# Introduction

## *The Emergence of an Individual Right to Reparation for Victims of Armed Conflict*

Christian Marxsen

The Max Planck Trialogues on the Law of Peace and War have so far dealt with *Self-Defence against Non-State Actors*[1] and with *Law Applicable to Armed Conflict*.[2] After taking up pressing topics of the *ius contra bellum* and *ius in bello* in its first two volumes, the series focuses on reparation for victims of armed conflict in this third, and thus it is dedicated to the *ius post bellum*.[3]

### I. REPARATION IN INTERNATIONAL LAW

Demands for reparation have many facets and emerge on multiple levels: between States for present violations of the law; for victims of genocide, war crimes, and crimes against humanity;[4] for groups of victims with particular vulnerabilities;[5] and also for historical wrongs,[6] such as colonialism,[7] violence

[1] Mary Ellen O'Connell, Christian J. Tams, and Dire Tladi, *Self-Defence against Non-State Actors*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 1 (Cambridge: Cambridge University Press, 2019).

[2] Ziv Bohrer, Janina Dill, and Helen Duffy, *Law Applicable to Armed Conflict*, Max Planck Trialogues on the Law of Peace and War (Anne Peters and Christian Marxsen, series eds), vol. 2 (Cambridge: Cambridge University Press, 2020).

[3] Carsten Stahn, Jennifer S. Easterday, and Jens Iverson (eds), Jus Post Bellum: *Mapping the Normative Foundations* (Oxford: Oxford University Press, 2014).
The following text builds on Christian Marxsen, 'Unpacking the International Law on Reparation for Victims of Armed Conflict', *Heidelberg Journal of International Law* 78 (2018), 521–40.

[4] See the comprehensive analysis in Carla Ferstman and Mariana Goetz (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Leiden: Brill, 2nd edn, 2020).

[5] See, e.g., Francesca Capone, *Reparations for Child Victims of Armed Conflict* (Cambridge: Intersentia, 2017).

[6] Gerry Johnstone and Joel Quirk, 'Repairing Historical Wrongs', *Social & Legal Studies* 21 (2012), 155–70; Daniel Butt, *Rectifying International Injustice: Principles of Compensation and Restitution between Nations* (Oxford: Oxford University Press, 2008).

[7] See, e.g., Larissa van den Herik, 'Reparation for Decolonisation Violence: A Short Overview of Recent Dutch Litigation', *Heidelberg Journal of International Law* 78 (2018), 629–33;



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committed against indigenous peoples,[8] and slavery.[9] This Trialogue deals with one specific aspect of the reparation debate – namely, reparation for victims of armed conflict. It provides a new perspective on the issue by focusing on practical experiences in the implementation of individual reparation.

The concept of reparation is firmly established in international law. It originally emerged as a concept of war reparations – that is, the payments or transferral of goods that (most commonly) the defeated party in a war had to pay to the victors.[10] The term 'war' in 'war reparations' was, before World War II, a redundant modifier because no general concept of reparation existed.[11] Today, the situation is different. An established rule of customary international law stipulates that States are obliged to provide reparation for violations of international law, including violations committed outside of the context of armed conflicts. This is clearly expressed in the International Law Commission's 2001 Draft Articles on the Responsibility of States for International Wrongful Acts (ARSIWA).[12]

Reparation today has to be understood broadly, referring to restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition.[13] A highly controversial issue under the current legal framework remains the question of whether – and if so, under what conditions – *individuals* may be seen to have a right to reparation under international law.

Jeremy Sarkin, *Colonial Genocide and Reparations Claims in the 21st Century* (Westport, Conn.: Praeger Security International, 2009).

8 Federico Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford: Oxford University Press, 2008).

9 Cf. the current debate on reparation for slavery: H.R. 40 – Commission to Study and Develop Reparation Proposals for African-Americans Act, 116th Congress 1st Session, Introduced in House 3 January 2019, available at www.congress.gov/bill/116th-congress/house-bill/40/text.

10 For an investigation of historical practices of awarding reparation, see Shava Musa, *Victim Reparation under the* Ius Post Bellum (Cambridge: Cambridge University Press, 2019).

11 John Torpey, 'Victims and Citizens: The Discourse on Reparation(s) at the Dawn of the New Millenium', in Koen de Feyter *et al*. (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Antwerpen: Intersentia, 2005) 35–50 (36).

12 See Arts 1, 12 and 31 of International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission*, 2001, vol. II, pt 2, 26 *et seq*.

13 See *ibid*., Arts 34–7 and 48; International Law Association, The Hague Conference, 'Reparation for Victims of Armed Conflict (Substantive Issues)', *International Law Association Reports of Conferences* 74 (2010), 291–345 (323–8; Arts 7–10). See further the UN Basic Principles, which also foresee 'rehabilitation' as a separate form of reparation: 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, Annex to GA Res. 60/147 of 16 December 2005, paras 18–23.

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A remark is warranted regarding the terminology concerning reparation, because the use of such terminology is often inconsistent. The plural form – namely, reparations – is used to refer to 'war reparations'.[14] When referring to a right to reparation of individuals, the singular form may be used.[15] Sometimes, however, the term *reparations* is used to describe one specific form of reparation – namely, compensation.[16] Plenty of scholarly publications also use the plural form as the general term covering all forms of reparation.[17] Likewise, in international criminal law, the plural form is frequently used.[18] For the sake of conceptual clarity, it seems best to speak of a (potential) right of victims to *reparation* and to reserve the plural form for referring to *war reparations*.[19]

The establishment of reparation mechanisms for victims of war was already a matter of debate in the early days of the codification of international humanitarian law (IHL). In 1872, Gustave Moynier, co-founder of the International Committee of the Red Cross (ICRC), presented a proposal for an international criminal tribunal that was supposed to have jurisdiction over breaches of the 1864 Geneva Convention.[20] Moynier suggested that this tribunal should have the power to sentence perpetrators based on an international penal code, which he also proposed to establish.[21] Furthermore, Moynier's proposal included a reparation mechanism under which States would have to file claims for the compensation of individuals.[22] However, the reparation award was not to be borne by the sentenced individual but by the State on whose side the individual was acting. It would be unfair, Moynier argued, if the victim were to bear the risk of the perpetrator's inability to pay. Moynier also pointed out the benefits of governments having an immediate financial interest in their citizens respecting IHL.[23]

[14] On that point, see Michael Wood, 'The Rights of Victims to Reparation: The Importance of Clear Thinking', *Heidelberg Journal of International Law* 78 (2018), 541–3.

[15] See, e.g., UN Basic Principles (n. 13).

[16] See Torpey, 'Victims and Citizens' (n. 11), 39.

[17] See, e.g., the contributions in Pablo de Greiff (ed.), *The Handbook of Reparations* (Oxford: Oxford University Press, 2006).

[18] See Art. 75(1) of the Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, 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) of the Internal Rules (Rev. 9) of the Extraordinary Chambers in the Courts of Cambodia (ECCC).

[19] Wood, 'The Rights of Victims to Reparation' (n. 14), 541.

[20] Gustave Moynier, 'Note sur la création d'une institution judiciaire internationale propre à prévenir et à réprimer les infractions à la convention de Genève', *Bulletin International des Sociétés de Secours aux Militaires Blessés* 3(11) (1872), 122–31.

[21] *Ibid.*, 130 (Art. 5).

[22] *Ibid.*, 130 (Art. 7).

[23] *Ibid.*, 127.

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There have been significant legal developments since then, but whether an individual right to reparation exists is still contested. The ARSIWA address only those obligations owed to States or to the international community as a whole. And they explicitly state that those Articles comprising Part 2 (relating to the content of responsibility) are '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'.[24] This clause suggests – or at least allows for – an obligation of States to make reparation towards individuals outside the scope of the ARSIWA.

Analytical clarity over whether an individual right to reparation exists may be achieved by means of a three-step approach.[25] First, there must be a primary rule of international law (in IHL or elsewhere) that grants individual rights. This is a necessary precondition because individual reparation can accrue only out of the violation of a legal position that is attributed to the individual. Second, it is relevant to determine whether international law also grants individuals the right to claim reparation for a violation of a primary rule of international law. This is by no means obvious: as a legal order traditionally addressing inter-State relations, international law can be interpreted as enabling only *States* to claim violations of the rights of their citizens against other States.[26] Asserting a victim's secondary right to claim reparation is not, however, sufficient to give reparation claims effect in practice. As the International Law Association observed in its 2010 report 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'.[27] Thus

[24] Art. 33(2) ARSIWA. The commentary to Art. 28 further states that this article 'does not exclude the possibility that an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States. This follows from article 1, which covers all international obligations of the State and not only those owed to other States.' Draft Articles (n. 12), 87 (para. 3).

[25] Veronika Bílková, 'Victims of War and Their Right to Reparation for Violations of International Humanitarian Law', *Miskolc Journal of International Law* 4 (2007), 1–11 (7).

[26] See the decision of the German Federal Constitutional Court that took exactly that position: BVerfG, 2 BvR 2660/06, Inadmissibility Decision of 13 August 2013 (*Varvarin*), esp. paras 43–7.

[27] International Law Association, 'Reparation for Victims of Armed Conflict (Substantive Issues)' (n. 13), 310 (comment on Art. 6, para. 2a). See (outside the law of armed conflict) PCIJ, *Peter Pázmány University Case*, Judgment of 15 December 1933, Ser. A/B, No. 61, 231. See also IACtHR, *Judicial Condition and Human Rights of the Child*, Advisory Opinion No. 17, 28 August 2002, holding 1 of the opinion (79) and concurring opinion of Judge Cançado Trindade, paras 6 and 8. For a detailed discussion, see Anne Peters, *Beyond Human Rights* (Cambridge: Cambridge University Press, 2016), 44–50.

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a third step becomes crucial. Tertiary rights are necessary to establish sufficient procedural rights for individuals to claim reparation.[28]

This three-pronged approach illustrates the complexity of the legal issues at play. There are hardly clear-cut or across-the-board answers to questions regarding the right to reparation for victims of war because the existing rules on all three levels are manifold and vary in different subfields of international law.

## II. DEVELOPMENTS TOWARDS AN INDIVIDUAL RIGHT TO REPARATION

Legal developments towards an individual right to reparation can be traced within various levels of international law and they are extensively analysed by the authors of this volume. Numerous regimes of international human rights law provide a clear legal foundation for an individual right to reparation. First of all, at the primary level, human rights law establishes individual rights. While the issue of the applicability of human rights law during armed conflict has long been (and remains) a subject of controversy, it is now widely accepted that, as a matter of principle, human rights law applies alongside IHL during armed conflict.[29] Hence, notwithstanding the controversial details of applicability, it is at least in principle possible for victims of armed conflict to rely on human rights law.[30]

Moreover, numerous human rights law regimes also contain provisions on reparation. In most cases, these obligations are not expressed as an individual right to claim reparation but rather as an obligation of the State to guarantee effective reparation within the domestic legal system.[31] For example, the International Covenant on Civil and Political Rights sets out States'

[28] Bílková, 'Victims of War and Their Right to Reparation' (n. 25), 2. It is worth mentioning that the existence of concrete legal procedures (third level) for victims to claim reparation is logically independent of whether a general right to reparation and a right to claim reparation actually exists. It may well be that a State establishes concrete legal procedures for reparation without assuming that victims had a prior right hereto. In that sense, the State would be creating the right and not responding to it.

[29] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004 (*Israeli Wall* Advisory Opinion), 136, para. 10; 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 May 2004, para. 11.

[30] See the detailed investigation of the applicability of IHL and human rights law to armed conflict in Bohrer *et al.*, *Law Applicable to Armed Conflict* (n. 2).

[31] Art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, 7 March 1966, 660 UNTS 195; Art. 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85; Art. 24(4) of the International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, 2716 UNTS 3.

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obligations to ensure that any person whose rights or freedoms under the Covenant have been violated shall have an effective remedy.[32] The Human Rights Committee has interpreted this to entail an obligation of States to 'make reparation to individuals whose Covenant rights have been violated'.[33] We find the same approach in the International Law Commission's Draft Articles on Crimes against Humanity.[34]

In contrast with such State-centred approaches, some regimes have established a procedure for individual claims.[35] In some instances, the regional systems even foresee compensation as one form of reparation.[36] The European Court of Human Rights (ECtHR), for example, may award 'just satisfaction' where the Court deems that 'necessary'.[37] Even where the Court does not award compensation, it considers its judgment to be a form of satisfaction.

Significant legal developments have also taken place in international criminal law. Before the International Criminal Tribunal for the former Yugoslavia (ICTY), only claims regarding the restitution of property were foreseen in the ICTY Statute.[38] The Rules of the ICTY explicitly deferred claims for compensation to domestic courts.[39] A significant innovation, then, was the establishment of a reparation mechanism before the International Criminal Court (ICC).[40] Moreover, the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia (ECCC)[41] and the Kosovo Specialist Chambers both foresee the possibility of victims seeking reparation.[42]

[32] Art. 2(3)(a) of the International Covenant on Civil and Political Rights, 16 December 1966, UNTS, vol. 999 (hereinafter ICCPR), 171.

[33] Human Rights Committee, General Comment No. 31 (n. 29), para. 16; see also Art. 9(5) ICCPR, which contains a right to compensation for unlawful arrest or detention.

[34] International Law Commission, Draft Articles on Crimes against Humanity, 2019, Ch. IV, UN Doc. A/74/10, Art. 12(3), 16.

[35] Art. 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221 (hereinafter ECHR); Art. 44 of the American Convention on Human Rights, 18 July 1978, 1144 UNTS 123 (hereinafter IACHR).

[36] Art. 41 ECHR; Art. 63(1) IACHR; Art. 27(1) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998.

[37] Art. 41 ECHR.

[38] See Art. 24(3) ICTY Statute (as amended 7 July 2009 by S/Res/1877); Rule 105 of the Rules of Procedure and Evidence of the ICTY (as amended 8 July 2015, Rev. 50).

[39] Rule 106(B) of the Rules of Procedure and Evidence of the ICTY.

[40] 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 September 2002, Official Records ICC-ASP/1/3), Rules 94–9.

[41] See Rule 23(1)(b) Internal Rules (Rev. 9). The Internal Rules limit victims' rights to 'seek collective and moral reparations'.

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

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In accordance with the individual responsibility of perpetrators that criminal proceedings seek to establish, the reparation award is, in principle, to be borne by the convicted person. Thus, in contrast to the rules on reparation within the ARSIWA framework, reparation in criminal proceedings does not lead to a claim against a State. This, of course, imposes a significant burden on victims because perpetrators often do not have the resources to bear the reparation award. This fact has led to the creation of models of collective funding for reparation awards within criminal proceedings – most notably, the Trust Fund for Victims for awards in proceedings before the ICC.[43]

The trend towards awarding reparation to victims has further manifested in the proceedings before *ad hoc* international commissions established to issue compensation awards after international armed conflicts. Especially noteworthy are the United Nations Compensation Commission (UNCC), established by the Security Council to deal with compensation claims after Iraq's invasion of Kuwait in 1990, and the Eritrea–Ethiopia Claims Commission (EECC), established in 2001 and based on an agreement between the two countries. These mechanisms will be thoroughly analysed and assessed throughout this volume: Shuichi Furuya focuses especially on international *ad hoc* reparation mechanisms; Cristián Correa provides an in-depth discussion of the UNCC and the EECC, as well as of various domestic reparation programmes; and Clara Sandoval focuses on the practice of awarding reparation before the Inter-American Court of Human Rights (IACtHR) and ECtHR.

A highly contested question is whether these developments have also led to the emergence of an individual right to reparation for violations of IHL. Underpinning the debate is an acknowledgement that, at least from a normative standpoint, the legal situation under IHL should be no different from that under other subfields of international law, especially human rights law. In fact, as Rainer Hofmann points out, it is 'difficult to accept that the situation should be different under international humanitarian law'.[44]

However, plenty of legal challenges remain, on all of the three levels that are necessary for a robust right to reparation. On the primary level, it remains contested whether IHL contains individual rights or whether it sets out only the obligations of States. The background to this controversy is that IHL rules – based on their wording – mostly establish State duties, so that individuals

[43] See Rule 98 of the Rules of Procedure and Evidence of the ICTY (n. 38).

[44] Rainer Hofmann, 'The 2010 International Law Association Declaration of International Law Principles on Reparation for Victims of Armed Conflict', *Heidelberg Journal of International Law* 78 (2018), 551–4 (553).

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could be viewed as 'indirect beneficiaries' only.[45] Ziv Bohrer argues in this direction, pointing out that IHL is focused on obligation-bearers, not on rights-holders, which – so he argues – is more effective in protecting individuals.[46] Kate Parlett concludes that IHL 'remains consistent with the nineteenth century framework of the international legal system, as a system which creates only interstate rights'.[47] This conclusion, however, is by no means compelling. The 'obligations language' has not prevented anybody from assuming that IHL creates obligations not only for States but also for acting soldiers,[48] so that it would seem coherent if the bestowal of obligations and rights were to go hand in hand. Rather, the very aim of IHL is to guarantee minimum standards of humanity in times of armed conflict and this implicit focus on the individual supports the case for IHL-based individual rights.[49]

Even more controversial is whether, on the secondary level, individuals have a right to reparation for violations of IHL (or whether only States have the right to claim violations on behalf of their citizens). Existing treaty law provides an important starting point. Article 3 of the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land[50] and Article 91 of the 1977 Additional Protocol I (AP I) to the Geneva Conventions[51] contain an obligation for States to pay compensation. Based on their wording,

[45] For criticism of such arguments, see Paola Gaeta, 'Are Victims of Serious Violations of International Humanitarian Law Entitled to Compensation?', in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (Oxford: Oxford University Press, 2011), 305–27 (319); Peters, *Beyond Human Rights* (n. 27), 194–202.

[46] Ziv Bohrer, 'Divisions over Distinctions in Wartime International Law', in Bohrer *et al.*, *Law Applicable to Armed Conflict* (n. 2), 106–96 (182–6).

[47] Kate Parlett, *The Individual in the International Legal System* (Cambridge: Cambridge University Press, 2012), 225.

[48] Mary Ellen O'Connell, 'Historical Development and Legal Basis', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press, 3rd edn, 2013), 1–42, (38, para. 135); Silja Vöneky, 'Implementation and Enforcement of International Humanitarian Law', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press, 3rd edn, 2013), 647–700 (722, para. 1436).

[49] Peters, *Beyond Human Rights* (n. 27), 201; Anne Peters, 'Direct Rights of Individuals in the International Law of Armed Conflict', in Jennifer Welsh, Dapo Akande, and David Rodin (eds), *The Individualisation of War: Implications for the Ethics, Law and Politics of Armed Conflict* (Oxford: Oxford University Press, 2020), forthcoming.

[50] Art. 3, sentence 1, of 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 October 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.'

[51] Art. 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS, 3: '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.'

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it seems possible to interpret the provisions as also entitling individuals to claim reparation.[52] This interpretation is not ruled out by the fact that such a perspective was certainly not the original intention of the Conventions' drafters.[53] Although sound, however, such an interpretation has yet to be adopted by courts and other law-appliers – in other words, it is not *lex lata*.

In view of changing circumstances – above all, the general recognition of the individual in various subfields of international law and its recognition as a partial subject of international law[54] – these rules could potentially be (re)interpreted in light of subsequent practice[55] – practice and *opinio iuris* that might then also provide evidence of a respective right under customary international law.

Assessing the practice of States clearly illustrates a reluctance to acknowledge and implement an individual right to reparation. Courts have generally been very dismissive and have often employed 'avoidance doctrines'[56] – as illustrated, for example, by German[57] and Japanese[58] court decisions and their general lack of recognition of an individual right to reparation.[59]

[52] See Frits Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces', *International and Comparative Law Quarterly* 40 (1991), 827–58 (835–6): '[T]he Article [Art. 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 Christopher 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 International Committee of the Red Cross, *IHL Database Customary IHL*, Practice Relating to Rule 150, Reparation, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter42_rule150: '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.'

[53] See also Furuya, 'Right to Reparation', Chapter 1 in this volume, 21–2.

[54] See generally, on the status of the individual in international law, Peters, *Beyond Human Rights* (n. 27).

[55] Rainer Hofmann, 'Victims of Violations of International Humanitarian Law: Do They Have an Individual Right to Reparation against States under International Law?', in Pierre-Marie Dupuy *et al*., Völkerrecht als Wertordnung: *Essays in Honour of Christian Tomuschat* (Kehl: N.P. Engel, 2006), 341–59 (348); Bílková, 'Victims of War and Their Right to Reparation' (n. 25), 3; Peters, *Beyond Human Rights* (n. 27), 210–13.

[56] Liesbeth Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', *International Review of the Red Cross* 85 (2003), 497–526 (512).

[57] See the decisions by the Federal Constitutional Court: BVerfG, 2 BvR 1476/03, 15 February 2006, para. 20 (*Distomo*); BVerfG, 2 BvR 2660/06, 13 August 2013, paras 43–7 (*Varvarin*); German Federal Court of Justice (Bundesgerichtshof), Judgment of 6 October 2016, file no. III ZR 140/15, para. 17.

[58] See generally, for a discussion of state practice, Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' (n. 56), 507–12.

[59] See the discussion by Furuya, 'Right to Reparation', Chapter 1 in this volume, 46–51. See further, for an overview of the practices of domestic courts, Sharon Weill, *The Role of National*

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More openness appears to be reflected in the 2004 *Israeli Wall* Advisory Opinion of the International Court of Justice (ICJ), in which the Court stated 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'.[60] The Court did not provide further substance concerning this claim's legal foundation. However, Israel being the occupying power and thus IHL being a relevant legal framework, and because there is no generally recognised State that could file a claim on behalf of its citizens, this advisory opinion can be read as evidence of an individual right to reparation.[61]

Some international bodies and individuals – such as the judges of the ICTY[62] or the International Commission of Inquiry on Darfur[63] – have been more straightforward in recognising an individual right to reparation.

## III. THE TRIALOGUE ON REPARATION

Against this complex backdrop of diverse legal regimes, the Trialogue aims to find answers to three leading questions.

1. *Does an individual right to reparation exist in international law, or does it arise out of an interplay between international and domestic law?* This

*Courts in Applying International Humanitarian Law* (Oxford: Oxford University Press, 2014), 168–76; Peters, *Beyond Human Rights* (n. 27), 204–7. See, for references to court decisions affirming a right to reparation, International Law Association, 'Reparation for Victims of Armed Conflict (Substantive Issues)' (n. 13), 313–15 (comment to Art. 6, para. 2g).

60 ICJ, *Israeli Wall* Advisory Opinion (n. 29), 136, para. 153; see also *ibid*., para. 152.

61 See Furuya, 'Right to Reparation', Chapter 1 in this volume, 44–5. Admittedly, the decision can also be read conversely. Because there was no recognised State that could have been the holder (and collector) of any right to reparation, the Court here, in this special situation, had no choice but to consider the individuals as *titulaires*. See also, on this point, Elke Schwager, 'The Right to Compensation for Victims of an Armed Conflict', *Chinese Journal of International Law* 4 (2005), 417–39 (429).

62 In a report submitted to the UN Secretary General on behalf of all judges of the ICTY, then President of the ICTY Judge Claude Jorda 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'. Letter dated 12 October 2000 from the President of the International Criminal Tribunal for the former Yugoslavia addressed to the Secretary-General, UN Doc. S/2000/1063, 3 November 2000, para. 20.

63 The International Commission of Inquiry on Darfur held that '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'. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para. 597.

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question has often been asked, but it remains unresolved. As usual, when confronted with emerging rules of customary international law, we debate for quite some time whether sufficient State practice and articulations of *opinio iuris* have materialised for the new rule to be thought to have crystallised into binding international law. Even though the question about the existence of an individual right to reparation appears to be rather theoretical, it nevertheless has practical relevance, especially with regard to the prospect of enforcing a possible right to reparation before domestic courts. For example, within the German legal system, rules of customary international law form an integral part of federal law.[64] If an individual right to reparation were to exist under customary international law (which German courts have so far denied[65]), reparation could in principle also be claimed before German courts. Thus the legal question about the existence of a right to reparation remains relevant and requires analysis in light of recent developments.

2. *How can reparation programmes practically be implemented?* The authors of this volume are convinced that, because victims themselves do not greatly benefit from an abstract analysis of the existence of a general right to reparation, the debate therefore has to move forward by focusing instead on the procedural, institutional, and concrete designs of reparation programmes. Which type of legal mechanisms have proven successful in practice? What were the factors relevant for success and what caused a programme to fall short of the expectations expressed towards it? These questions relate to, but are independent of, the actual existence of a right to reparation. Even if one were to find that practice has not crystallised into a general individual right, policy-makers would still depend on an understanding of the concrete legal designs of reparation mechanisms that have been implemented in practice and have proven to be beneficial in post-conflict societies. The experiences of past programmes are important for identifying best practices, and they might also form the building blocks for the procedural or substantive elements of an emerging right to reparation.
3. *What is the content of the right to reparation?* This content is largely determined by the context of implementation. What is the substance of the right to reparation in mechanisms that have already been

[64] Art. 25 German Basic Law.
[65] See the German Federal Constitutional Court, BVerfG, 2 BvR 2660/06, Inadmissibility Decision of 13 August 2013 (*Varvarin*), esp. paras 43–7.

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> established? What conclusions can we draw for a general individual right to reparation? Which legal challenges exist in view of the particular situation we face following armed conflicts – that is, in cases in which a particularly high number of victims has to be deplored? Do principles of awarding reparation established before international human rights courts need to be adapted to mass proceedings after armed conflict? And if so, how?

These questions are addressed throughout this Trialogue, and three authors with broad expertise in both the legal and practical dimensions of awarding reparation to victims of war develop a number of answers. The first author, Shuichi Furuya, is a professor of International Law at Waseda University Law School in Japan and a member of the United Nations Human Rights Committee. Shuichi Furuya has extensively researched the right to reparation and its implementation. He has been a co-rapporteur of the International Law Association's Committee on Reparation for Victims of Armed Conflict.

In answering the first question about the existence of an individual right to reparation for victims of war, Shuichi Furuya provides a detailed study of the development of state practice in regard to reparation. He shows how the concept of reparation has been transformed from a mere inter-State affair that results in lump-sum agreements to become a victim-centred and individual-oriented process. Drawing on developments in the various fields of international law, his assessment is that an individual right to reparation did indeed emerge in the 1990s. According to Furuya, however, the abstract question about the existence of such a right is not particularly helpful: '[F]rom a practical point of view, the substantive right to reparation would be mere "pie in the sky" without the procedural right to access an effective reparation mechanism.'[66]

Accordingly, Furuya's particular focus rests on how a right to reparation can and should be practically implemented. Based on his analyses of reparation mechanisms established in international human rights bodies and before international criminal tribunals, and various *ad hoc* international reparation mechanisms established since the early 1990s, Furuya sets out the elements of the right to reparation. According to Furuya, this right entails substantive, as well as procedural, elements. The concrete content of the right to reparation has to be defined under specific historical circumstances, taking into account the specific challenges of concrete post-conflict constellations. This requires interlinking substantive and procedural aspects. In other words, the substance

[66] Furuya, 'Right to Reparation', Chapter 1 in this volume, 90.

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of a right to reparation will be defined only as the result of an adequate procedure. For that reason, the core contribution of Furuya's chapter is the identification and elaboration of the substantive, as well as procedural, elements of the right to reparation that international reparation mechanisms have to implement.

The Trialogue's second author, Cristián Correa, is a Chilean and US-trained lawyer who serves as a senior expert for the International Center for Transitional Justice, a non-governmental organisation based in New York City. In this capacity, Correa has provided advice and technical assistance on the creation and implementation of reparation programmes to governments, as well as civil society and victims' organisations, in numerous countries, particularly in South America, Africa, and Asia. Previously, Correa was legal adviser for a commission of the Presidency of Chile responsible for identifying the 'disappeared' and defining a human rights policy. He further served as legal secretary for the Commission of Political Imprisonment and Torture of Chile (known as the Valech Commission).

In answering the Trialogue's first question on the existence of an individual right to reparation, Cristián Correa takes a more cautious approach than Shuichi Furuya. While he acknowledges the legal practice of awarding reparation under international human rights law, he is more sceptical about whether a general right to reparation has emerged within IHL, particularly in view of opposing decisions of domestic courts. More promising, as Correa points out, is the avenue of international human rights law, which is generally applicable also to armed conflict and therefore can provide the legal tools to implement the right to reparation for victims of armed conflict.

The gist of Correa's chapter, however, is a comprehensive analysis of practices of awarding reparation occurring not at the international level but within domestic reparation programmes. Thus Correa's focus rests on answering the second question. He shows that the international legal debate has a lot to learn from domestic experiences, particularly because domestic programmes have been at the forefront in providing a comprehensive answer to mass violations of human rights and IHL during armed conflicts. While international human rights law places its focus on the individual victim, Correa shows that post-conflict societies benefit from establishment of comprehensive reparation programmes capable of dealing with large numbers of victims. This reorientation, however, necessitates an adjustment to the legal principles upon which reparation can be awarded to victims of armed conflict. Based on analysis of domestic reparation programmes, Correa draws a set of conclusions in answer to the third question about the content of the right to reparation regarding, *inter alia*, the types of violation and the victims that

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should be included in reparation programmes, the registration process, evidentiary standards, budgetary planning, and the concrete content of reparation awards, as well as in regard to implementation measures.

The Trialogue's third author is Clara Sandoval. Clara Sandoval is originally from Colombia and is a professor at the School of Law and Human Rights Centre at the University of Essex, as well as a co-director of the Essex Transitional Justice Network in the UK. Her research focuses on human rights, particularly on the implementation of reparation mechanisms in transitional justice environments. Additionally, she has served as an expert before international tribunals such as the ICC and the IACtHR. She has also worked as a consultant for various UN bodies dealing with reparation for victims of mass atrocities. In this volume, Sandoval follows the approach towards operationalising victims' right to reparation that her co-authors pursue. She focuses on the case law of international human rights bodies, particularly the IACtHR and the ECtHR (as the international bodies with the most extensive jurisprudence on reparation). Her chapter addresses the interplay of different legal mechanisms for awarding reparation – namely, the involvement of domestic reparation programmes (which Correa has identified and presented as an important and often effective way of awarding reparation), on the one hand, and international bodies such as the IACtHR and ECtHR, on the other. An analysis of practice shows that the reparation awards granted by domestic reparation programmes are, in many cases, less substantive – in that they provide less compensation than an international human rights court would usually provide. This raises the question of the interplay between these different levels of awarding reparation.

In a careful and pointed analysis of the jurisprudence of the IACtHR and ECtHR on reparation, Sandoval shows how this interplay is regulated by the *principle of subsidiarity*. Both courts give leeway – Sandoval also speaks of 'qualified deference'[67] – to States regarding how they design and implement reparation. This is necessary to pay respect to differing concrete circumstances, but it is also problematic because States may use an underambitious and deficient domestic reparation programme to shield themselves from reparation awards issued by an international human rights court. Sandoval presents a solution to this problem: she suggests a two-pronged test for international bodies, on the basis of which they should decide whether a specific domestic reparation programme is in accordance with States' obligations under international law. First, and under what Sandoval describes as

[67] Sandoval, 'International Human Rights Adjudication', Chapter 3 in this volume, 206.

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the 'international law test', States must fulfil certain minimum core obligations. Once this minimum level is respected, the second test – the 'public policy test' – is meant to determine whether States have struck a reasonable balance between victims' right to reparation and other concerns based on public policy.

It seems that the debate on the right to reparation for victims of armed conflict has been stuck for some time now. It is hoped that the three chapters of this Trialogue, as well as Anne Peters' concluding reflections, will offer some lead on how this situation might be overcome and on how the much-needed right to reparation for victims of armed conflict could eventually become reality.

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