What Do Different Theories of Customary International Law Have to Say About the Individual Right to Reparation Under International Humanitarian Law?

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Many believe that a right for victims of armed conflict to claim reparation under a rule of customary international humanitarian law (IHL) would be desirable from a moral point of view and from a policy perspective. But does this right exist as a matter of law? Answering this question depends significantly on the method we employ for determining customary international law and this has traditionally been a contested field. This impulse provides a brief reflection on what different approaches to customary international law have to say in regard to an individual right to reparation under customary IHL. It does not attempt to provide an ultimate answer, but rather aims to more closely connect the debate regarding the existence of a right to reparation to the different methodological approaches towards customary international law.

In order to establish a rule of customary international law, "it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)".[1] What counts as practice, whether further considerations may be taken into account, and which weight should be attributed to each of these elements is, however, the subject of controversies.

I. The "Traditional" Inductive Approach

The inductive approach to customary international law may be seen as the methodological standard tool,[2] also described as "traditional custom".[3]

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[1] Report of the International Law Commission, Identification of Customary International Law, 2016, UN Doc. A/71/10, 76 (draft conclusion 2).

[2] See generally *G. Schwarzenberger*, The Inductive Approach to International Law, Harv. L. Rev. 60 (1947), 539 et seq.; see also the recognition of the ICJ of the value of the inductive

Customary rules are inferred from an analysis of what States are doing "on the ground", identifying patterns in the practice of States and analysing whether this practice is accompanied by a sense of legal obligation (*opinio iuris*). In regard to the right to reparation this approach would not lead far. As pointed out in the introduction to these Impulses, we face a rather consolidated practice – especially of domestic courts – of not granting an individual right to reparation. Moreover, what proponents of an individual right to reparation claim to be supporting evidence for such a right (especially the practice of awarding reparation under human rights regimes, international criminal law and before certain *ad hoc* commissions) does not figure as a valid argument under this traditional perspective. The practice stems from or is related to different sub-fields of international law or does not unambiguously support an individual right to reparation. The work of the United Nations Compensation Commission (UNCC) for example, mainly addressed Iraq's responsibility for the violation of the *jus contra bellum* and only under very specific circumstances dealt with violations of IHL. While dealing with violations of IHL, the Ethiopia-Eritrea Claims Commission held that the claims before it were not those of the individual, but rather those of the State.[4] In international criminal law, reparation claims are directed against the perpetrator rather than against the State, so the structure and character of the legal claim is very much different from what we are looking for in the framework of IHL where the debate is about a right to claim reparation from the State. Obligations under international human rights law result from specific legal regimes (mostly from human rights treaties) and the respective practice cannot without problem be counted as practice within the armed conflict framework addressed by IHL. Thus, taking an inductive approach, State practice speaks against an individual right to reparation.

II. "Modern" Approaches

This is, however, not the end of the story. Other approaches to custom – also described as "modern custom"[5] – put less emphasis on States' "actual

method: ICJ, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgement, 12.10.1984, ICJ Reports 1984, 246, para. 111.

[3] *A. Roberts*, Traditional and Modern Approaches to Customary International Law: A Reconciliation, AJIL 95 (2001), 758.

[4] See in the introduction to these Impulses, especially note 42.

[5] *A. Roberts* (note 3), 758.

practice" but rather focuses on articulations of *opinio iuris* from which the customary rule is then established by means of *deduction*. Such an approach therefore makes it easier to overcome a lack of rule-confirming practice (and even to disregard contrary State practice) in cases where we have strong articulations of the legal opinions of States. Traditional examples of such articulations include the United Nations (UN) General Assembly's Definition of Aggression[6] or the Friendly Relations Declaration[7] from which the International Court of Justice (ICJ) deduced customary obligations concerning the prohibition on the use of force in its *Nicaragua* judgement.[8]

We find the most general statement of an international body affirmative of an individual right to reparation in the UN's Basic Principles and Guidelines on the Right to Remedy and Reparation.[9] It is already controversial whether UN General Assembly resolutions can at all be regarded as expressions of State practice or *opinio iuris*. In regard to the Basic Principles a further obstacle occurs. It is difficult to qualify these Principles as authoritative expressions of *opinio iuris*, because they expressly claim to "not entail new international or domestic legal obligations".[10] Thus, any attempt to derive legal obligations from the Basic Principles can be refuted with the argument that States expressly did not deem the Principles' content to reflect legal obligations, rather than only political commitments.[11]

Other international documents – such as the report of the Inquiry Commission on Darfur, the *Wall* advisory opinion of the ICJ or the declaration of judges of the International Criminal Tribunal for the former Yugoslavia (ICTY) mentioned in more detail in the introduction to these Impulses – do not fall within even a broad understanding of State practice (and can neither be seen as collective expressions of *opinio iuris*) and therefore do not directly support a respective customary rule.

Nevertheless, modern approaches provide more argumentative resources for assuming a customary right to reparation than the inductive approach does.

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6 A/Res/3314(XXIX), 14.12.1974.

7 A/Res/25/2625, 24.10.1970.

8 See ICJ, *Military and Paramilitary Activities in and against Nicaragua*, Judgement, 27.6.1986, ICJ Reports 1986, 14, para. 188.

9 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.

10 UN Basic Principles (note 9), 3.

11 See further on this topic the analysis of *F.-J. Langmack* and *C. Sandoval* in this issue.

III. Principle-Oriented Approaches

We further find approaches to customary international law that argue that certain customary rules may be derived from foundational principles of the international legal order. Thus, they take into account considerations that cannot be seen to be firmly grounded in solid State practice, but rather result from general legal, partly even moral principles. The ICJ, for example, based a legal obligation *inter alia* on the "general and well recognized" principle of "elementary considerations of humanity".[12]

Christian Tomuschat has argued that some customary obligations can be deduced from the constitutional foundations of international law. He has, above all, the principle of sovereign equality in mind,[13] but also certain "common values of mankind" especially during warfare, the violation of which would result in criminal responsibility, as assumed by the International Military Tribunal in Nuremberg.[14]

Other authors also explicitly suggest taking values into account when determining customary rules. *Enzo Cannizzaro*, for example, proposes a "balance-of-value approach" to customary international law. This approach takes into account social values, not as "pre-conceived ideas", but rather "considers values as legal structures, i.e. values which have already assumed a legal form and crossed the threshold of normativity".[15]

The argument for an individual right to reparation strongly depends on a similar line of reasoning, expanding the potential principles or values from which customary obligations can be deduced (as proposed e.g. by *Tomuschat*) to the acknowledgment of the individual as the ultimate beneficiary of international law. If it can be shown that the protection of the individual is an underlying constitutional principle of the international legal order, this could also serve as a value within the process of establishing customary international law. The role of the individual is, after all, not a mere abstract "pre-conceived idea" but has permeated deeply into various fields of international law and may thus be seen as a structural feature.[16] We can witness a turn to the individual on many levels, as illustrated by the acknowledgment

[12] ICJ, *Corfu Channel* Case, Judgement, 9.4.1949, ICJ Reports 1949, 4, 22 see also: ICJ, *Nicaragua* (note 8), para. 218.

[13] *C. Tomuschat*, Obligations Arising for States Without or Against Their Will, RdC 241 (1993), 293 et seq.

[14] *C. Tomuschat* (note 13), 300 et seq.

[15] *E. Cannizzaro*, Customary International Law on the Use of Force: Inductive Approach vs. Value-oriented Approach, in: E. Cannizzaro/P. Palchetti (eds.), Customary International Law on the Use of Force, 2005, 263.

[16] See generally *A. Peters*, Beyond Human Rights, 2017.

of individual protection in international human rights law, international criminal law, and further international mechanisms. At the core of this approach to custom would therefore be the acknowledgment of an individual-oriented general (constitutional) principle of the international legal order, which is seen to inform the formulation of customary international rules.

IV. Concluding Observations

Which one of the described approaches is the correct one? There is no objective answer to this as there is "no settled customary practice governing how to define customary rules of law".[17] Rather, there is much contestation and difference of opinion about the methodology, not in the least because, as *Tom Ruys* points out, "[t]he methodological approach one adopts to a large degree determines the outcome of any inquiry into the substantive content of the law".[18] The ICJ itself has not taken a clear stand on its methodology and has resorted to induction, deduction, but also referenced substantive principles, such as the mentioned "elementary considerations of humanity". As *Stefan Talmon* convincingly states, "[t]he main method employed by the Court is not induction or deduction but assertion".[19]

The reference to values and general "constitutional principles" for establishing the content of customary rules takes place on a much more uncertain terrain than the reference to solid State practice and is therefore much more vulnerable to critique than the more traditional approaches to custom. Moreover, one should also be careful what one wishes for. It may seem morally justified to base the individual right to reparation on a constitutional principle related to the individual. The danger from a more general point of view is that the employment of such a loose approach to custom (with less rigorous standards), will ultimately not primarily support the interests of the weak (e.g. the victims of armed conflict), but rather support attempts by powerful States to shape customary rules, for example by creating customary justifications for military interventions. If we derive customary rules from the principle of the individual, we should not be surprised if others derive customary rules from the principle of statehood, arguing for more

[17] *E. Kadens/E. A. Young*, How Customary Is Customary International Law, Wm. & Mary L. Rev. 54 (2013), 911.

[18] *T. Ruys*, Armed Attack and Article 51 of the UN Charter – Evolutions in Customary Law and Practice, 2010, 6.

[19] *S. Talmon*, Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion, EJIL 26 (2015), 434.

freedom of action for States in defending their sovereignty (as the debate in regard to self-defence against non-State actors illustrates).

What becomes clear in any case is that the handling of the sources of international law depends, to a significant extent, on the interpreter's vision for international law and whether it should remain within its State-centred framework or should further open up for the acknowledgment of the status of the individual.