Unpacking the International Law on Reparation for Victims of Armed Conflict

Christian Marxsen[*]

Debates about ways to address the consequences of armed conflict through reparation are focal points of contestation about moral values, different conceptions of justice and approaches to international law, and they are highly politically charged. Recent and current legal conflicts – only with regard to Germany – *inter alia* involve Italian[1] and Polish[2] claims against Germany for war reparations for German crimes committed during World War II, claims as well as proceedings by representatives of the Ovaherero and Nama indigenous people before a district court in New York for crimes committed by Imperial Germany at the beginning of the 20th century in what is now Namibia,[3] or the recent proceedings in the case of *Kunduz*, in which victims of a German military strike in Afghanistan sued Germany for compensation.[4]

The current symposium deals with one currently controversial question. It raises the question whether individual victims have a right to reparation under international law as it currently stands and addresses questions related to the realisation of reparation claims.

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[*] Dr. iur., LL.M. (NYU), Head of the Max Planck Research Group "Shades of Illegality in International Peace and Security Law" at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. The author would like to thank *Paola Gaeta* for valuable input and *Anne Peters*, *Karin Oellers-Frahm*, *Leander Beinlich* and *Richard Dören* for valuable comments on an earlier draft of this article.

[1] See out of the numerous lower court decisions awarding reparation to victims (after the Italian Constitutional Court's Sentenza 238 of 22.10.2014 which found that victims have a constitution-based right to access to a judge, notwithstanding the immunity of Germany): Tribunale Ordinario di Firenze (N. R.G. 8879/2011), Sentenza of 6.7.2015 (Judge *Luca Minniti*); Tribunale Ordinario di Ascoli Piceno (N. R.G. 2015/112), Ordinanza of 8.3.2016 (Judge *Enza Foti*); Tribunale Ordinario di Ascoli Piceno (N. R.G. 523/2015), Ordinanza of 8.1.2017 (Judge *Paola Mariani*).

[2] See e.g. *M. Goettig*, Polish Lawmaker: Due Reparations from Germany Could Stand at $850 billion, Reuters, 2.3.2018, <https://www.reuters.com>.

[3] See United States District Court, Southern District of New York, Class Action Complaint, Civ. No. 17-0062, New York, 5.1.2017.

[4] German Federal Court of Justice (Bundesgerichtshof), Judgement of 6.10.2016, file no.: III ZR 140/15. See for an analysis of the *Kunduz* case with view to the application of German *Amtshaftungsrecht*: *P. Starski/L. Beinlich*, Der Amtshaftungsanspruch und Auslandseinsätze der Bundeswehr, JöR 66 (2018), 299 et seq.

I. Terminology: Reparation and Reparations

The concept of reparation is well established in international law, but its concrete shape and also the use of terminology varies in different subfields. In its most traditional form we find it in the concept of *war reparations* – used with the plural form. In fact, in international law the concept of reparation was long used solely to denominate payments (and other transferal of goods) made after an armed conflict (usually by the defeated party), the term "war" therefore being a redundant modifier.[5]

In addition to that, international law contains a well-established rule that States must provide reparation (used in the singular) where they are responsible for a violation of international law.[6] This is a general rule, valid also outside the context of armed conflict. The content of this rule is clearly set out in the Articles on the Responsibility of States for International Wrongful Acts (ARSIWA).[7] According to these Articles, every wrongful act of a State entails the international responsibility of that State[8] and creates the legal obligation to remedy the violation and its effects. A State responsible for a violation of international law is – where appropriate – under an obligation to cease the violation and to offer assurances and guarantees of non-repetition.[9] In addition, the "responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act".[10] The ARSIWA foresee restitution, compensation and satisfaction as possible forms of reparation.[11]

In international criminal law we usually find the use of the term *reparations*.[12] The term refers to a wide range of mechanisms and is partly limited to specific non-pecuniary awards. For example, reparation awards before

[5] *J. Torpey*, Victims and Citizens: The Discourse on Reparation(s) at the Dawn of the New Millenium, in: K. de Feyter/S. Parmentier/M. Bossuyt/P. Lemmens (eds.), Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations, 2005, 36.

[6] *PCIJ*, Case concerning the factory at Chorzów, Judgement of 23 September 1928, at 29 ("[T]he Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."

[7] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, vol. II, Part Two, 26 et seq.

[8] See Arts. 1, 12 ARSIWA.

[9] Art. 30 ARSIWA.

[10] Art. 31(1) ARSIWA.

[11] Art. 34 ARSIWA.

[12] See the Statute of the International Criminal Court (ICC), Art. 75(1), according to which the "Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation." See also Rule 23(1)(b) Internal Rules (Rev. 9) of the Extraordinary Chambers in the Courts of Cambodia (ECCC).

the Khmer Rouge Tribunal are limited to "collective and moral reparations".[13]

Also, the term *reparations* is often used synonymously with compensation, i.e. referring to one specific form of reparation, namely monetary awards.[14] Numerous publications also use the plural form as the general term covering all sorts of reparation awards.[15]

Against the background of this lack of uniformity in the use of terminology, *Sir Michael Wood* is right to call, in his contribution to these Impulses, for conceptual clarity.[16] When analysing the issue of reparation for victims of armed conflict, we will speak of a (potential) *right to reparation*. As *Sir Michael Wood* suggests, the plural form should generally be reserved for referring to *war reparations*. The possible substance of a right to reparation should be understood broadly and is not limited to monetary compensation. Rather, it includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[17]

II. A General Trend Towards Awarding Reparation to Individual Victims

While the international law on reparation in an interstate framework has – especially due to the work of the ILC and the development of the ARSIWA – been significantly consolidated and clarified, recent decades have witnessed extensive debates on whether individuals can also have a right to reparation under international law. The ARSIWA do not address this issue. Their scope is limited to obligations owed to another State, to several States, or to the international community as a whole. Art. 33(2) recognises that obligations towards individuals may exist, but makes clear that

13 ECCC, Internal Rules, Rule 23 quinquies (1).

14 *J. Torpey* (note 5), 39 ("Paradoxically, the singular of the term connotes a multiplicity of activities, whereas the plural tends to entail only one.").

15 See e.g. the contributions in: Pablo de Greiff (ed.), The Handbook of Reparations, 2006.

16 See the contribution of *Sir Michael Wood* in this issue.

17 See UNGA, 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 on 16.12.2005, UN Doc. A/RES/60/147, 21.3.2006, paras. 18-23.

such obligations are beyond the scope of the ARSIWA and shall not be affected by its provisions.[18]

In order to assess whether individuals have a right to reparation under international law, three questions should be distinguished.[19] Firstly, it has to be asked whether there is a primary rule of international law that offers protection to an individual by granting individual rights. A second question is whether individuals have a right to reparation for a violation of the primary rule of international law. This is not obvious, as within the State-centred framework of international law, it may also only be the States who may claim a violation of individual rights on behalf of their citizens.[20] Ultimately, it is important to analyse whether there are, under the specific circumstances, established procedural rights for individuals to claim reparation, rights sometimes described as tertiary rights.[21] The difference between secondary rights and tertiary rights is possible because – as observed in the 2010 report of the International Law Association (ILA) on "Reparation for Victims of Armed Conflict" – "[u]nder traditional international law, the existence of an individual right is not dependent on the international procedural capacity to assert it".[22]

The question whether there is a right to reparation for victims of armed conflict is, in this generality, difficult to answer. It is much easier to approach this question by distinguishing specific subfields of international law and specific legal regimes under which reparation shall be claimed. These regimes have significantly developed in recent decades and therefore diverse legal requirements exist.

Some international human rights law (IHRL) regimes provide a clear legal foundation for an individual right to reparation. First of all, human rights law offers, on the primary level, rights to individuals where it is ap-

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18 Art. 33(2) ARSIWA: "This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."

19 *V. Bílková*, Victims of War and Their Right to Reparation for Violations of International Humanitarian Law, Miskolc Journal of International Law 4 (2007), 7.

20 See the decision of the German Federal Constitutional Court that took exactly that position: BVerfG, 2 BvR 2660/06, inadmissibility decision of 13.8.2013 –*Varvarin*, esp. paras. 43-47.

21 *V. Bílková* (note 19), 2.

22 ILA, The Hague Conference (2010), Reparation for Victims of Armed Conflict (substantive issues), Comment on Art. 6, para. 2(a). See already (outside the law of armed conflict) PCIJ, *Peter Pàzmàny University* Case, Judgement of 15.12.1933, Ser. A/B, No. 61, 231. See also IACtHR, *Judicial Condition and Human Rights of the Child*, Advisory Opinion No. 17, 28.8.2002, holding 1 of the opinion (p. 79) and concurring opinion of *Cançado Trindade*, paras. 6 and 8. See for a detailed discussion: *A. Peters*, Beyond Human Rights, 2016, 44 et seq.

plicable. The issue of applicability can, of course, be problematic, especially with regard to the extraterritorial application and also in view of a potential conflict with the applicability of international humanitarian law (IHL). However, with the co-applicability of IHRL and IHL becoming widely accepted, human rights provisions in principle also apply in the context of armed conflicts.[23]

Numerous human rights law treaties contain provisions on reparation that oblige the State parties to guarantee effective reparation for violations of the treaties' terms through the domestic legal system.[24] Based on their wording, they do not provide for an individual right under international law to claim reparation, but create an obligation for States to act accordingly. The International Covenant on Civil and Political Rights provides for a

[23] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9.7.2004, ICJ Reports 2004, 136, para. 106 ("[T]he Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law."); see also: UNHRC, General Comment No. 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), UN Doc. CCPR/C/21/Rev.1/Add. 13), 26.5.2004, para. 11. See also *Z. Bohrer/J. Dill/H. Duffy*, Max Planck Trialogues Vol. 2, Applicability of International Humanitarian Law (A. Peters/C. Marxsen eds.), forthcoming 2019.

[24] International Convention on the Elimination of All Forms of Racial Discrimination, 7.3.1966, UNTS 660, 195, Art. 6 ("States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10.12.1984, UNTS, Vol. 1465, 85, Art. 14 ("1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation. 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law."); International Convention for the Protection of All Persons from Enforced Disappearance, 20.12.2006, UNTS, Vol. 2716, 3, Art. 24(4) ("Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.").

right to "effective remedy"[25] which the Human Rights Committee has interpreted to entail an obligation of States to "make reparation to individuals whose Covenant rights have been violated".[26] This approach has also been chosen by the International Law Commission in its Draft Articles on Crimes against Humanity.[27]

In addition to this, some human rights regimes offer individuals a clear right to also claim reparation for violations of their rights. Reparation has to be understood broadly here, in the sense defined above. The regional human rights systems all offer individuals a right to claim reparation and establish concrete procedures for realising this right. Moreover, compensation as one specific form of reparation is foreseen under specific circumstances.[28] Before the European Court of Human Rights (ECtHR) for example, compensation will only be awarded where the Court deems the award of com-

[25] International Covenant on Civil and Political Rights, 16.12.1966, UNTS, Vol. 999, 171, Art. 2(3)(a).

[26] Human Rights Committee, General Comment No. 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant), 26.5.2004, UN Doc. CCPR/C/21/Rev.1/Add. 13, para. 16; ("Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation."); see also Art. 9(5) ICCPR, which contains a right to compensation for unlawful arrest or detention.

[27] International Law Commission, Draft Articles on Crimes against Humanity, Report of the Commission on the work of the sixty-ninth session, 2017, Chapter IV, UN Doc. A/72/10, Art. 12(3), 92 ("Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.").

[28] European Convention on Human Rights (ECHR), UNTS 213, 221, Art. 41 ("If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."); American Convention on Human Rights, 18.7.1978, UNTS 1144, 123, Art. 63(1) ("If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."); Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10.6.1998, Art. 27(1) ("If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.").

pensation "necessary".[29] Accordingly, there is a right to reparation (in the broad sense), but there is no right to (monetary) compensation, as the latter depends on the discretion of the Court. Overall, at least the regional human rights systems acknowledge an individual right to reparation.

In the field of international criminal law the issue of awarding reparation for crimes has attracted much attention and saw significant development. The Statute and Rules of the International Criminal Tribunal for the former Yugoslavia contained some rules on the restitution of property,[30] but referred victims for their reparation claims to domestic courts.[31] The Statute of the International Criminal Court (ICC), by contrast, foresees in Art. 75 the possibility of awarding "reparations to victims".[32] The Internal Rules of the Khmer Rouge Tribunal (ECCC) acknowledge that victims may participate in the criminal proceedings as civil parties and may "seek collective and moral reparations".[33] Also the Kosovo Specialist Chambers may order reparations if an accused is found guilty of a crime.[34] The cost of the reparation award is in principle to be borne by the convicted person. As an alternative avenue, the International Criminal Court, for example, has set up The Trust Fund for Victims that may bear the cost of reparation awards where the convicted person does not have sufficient resources to do so.[35] A significant difference between the ARSIWA framework and reparation awarded in criminal proceedings, therefore, is that under international criminal law the reparation claim is in principle directed against the perpetrator, not against a State.

The general trend for awarding reparation to individuals is expressed also in the work of international *ad hoc* commissions mandated to issue compensation awards after international armed conflicts. The United Nations Compensation Commission (UNCC) was established based on Security Council resolution 687 (1991) in order to deal with claims after Iraq's illegal

29 Art. 41 ECHR.

30 See Art. 24(3) ICTY Statute (as amended 7.7.2009 by S/Res/1877); Rule 105, Rules of Procedure and Evidence of the ICTY (as amended 8.7.2015, Rev. 50).

31 Rule 106(B), Rules of Procedure and Evidence of the ICTY.

32 Art. 75 ICC Statute, see also the more specific rules in the ICC's Rules of Procedure and Evidence (as adopted by the Assembly of States Parties, First session, New York, 3.-10.9.2002, Official Records ICC-ASP/1/3), Rules 94-99.

33 Rule 23(1)(b) Internal Rules (Rev. 9).

34 Law on Specialist Chambers and Specialist Prosecutor's Office, Law No. 05/L-053, Art. 22(8); Rules of Procedure and Evidence before the Kosovo Specialist Chambers, Rule 168.

35 See Rule 98, Rules of Procedure and Evidence (note 32).

invasion of Kuwait in 1990.[36] The UNCC did not, in principle, investigate violations of IHL, but awarded compensation for losses caused by the invasion, the illegality of which under the *jus contra bellum* had been determined by the Security Council.[37] The UNCC did not receive claims by individuals directly, but respective governments and especially appointed agents (where submission through a government was impossible) had to submit the claims *on behalf of individuals*.[38] Governments were then also responsible for the distributions of compensation to successful claimants.[39] Thus, governments played a crucial role as intermediaries, but the individual claimants were treated as the actual rights holder.

Another mechanism that is often referred to as supporting an individual right to reparation is the Eritrea-Ethiopia Claims Commission (EECC) established in 2001 based on an agreement between Eritrea and Ethiopia.[40] Before that commission, a party to the agreement could submit claims "on behalf of its nationals".[41] However, the EECC did not regard the claims to be those of the victims. Rather, the EECC concluded in its Final Award: "The claims before the Commission are the claims of the Parties, not the claims of individual victims."[42]

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[36] UNSC Res. 687, 8.4.1991, UN Doc. S/RES/687(1991), paras. 16-19; see for more details of the UNCC's work the contribution of *M. Kazazi* in this issue.

[37] Only under very specific circumstances claims for violations of IHL could be filed: See *R. Hofmann*, Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation against States under International Law?, in: P.-M. Dupuy, Völkerrecht als Wertordnung, Essays in Honour of Christian Tomuschat, 2006, 351.

[38] UNCC, Provisional Rules for Claims Procedure, UN Doc. S/AC.26/1992/10, 26.6.1992, Art. 5; see on the procedure established before the UNCC also the contribution of *Mojtaba Kazazi* in this issue.

[39] See <https://uncc.ch>.

[40] Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia of 12.12.2000, UN Doc. A/55/686-S/2000/1183, 13.12.2000, Art. 5.

[41] Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia (note 40), Art. 5(8). See for more background: *Michael J. Matheson*, Eritrea-Ethiopia Claims Commission: Damage Awards, in: ASIL Insights, Vol. 13, Issue 13, 4.9.2009.

[42] Eritrea-Ethiopia Claims Commission, Final Award – Ethiopia's Damages Claims, 17.8.2009, Reports of International Arbitral Awards, Vol. XXVI, 631 et seq., para. 209. The Commission continued to state: "Particularly when deciding damages owing for unlawful treatment of POWs, those damages can appropriately be assessed only for the Claimant State, because fixed-sum damages designed to be distributed to each individual who was a prisoner of war would not reflect the proper compensation for that individual. Different POWs were held under different conditions at various camps for various periods of time. Some were injured in the camps, and some died of those injuries. Others were affected adversely in other ways that varied from individual to individual. While the Commission encourages the Parties to compensate appropriately the individual victims of warfare, it calculates the damages owed

Overall, the developments just analysed illustrate that we can witness a general turn away from treating questions of awarding reparation as a mere inter-State affair. There is a general tendency to treat individuals as holders of a right to reparation.

III. A Right to Reparation for Violations of International Humanitarian Law?

But is there a right to reparation specifically for violations of international humanitarian law? Commentators widely agree that reparation should be awarded, at least under certain circumstances. Interestingly, this normative conviction is, at least implicitly, also articulated in the practice of Germany, even though Germany is generally taking position against the existence of an individual right to reparation.[43] After the military strikes on Kunduz, Germany initiated *ex gratia* payments for the victims of the Kunduz military strike that killed almost 100 persons, many of them civilians.[44] *Rainer Hofmann* in his contribution to these Impulses points out that, in view of the reparation mechanisms in other subfields of international law, it is "difficult to accept that the situation should be different under international humanitarian law".[45]

Debates about the establishment of reparation mechanisms beneficial to individual victims of war date back to the early hours of the codification of international humanitarian law. In 1872, co-founder of the International Committee of the Red Cross (ICRC) *Gustave Moynier* already developed the first proposal for an international criminal tribunal which would have had jurisdiction over breaches of the 1864 Geneva Convention.[46] According to this proposal, the tribunal was meant to sentence perpetrators in accord-

by one Party to the other, including for mistreatment of POWs, on the basis of its evaluation of the evidence with respect to the seriousness of the unlawful acts or omissions, the total numbers of probable victims of those unlawful acts or omissions (where those numbers can be identified with reasonable certainty) and the extent of the injury or damage suffered because of those unlawful acts or omissions."

[43] See the statement of the German Federal Government in: Deutscher Bundestag, BT-Drs. 18/4263, 9.3.2015.

[44] The German government paid each family which had lost a member in the air strike the amount of 5000 US$. See Deutscher Bundestag, BT-Drs. 17/3723, 11.11.2010.

[45] *R. Hofmann* in this issue.

[46] *G. Moynier*, Note sur la creation d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la convention de Genève', Bulletin International des Societes de Secours aux Militaires Blesses, Vol. 3, Issue. 11 (1872), 122 et seq.

ance with a (yet to be concluded) international penal code.[47] This proposal included the establishment of a reparation mechanism under which States would have filed claims for compensation of individuals.[48] Whereas the individual perpetrator would have been subject to criminal sanctions, the State on whose side the perpetrator was acting would have had to bear the damages. This, so *Moynier* argued, would be necessary because it would be unfair if the victim were to bear the risk of the perpetrator's insolvency. He also pointed out that it would be beneficial if governments had an immediate financial interest that their citizens respect international humanitarian law.[49]

Since then, legal development has been significant, but it is still subject to far reaching controversy whether a right to reparation is existent under the *lex lata* or whether the call for such a right is rather a *lex ferenda* claim.

On the primary level, it is subject of controversy whether international humanitarian law contains rights of individuals, rather than only obligations for States.[50] The rules are widely formulated as obligations of States so that individuals could be seen as mere "indirect beneficiaries".[51] In that sense *Kate Parlett* holds that IHL "remains consistent with the nineteenth century framework of the international legal system, as a system which creates only interstate rights".[52] However, one should bear in mind that the formulation of IHL rules as obligations of States has not prevented the majority of commentators from assuming that these rules also create obligations for individuals (especially the acting soldiers).[53] It would seem coherent if the bestowal of obligations and rights went hand in hand. Also, the fact that IHL's very aim is to guarantee minimum standards of humanity even in times of armed conflict very much speaks in favour that IHL offers, on a primary level, rights to individuals.[54]

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47 *G. Moynier* (note 46), 130 (Art. 5).
48 *G. Moynier* (note 46), 130 (Art. 7).
49 *G. Moynier* (note 46), 127.
50 See for a discussion of this problem *A. Peters* in this issue.
51 Critical against such arguments: *P. Gaeta*, Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?, in: O. Ben-Naftali (ed.), International Humanitarian Law and International Human Rights Law, 2011, 319; *A. Peters* (note 22), 194 et seq.
52 *K. Parlett*, The Individual in the International Legal System, 2012, 225.
53 *C. J. Greenwood*, Historical Development and Legal Basis, in: D. Fleck (ed.), The Handbook of International Humanitarian Law, 2nd ed. 2008, 39 (para. 134); *R. Wolfrum/D. Fleck*, Enforcement of International Humanitarian Law, in: D. Fleck, The Handbook (note 53), 722 (para. 1434).
54 *A. Peters* (note 22), 201.

Another controversial issue is whether, on a secondary level, individuals have a *right to reparation* for violations of rules of IHL, i.e. whether they can claim the violation of their rights against another State. Some argue that such a right already follows from existing treaty law. This argument rests on Art. 3 of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land[55] and Art. 91 of the 1977 Additional Protocol I (AP I) to the Geneva Conventions.[56] Some have interpreted these provisions to include a right to reparation that can also be claimed by the individual.[57] In fact, based on the wording of these provisions this interpretation seems possible as they are formulated rather broadly. The fact that it was not interpreted in such a manner originally, does not exclude that – in view of changing circumstances and especially the recognition of the individual as a partial subject of international law[58] – the rule would have to be interpreted differently today. Therefore, in order to determine the state of the law we have to analyse which meaning these provisions have been given by the subsequent practice of States.[59] An analysis of practice (and *opinio iuris*) is also required for the analysis of whether a customary rule regarding an individual right to reparation has emerged.

Looking at the practice of domestic courts, the picture is sobering and still characterised by "the use of avoidance doctrines"[60] – aiming to prevent victims to claim reparation before domestic courts. In recent decades nu-

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55 Art. 3 sentence 1 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18.10.1907, 205 CTS 277 ("A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation.").

56 Protocol Additional to the Geneva Conventions of 12.8.1949, and relating to the protection of victims of international armed conflicts (Protocol I), 8.6.1977, UNTS 1125, 3, Art. 91 ("A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation.").

57 See *F. Kalshoven*, State Responsibility for Warlike Acts of the Armed Forces, ICLQ 40 (1991), 835 et seq. ("[T]he Article [Article 3 of the Hague Convention of 1907] is unmistakably designed to enable these people to present their bills directly to the State, i.e. to its competent (military or other) authorities, either during or after the war."); see also *C. Greenwood*, Expert Opinion, Rights to Compensation of Former Prisoners of War and Civilian Internees under Article 3 of Hague Convention No. IV 1907, quoted in: J.-M. Henckaerts/L. Doswald-Beck, Customary International Humanitarian Law, Vol. II, Part 2, 2005, 3592 ("It is my opinion […] that Article 3 of the Hague Convention, the Hague Regulations and customary international law of war confer rights upon individuals, including rights to compensation, in the event of a violation, which the individual can assert against the State of the wrongdoer. The right exists under international law.").

58 See generally on the role of the individual in international law: *A. Peters* (note 22).

59 See *R. Hofmann* (note 37), 348; *V. Bílková* (note 19), 3; *A. Peters* (note 22), 212.

60 *L. Zegveld*, Remedies for Victims of Violations of International Humanitarian Law, Int'l Rev. of the Red Cross 85 (2005), 512.

merous attempts have been made by victims of armed conflicts to claim reparation in domestic courts, but these courts have largely dismissed such claims.[61] German courts have consistently denied individual claims for violations of IHL.[62] In its latest decision on the matter, the German Federal Court of Justice held in its 2016 *Kunduz* case that Art. 3 of the 1907 Hague Convention (IV) and Art. 91 AP I would "not constitute individual rights for damages and compensation".[63] The court held further: "compensation for international wrongful acts of a State against citizens of another State can generally only be claimed by the home State of the injured citizens".[64] Japanese Courts have also been dismissive of individual rights to reparation, as have been US courts.[65] Court decisions in favour of a right to reparation are, by contrast, rare.[66]

However, we also find strong support for an individual right to reparation especially in the practice and declarations of international bodies. In that sense, the then President of the International Criminal Tribunal for the Former Yugoslavia (ICTY) Judge *Claude Jorda*, on behalf of all judges of the ICTY, submitted a report to the UN Secretary General in which he held that the

> "integration of human rights into State responsibility has removed the procedural limitation that victims of war could seek compensation only through their own Governments, and has extended the right to compensation to both nationals and aliens".[67]

Similarly, the International Commission of Inquiry on Darfur held that

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61 See for an overview of the practice of domestic courts: *S. Weill*, The Role of National Courts in Applying International Humanitarian Law, 2014, 168 et seq.; *A. Peters* (note 22), 204 et seq.

62 See the decisions by the Federal Counstitutional Court: BVerfG, 2 BvR 1476/03, 15.2.2006, para. 20 (*Distomo*); BVerfG, 2 BvR 2660/06, 13.8.2013, paras. 43-47 (*Varvarin*).

63 German Federal Court of Justice (Bundesgerichtshof), Judgement of 6.10.2016, file No.: III ZR 140/15, para. 17, translation by author (German orginal: "Diese Regelungen statuieren zwar ein besonderes völkerrechtliches Haftungsregime für Verstöße gegen das humanitäre Kriegsvölkerrecht, begründen jedoch keine individuellen Schadensersatz- oder Entschädigungsansprüche.").

64 German Federal Court of Justice (Bundesgerichtshof), Judgement of 6.10.2016, file No.: III ZR 140/15, para. 16, translation by author (German original: "Schadensersatzansprüche wegen völkerrechtswidriger Handlungen eines Staates gegenüber fremden Staatsangehörigen stehen grundsätzlich weiterhin nur dem Heimatstaat zu […].").

65 See generally for a discussion of state practice, *L. Zegveld* (note 60), 507 et seq.

66 See for references: ILA (note 22), comment to Art. 6, para. 2(g).

67 Letter dated 12.10.2000 from the President of the International Tribunal for the Former Yugoslavia addressed to the Secretary-General, UN Doc. S/2000/1063, 3.11.2000, para. 20.

> "there has now emerged in international law a right of victims of serious human rights abuses (in particular, war crimes, crimes against humanity and genocide) to reparation (including compensation) for damage resulting from those abuses".[68]

Importantly, the ICJ found in its 2004 *Israeli Wall* advisory opinion

> "that Israel also has an obligation to compensate, in accordance with the applicable rules of international law, all natural or legal persons having suffered any form of material damage as a result of the wall's construction".[69]

The legal foundation for this view is not spelled out, but as Israel is the occupier (herewith IHL being a relevant legal framework) and as we do not even have a State that could file a claim on behalf of injured citizens, this advisory opinion has to be seen as evidence of an individual right to reparation.[70]

A further very important document is the resolution on 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". This document, adopted by the UN General Assembly, contains 13 principles and guidelines and, *inter alia*, holds that

> "victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation".[71]

As a resolution of the General Assembly, this document is not binding as such, but it is subject of debates whether it, or at least parts of it, set out rights and obligations already existing under international law or whether its provisions have been accepted in the practice of States.[72]

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[68] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18.9.2004, 25.1.2005, para. 597.

[69] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9.7.2004, ICJ Reports 2004, 136, para. 153, see also para. 152.

[70] At the same time it is not plausible to assume that the ICJ had to refer to individuals only in lack of the existence of a Palestinian State, as the ICJ could have assumed that claims must be filed by the Palestinian National Authority. See *E. Schwager*, The Right to Compensation for Victims of an Armed Conflict, Chinese Journal of International Law 4 (2005), 429.

[71] Basic Principles (note 17), para. 18.

[72] See the reflections on the Basic Principles in the contributions of *C. Sandoval* and *F.-J. Langmack* in this issue.

Further important documents are the reports of the International Law Association on "Reparation for Victims of Armed Conflict",[73] one on substantive issues (2010)[74] and one on procedural issues (2014).[75]

The main argument for an individual right to reparation rests on a broader acknowledgment of the overall legal developments of the past decades. Supporters of an individual right to reparation underline a general development of the law in various fields, indicating a – as the International Law Association describes it – "cross-fertilization between the different regimes of international law"[76] and an overall trend to also give standing to the individual in regard to claims for violations of international law. As discussed above, we find this development in human rights law, international criminal law, as well as in the practice of international *ad hoc* mechanisms. From the perspective of the sources of international law this raises the question of how much weight we should assign to this more general practice *vis-à-vis* a more specific State practice dealing more narrowly with violations of international humanitarian law.[77]

Unsurprisingly, the conclusions drawn in the academic debate point in opposite directions. Emphasising the overall trend towards the acknowledgment of the status of the individual in international law we find the conclusion that a customary right to reparation for victims of serious violations of IHL has already emerged.[78] Emphasising the lack of supporting practice and the existence of contrary State practice (especially by courts), such a right is strongly opposed by other commentators.[79] Most commonly we find the acknowledgment of a certain trend in the development of international law,[80] indicating that an individual right is emerging. The International Committee of the Red Cross (ICRC) sees

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73 See the contribution of *R. Hofmann* in this issue.

74 ILA (note 22).

75 ILA, Washington Conference (2014), Reparation for Victims of Armed Conflict (procedural issues).

76 ILA (note 22), commentary to Art. 6, para. 2(n).

77 See on this point the impulse of *C. Marxsen* in this issue.

78 *A. Fischer-Lescano*, Subjektivierung völkerrechtlicher Sekundärregeln, AVR 45 (2007), 380; *P. Gaeta* (note 51), 310, 326; *C. Ferstmann*, The Right to Reparation for Victims of Armed Conflict, in: M. Lattimer/P. Sands (eds.), The Grey Zone: Civilian Protection Between Human Rights and the Laws of War, 2018, 229.

79 See for example: *C. Tomuschat*, Reparation for Victims of Grave Human Rights Violations, Tul. J. Int'l & Comp. L. 10 (2002), 183 ("At the present time there exists no general rule of customary international law to the effect that any grave violation of human rights creates an individual reparation claim under international law.").

80 *V. Bílková* (note 19), 9 ("[T]he circle of right-bearers entitled to claim reparation under IHL remains limited to states, but […] this circle is slowly enlarging to include the individual victims of IHL violations."); *C. Evans*, The Right to Reparation in International Law for Vic-

"an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State".[81]

IV. Fields of Contestation and Open Questions

When raising the question whether individual victims of armed conflict have a right to reparation and how it can be realised, we can identify five issue areas that demand further research and reflection.

1. Exploring the existence of a right to reparation: As evident from the discussion so far, it remains an unsettled question whether an individual right to reparation exists or is about to emerge under IHL. As usual when confronted with emerging norms, legal scholarship has to continuously analyse new practice and expressions of legal views issued by States (and other international actors) in order to establish evidence for or against the emerging legal view. This debate, however, appears to be stuck and currently, in fact, seems to circle around a rather theoretical question. Without further development in practice, especially without the establishment of mechanisms through which violations of rights can be claimed, the assertion of a right to reparation under IHL is unable to unfold its benefits for victims.

2. Exploring alternative avenues: It can therefore be helpful to further explore the potentials of existing legal mechanisms. While initiatives to establish a general legal (or even only political) international mechanism to address violations of IHL are not making any significant progress,[82] it seems that the role of human rights has not been fully explored and made use of yet for establishing and shaping how reparation has to be made for victims of violations of IHL. With the extra-territorial applicability of human rights law to situations of armed conflict also accepted at least in principle, it seems that domestic courts as well as international human rights courts could play a more substantial role in deciding on violations of IHL

tims of Armed Conflict, 2012, 231 ("[T]he right to reparation is gaining customary recognition."); see also: *E.-C. Gillard*, Reparation for Violations of International Humanitarian Law, Int'l Rev. of the Red Cross 85 (2003), 536.

[81] ICRC, Customary IHL Database, <https://ihl-databases.icrc.org>, Rule 150, para. 27.

[82] See on recent initiatives aiming to establish mechanisms that could enhance States' compliance with IHL: *J. Pejic*, Strengthening Compliance with IHL: The ICRC-Swiss Initiative, Int'l Rev. of the Red Cross 98 (2016), 315 et seq.

in the future.[83] While there is certainly a stony path ahead, it seems that human rights law should and does play a more significant role in regard to reparation for victims of armed conflict than is currently acknowledged in the jurisprudence of domestic courts. For example, it is difficult to understand how the German Federal Court of Justice in its *Kunduz* decision managed to proceed without even discussing the possible effects of Germany's extraterritorial human rights obligations under the European Convention on Human Rights (ECHR). With Germany's obligations under IHRL also applicable extraterritorially and during armed conflict,[84] it would have been possible and legally required to interpret domestic tort law (the German *Amtshaftungsrecht* that was decisive in the *Kunduz* case) in light of these IHRL obligations.[85] The saga of *Kunduz* is, in any case, not over yet. With a constitutional complaint of the plaintiff pending before the Federal Constitutional Court as well as with a potential follow up case before the ECtHR, we will have further developments on the matter in the years to come.

3. Exploring the frictions, drawbacks, and challenges for cases of mass violations: In addition to these challenges of establishing and realising the right to reparation in general, substantive hurdles occur in practical terms where massive numbers of claims shall be processed. This is even true in situations in which governments decide to establish reparation mechanisms beneficial for individuals as in the cases of the UNCC or the EECC mentioned above. A significant challenge lies in the generalisation of the idea of reparation to *all* victims of violations of IHL during armed conflict. Many of the established mechanisms, for example in international criminal law or IHRL, award reparation for relatively small numbers of individual victims. It is by far a different matter to generalise reparation mechanisms and make them fit to address violations of rights of large numbers of victims – a necessary consequence of assuming a general individual right to reparation. As a right to reparation is dependent on the violation of a primary rule, reparation mechanisms will need to be able to establish the existence of such violations. Reparation mechanisms will usually not be in the favourable position of the UNCC, for which the violation of a primary rule (in case of the UNCC the violation of the *jus contra bellum*) had been determined already by the UN Security Council. Rather, mechanisms will have to bear the burden of estab-

83 See in this regard the contribution of *L. Beinlich* in this issue.

84 See for a discussion of these matters in regard to Germany's military involvement in Afghanistan: *A. Fischer-Lescano/S. Kommer*, Entschädigung für Kollateralschäden?, AVR 50 (2012), esp. 175 et seq.

85 See *P. Starski/L. Beinlich* (note 4), 299 et seq.

lishing violations in concrete cases, which creates substantial challenges when confronted with a large number of violations and victims.

Here another point of debate also becomes relevant, namely whether the right to reparation should be limited to *serious* violations of IHL (as proposed by the UN Basic Principles),[86] or whether the right should be seen to exist for every violation of IHL, as proposed in the ILA report.[87] Obviously the workload for a reparation mechanism would be significantly affected by this choice.

Moreover, generalising the right to reparation also takes effect on the possible substance of reparation awards. Whereas in an interstate framework the ARSIWA foresee *full* reparation, it is – in scenarios with massive numbers of victims – unrealistic to allow for full reparation when every victim shall be able to claim reparation (even though the UN Basic Principles foresee such a right to full reparation[88]). This is even more so the case in view of the fact that the economically favourable circumstances that the UNCC faced (where sufficient revenues from the export of oil guaranteed that the reparation awards could be paid by Iraq) will likely remain the exception. Where the number of victims is high and resources are limited, some sort of limitation appears to be a practical necessity. It seems that the establishment of criteria for such limitations in concrete cases will only be possible through procedural approaches that need to be spelled out in more detail.[89] At the same time it raises the question whether there is a substantive core of the right to reparation that must be guaranteed under all circumstances. The necessity of limiting the potential numbers of claim holders is also relevant with regard to the question of legal succession.[90]

In general terms it should also be borne in mind that the amount of reparation awards generally due after an armed conflict may also have impact on the general possibilities for ending conflicts. Overburdening the parties to a conflict by demanding too much could backfire and create an incentive to protract armed conflicts. A robust right to reparation (especially when

[86] UN Basic Principles (note 17), para. 15.

[87] ILA (note 22), commentary to Art. 4, para. 3 ("As an important deviation from the Basic Principles, which are restricted to serious violations of international humanitarian law and gross violations of international human rights law, the present Declaration does not set a threshold of gravity. It is the position of the Committee that from a normative point of view, there are no compelling reasons to a priori limit the right to reparation to infringements of a certain gravity.").

[88] UN Basic Principles (note 17), para. 18.

[89] See generally on procedural mechanisms for reparation mechanisms: ILA (note 75); see further on the problem of waivers and limitations of reparation claims *S. Furuya's* contribution in this issue.

[90] See on this problem *N. Wühler's* contribution in this issue.

made in regard to compensation claims) might make the conclusion of peace treaties a more difficult affair than it already is. There could be less inclination to end conflicts if the end of the conflict usually went hand in hand with – from the perspective of the parties to the conflict – an unbearable financial burden.

4. The lack of an overall coherent system of awarding reparation: An issue that remains understudied is what the effects of the multiplicity of rights-holders and claimants as well as potentially obligated parties and actors are. (Potential) rights holders include States (for war reparations) and individuals. Individuals could bring up claims against another State and against the individual perpetrators for violations they have suffered themselves. States on the other hand could claim losses in regard to State infrastructure, but it is unclear to which extent States could also claim violations suffered by its citizens. There is a competition of claims that calls for general principles that would be capable of providing a general and coherent framework of awarding reparation after armed conflicts.[91]

5. Remaining lacunae: In addition to these challenges, we should not lose sight of the fact that legal development significantly lags behind the current realities of armed conflicts. In that sense international law is still trying to come to terms with a kind of war that is, in terms of frequency, not the most common form of conflict today, i.e. with conflicts in which violations of IHL are carried out mainly by States. Many conflicts today, however, are to a significant extent driven by non-State actors, with States occupying one, but oftentimes not even the most important role. Outside the framework of international criminal law (where the reparation award is directed against the individual) we lack the legal tools for addressing such types of situations and for establishing the responsibility of non-State actors, even though they cause many of the most heinous violations of IHL.

Moreover, we should also bear in mind that we do not have legal tools to address situations in which no violation of IHL rules has occurred. This may at times be a difficult consequence, and in the eyes of those bearing the consequences of collateral damages, appear to be a (morally) unjustified result.

[91] *A. Peters* (note 22), 212 suggests that the individuals' right to reparation would be subsidiary to any State claims on behalf of citizens.

V. The Contributions to These Impulses

The contributions to this focus section address various aspects of the issues that have just been mentioned. The following collection of short essays results from the third workshop of the "Max Planck Trialogues on the Law of Peace and War" which was dedicated to the topic of reparation for victims of armed conflict.[92] The contributors to the current symposium tackle specific issues that came up during the debate, analysing one layer of the complex set of interrelated problems.

This symposium starts with *Michael Wood's* call for conceptual and terminological clarity. A number of contributions then address various aspects in regard to the existence of an individual right to reparation under current international law. *Anne Peters* analyses individual rights to reparation as extensions of individual rights under international humanitarian law. *Rainer Hofmann* explains the work of the International Law Association on the topic. *Letizia Lo Giacco* reflects on the correlation between individual rights and State obligations, and *Carla Ferstmann* on the relationship between inter-State reparation and individual entitlements. The contributions of *Clara Sandoval* and *Fin-Jasper Langmack* tackle the role and significance of the UN's Basic Principles and Guidelines on the Right to Remedy and Reparation. *Carolyn Moser* introduces recent practice in regard to reparation within the EU's security and defence activities and *Christian Marxsen* analyses what different theories of customary international law have to say about the individual right to reparation under IHL.

The second group of contributions provides reflections on specific aspects and challenges of the practice of awarding reparation. *Franziska Brachthäuser* and *Anton Haffner* raise the question whether reparation awards should be used to transform societies. *Shuichi Furuya* reflects on the possibility of waivers and limitations for the reparation claims of victims, and *Norbert Wühler* raises the question of how to deal with legal succession in reparation claims. *Mojtaba Kazazi* presents the work of the United Nations Compensation Commission. Recent jurisdiction of the ICC is analysed by *Thore Neumann,* and *Matthias Hartwig* raises some fundamental

[92] The Max Planck Trialogues are a book series of the MPIL (edited by *Anne Peters* and *Christian Marxsen*) that is published with Cambridge University Press. In a Max Planck Trialogue, three authors discuss one topic within the international law surrounding armed conflict. Each trio is composed so as to engage different modes of legal thinking, intellectual paradigms, regional backgrounds, and professional specialisation. By bringing the pluralism of premises and methods to the fore, the Trialogues facilitate the emergence and global refinement of common legal understandings.

challenges for the question of reparations in the time of the international fight against terrorism.

The two contributions of the last section ultimately address the practice and potential role of domestic courts. *Larissa van den Herik* presents recent Dutch litigation related to reparation for decolonisation violence, and *Leander Beinlich* discusses how procedural human rights could function as a lever to strengthen the role of domestic courts for giving access to justice for victims.