral to police for possible criminal investigation and prosecution (133 complainants); and referral to the Chief of the Defence Force for consideration of possible administrative or disciplinary action (132 complainants)’. See Australian government, ‘Defence Abuse Response Taskforce Final Report’, (31 March 2016), available at <https://core.ac.uk/download/pdf/51343294.pdf>, 11.

³⁹Vernon, ‘The Ethics’ 2017 (n 35), 146, records the motivation of establishing the so-called Restorative Engagement Conferences: ‘The consistent request from complainants was to: have their personal account of abuse listened to by Defence; have their personal account accepted as true; be given acknowledgement that the abuse was wrong and should not have happened’.

⁴⁰Australian government, ‘Defence Abuse Reparation Scheme Guidelines’, available at www.aph.gov.au/DocumentStore.ashx?id=7d8a8c38-f721-42cf-baed-3538593a3ee4, para 1.6.1: ‘A payment to a person under the Reparation Scheme is not paid as compensation or damages for any asserted, perceived, or possible legal liability on the part of the Commonwealth, or for any injury, disease or impairment, and does not constitute an admission of liability on the part of the Commonwealth.’

⁴¹Ibid, para 1.6.2.

⁴²Ibid, para 2.1.6: ‘[H]earings, negotiations or appeals’ were not envisaged for its functioning.

⁴³Ibid, para 3.1.4.

identity. Reparation was not available for applications made regarding deceased persons.⁴⁴

The evidentiary standard required of applicants is worth careful analysis. The individual account of the abuse is expressly presumed to correspond to the ‘person’s personal experience of alleged abuse’ unless evidence emerges to contradict it.⁴⁵ Additional information might be sought from either the applicant or the Defence Force. The Defence Force’s failure to submit documents requested by the taskforce would result in a presumption that the Defence Force is unable to contradict the information provided by the applicant,⁴⁶ though it would ultimately be for the competent assessor⁴⁷ to form an opinion on the merits as to the ‘plausibility’ of the applicant’s allegations.⁴⁸ There is no classic treatment of the burden and standard of proof, nor is there a precise system of reversals; the assessor’s opinion, based on any available evidence, is the controlling criterion of any payment determination. In the words of the assessor:

The plausibility test was also pivotal in humanely considering complaints from many individuals who were aged, frail or in a vulnerable state of health or wellbeing or otherwise reluctant or unable to recount often very traumatic instances of abuse.⁴⁹

DART-awarded reparations were classified in pre-fixed amounts corresponding to the varying gravity of the alleged abuse.⁵⁰

The DART scheme, insofar as it did not preclude the victims’ access to judicial redress, is not a pertinent model for the Joint Scheme because it did not ensure legal peace. However, some of its features might be effectively transplanted. The system

⁴⁴Ibid, para 3.7.1.

⁴⁵Ibid, para 4.3.1.

⁴⁶Ibid, para 4.4.1.

⁴⁷The Reparation Payment Assessor was appointed by the Minister of Defence to review abuse applications and determine whether a payment would be made, and the amount thereof. The designated assessor was Robyn Kruk, a retired senior Australian public servant.

⁴⁸Ibid, para 4.5.1: The plausibility standard entailed that individual applications were upheld when the allegations had ‘the appearance of reasonableness’; see Vernon, ‘The Ethics’ 2017 (n 35), 146.

⁴⁹Australian government, ‘DART Final Report’ 2016 (n 38), 62, Appendix I—Comments by the Reparation Payments Assessor.

⁵⁰Categories 1 to 4 attract, respectively, a payment of A\$5,000 (approx. €3,200); A\$15,000 (approx. €9,600); A\$30,000 (approx. €19,200); A\$45,000 (approx. €28,800); see Australian government, Defence Abuse Reparation Scheme Guidelines (n 40), para 4.6.1. More than half of the applicants received payments relating to the most serious category of abuse. The types of abuses are reported in Annex 10 to the DLA Piper Report and are further grouped to facilitate the task of the taskforce into four genres (sexual abuse, sexual harassment, physical abuse, and harassment and bullying). Somewhat counter-intuitively, the four categories used for reparation purposes have little descriptive value and do not correspond to the type of abuse, but they are supposed to correspond to different degrees of gravity. As explained by the taskforce: ‘A single incident of physical assault with no serious injury might fall in Category 1 or 2 (depending on the individual circumstances), while a serious sexual assault, such as a rape, would be expected to fall within Category 4.’ See DART taskforce, ‘Seventh Interim Report to the Attorney-General and Minister for Defence’, (September 2014), 19.

of pre-fixed reparation amounts relating to certain recurring abuses and the use of a flexible standard of evidence are two solutions that might fit well with the operation of a Joint Scheme.

IV. Other Compensation Schemes

1. *Eritrea/Ethiopia*

Within the regime of the Algiers Agreement, which put an end to the border war between Eritrea and Ethiopia, the parties provided for the establishment of an independent Claims Commission. Such a Commission was competent to decide through arbitration the claims brought by either state party, including claims made on behalf of individual citizens.⁵¹ The Commission's jurisdiction extended, *inter alia*, on claims for damages relating to breaches of international humanitarian law committed during the conflict by either party.⁵² The Commission was entitled to draft its own rules of procedure.⁵³

Insofar as the Commission functioned as an arbitral tribunal, it does not seem to provide an adequate model for the Joint Scheme. The great advantage of the Joint Scheme would be that Germany does not object to the assumption of responsibility for the injustices perpetrated against IMIs. A review of compensation claims under the Joint Scheme would not implicate or require a determination of state responsibility for breaches of *ius in bello* or *ad bellum*—a determination that the

⁵¹Note that individuals were not afforded access to arbitration, which remained an interstate affair only.

⁵²Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia for the resettlement of displaced persons, as well as rehabilitation and peacebuilding in both countries (*Algiers Agreement*), 12 December 2000, 2138 UNTS 93, Art 5.1: '1. Consistent with the Framework Agreement, in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population including the impact on those persons who have been deported, a neutral Claims Commission shall be established. The mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. The Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law.'

⁵³Which are available at the dedicated website of the Permanent Court of Arbitration; see Eritrea-Ethiopia Claims Commission, 'Rules of Procedure', available at <https://pcacases.com/web/sendAttach/774>.

Commission, controversially enough, resolved to make.⁵⁴ The Eritrea/Ethiopia experience, in other words, is mostly instructive *a contrario*. The Joint Scheme should not hinge itself on the ascertainment of Germany's responsibility through judicial or arbitral proceedings but only on the administrative review of the pre-determined eligibility criteria of the applicants and their claims.

In one respect, however, the experience of the Claims Commission can be relevant. The Commission established, alongside single claims warranting ad hoc scrutiny on the merits, certain categories of claims for which a mass-claim procedure would be used instead. Applicants whose claims were aggregate into mass claims would be entitled to a fixed amount of compensation.⁵⁵ In essence, once state responsibility for a certain breach of international law is determined, a random sample of individual claims hinging on the invocation of that breach would proceed to a review on the merits. Through this exercise, the Commission would determine (within the sample) the percentage of claims supported by adequate evidence. It would then order compensation to all claimants in the class, reduced in amount to match that percentage.⁵⁶ For instance, if only 50% of claims in the sample are meritorious, each claimant in that class would receive half of the compensation owed.

Neither Ethiopia nor Eritrea used this mass-claim mechanism, a choice that revealed the limits of subjecting individual claims to state espousal and the constraints imposed by a severe deadline.⁵⁷ The state parties opted for a fast-track process with a predetermined conclusion date: they allowed 3 years for the exhaustion of all arbitration proceedings, and consequently envisaged a tight 1-year deadline to present the claims. These time constraints certainly had a chilling effect on the possibility to orchestrate mass claims.⁵⁸

⁵⁴Christine Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?', *European Journal of International Law* 17 (2006), 699-721.

⁵⁵Claims Commission, 'Rules of Procedure' (n 53), Art 30. The sub-categories refer to unlawful displacement, unlawful expulsion, unlawful treatment of prisoners of war, unlawful detention and other instances of loss, damage and injuries.

⁵⁶Ibid, Art 32.3: 'If the Commission makes all of the determinations in paragraph 1, the claims in that sub-category for each of the two levels of compensation shall be subject to random sampling of their evidence to ascertain the percentage of such claims for which the evidence is inadequate to establish the claim. The compensation for all claims in that compensation level of that sub-category is automatically reduced by that percentage, and the Commission shall issue an award of such compensation for all claims in that sub-category.'

⁵⁷See Ari Dybnis, 'Was the Eritrea-Ethiopia Claims Commission Merely a Zero-Sum Game: Exposing the Limits of Arbitration in Resolving Violent Transnational Conflict', *Loyola of Los Angeles International and Comparative Law Review* 33 (2010), 255-286, at 268: '[D]espite the availability of this mass claims option, the parties chose only to file government-to-government claims, with the exception of six claims which Eritrea filed on behalf of six individuals whom Ethiopia had expelled.'

⁵⁸Ibid, '[i]f not for this deadline, then the parties might have considered collecting individuals' claims and utilizing the mass claims procedure'.

The automatic reduction in the compensation paid to the individual applicants, commensurate with the percentage of unmeritorious claims in the sample, would likely have encouraged the states to exercise diligence in the collection and presentation of claims. A similar mechanism would be inherently unfair in a system where individuals can present the applications in their own name, a model that is most appropriate for a potential Joint Scheme. To the contrary, the adoption of a sample review might be an efficient solution, especially if applications share a common factual matrix and certain gateway issues are positively established for each claim (the identity of the claimant or the plausibility of their involvement in the chronological and geographical scenario of the injustice).

2. Iraq/Kuwait Reparations

After the end of the Gulf War of 1990–1991, the UN Security Council issued Resolution 687 in which it reaffirmed Iraq’s liability for all damages caused by the unlawful occupation of Kuwait.⁵⁹ It also called for the creation of a fund and a commission for the compensation of claims relating to such liability, including those brought by individuals.⁶⁰ The United Nations Compensation Commission (UNCC) was thus created.⁶¹ Some of its operational features are of interest to our current purposes.

In particular, the UNCC had jurisdiction over an enormous number of individual claims for damages up to US\$100,000 (‘C’ claims, referring to its dedicated category). It noted in its first decision that ‘[t]he complexities associated with the processing of “C” claims, requiring the resolution of myriad legal, factual, evidentiary and valuation issues, are compounded by the massive number of claims in this category—in excess of 415,000’.⁶² Since these complexities are, in part, comparable to those with which a Joint Scheme might have to cope, if the eligibility criteria are wide enough, it is helpful therefore to observe the solutions adopted by the UNCC.

The UNCC started from an assumption of Iraq’s responsibility, and circumscribed its review to the issue of causality and quantum.⁶³ With a view to process all ‘C’ claims in an expedited way, the rules provided for the possibility to resort to a sample analysis of the merits of the individual claims.⁶⁴ The Panel of

⁵⁹UN Security Council, Resolution 687, S/RES/687, 3 April 1991, para 16.

⁶⁰Ibid, paras 18 and 19.

⁶¹For more information see United Nations Compensation Commission (UNCC); see www.uncc.ch/.

⁶²UNCC, Report and Recommendations Made by the Panel of Commissioners Concerning the First Instalment of Individual Claims for Damages up to US\$100,000 (Category ‘C’ Claims), S/AC.26/1994/3, 21 December 1994, 6.

⁶³Ibid, 9.

⁶⁴Provisional Rules for Claims Procedure, S/AC.26/1992/10, 26 June 1992, Art 37(b): ‘With respect to claims that cannot be completely verified through the computerized database, if the

Commissioners, moreover, made its recommendations based on the documents submitted.⁶⁵ This approach suggested the possibility that full evidence would not be required for every claim; indeed, the applicable rule suggests that ‘C claims’ must satisfy a relatively low evidentiary threshold, and that the smaller claims among them might be treated even more leniently:

With respect to “C” claims, Article 35(c) of the Rules provides that the claims must be documented by *appropriate* evidence of the circumstances and amount of the claimed loss. Documents and other evidence required will be the reasonable minimum that is appropriate under the particular circumstances of the case. A *lesser degree of documentary evidence* ordinarily will be sufficient for smaller claims such as those below US\$20,000.⁶⁶

The Panel of Commissioners, explaining what documents might suffice to achieve a ‘reasonable minimum’ of evidence, stressed the importance of the claim form—corroborated by the self-declaration of veracity of the applicant and the sanctions that domestic law attaches to false statements. Alongside the claim form, the Panel considered identification documents, personal and witness statements, and other documents that could be probative of the loss claimed.

The Panel, called to consider the ‘particular circumstances of the case’, in determining the standard of proof required, noted all the reasons, in the circumstances of the invasion, why the applicants might not have been able to withhold, conserve and present fuller evidence in support of their claims.⁶⁷ It was also noted that the scarcity of evidence in support of mass claims ‘is not a phenomenon without precedent’ in international practice. Therefore, the upholding of claims that, taken individually, present less than optimal evidentiary support is acceptable, owing to the circumstances in which the applicants had to gather the evidence and the nature of the UNCC’s mandate.⁶⁸

This is a lesson that might apply all the more plausibly to a hypothetical Joint Scheme, given that the general elements of the injustices attributed to Germany are known and that the applicants would probably not seek precise amounts of compensation relating to material losses. A Joint Scheme might be spared the difficult

volume of claims is large, the Panel may check individual claims on the basis of a sampling with further verification only as circumstances warrant.’

⁶⁵Ibid, Art 37(c).

⁶⁶Ibid, Art 35(c), reproduced in UNCC, Report, 1994 (n 62), 22 (emphases added).

⁶⁷Ibid, 26.

⁶⁸Ibid, 29. The panel also recalled the remark made in the Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, presented by Theo van Boven, the Special Rapporteur appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the UN Commission on Human Rights (UN Commission on Human Rights, E/CN.4/Sub.2/1993/8, 2 July 1993, available at http://hrlibrary.umn.edu/demo/van%20Boven_1993.pdf. In particular, para 137 of the Study states that ‘[a]dministrative or judicial tribunals responsible for affording reparations should take into account that records or other tangible evidence may be limited or unavailable. In the absence of other evidence, reparations should be based on the testimony of victims, family members, medical and mental health professionals.’

determination of causation and quantum that complicated the task of the UNCC. A system based on eligibility through status (eg, the applicant's condition as IMI, or heir of a victim of mass killings) and pre-fixed compensation amounts would render the review of applications significantly easier.

3. *Comfort Women*

In December 2015, Japan and South Korea reached an agreement aimed ostensibly at resolving interstate tensions with regard to Japan's practice of enforced prostitution during World War II (the so-called 'comfort women' phenomenon).⁶⁹ The issue of 'comfort women' has plagued relations between the two states for decades,⁷⁰ along with several other historical disputes,⁷¹ in part due to Japan's unflinching stance.

Japan, indeed, has openly accepted only its 'moral responsibilities',⁷² and tried to assuage the victims through monetary contributions *ex gratia* channelled through a newly established Asian Women's Fund (AWF). Such emoluments have not always been so well received; NGOs urged victims to boycott the AWF⁷³ and many survivors refused to accede the payments, noting Japan's refusal to own up to its historical responsibility and provide full reparation.⁷⁴ In short:

The women who would become military sex slaves have uniformly indicated that they are unsatisfied with Japan's engagement with the comfort women issue. This has been largely due to the lack of an apologetic stance by Japan. The consistent denial, acknowledgment, and then blaming the victims for the injustices experienced, has lent credence to the viewpoint that the Japanese government is insincere in its efforts to come to terms with the past.⁷⁵

⁶⁹See a recent account of the controversy in Torsten Weber, 'Apology Failures: Japan's Strategies Towards China and Korea in Dealing with Its Imperialist Past', in Berber Bevernage/Nico Wouters (eds), *The Palgrave Handbook of State-Sponsored History After 1945* (London: Palgrave Macmillan 2018), 801–816, at 804 et seq.

⁷⁰See, for instance, Naomi Roht-Arriaza, 'Reparations in the Aftermath of Repression and Mass Violence', in Eric Stover/Harvey M Weinstein (eds), *My Neighbour, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge: CUP 2010), 121–140, at 128–129; Cheah Wui Ling, 'Walking the Long Road in Solidarity and Hope: A Case Study of the Comfort Women Movement's Deployment of Human Rights Discourse', *Harvard Human Rights Journal* 22 (2009), 63–107.

⁷¹Spanning across trade disputes, territorial disputes, disputes on the reparations for World War II forced labourers.

⁷²Japan's Prime Minister Junichiro Koizumi, *Letter to the Former Comfort Women*, [exact day unspecified] 2001, available at www.mofa.go.jp/policy/women/fund/pmletter.html.

⁷³Wolfe, *The Politics of Reparations* 2014 (n 5), 275.

⁷⁴Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: OUP 2005), 437 (recounting also Japan's initiative in 1995 to establish an Asian Women's Fund, financed by private donations, which made approximately US\$19,000 available to each comfort woman).

⁷⁵Wolfe, *The Politics of Reparations* 2014 (n 5), 276.

Alongside an overdue acknowledgement of generic ‘responsibilities’,⁷⁶ and Japanese Prime Minister Shinzō Abe’s conveyance of ‘his most sincere apologies and remorse’,⁷⁷ the 2015 agreement contemplated a Japanese contribution of a modest sum (approximately US\$8.8 million) towards the establishment of a Korean foundation supporting former comfort women. The Foundation for Reconciliation and Healing was effectively created in July 2016 and received the promised amount by the Japanese government. The Korean government looked after the payment of approximately US\$18,000 to the families of deceased comfort women and US\$90,000 to those still alive.⁷⁸ It might be worth noticing that, out of an estimated 80,000 to 200,000 victims, only 238 Korean women have come forward to register with the scheme, of whom just 46 were alive at the time of the 2015 agreement,⁷⁹ 37 in July 2017,⁸⁰ 31 in January 2018,⁸¹ 27 in November 2018,⁸² 22 in March 2019,⁸³ 19 in January 2020, and 17 in August 2020.⁸⁴

In spite of the payments, the deal attracted criticism in South Korea. It was widely perceived as a diplomatic defeat for Korea and as Japan’s successful attempt at

⁷⁶The wording of the statement is carefully crafted to mention the notion of responsibility without attaching it to anyone in particular: ‘The issue of comfort women, with an involvement of the Japanese military authorities at that time, was a grave affront to the honor and dignity of large numbers of women, and the Government of Japan is painfully aware of responsibilities from this perspective.’ See the full text of the Announcement by Foreign Ministers of Japan and the Republic of Korea at the Joint Press Occasion of 28 December 2015, available at www.mofa.go.jp/a_o/na/kr/page4e_000364.html.

⁷⁷Ibid, point 1.

⁷⁸Benjamin Lee, ‘South Korea-Japan Comfort Women Agreement: Where Do We Go from Here?’, *The Diplomat*, (6 September 2016), available at <https://thediplomat.com/2016/09/south-korea-japan-comfort-women-agreement-where-do-we-go-from-here/>.

⁷⁹Benjamin Lee, ‘South Korea, Japan Agree to Irreversibly End “Comfort Women” Row’, *The Diplomat*, (28 December 2015), available at www.reuters.com/article/us-japan-southkoreacomfortwomen/south-korea-japan-agree-to-irreversibly-end-comfort-women-rowidUSKBN0UB0EC20151228.

⁸⁰‘Head of South Korean “Comfort Women” Foundation Resigns; Survivor Who Testified in U.S. Dies’, *The Japan Times*, (23 July 2017), available at www.japantimes.co.jp/news/2017/07/23/national/politics-diplomacy/head-south-korean-foundation-comfort-women-steps/#.WhoBQkqnHIU.

⁸¹Hyonhee Shin, ‘Japan Rejects South Korean Call for Extra Steps over “Comfort Women”’, *Reuters*, (9 January 2018), available at www.reuters.com/article/us-korea-japan-comfortwomen/japan-rejects-south-korean-call-for-extra-steps-over-comfort-women-idUSKBN1EYOF6.

⁸²‘South Korea Says It Will Dissolve Japan-funded “Comfort Women” Foundation’, *The Japan Times*, (21 November 2018), available at <https://www.japantimes.co.jp/news/2018/11/21/national/politics-diplomacy/south-korea-says-will-dissolve-japan-funded-comfort-women-foundation>.

⁸³‘Another Comfort Woman Survivor Passes Away without Apology from Japanese Government’, *Hankyoreh*, (4 March 2019), available at http://english.hani.co.kr/arti/english_edition/e_international/884479.html.

⁸⁴‘Another Korean sexual slavery victim dies, number of survivors at 19’, *The Korea Herald*, (23 January 2020), available at http://www.koreaherald.com/view.php?ud=20200123000650&ACE_SEARCH=1; ‘Commemorative ceremony marking Int’l Memorial Day for Comfort Women to be held in Cheonan’, *Arirang*, (14 August 2020), available at http://www.arirang.com/News/News_View.asp?sys_lang=Eng&nseq=263353.

resolving ‘finally and irreversibly’ the row with South Korea without trying to meaningfully engage either with the victims or with its own responsibility.⁸⁵ The deal came under severe scrutiny and the newly incumbent Korean government announced that it would revise its terms, causing the head of AWF to resign.⁸⁶ The impression that the agreement did not take into account the voice of the victims has been compounded by Japan’s attempts at silencing protests and condemning the erection of memorials. These actions are perceived as furthering an intention to erase the memory of the victims and, as a consequence, the country’s full assumption of past responsibility.⁸⁷ Japan’s refusal to issue a letter of apology after the 2015 agreement and South Korea’s refusal to remove statues paying tribute to comfort women installed in the vicinity of Japanese embassies paved the way for the current renewal of diplomatic tensions.⁸⁸

In late 2017, the Korean minister of foreign affairs requested a revision of the agreement, but his Japanese counterpart, hinting at its interstate nature, refused to re-open the deal.⁸⁹

The Japan–South Korea agreement is an agreement between the two governments and one that has been highly appreciated by international society (...). If the South Korean government (...) tried to revise the agreement that is already being implemented, that would make Japan’s ties with South Korea unmanageable and it would be unacceptable.⁹⁰

⁸⁵The ambiguity of monetary payments in restorative efforts—especially when compensation is inherently incommensurable with the harm suffered and is inevitably low—is a known phenomenon. See Vermeule, ‘Reparations’ 2005 (n 8), 10: ‘Offering an apology for some wrong one has committed would usually become a more offensive gesture, rather than a more credible expression of remorse, were a \$100 bill to be thrown in—although this may be a strictly interpersonal point that does not hold for government payments.’ The South Korean case shows that the point can hold, at least in certain circumstances, also in respect of government payments, although the interstate dimension and the memory of war scenarios might exacerbate the problem. Wolfe, *The Politics of Reparations* 2014 (n 5), 274, remarked on the dichotomy between the domestic and the international take on the atrocities committed by Japan. In spite of the reparation scheme established, the prevailing view in Japan has remained one of denial: ‘[T]he tension between the international memory and the domestic memory indicates that acceptance is still contentious within Japan.’

⁸⁶See Lee, ‘South Korea, Japan Agree’ 2017 (n 79).

⁸⁷See, for instance, the letter sent on 1 February 2017 by the Mayor of Osaka to the Mayor of San Francisco to protest the instalment of a Comfort Women Memorial. This action is described as being ‘adverse to the spirit of the agreement [with South Korea]’, available, in full, at <https://ww2.kqed.org/arts/wp-content/uploads/sites/2/2017/09/Ltr-of-Osaka-mayor-opposing-CWM-2-1-2017.pdf>.

⁸⁸Ilaria Maria Sala, ‘Why Is the Plight of “Comfort Women” Still So Controversial?’, *The New York Times*, (14 August 2017), available at www.nytimes.com/2017/08/14/opinion/comfort-women-japan-south-korea.html.

⁸⁹Annemarie Luck, ‘No Comfort in the Truth: It’s the Episode of History Japan Would Rather Forget. Instead Comfort Women Are Back in the News’, *Index on Censorship* 47(1) (2018), 19-21.

⁹⁰‘Japan Says Revising Comfort Women Agreement with South Korea Unacceptable’, *Reuters*, (27 December 2017) available at <https://uk.reuters.com/article/uk-southkorea-japan-comfortwomen-kono/japan-says-revising-comfort-women-agreement-with-south-korea-unacceptable-idUKKBN1ELOJ>.

Korea back-pedalled somewhat on its threat to denounce the agreement, but refused to use the funds provided by Japan, opting instead to inject the necessary funds to replace them from its own budget.⁹¹

The 2015 agreement has been ‘effectively abandoned’⁹² and in December 2019 the Constitutional Court of South Korea has determined that, since it did not establish clear rights and duties for the two countries, it cannot be set aside for infringing on the victims’ constitutional rights. In January 2021, a Seoul Central District Court condemned Japan to pay approximately \$92,000 each to the 12 surviving victims.⁹³ The non-agreement remains, and so does the disagreement between the two countries.

As of early 2021, Japan has not obtained irreversible closure, and the South Korean government has received criticism from its own citizens for its mishandling of the negotiation and having to pay its way out of the mess. Furthermore, the victims have expressed no feeling of satisfaction, and the citizens of both countries have grown increasingly uneasy about the issue. None of the sought-after goals of the agreement have materialized. The circumstances evince the *faux pas* of the respective state authorities, who have struck a deal without consulting nor paying meaningful considerations to the victims.⁹⁴

There are certain obvious differences between the Japan–South Korea tensions and the prospect of providing reparation to IMIs and other victims. The most evident is that Japan is hesitant to embrace its full responsibility and actively tries to erase the memory of the injustices (or at least what it believes to be exaggerated representations thereof), whereas Germany has unquestionably accepted legal responsibility for war crimes committed. This crucial difference might contribute to reducing the risk of a Joint Scheme being rejected by the beneficiaries on the grounds that it merely represents a buy-out. However, the lesson learnt from the fragile fate of the

⁹¹‘South Korea Not Seeking Renegotiation over Comfort Women Deal with Japan’, *Reuters*, (9 January 2018): ‘South Korea’s Foreign Minister Kang Kyung-wha said it was “undeniable” the two governments formally reached the settlement, under which Japan apologised to victims and provided 1 billion yen (\$8.8 million) to a fund to support them. Seoul will set aside its own budget to bankroll the fund and consult with Tokyo on what to do with the 1 billion yen it had given, she said’, available at <https://www.abc.net.au/news/2018-01-09/s.korea-not-seeking-to-renegotiate-comfort-women-deal-with-japan/9315556>.

⁹²‘South Korea court upholds Japan ‘comfort women’ deal’, *The Straits Times*, (28 December 2019), available at <https://www.straitstimes.com/asia/east-asia/south-korea-court-upholds-japan-comfort-women-deal>.

⁹³Seoul Central District Court, Judgment of 8 January 2021, No 2016 Ga-Hap 505092; see Daniel Franchini, ‘South Korea’s denial of Japan’s immunity for international crimes: Restricting or bypassing the law of state immunity?’, *Voelkerrechtsblog*, (18 January 2021), available at <https://voelkerrechtsblog.org/south-koreas-denial-of-japans-immunity-for-international-crimes/>

⁹⁴Weber, ‘Apology Failures’ 2017 (n 69), 804: ‘Instead of offering an “apology” (*shazai* or *owabi* in Japanese), the terms used to convey notions of self-critical reflection were “true regret” (*makoto ni ikan*) in the Korean case, as well as “deep remorse” in both the Korean and Chinese cases (. . .). These phrases were apparently regarded as sufficient by the respective state leaders, who prioritized receiving Japanese economic assistance over emphasizing Japan’s historical guilt’ [notes omitted].

2015 agreement is that the two states concerned must involve the victims or their representatives during the negotiation stage, and make sure that the outcome is at least reflective of their voices and acknowledges their requests. In this respect, the mere allocation of monetary awards might fall short of satisfactory reparation if the victims are cut out of the process. Reparation cannot function independently of reconciliation, and reconciliation is not solely an interstate matter.

There is, however, a striking similarity between the two scenarios. Given the shared factual taxonomy of the two underlying injustices (occurring between 80 and 70 years ago), the surviving victims are now few in numbers and are dying at an accelerating rate. A provision for the compensation of deceased victims' families, at a reduced rate, might prove acceptable. Alternatively, the Joint Scheme might provide for the descendants' right to seek full compensation on behalf of deceased IMIs if death occurred after a specific cut-off date, which might very well be set in the past (eg 2004, the date of the first *Ferrini* judgment,⁹⁵ or February 1999, the cut-off date established in the RRF Law). Safeguards such as these would defuse the obnoxious result that any delay in fulfilling the moral duty of providing reparation might directly diminish the burden of its realization, due to the shrinking pool of beneficiaries.

4. The US/France Agreements on Banks and Railroad Deportees

a) The 2001 Banks Agreement

In 2001, France and the US stipulated an agreement regarding the restitution of sums held on bank accounts opened with certain French banks that had been frozen as a result of anti-Semitic legislation (the Washington Agreement).⁹⁶ France committed to obtaining from the banks a US\$100 million contribution for a dedicated foundation.⁹⁷ The banks also committed themselves to pay restitution claims approved by the Commission for the Compensation of Victims of Spoliation (*Commission pour l'indemnisation des victimes de spoliations*, or CIVS).⁹⁸ The US pledged to inform

⁹⁵*Corte di Cassazione*, Judgment of 11 March 2004, No 5044/04 (*Ferrini*).

⁹⁶See Agreement between the Government of the United States of America and the Government of France Concerning Payments for Certain Losses Suffered During World War II (the Washington Agreement), 18 January 2001, 2156 UNTS 281, as amended 30 and 31 May 2002, 21 February 2006 (entered into force 5 February 2001).

⁹⁷*Fondation pour la Mémoire de la Shoah* (Foundation for the Memory of the Shoah), created in France on 26 December 2000.

⁹⁸For more information see www.civs.gouv.fr/. With decree No 99-778 of 10 September 1999, the French Government created a Commission for the Compensation of Victims of Spoliation Resulting from Anti-Semitic Legislation in Force during the Occupation, available at <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000005628500&dateTexte=20081229>.

US courts that any claims against the French banks should be dismissed as contradicting US foreign policy interests,⁹⁹ effectively designating the CIVS procedure as the preferred avenue for such claims.¹⁰⁰

Annex B to the Washington Agreement defined the working procedure of the CIVS as one of considering the individual claims. Of particular interest is the indication that '[t]he Commission will investigate and consider claims on relaxed standards of proof. A claimant's application or a simple inquiry by the claimant to the existence of a bank asset is sufficient to trigger an investigation'.¹⁰¹ The operation of this relaxed standard of proof is further explained when the recommendation powers of the Commission are addressed:

Following such an investigation and after communication with the claimant or their representative (...) if an account can be verified by any means, including because the claim matches a name or account on a list or other document available to the Commission, the Commission makes a recommendation on an award together with the reason(s) for that recommendation (...) the Commission will recognize as sufficient evidence to make an Award any of the following four categories: proof, presumption, indication, and intimate personal conviction.¹⁰²

In other words, the Commission procedure hinged on a highly favourable standard of proof ('any means' including a plausible affidavit by the applicant¹⁰³ could be sufficient to demonstrate the existence of an expropriated account) and a favourable burden of proof (the evidence might be provided by the CIVS itself rather than by the applicant). First instance decisions by the CIVS could be appealed.¹⁰⁴

The scheme was strictly restitutory in nature, and the Commission was not entitled to reduce the amount of compensation for any reason other than double recovery.¹⁰⁵ the balance on the accounts would have to be repaid in full, subject to certain rounding adjustments. Until 2005, it was also possible to receive compensation of up to US\$3,000 merely on the basis of an affidavit, even if the Commission was unable to ascertain the existence of the account claimed by the applicant.¹⁰⁶

⁹⁹Washington Agreement, 2001 (n 96), Art 2.

¹⁰⁰Consider, however, point 9 of Annex C to the Washington Agreement, which reproduces the Statement of Interest of the US to be submitted in the domestic proceedings: 'The United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal.' This language is perhaps obligatory to preserve the separation of powers between the executive and judicial branches.

¹⁰¹Washington Agreement, 2001 (n 96), Annex B.

¹⁰²Ibid, principles B and D.

¹⁰³Ibid, principle F.1. See also Exhibit 2 for a model of the affidavit.

¹⁰⁴Ibid, principle K.

¹⁰⁵Ibid. The Commission was also prevented from offsetting part of the compensation against other payments received by the applicants in the form of material or non-material damages.

¹⁰⁶An overview of the liquidation principles is available at www.civs.gouv.fr/en/getting-compensation/specific-provisions-relating-to-bank-related-compensation/; 'Soft-claims' (ie, those deprived of sufficient evidence) would be paid out of a dedicated fund, capped at US\$22.5 million.

Since the claims submitted to the CIVS under the Washington Agreement were only for restitution, the scheme might be a poor template for any future Joint Scheme, which would presumably focus on reparation or quasi-compensation. However, the technical provisions relating to the evidentiary regime used by the CIVS to review claims are worth taking into account, as they aimed at addressing evidentiary complications that are similar to those the IMIs and other victims might encounter.

The imposition of forced labour or the occurrence of mass killings, similar to the blocking of the French bank accounts, is not a controverted fact; several decades have passed since the unjust actions occurred and the affected individuals' age and personal history might undermine attempts to retrieve a full documentation of the harms suffered. In this respect, the value of individuals' affidavits as presumptive evidence is a possible solution that would respond to the need to afford applicants with fair treatment in the operation of a Joint Scheme for compensation.

b) The 2014 Railroad Deportees Agreement

In December 2014, the governments of France and the US stipulated an agreement regarding the treatment of certain holocaust victims—those deported from French territory who had not been covered by previous reparation schemes.¹⁰⁷

The explicit purpose of the agreement and the compensation mechanism established therein was to achieve 'legal peace' with respect to all claims against France asserted in US courts.¹⁰⁸ France pledged US\$60 million to a US account, from which the US government would draw funds to pay individual claimants. In return, the US would recognize French immunity, terminate legal actions pending in US courts and ensure that the beneficiaries of the compensation schemes would execute waivers of further action against France.¹⁰⁹ The US and its affiliated authorities would take full responsibility for the distribution of the funds to the

See, for a discussion of the restitution scheme, Michael J Bazylar, 'The Holocaust Restitution Movement in Comparative Perspective', *Berkeley Journal of International Law* 22 (2002), 11-44, at 18-19.

¹⁰⁷See also Riccardo Pavoni, chapter 'A Plea for Legal Peace', in this volume. Agreement between the Government of the United States of America and the Government of the French Republic on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are Not Covered by French Programs (Railroad Deportees Agreement), 8 December 2014, 55 ILM 339 (2016), available at https://www.state.gov/wp-content/uploads/2019/04/us_france_agreement.pdf.

¹⁰⁸Railroad Deportees Agreement, 2014 (n 107), Art 4.1: 'The Parties agree that this payment constitutes the final, comprehensive, and exclusive manner for addressing, between the United States of America and France, all Holocaust deportation claims not covered by existing compensation programs, which have been or may be asserted against France in the United States of America or in France.' See also Art 4.2.

¹⁰⁹Ibid, Art 5. An Annex to the Agreement spells out the waivers and relinquishments that all applicants will be required to sign in order to access the payment.

victims and establish the appropriate procedure without French input;¹¹⁰ the US established a Deportation Claims Program that is currently processing claims.¹¹¹

The programme reaches widely *ratione personae*. Alongside those individuals deported from France who remain alive, the programme covers their spouses and thus envisages two main categories of beneficiaries: survivors and surviving spouses. Furthermore, estates (heirs or assigns) of either category are entitled to receive compensation if the death occurred between 1948 and the date of the application. Subject to the territorial link inherent in the requirement of deportation from France, there is no nationality requirement. Whilst the incompatibility of the programme with other pre-existing compensation schemes rules out claims from citizens of certain nationalities,¹¹² anyone can apply (ie, not just US nationals).

The US provided applicants with a statement of claim form, which required them to provide 'all available identifying information and documentation regarding the relevant individual's deportation from France during World War II, including if possible the date, convoy, and place of departure and arrival of such deportation'. The form also reminded applicants of the criminal implications in making a false statement.

The amount of compensation envisaged was significantly higher than those awarded in the schemes discussed thus far. According to the estimates released by the claims programme, survivors would receive US\$204,000 and all surviving spouses whose deported spouse died prior to 1948 would receive US\$51,000. Surviving spouses of deportees who died in or after 1948 would receive US\$750 for each year after the deportee's death. Estates of survivors or surviving spouses would receive a fraction of the amounts above, calculated on the period of survival of the eligible individual during the 1948–2015 period.¹¹³

A comment on the size of the payments is in order.¹¹⁴ The negotiating history shows that the allocated amount of US\$60 million was arrived at by knowing an estimate of the number of beneficiaries (486) and that the resulting average compensation of US\$100,000 would correspond to roughly 3 years of disability pension

¹¹⁰Ibid, Art 6.

¹¹¹For more information see <https://www.state.gov/notice-regarding-holocaust-deportation-claims-program-under-u-s-france-agreement/>.

¹¹²Namely, those of France, Belgium, Poland, the UK, and the former Czechoslovakia. See FAQ page of the Claims Programme, available at <https://2009-2017.state.gov/p/eur/rt/hlcst/deportationclaims/250658.htm>.

¹¹³More specifically, 'estates of survivors and estates of surviving spouses [would receive] a yearly percentage of the full \$204,000 and \$51,000 amounts, respectively. Estates of survivors will receive \$3,000 for each year that the survivor lived, beginning with 1948 and ending in 2015. Estates of surviving spouses will receive \$750 for each year that the surviving spouse lived after the year of the deportee spouse's death, again beginning with 1948 and ending in 2015.' See Claims Programme, FAQ page (n 112).

¹¹⁴A fuller analysis, providing the basis for the brief remarks in the text, is offered in Ronald Bettauer, 'A Measure of Justice for Uncompensated French Railroad Deportees during the Holocaust', *ASIL Insights*, (1 March 2016), available at <https://www.asil.org/insights/volume/20/issue/5/measure-justice-uncompensated-french-railroad-deportees-during-holocaust>.

under French law.¹¹⁵ Though it is difficult to assess the congruity of these calculations in the abstract, it is possible to note their large relative amount, as well as the low number of expected beneficiaries, which permitted the adoption of a quasi-compensatory approach (as opposed to the merely reparatory scheme adopted, for instance, in the RRF Law).

This scheme is interesting because it has a residual character: it expressly covers beneficiaries that were excluded from previous schemes. In this light, it might be comparable to a future Joint Scheme insofar as the latter would essentially cover IMIs and other victims expressly excluded from the application of the 2001 RRF Law.

V. A Ten-Step Sketch of a Future German-Italian Joint Scheme

The previous sections sought to provide an overview of selected payment schemes. While the comparative analysis is beside the point (as the schemes differ widely along several variables), it is nonetheless possible to identify certain solutions that, with all due caution, appear appropriate also for the Joint Scheme. In what follows, I recapitulate some of the lessons learnt from this anthological survey into a ten-step sketch.

1. *Reparation or Compensation*

The Joint Scheme would plausibly grant reparation falling short of full compensation. A reasonable approach would be to consider it an extension of the RRF payment scheme. Since the whole IMI issue apparently flows from war prisoners being excluded from the RRF Law, a reliable starting point would be to ensure that the Joint Scheme produces the effects that the RRF Law could have produced had it applied to IMIs. Along these lines, it might be helpful to recall the number of IMI applications that were rejected under the RRF scheme if we are to have a working estimate of the number of beneficiaries of the Joint Scheme.¹¹⁶ Full compensation might be an ambitious but impracticable target, let alone a conceptually thorny issue

¹¹⁵Ibid, drawing extensively from the reports of the French National Assembly and the French Senate.

¹¹⁶According to Italy's Counter-Memorial in the *Jurisdictional Immunities* case before the ICJ, 127,000 such applications were rejected; see ICJ, *Jurisdictional Immunities of the State (Germany v Italy)*, Counter-Memorial of Italy of 22 December 2009, para 2.21.

when (and if) reserved to heirs and descendants.¹¹⁷ The express language of the DART scheme, which opted for the reparation label, could serve as a template.

2. Funding

That Germany and Italy will both contribute to the finances of the Joint Scheme can at this stage only be assumed. Multi-source funding is not unprecedented (the German government and industry both supported the RRF Fund, for instance) and would facilitate the accumulation of a decently sized budget. Ideally, Germany would pledge to match Italy's contribution, so that an example of virtue rather than strained negotiations might ensure the scheme's financial capacity. An alternative method of quantifying the contributions to the fund, suggested by Jörg Luther,¹¹⁸ could be to measure them against the size of the respective national populations (roughly 82 million for Germany and 60 million for Italy). A raw equivalence of 1 person = €x would be tenable and acknowledges population differences between the two countries in setting the criterion for a comparable economic contribution. With $x = €1$, this calculation would roughly amount to a €140 million fund, which could ensure the payment of roughly €1,000 to a number of claimants similar to those who saw their applications rejected under the RRF Law.¹¹⁹ It appears preferable that $x > 1$ (see next step), unless the estimated number of applicants is much lower. Interestingly, in one twist of the Japan–South Korean feud over the issue of comfort women, Korea has strived to increase the legitimacy of the reparation scheme by unilaterally financing the budget and announcing that the funds provided by Japan will not be used. In other words, the contribution from the state to whom the nationality of the victims belong is a powerful gesture: it avoids the impression that any agreement between the states reflects a political sell-out.¹²⁰

¹¹⁷See, generally, Tyler Cowen, 'How Far Back Should We Go? Why Restitution Should Be Small', in Jon Elster (ed), *Retribution and Reparation in the Transition to Democracy* (Cambridge: CUP 2006), 17-32. Whilst the author mostly refers to restitution, the legitimacy of intergenerational compensation is similarly dubious. See also Giovanni Boggero/Karin Oellers-Frahm, chapter 'Between Cynicism and Idealism', in this volume.

¹¹⁸See Jörg Luther, chapter 'A Story of "Trials and Errors" that Might Have No Happy End', in this volume.

¹¹⁹See n 12.

¹²⁰See also Francesco Francioni, chapter 'Overcoming the Judicial Conundrum', in this volume.

3. The Amount Paid to Each Victim

It is perhaps inevitable that IMIs and other victims receive a lump sum rather than compensation reflecting the specific damage suffered. Most systems described above adopt this lump-sum approach and the benefits in terms of expediency seem to outweigh a concern for accuracy, insofar as fair treatment is assured to all applicants. It is difficult to tell whether the system should envisage only one lump sum or a range of amounts, corresponding to several types of injustice suffered (for instance, long-lasting conditions caused by forced labour might warrant a more generous reparation). The DART and RRF schemes opted for graduated amounts, but the latter essentially lumped all victims into two macro-groups ('concentration camps' and 'others'). The reparation offered to comfort women was also undifferentiated in amount. In the interest of expediting the processing of claims, the adoption of a one-size-fits-all quantum should be favourably considered. As to the magnitude of the payment, it will inevitably depend on the size of the available fund and the number of eligible applicants. Of the schemes described above, the ones that directly provided reparation for personal harms (rather than restitution) converged around a figure of US\$50,000 (the DART scheme, the reparation offered to comfort women, and railroad deportees), but the number of eligible individuals was much smaller than that of eligible IMIs and other victims. A lump sum in the €10,000–€20,000 bracket might be considered fair given the circumstances. A system of partial payment mechanisms could be set up, when the estimate of the number of applicants is particularly difficult and, accordingly, the amount available to each is difficult to pin down in advance. Partial payments could ensure the possibility of paying late applications and prevent the premature depletion of funds when the number of applicants is unexpectedly high or the available budget is insufficient to cover full payment to every applicant. Once all applications are processed, the residual funds can be distributed to make up for what reparations remain, or even fund further projects if any money is left unallocated.

4. The Management of the Fund and the Organs Overseeing Its Distribution

Again, it might be worth looking at the RRF scheme as a template. The Joint Scheme would be run by a body participated in equal measure by the German and Italian governments, that might decide to integrate its structure with representatives from civil society, victims' associations, and technical experts. The body tasked with the review of applications and liquidation of claims would reflect this balanced make-up, and operate as an administrative office, as in the DART experience, with an internal capacity to perform, upon request, the review of individual decisions.

5. *The Eligibility Criteria*

Specific criteria should be drafted to ensure that beneficiaries correspond to the categories left out of the RRF Law: primarily war prisoners subjected to forced labour, but other internees and victims of mass killings should also be included. Limiting reparation to Italian citizens (unlike the French banks scheme) might be understandable since Italy would be responsible for the Scheme's funding. A possibility worth discussing is that claims be aggregated into mass claims (as in the Eritrea/Ethiopia scheme), or at least that the governing body make available partially pre-filled application forms for prospective applicants. Forms could be divided into categories, according to the distinguishing features of the crime at stake and the factual coordinates (provenance of the applicant, timeframe, location, and conditions of the killing/internment/forced labour). The Joint Scheme would have the same advantage as the UNCC, which reviewed the claims against Iraq: the issue of responsibility would not be in question. Since the Joint Scheme would most probably warrant reparation rather than compensation for specific damages, the issue of causation and the determination of quantum would also be minimized in the proceedings. A mere scrutiny of eligibility could suffice.

6. *The Treatment of Heirs*

The notion of descendants being eligible for compensation is not immediately intuitive. On the one hand, it defies the immediate realization that compensation should benefit the individual harmed and provide a modicum of relief for the direct victim rather than material enrichment for their family. On the other hand, two circumstances might militate in favour of providing reparation to heirs as a means to achieve fairness. First, the death of the victim might be a precise consequence of the injustice—especially in the case of mass killings, but also when the suffering of forced labour takes a permanent toll on a person's health. Second, the legal deadlock has inevitably entailed that the death of multiple victims might have occurred before the granting of reparation, which is an odious side effect of the slow course of justice (a second-order instance of injustice). In that light, 'the rough intuition is that, in strictly comparative terms, there is no better stand-in for the deceased payees—a view that seems vague and difficult to defend, but that strikes many as superior to the alternative of awarding no money at all'.¹²¹ Moreover, relatives of the Italian victims have arguably suffered directly from the crimes committed, especially those causing death or permanent bodily harm. In some respect, therefore, the heirs are also direct victims of the injustice. The Joint Scheme would be too little too late, but it could be understood as a form of 'rough justice'¹²² and its shortcomings might be acceptable

¹²¹Vermeule, 'Reparations' 2005 (n 8), 8.

¹²²*Ibid.*

if certain safeguards were implemented. One such safeguard concerns the eligibility of heirs: Italian victims are either dead or elderly. Without a specific mechanism to avoid delays frustrating its goal, the whole exercise would be emptied of meaning. If anything, this scenario would exacerbate rather than remedy the injustice. Reduced payments to victims' heirs and assigns are common (for instance, consider the calculation used in the liquidation of US/French Railroad Deportees' claims and the pay-outs to the families of Korean comfort women) and might represent an acceptable compromise. Another solution might be to establish a cut-off date (for instance, February 1999, on the model of the RRF scheme) and allow the heirs to claim reparation on behalf of eligible persons deceased thereafter.

7. The Standard and Burden of Proof

One recurring feature of the payment schemes described above is the bestowment upon the claimants of evidentiary duties that are softer than normally expected in litigation (see, eg, the UNCC, the DART, the Eritrea/Ethiopia scheme and the US Banks and Railroads schemes). This staple of reparation processes is certainly fit for the Joint Scheme. More to the point, Germany could pledge to retrieve the applications filed with the RRF competent organizations by IMIs and process their claims automatically. In any event, applicants shall be expected to provide evidence of their identity and nationality and a template form reporting their account of the relevant circumstances of internment and forced labour. The form might facilitate the task by providing some pre-determined choices as regards places and dates, relating to known historical patterns of wrongdoing and documented flows of IMIs and other forced laborers. Applicants should be warned of the sanctions attached to the making of false statements; conversely, their affidavits, if complete, plausible and not contradicted, should warrant reparation even in the absence of other supporting documentation.

8. The Involvement of Victims

The Joint Scheme should include specific safeguards for offering satisfaction to the Italian victims, besides and independently of any monetary payment.¹²³ Specific means to do so could include: issuing official declarations and individual letters to

¹²³Satisfaction is listed among the basic forms of reparation that states should warrant in the UN 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 and proclaimed by General Assembly Resolution, A/RES/60/147, 16 December 2005; see, in particular, principle 22. See also Andreas von Arnould, chapter 'Deadlocked in Dualism', in this volume.

restore the victims' dignity and assume responsibility (possibly, and when appropriate, on the part of both states), establishing commemorations and tributes to the victims, and including an account of the injustices in educational materials.¹²⁴ It is equally important that the victims—possibly through the representative associations—are consulted during the negotiation stage and subsequently involved in the governance of the scheme. Involvement of victims might be the critical element making an otherwise unpalatable payment acceptable.¹²⁵ The offer of multiple non-monetary remedies proved beneficial in the DART scheme and catered effectively to the victims' fundamental need for closure and reconciliation.¹²⁶ The opposite might be said of the comfort women scheme, in which monetary reparations were perceived to be unsatisfactory by some of the victims and a large share of South Korean public opinion. As Korea and Japan have learnt the hard way, memory and respect for victims might save the day when reparation cannot make the victims whole.¹²⁷

9. Legal Peace

Germany will likely insist on the insertion of language specifying that any payment under the Joint Scheme would be made out of comity and a sense of moral and historical justice, rather than under any legal obligation. Moreover, in the current scenario Germany is satisfactorily shielded from individual actions by the law of sovereign immunity. Nonetheless, it would be reasonable to consider the Joint Scheme an adequate opportunity to provide legal peace to Germany from the claims of Italian victims brought before any alternative forum.¹²⁸ The system of individual waivers, state commitment to redirect court actions and express relinquishment, common to some of the schemes described above (check, in particular, the language of the two US/French agreements), would serve as an appropriate model for the Joint Scheme.

¹²⁴See *ibid.*, lets d), e), g), h).

¹²⁵Vermeule, 'Reparations' 2005 (n 8), 11: '[W]hether partial payment is better than nothing should depend on the political process by which the payment is accomplished, on the perceived alternatives, and on the accompanying symbolism.'

¹²⁶Vernon, 'The Ethics' 2017 (n 35), 147, recorded the beneficial effects of the engaging conferencing sessions offered by the DART programme: '[C]omplainants reported immediate therapeutic benefits and a high level of satisfaction that their concerns had been thoroughly acknowledged and addressed.' These effects were recorded in the Defence Abuse Response Taskforce, Seventh Interim Report; see n 50.

¹²⁷Christopher Kutz, 'Justice in Reparations: The Cost of Memory and the Value of Talk', *Philosophy & Public Affairs* 32 (2004), 277-312, at 312.

¹²⁸See also Riccardo Pavoni, chapter 'A Plea for Legal Peace', in this volume.

10. Speed

This element explains itself. Beating around the bush is an indecent strategy given the age of the victims who are still alive.

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