
Rights under International Humanitarian Law

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Abstract

The idea of 'rights' under the law of war historically referred to state or belligerent rights – that is, rights to engage in actions not permitted under the law of peace. The different sense of rights of individuals was absent from those traditional accounts of the law, and whether individuals are granted rights (for example, of prisoners of war to be humanely treated, of civilians not to be targeted) under contemporary international humanitarian law (IHL) remains contested. This article explores how this debate has developed in recent history. It argues that clear support for the notion of individual rights during the drafting of the 1907 Hague Convention IV and subsequent treaties seemed to be overtaken by state practice in the area of war reparations, only to re-emerge in more recent practice that, in part, is shown to be a result of a more legalized approach to the invocation of responsibility for IHL violations. This growing support for the individual rights perspective of IHL is then juxtaposed with the re-emergence of state rights. The article concludes that these two different notions of 'rights' under IHL present two fundamentally opposing visions for the law's role in regulating armed conflict.

1 Introduction

The different ways in which the concept of 'rights' is invoked under international humanitarian law (IHL) has received little detailed attention.¹ Historically, the term

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¹ An examination of the invocation of both state and individual rights under international humanitarian law (IHL) or the consequences thereof, which is the focus of this article, has not, to my knowledge, been carried out elsewhere. A few have given a more than cursory treatment of individual rights under IHL *de lege lata*: R. Provost, *International Human Rights and Humanitarian Law* (2002), at 26–42; K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (2013), at 176–228 (part of a broader discussion on the status of individuals in IHL); A. Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (2016), at 194–216. Others have focused

‘rights’ was invoked to refer to belligerent or state rights under the law of war to engage in actions in wartime that would not be permitted under the law of peace. Under just war doctrine, for example, ‘rights’ often referred to the right of the just side to do what was necessary for the cause, and as just war began to give way to alternative theories in the 17th and 18th centuries, scholars such as Hugo Grotius, Emer de Vattel and Samuel von Pufendorf wrote of belligerent rights to kill, capture and destroy.² The late 19th- and early 20th-century canonical texts similarly invoked the concept of ‘rights’ under the law of war in this way.³

This is to be contrasted with the notion of rights of individuals under the law of war in the sense of substantive rights of individuals to be treated in accordance with the law (for example, of civilians not to be targeted and prisoners of war [POWs] to be treated humanely) and/or rights of reparation (including compensation) in the event of a violation of the substantive rules.⁴ This notion of individual rights was absent from those traditional accounts of the law, with individual victims of armed conflict being seen not as rights holders but, rather, as incidental beneficiaries of an interstate system of rights and obligations; the legal right to see a belligerent state honour its obligations under the law of war was thus considered to vest in the enemy state alone (or, potentially, the enemy belligerent in a civil war where belligerency was recognized).⁵ This view most clearly manifested with respect to the settlement of war reparations, for which an interstate agreement was often made that included a lump sum settlement and a waiver of individual claims.⁶ Such waivers were considered unproblematic on the assumption that only interstate rights and obligations, not individual rights, were implicated in war, an assumption consistent with international law more generally at the time.⁷

on the specific question of the individual right to reparation: e.g., Zegveld, ‘Remedies for Victims of Violations of International Humanitarian Law’, 85 *International Review of the Red Cross (IRRC)* (2003) 497; Bank and Schwager, ‘Is There a Substantive Right to Compensation for Individual Victims of Armed Conflict against a State under International Law?’ 49 *German Yearbook of International Law* (2006) 367; Tomuschat, ‘Reparation for Victims of Grave Human Rights Violations’, 10 *Tulane Journal of International and Comparative Law* (2002) 157.

² S.C. Neff, *War and the Law of Nations: A General History* (2005), at 62–65 (on rights of war under just war theory), 147–151 (on rights of war under later theories).

³ See, e.g., L. Oppenheim, *International Law, A Treatise*, vol. 2: *War and Neutrality* (1906), at 333–334; T.J. Lawrence, *The Principles of International Law* (1895), at 108, 306.

⁴ In using the term ‘individual rights’, this article thus refers to rights of individuals as persons enjoying protections under the law as opposed to rights of individuals as belligerents; the latter are treated together with ‘state’/‘belligerent’ rights. In using the term ‘reparation’, this article refers to the usual forms of reparation available for violations of international law, including restitution, compensation and satisfaction. International Law Commission (ILC), Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles on the Responsibility of States), UN Doc. A/56/83, 3 August 2001, Art. 34. The nature of IHL is such that compensation will often be the principal form of reparation available.

⁵ Aldrich, ‘Individuals as Subjects of International Humanitarian Law’, in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (1996) 851, at 851; Provost, *supra* note 1, at 27.

⁶ See, e.g., San Francisco Treaty of Peace with Japan 1951, 136 UNTS 45, Arts 14, 19.

⁷ McNair, ‘The Effect of Peace Treaties upon Private Rights’, 7 *Cambridge Law Journal* (1939–1941) 379; Parlett, *supra* note 1, at 181.

Certain commentators continue to take the view that contemporary IHL does not grant rights directly to individuals. René Provost, for example, has argued that 'humanitarian law protects the interests of the individual through means other than the granting of rights'.⁸ This orthodoxy, however, is not shared by all writers, with some taking the position that IHL has evolved so as to grant rights to individuals corresponding to the obligations of states and, potentially, non-state armed groups; such individual rights would be in addition to any rights of other contracting states to see IHL complied with, including the individual's national state in an international armed conflict. George Aldrich, Yoram Dinstein, Christopher Greenwood and Theodor Meron, for example, have all taken this view, opining that contemporary humanitarian law grants (certain) rights directly to individuals.⁹

This disagreement over the nature of rights under IHL arose in the *Jurisdictional Immunities* case before the International Court of Justice (ICJ), in which the Court assessed the conformity with international law of Italian court judgments granting compensation against Germany to individual victims of abuses during World War II.¹⁰ The Court held that it was unnecessary to address the question of whether individuals are granted rights under IHL for which they are entitled to compensation in the event of a breach, as it decided the case on the basis of state immunity.¹¹ For the Court, the nature of state immunity meant Italy's responsibility could be determined without considering many of the arguments on the merits, including the question of rights under IHL.

Such questions, however, were considered both in the pleadings and in some of the judges' separate and dissenting opinions, given their potential importance had the Court not resolved the dispute on the basis of state immunity. It is here that we find significant disagreement over the nature of rights under IHL. Italy and, as intervenor, Greece, were of the view that IHL grants both substantive rights of treatment and a right to reparation, including compensation, for violations directly to individuals.¹² In his dissenting opinion, Judge Cançado Trindade also took the view that IHL grants a right to reparation for breaches directly to individual victims.¹³ This was seen, in part,

⁸ Provost, *supra* note 1, at 16. Similarly, see Vöneky, 'Implementation and Enforcement of International Humanitarian Law', in D. Fleck (ed.), *Handbook of International Humanitarian Law* (2013) 647, at 684; Parlett, *supra* note 1, at 224.

⁹ These claims are made as part of broader discussions, however, often without elaborating fully on this specific point. See Meron, 'The Humanization of Humanitarian Law', 99 *American Journal of International Law (AJIL)* (2000) 239; Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2016), at 28–29; Greenwood, 'Rights at the Frontier: Protecting the Individual in Time of War', in B. Rider (ed.), *Law at the Centre: The Institute of Advanced Legal Studies at Fifty* (1999) 277, at 281–283; Aldrich, *supra* note 5.

¹⁰ *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, Judgment (*Jurisdictional Immunities*, Judgment), 3 February 2012, ICJ Reports (2012) 99.

¹¹ *Ibid.*, para. 108: '[T]he Court need not rule on whether ... international law confers upon the individual victim of a violation of the law of armed conflict a directly enforceable right to claim compensation.'

¹² *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, Written Statement of the Hellenic Republic (*Jurisdictional Immunities*, Statement of Greece), 3 August 2011, paras 34–39; *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, Counter-Memorial of Italy (*Jurisdictional Immunities*, Counter-Memorial of Italy), 22 December 2009, paras 5.10–5.11, 5.23.

¹³ *Jurisdictional Immunities*, Judgment, *supra* note 10, Dissenting Opinion of Judge Cançado Trindade, para. 70.

as reflecting a clear evolution in the law under the influence of international human rights law (IHRL).¹⁴

Making the contrary argument, and reflecting the more traditional position noted above, Germany made clear its view that ‘no individual entitlements arose from the breaches of IHL perpetrated by Germany’.¹⁵ In their separate opinions, Judges Koroma and Keith agreed.¹⁶ Indeed, in making this argument, Germany, as well as Judges Koroma and Keith, all relied on strong historical claims concerning the position of individuals under the law of war. Judge Keith, for example, argued that the idea of individual claims for war damages has never been accepted by states, pointing to the long-standing practice of determining war reparations at the interstate level and the impracticability of granting full compensation to each individual victim at the end of an armed conflict.¹⁷

It is on this question of the nature of rights under IHL, in the sense of individual and state rights, that this article focuses. In so doing, it has two aims, both of which advance the existing literature in this area. First, it will explore treaty law and state practice in relation to the claim that IHL grants rights directly to individuals. This will form the majority of the article due to the breadth of material to cover. The principal goal here is not to establish conclusively whether the positive law grants such individual rights, though some tentative proposals will be offered on this point, but, rather, to consider how the idea of individual rights has developed over IHL’s recent history and whether the various claims noted above in the *Jurisdictional Immunities* case are supported by this history. While the majority of scholarship touching on the question of individual rights under IHL focuses on the specific right to reparation for violations,¹⁸ this article is concerned with individual rights more generally, including substantive rights to be treated in accordance with the law. Although practice in relation to reparations will be discussed in some detail throughout (and going beyond what is explored in the existing literature), this article offers a more comprehensive consideration of the individual rights debate by also considering other provisions of IHL. Importantly, it will also consider what is at stake in this debate, which has not been addressed in detail elsewhere.

Second, the article will go on to compare this debate with the recent re-emergence of the notion of belligerent or state rights, in which states rely on IHL as empowering

¹⁴ *Jurisdictional Immunities*, Statement of Greece, *supra* note 12, paras 31–33; *Jurisdictional Immunities*, Judgment, *supra* note 10, Dissenting Opinion of Judge Cançado Trindade, para. 70.

¹⁵ *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, Reply of the Federal Republic of Germany (*Jurisdictional Immunities*, Reply of Germany), 5 October 2010, paras 45, 39–49.

¹⁶ *Jurisdictional Immunities*, Judgment, *supra* note 10, Separate Opinion of Judge Koroma, para. 9; Separate Opinion of Judge Keith, paras 18–19.

¹⁷ *Jurisdictional Immunities*, Judgment, *supra* note 10, Separate Opinion of Judge Keith, paras 18–19; similarly see Separate Opinion of Judge Koroma, para. 9: ‘[A] provision requiring state payments to individuals would have been inconceivable in 1907, when the Hague Convention IV was concluded [which, as discussed below, contained the obligation of compensation for violations], as international law at that time did not recognize the rights of individuals to the extent that it does today.’ *Jurisdictional Immunities*, Reply of Germany, *supra* note 15, para. 39: ‘[T]he relevant instruments do not provide for individual entitlements. This was the *communis opinio* in 1907.’

¹⁸ See the sources in note 1 above.

them to exercise coercive measures. The juxtaposition of these two senses of ‘rights’ under IHL has not been explored before, and it will be argued that these two different notions of ‘rights’ go to the heart of IHL’s object and purpose, pointing to two fundamentally different visions for the law’s role in contemporary armed conflict.

Each of these issues will be explored in turn. To begin, section 2 will consider what is at stake in the debate over individual rights under IHL, with section 3 moving on to an examination of the treaty rules and practice in relation to the question of whether IHL grants rights directly to individuals. Section 4 will then compare this debate to other recent arguments in which the idea of state or belligerent rights under IHL has re-emerged.

2 What Is at Stake in the Debate on Individual Rights under IHL?

Faced with the disagreements outlined above over the extent to which IHL grants rights directly to individuals, one must ask what are the consequences of this debate. This section will advance three key consequences of this disagreement over individual rights. The first two outlined below concern some of the core doctrinal consequences of the debate – in particular, its implications for the relationship between IHL and IHRL and for the practice of negotiating war reparations. The third consequence discussed is more fundamental and concerns IHL’s *raison d’être*.

The first consequence, concerning the relationship between IHL and IHRL, may be summarized briefly. It has been suggested that one significant difference between these two bodies of law is that, while human rights treaties confer rights directly on individuals, IHL treaties benefit individuals only indirectly, as they are drafted in terms of obligations (principally) of states, with any correlative rights being those of other states (specifically, the enemy state in an international armed conflict).¹⁹ Some have gone further,²⁰ implying that this distinction makes more difficult to accept those approaches in which these two bodies of law are read in light of one another.²¹ Without passing judgment on the merits of these arguments, it is clear that the debate over individual rights under IHL could have consequences for how some think about the differences and similarities between these two bodies of law.

A second consequence of this debate relates to the impact that the nature of rights under IHL may have on the invocation of state responsibility for violations. As already

¹⁹ Provost, *supra* note 1, at 16; Doswald-Beck and Vité, ‘International Humanitarian Law and Human Rights Law’, 33 *IRRC* (1993) 94, at 101; Droege, ‘Elective Affinities? Human Rights and Humanitarian Law’, 90 *IRRC* (2008) 501, at 503.

²⁰ See, e.g., Hansen, ‘Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict’, 194 *Military Law Review* (2007) 1; Modirzadeh, ‘The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict’, 86 *International Law Studies* (2010) 349, at 357 (invoking this distinction and then going on to critique the co-applicability of IHL and international human rights law [IHRL]).

²¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, para. 25; ECtHR, *Hassan v. United Kingdom*, Appl. no. 29750/09, Judgment of 7 July 2011.

alluded to and as will be explored further below, one of the specific rights under IHL that is sometimes said to vest directly in individual victims is the right to reparation for violations of IHL's substantive rules (for example, the prohibition of targeting civilians). Moreover, it has been suggested as a general principle that, should the primary, substantive rules of IHL be read as granting individuals direct rights, any violation thereof automatically carries, under the secondary rules on state responsibility, not only the obligation of the violating state to make reparation²² but also corresponding rights of the individual victims to such reparation.²³ There is some implicit support for this in recent interstate human rights cases, in which it has been argued that any compensation paid is due to the individual victims, in contrast to the traditional approach to diplomatic protection.²⁴

In viewing individual victims as holders of rights, including a right to invoke state responsibility and to reparation, the individual rights perspective on IHL could have important implications for the permissibility of interstate agreements on war reparations that purport to waive individual claims. To demonstrate this, it is useful to look to other areas of international law in which similar debates exist. For our purposes, a useful analogue is the international law of investment protection and the question of the nature of rights under bilateral investment treaties (BITs) – that is, whether BITs create rights only for the states parties or whether they also grant rights directly to investors.²⁵ It has been argued in this context that whether one characterizes the (substantive or procedural) rights under BITs merely as state rights or also as direct rights

²² ILC Articles on the Responsibility of States, *supra* note 4, Commentary to Art. 31, para. 4: '[T]he general obligation of reparation arises automatically upon commission of an internationally wrongful act'; *Factory at Chorzów (Germany v. Poland)*, 1928 PCIJ Series A, No. 17, at 29: '[I]t 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 ... [R]eparation is the indispensable complement of a failure to apply a convention.'

²³ Supporting such a view, see Schwager, 'Reparation for Individual Victims of Armed Conflict', in R. Kolb and G. Gaggioli, *Research Handbook on Human Rights and Humanitarian Law* (2013) 628, at 634–637; Peters, *supra* note 1, at 167–193; ILC Articles on State Responsibility, *supra* note 4, at Commentary to Art. 33, para. 3. Against such a view, see Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations', in A. Randelzhofer and C. Tomuschat (eds), *State Responsibility and the Individual* (1999) 1, at 13; *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, Germany's Comments on the Greek Declaration of 3 August 2011 (*Jurisdictional Immunities*, Germany's Comments), 26 August 2011, para. 11.

²⁴ *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 19 June 2012, ICJ Reports (2012) 324, Separate Opinion of Judge Cançado Trindade, para. 5; Separate Opinion of Judge Greenwood, para. 1; ECtHR, *Cyprus v. Turkey*, Appl. no. 25781/94, Judgment of 12 May 2014, para. 46. In a different context, see Joined Cases C-6/90 and C-9/90, *Francovich et al v. Italy*, [1991] ECR I-05357, paras 31–37.

²⁵ There are a variety of potential approaches to the nature of investors' rights. See, e.g., Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration', 74 *British Yearbook of International Law (BYIL)* (2003) 151 (presenting the three principal approaches of derivative rights, direct procedural rights and direct procedural and substantive rights); Papanikolaou, 'Investment Treaty Arbitration and the (New) Law of State Responsibility', 24 *European Journal of International Law (EJIL)* (2013) 617 (presenting the alternatives in terms of agency rights, direct rights and third party rights); Roberts, 'Triangular Treaties: The Extent and Limits of Investment Treaty Rights', 56 *Harvard International Law Journal* (2015) 353 (proposing a model that recognizes investors as third party beneficiaries with limited rights).

of investors could affect the permissibility of waivers by the investor's home state of the right to invoke the responsibility of the wrongdoing state.²⁶ Simply put, a state can only waive its own rights, and if investors are considered holders of direct rights under BITs, then, according to this argument, national states may not have complete freedom to waive their investors' rights.²⁷

If one applies the same argument by analogy here, then, in the event that IHL treaties are considered to grant rights directly to individuals, states party to an international armed conflict would potentially face restrictions in negotiating post-conflict mass settlements of claims for violations of IHL. This is because the national (enemy) state, though capable of waiving its own right to invoke the violating state's responsibility, may not be capable of doing the same with respect to its nationals' rights.²⁸ Of course, individuals would be free to waive their own rights, for example as part of a lump sum settlement.²⁹ As noted, interstate settlement of war reparations was, historically, a common feature of peace treaties, with states being viewed as free to waive any claims of their nationals in such circumstances.³⁰ If IHL is considered still to create rights only for states, and not also for individual war victims, this traditional model could be preserved.³¹ However, if IHL confers rights directly on individuals, then, according to this argument, their consent may be needed to expunge their claims.³²

This issue was raised in a number of the submissions and judgments in the *Jurisdictional Immunities* case. Italy, for example, argued that states are not free simply to waive the individual right to reparation for serious violations of IHL.³³ In his dissenting opinion, Judge Cançado Trindade argued that 'a State can waive only claims on its own behalf, but not claims on behalf of human beings pertaining to their own rights, as victims of grave violations of international law'.³⁴ Germany, by contrast, relied on the practice of states in concluding interstate settlements for war reparations with waivers of individual claims to support its view that individual victims of

²⁶ Paparinskis, *supra* note 25, at 645; J.-E. Alvarez, *The Public International Law Regime Governing International Investment* (2011), at 418; Douglas, *supra* note 25, at 169–170. Though see Roberts, *supra* note 25 (arguing for a limited conception of direct rights under bilateral investment treaties that does not prevent the home state waiving their investors' rights).

²⁷ *Ibid.*

²⁸ Taking this view, see Dinstein, *supra* note 9, at 29; Peters, *supra* note 1, at 214.

²⁹ Parlett, *supra* note 1, at 100.

³⁰ See text accompanying notes 6–7 above.

³¹ See Palchetti, 'Can State Action on Behalf of Victims Be an Alternative to Individual Access to Justice in Case of Grave Breaches of Human Rights?', 24 *Italian Yearbook of International Law* (2014) 53 (calling for greater use of interstate settlement of mass human rights and humanitarian law claims, notably where domestic courts do not have jurisdiction due to state immunity rules).

³² Although some might argue that individual reparation claims could be addressed sufficiently under international human rights law, controversy over the application of IHRL both in armed conflict and extraterritorially renders the question of the position of individuals under IHL also important. On these points generally, see Droege, *supra* note 19.

³³ *Jurisdictional Immunities*, Counter-Memorial of Italy, *supra* note 12, para. 5.52.

³⁴ *Jurisdictional Immunities*, Judgment, *supra* note 10, Dissenting Opinion of Judge Cançado Trindade, para. 71.

IHL violations do not have a right to reparation.³⁵ Although these arguments were, for the most part, expressed in binary terms as either an individual right to full reparations or the state's right to waive individual claims entirely, it is conceptually possible for individuals to possess a limited right to reparation under IHL. Such a limited right might mean that individuals could not veto a final interstate settlement providing partial compensation with distribution by a claims commission, for example, but that they could prevent absolute state waiver of claims where no responsibility for IHL violations is considered and no reparation of any form is made.³⁶ Italy, for example, appeared to take a similar view to this in its submissions.³⁷ Nonetheless, this could still have significant consequences for the freedom of states here.³⁸

The above two consequences of the debate over individual rights under IHL are fairly doctrinal. The final consequence to which I wish to draw attention is more fundamental and relates to what this debate says about the object and purpose of IHL and the role that we want law to serve in armed conflict. It is clear that those invoking the individual rights perspective see it as intimately linked with IHL's *raison d'être*. In *Jurisdictional Immunities*, Greece, for example, stated that:

it cannot be argued with any seriousness that IHL – law *par excellence* aimed at protecting the individual and his rights – does not confer direct rights on individuals which are opposable to States. That notion is implicitly accepted in a series of IHL provisions and explicitly accepted in the philosophy and very *raison d'être*.³⁹

Italy similarly argued:

IHL does not pose rights and obligations in the interests of the Contracting Parties, but to protect persons; thus it logically follows that it cannot allow the Contracting Parties to ... waive such protection altogether. This is more than a fundamental principle of IHL, it is its very *raison d'être*.⁴⁰

Underpinning Italy and Greece's submissions was thus a particular view of IHL's purpose – that is, the protection and empowerment of individual victims. Indeed, Greece, in its written pleadings, and Judge Cançado Trindade, in his dissenting opinion, considered the evolution of individual rights under IHL to be reflective of the progression of international law towards greater recognition of individuals.⁴¹ In this respect, the

³⁵ *Jurisdictional Immunities*, Reply of Germany, *supra* note 15, paras 45–46. Similarly, see *Jurisdictional Immunities*, Judgment, *supra* note 10, Separate Opinion of Judge Keith, paras 18–19.

³⁶ Similarly see Roberts, *supra* note 25 (making a similar proposal in the context of international investment law).

³⁷ *Jurisdictional Immunities*, Counter-Memorial of Italy, *supra* note 12, para. 5.14.

³⁸ A related question, beyond the scope of this article, that could also have consequences for interstate settlement of claims concerns the structure of the obligations under the particular area of international law as either bilateral(izable) or collective. Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' 14 *EJIL* (2003) 907; Gourgourinis, 'Investors' Rights *Qua* Human Rights? Revisiting the "Direct"/"Derivative" Rights Debate', in M. Fitzmaurice and P. Merkouris (eds), *The Interpretation and Application of the European Convention on Human Rights: Legal and Practical Implications* (2013).

³⁹ *Jurisdictional Immunities*, Statement of Greece, *supra* note 12, para. 35.

⁴⁰ *Jurisdictional Immunities*, Counter-Memorial of Italy, *supra* note 12, para. 5.21.

⁴¹ *Jurisdictional Immunities*, Statement of Greece, *supra* note 12, paras 31–33; *Jurisdictional Immunities*, Judgment, *supra* note 10, Dissenting Opinion of Judge Cançado Trindade, para. 70.

individual rights perspective fits well with those narratives of progress and humanization that are often invoked both in IHL⁴² and in international law more generally.⁴³ Recognizing individual rights under IHL can be seen as part of this trend and the growing pressure for, *inter alia*, IHL to reflect a more individual rights-based morality.⁴⁴ Indeed, certain scholars have even called for a rewriting of IHL in order to reflect a pure moral standard based on the preservation of individual rights.⁴⁵ An IHL that grants rights to individuals and empowers them to invoke the responsibility of wrongdoing states helps to meet this pressure for a more morally informed and individually focused law of war.

We will return to this theme of IHL's purpose in the fourth section when discussing the re-emergence of state rights. It will be shown that this alternative notion of rights presents a very different vision for the law's role in armed conflict than that noted here. Before that, however, the next section will consider the development of the individual rights perspective of IHL in treaty law and practice.

3 Individual Rights in Treaty Law and Practice

It was explained in the introduction that traditional accounts of the law of war did not recognize rights of individuals but only rights of their national state, in line with the orthodox position in international law until the latter part of the 20th century.⁴⁶ Indeed, as noted, it was on strong historical claims concerning the position of individuals under IHL that Germany, as well as Judges Keith and Koroma, relied in the *Jurisdictional Immunities* case in concluding that IHL does not grant individuals the specific right to reparation for violations of its substantive rules.⁴⁷ This section considers whether treaty law and practice support these accounts of IHL's recent history. In fact, it will be shown that the *travaux* of early IHL treaties reveals acceptance among their drafters of the individual rights perspective, with later treaties consolidating this (section A). However, subsequent state practice in relation to war reparations during much of the 20th century seemed to overtake this and revert to the 'traditional' interstate view of IHL (section B). Finally, it will be shown that practice in more recent years has seen a revival of the individual rights perspective (section C).

⁴² See e.g., Meron, *supra* note 9; Neff, *supra* note 2, at 340; Mégret, 'Theorizing the Laws of War' in A. Orford and F. Hoffmann (eds), *The Oxford Handbook to the Theory of International Law* (2016) 762, at 775.

⁴³ See, e.g., T. Meron, *The Humanization of International Law* (2006); Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States', 32 *American University Law Review* (1982) 1.

⁴⁴ Dill, 'The Twenty-First Century Belligerent's Trilemma', 26 *EJIL* (2015) 83, at 98–100 (noting the growth over the 20th century of an international public opinion favouring an individual rights-based morality as informing international relations).

⁴⁵ See, e.g., J. McMahan, *Killing in War* (2011). Though see Dill, 'Should International Law Ensure the Moral Acceptability of War?' 26 *Leiden Journal of International Law (LJIL)* (2013) 253. More moderate proposals seek to bring IHL closer to an individual rights-based morality by, for example, further limiting the class of targetable persons. See, e.g., Beer, 'Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity', 26 *EJIL* (2015) 801.

⁴⁶ See text accompanying notes 4–7 above.

⁴⁷ See text accompanying note 17 above.

A The Treaties and Travaux: Early Support for the Individual Rights Perspective

As the Permanent Court of International Justice (PCIJ) in the *Jurisdiction of the Courts of Danzig* case made clear, any treaty provision (or, by analogy, customary rule) may, if intended, confer rights directly on individuals.⁴⁸ Seventy years later, the ICJ in *LaGrand* held that whether a treaty provision grants rights directly to individuals is a matter of treaty interpretation.⁴⁹ In elaborating, the Court emphasized the importance of the treaty text itself (whether the language of ‘rights’ is used) and the role of the individual under the provision (whether its operation is conditional upon actions by the individual).⁵⁰ Although it has been suggested that the ICJ, by focusing on the text, departed from the PCIJ’s focus on party intentions,⁵¹ the better view is that one must examine the treaty text, in addition to other factors, in order to help distil party intentions.⁵² Indeed, it is clear that the explicit use of the term ‘rights’ is not a necessary condition for the creation of individual rights.⁵³ As the goal of this article is not to enumerate a full list of IHL provisions potentially granting individual rights *de lege lata* but, rather, to test the acceptance of such rights in principle over time, the focus here will be on those provisions either explicitly referring to individual ‘rights’ or whose *travaux* supports such a reading, as these arguably provide the strongest indication of the original intentions of the parties.

Applying the *LaGrand* framework, the earliest treaties on the law of armed conflict rarely made reference to individual ‘rights’ (as opposed to rights of belligerents) in their provisions, instead speaking in terms of obligations; indeed, this is true not only for so-called Hague law but also for Geneva law, which is sometimes seen as speaking more directly to individuals.⁵⁴ Nevertheless, there were exceptions in which certain provisions in the early treaties did refer to individual ‘rights’.⁵⁵ What is perhaps more

⁴⁸ *Jurisdiction of the Courts of Danzig*, 1928 PCIJ Series B, No. 15, at 17–18: ‘[I]t cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations.’

⁴⁹ *LaGrand (Germany v. United States of America)*, Judgment, 27 June 2001, ICJ Reports (2001) 466, para. 77. See also Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen (van Gend en Loos)*, [1963] ECR 1.

⁵⁰ *LaGrand*, *supra* note 49, para. 77; Paparinskis, *supra* note 25, at 626.

⁵¹ Parlett, *supra* note 1, at 96.

⁵² See also ICSID, *Corn Products International, Inc. v. United Mexican States*, Decision on Responsibility, 15 January 2008, ICSID Case no. ARB(AF)/04/01, para. 168: ‘[T]he question will be whether the text of the treaty reveals an intention to confer rights not only upon the Parties thereto but also upon individuals and/or corporations.’

⁵³ Greenwood, *supra* note 9, at 282; *van Gend en Loos*, *supra* note 49.

⁵⁴ See, e.g., Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864 (e.g., Art. 6 stating that ‘[w]ounded or sick combatants, to whatever nation they may belong, shall be collected and cared for’); Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex (Hague Convention IV): Regulations Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Regulations: Art. 1: ‘The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps.’

⁵⁵ See, e.g., Hague Convention IV, *supra* note 54, Regulations: Art. 3 (right of enemy armed forces to be treated as prisoners of war [POWs]); Art. 46 (respect for family rights). See also Institute of International

striking is the *travaux* of Article 3 of the 1907 Hague Convention IV (on compensation for violations of the Hague Regulations) that strongly suggested a general acceptance among the delegates that the draft article endowed the individual victims of violations with the right to compensation (rather than the victim's national state).⁵⁶ The United Kingdom's (UK) delegate to the Hague peace conference, for example, acknowledged that one of the draft articles that later became Article 3 granted to the individual victims 'a right to claim indemnity from the belligerent party for the wrong done them.'⁵⁷ At a time where it was assumed that individual rights were not generally conferred by treaties,⁵⁸ this early example stands out as an important counter to some of the historical claims in the *Jurisdictional Immunities* case outlined above (indeed, as noted, much of the debate there concerned this specific right to compensation).

In contemporary IHL treaties, notably the 1949 Geneva Conventions and their 1977 Additional Protocols, one can see a marked increase in the language of 'rights' of individuals across a range of provisions.⁵⁹ Two sets of common articles in the Geneva Conventions are frequently invoked as evidence of the existence of individual rights under IHL.⁶⁰ Common Article 6/6/6/7 prescribes that '[n]o special agreement

Law, *Manual of the Laws of Naval War* (1913), Art. 114 (right to indemnity for owner of destroyed goods not subject to capture); Convention Relative to the Treatment of Prisoners of War 1929, 118 LNTS 343, Arts 42, 62, 64 (certain rights of POWs in relation to their treatment and any penal proceedings against them).

⁵⁶ Bank and Schwager, *supra* note 1, at 388–389. Hague Convention IV, *supra* note 54, Art. 3 itself does not explicitly refer to such a right: 'A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation.'

⁵⁷ J.B. Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (1921), vol. 3, at 142 (also stating: 'I do not deny the obligation which exists on the part of a belligerent Power to indemnify those who have been victims of violations of the laws and customs of war.'). Similarly, see the text where Louis Renault (the French delegate), responding to the original German proposal that expressly granted a right of compensation to neutral persons, whilst apparently not granting such a right to enemy nationals, stated: '[I]n many cases the violation of international regulations results in serious harm to individuals who should be indemnified' and argued that enemy nationals should be treated the same as neutrals (at 141); the Swiss delegate stating his view that the original German proposal rightly confirmed that nationals of both neutral and enemy states have a right to compensation (at 142). J.B. Scott, *The Proceedings of the Hague Peace Conferences: The Conference of 1907* (1920), vol. 1, at 101–102 (reporting that the draft article conferred the right of compensation on nationals of neutral and belligerent states).

⁵⁸ See text accompanying note 7 above.

⁵⁹ See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) 1949, 75 UNTS 135, Art. 57 (right to communicate with prisoners' representatives); Art. 78 (right to complain to the detaining authority and protecting power regarding conditions of captivity); Art. 105 (rights of defence in penal hearings); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV) 1949, 75 UNTS 287, Art. 5 (permitting derogation from certain 'rights' under Geneva Convention IV); Art. 38 (core rights of non-repatriated enemy aliens); Art. 48 (right of non-nationals of occupied state to leave occupied territory); Art. 72 (rights of defence of accused persons in occupied territory); Art. 76 (right of detainees to visits by the International Committee of the Red Cross [ICRC]); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) 1977, 1125 UNTS 3, Art. 32 (right of families to know fate of relatives); Art. 44 (right to POW status); Art. 45(2) (right to assert POW status before judicial tribunal); Art. 75(4) (rights of fair trial); Art. 79(2) (right of accredited war correspondents to POW status).

⁶⁰ See, e.g., Dinstein, *supra* note 9, at 28; Greenwood, *supra* note 9, at 282; Aldrich, *supra* note 5, at 855; Peters, *supra* note 1, at 196–198.

shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them.’ Common Article 7/7/7/8 sets out the absolute rule that ‘[p]rotected persons may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention.’ Based on the *LaGrand* approach, these various provisions in the contemporary treaties, in using the language of ‘rights’ of protected persons, support the view that the drafters intended the Conventions to grant certain rights directly to individuals.

Contrarily, it has been suggested that these provisions, though referring to ‘rights’, were not intended to establish international law rights but, rather, either to create standards of treatment binding on the states parties (without a correlative right of individuals)⁶¹ or to require of states that they confer such rights on individuals via their domestic law.⁶² Some support for such views is found in the proceedings leading up to the 1949 diplomatic conference. Thus, during the 1947 meeting of government experts, a clear position was taken by some that the intended Conventions were not meant to create direct rights for individuals. When discussing a proposal for the provision prohibiting derogation from POW rights, the report of that meeting notes:

Other delegations were emphatic in objecting that it seemed difficult, in an international convention, to stipulate rights which today are recognized to States alone; in their opinion the Convention was in fact not so much a declaration in principle as a series of bilateral agreements between belligerents who are signatories thereto.⁶³

The inclusion in the final version of Article 6/6/6/7 that agreements between belligerents must not restrict the ‘rights’ of protected persons suggests that this view was rejected at the diplomatic conference. Moreover, support for the individual rights approach can be found in the *travaux* of the 1949 Geneva Conventions. Thus, an Italian proposal to the diplomatic conference that would have replaced the words ‘rights which it confers upon them’ in Article 6/6/6/7 with ‘rights which it stipulates on their behalf’ was rejected, implying a general acceptance among the delegates that the Conventions do confer rights directly on individuals.⁶⁴ More generally, the 1949 delegates did not appear to avoid using language that one would expect to find in a diplomatic conference negotiating a human rights treaty.⁶⁵ Though necessarily not

⁶¹ Hampson, ‘Human Rights Law and Humanitarian Law: Two Coins or Two Sides of the Same Coin?’, 1 *Bulletin of Human Rights* (1991) 46; Provost, *supra* note 1, at 29–30 (arguing that the drafters intended ‘a protection regime setting up absolute standards of treatment’, rather than direct rights for individuals).

⁶² Parlett, *supra* note 1, at 187.

⁶³ ICRC, *Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims: Geneva, April 14–26, 1947* (1947), at 115.

⁶⁴ ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. 2, section B (1963), at 76.

⁶⁵ See, e.g., ICRC, *Final Record of the Diplomatic Conference of Geneva of 1949*, vol. 2: Section A (1963), at 822 (on draft Art. 30 of Geneva Convention IV requiring that protected persons have the facility to apply to the protecting power or ICRC, the Special Committee report on Geneva Convention IV noted that ‘[i]t is not enough to grant rights to protected persons (Article 25) and to lay responsibility on the States (Article 26); protected persons must also be furnished with the support they require to obtain their rights; they would otherwise be helpless from a legal point of view in relation to the Power in whose hands they are’); at 796 (on draft Art. 5 of Geneva Convention IV, Australia (proposer) said it was ‘intended to strike a fair balance between the rights of the State and those of protected persons’ and Bulgaria, objecting, said ‘[i]t

definitive, these references in the *travaux* suggest an openness among the drafters to the individual rights perspective.

Where the nature of rights under the draft Additional Protocols was alluded to in the *travaux*, a similar level of support for the individual rights perspective could be found. Again, there were many references during the 1974–1977 diplomatic conference by delegates to the ‘rights’ of individuals under the Protocols.⁶⁶ More clearly, the US delegate unequivocally endorsed the individual rights perspective in response to Cuba’s objection that draft Article 32 of Additional Protocol I placed too much emphasis on the right of families to information about war victims:

If the right of families was not specifically mentioned, the section might be interpreted as referring to the right of Governments ... The paragraph had been included in response to a strong feeling of many delegations and institutions that it was important to express in the Protocol the idea that families had a right to know what had happened to their relatives. United Nations General Assembly resolution 3220 (XXIX) ... stated in the last preambular paragraph that ‘the desire to know is a basic human need’, but the text under consideration went even further by referring to the ‘right’.⁶⁷

Less acknowledged than the use of the word ‘rights’ in the treaties is the existence of provisions that place obligations on the state at the instigation of protected persons. Article 78 of Geneva Convention III, for example, asserts that POWs ‘shall have the unrestricted right to apply to the representatives of the Protecting Powers ... in order to draw their attention to any points on which they may have complaints to make regarding their conditions of captivity ... [These requests] must be transmitted immediately’.⁶⁸ The inclusion of such obligations in a treaty provision was the second factor to which the ICJ pointed in *LaGrand* as evidence of an intention to create individual rights. By conferring powers on individuals that, when exercised, obligate the state to

would seem therefore that elementary human rights, rights which it was the purpose of the Convention to defend, would be seriously endangered’); ICRC, *Final Record*, vol. 2, section B, *supra* note 64, at 74 (in response to a UK proposal to amend draft Art. 6/6/6/7 to permit special agreements that derogated from rights other than fundamental rights, the US delegate stated: ‘[I]t would be difficult to draw a distinction between rights which were fundamental and those which were not’).

⁶⁶ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974–77)*, vol. 6 (Federal Political Department, Bern 1978), at 60 (Australia); at 236 (Romania); at 248 (USA); at 264–265 (Austria and Belgium); *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974–77)*, vol. 8 (Federal Political Department, Bern 1978), at 223 (Italy); *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974–77)*, vol. 5 (Federal Political Department, Bern 1978), at 181 (New Zealand); at 185 (Finland).

⁶⁷ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva 1974–77)*, vol. 12 (Federal Political Department, Bern 1978), at 232.

⁶⁸ Similarly, see Geneva Convention IV, *supra* note 59, Art. 35 (entitlement of enemy aliens to demand appeal of refusal to leave enemy territory and to reasons for refusal); Art. 43 (entitlement of protected persons to demand review of internment and to prevent the detaining power from transferring their details to the protecting power); Art. 72 (accused persons can waive access to an interpreter or object to an interpreter and ask for a replacement).

act (or prohibit it from acting), these provisions again might imply a conferral of direct individual rights.

Importantly for our purposes, the above analysis suggests that what is sometimes still presented as the orthodox legal position, that is, that IHL was not intended to confer rights on individuals (whether speaking of substantive rights of treatment or rights of reparation for violations),⁶⁹ is in fact a more contentious claim. Thus, there is clear evidence from as early as the 1907 Hague Convention IV providing support for the individual rights perspective at least with respect to certain provisions. The increase in the use of the term ‘rights’ from the 1949 Geneva Conventions onwards, as well as allusions to the concept of individual rights in their *travaux*, further suggests that in fact there was some early acceptance of this idea. The International Committee of the Red Cross (ICRC) Commentary to the 1949 Geneva Conventions firmly embraced the notion that the Conventions confer rights directly on individuals, treating this as a development from the previous law.⁷⁰ Indeed, some have gone further than the above analysis, relying on more general language indicating a benefit to individuals (rather than using the term ‘rights’ specifically), or on claims relating to IHL’s object and purpose, as a basis for concluding that other provisions also create individual rights. This approach has been used, for example, to argue that the treaty law of non-international armed conflict, which, on the whole, does not use the language of ‘rights’, does in fact create rights for individuals.⁷¹ Thus, based on the *LaGrand* test, there is strong support that certain IHL provisions were intended to vest direct rights in individuals. Nonetheless, it will be shown in the next section that this early support for the individual rights perspective appeared to be overtaken by subsequent practice, itself a valuable guide to the intentions of states.⁷²

B State Practice and a Return to the ‘Traditional’ Position

The principal difficulty with relying on state practice in this area is that, whether or not states consider particular provisions of IHL to create individual rights does not often emerge clearly from their practice. One area in which practice has been invoked by scholars in order to distil a sense of states’ views on this matter relates to Article 118 of Geneva Convention III on the repatriation of POWs. Here, it has been argued that, although Article 118 was originally conceived as a right of the national state to have its POWs repatriated, practice has since turned this into a right of POWs to be repatriated if they wish.⁷³

⁶⁹ See notes 8 and 17 above.

⁷⁰ See, e.g., J.S. Pictet (ed.), *Commentary to Geneva Convention III Relative to the Treatment of Prisoners of War* (1960), at 90: ‘It was not, however, until the Conventions of 1949 (in particular in Articles 6 and 7) that the existence of “rights” conferred on prisoners of war was affirmed. In this connection, we would refer to the unanimous recommendation of the Red Cross Societies, meeting in conference in Geneva in 1946, to confer upon the rights recognized by the Conventions “a personal and intangible character” allowing the beneficiaries “to claim them irrespective of the attitude adopted by their home country”’.

⁷¹ See, e.g., Greenwood, *supra* note 9, at 282; Zegveld, *supra* note 1, at 504.

⁷² Hence, its role in the treaty interpretation process. Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, Art. 31(3)(b).

⁷³ Meron, *supra* note 9, at 253–256; Greenwood, *supra* note 9, at 282–283; Aldrich, *supra* note 5, at 855–856.

Beyond this one example, the main area in which one might discern the intentions of states regarding the individual rights perspective concerns the invocation of state responsibility for violations of IHL and, more specifically, the extent to which individual victims have a right to reparation from violating states. As shown, it was with respect to reparation (and, more specifically, compensation) that some of the earliest support for the individual rights perspective could be seen. Indeed, this practice might indicate not only how states view the specific right to reparation under IHL but also potentially how they view individual rights under IHL more generally. As noted, there is some support for the view that if rights under primary, substantive rules vest in individuals, certain rights under the secondary rules on state responsibility, including the right to reparation, must also vest in those individuals in the event of a breach of the primary rules.⁷⁴ On this view, practice rejecting any individual right to reparation could suggest a rejection of the individual rights perspective of IHL more generally. It is thus on practice in this area that this and the following sections focus. In this section, it will be shown that practice throughout much of the 20th century seemed to undermine the early treaty support for the individual rights perspective. The following section will then explore a more recent resurgence of this idea in some state and other practice.

The concept of 'war indemnities' became well established in the 19th century and generally consisted of large payments from the vanquished state to the victor without regard to war costs or legal responsibility arising from conduct.⁷⁵ World War I triggered a change in this area, replacing the notion of 'war indemnity' with 'war reparations', tied more clearly to responsibility for the origins of the war and the costs incurred by the victors.⁷⁶ However, the obligation of reparations was seen to arise from the factual responsibility of the vanquished state for the overall war rather than from legal responsibility for specific violations of IHL or other rules of public international law.⁷⁷ Indeed, the concern that responsibility for violations of the law of armed conflict was frequently ignored when negotiating reparations was raised during the 1949 diplomatic conference.⁷⁸

Furthermore, these developments after World War I did not alter the classical interstate approach to reparations, which was often characterized by lump sum settlements with waivers of future claims of individuals.⁷⁹ This was confirmed after World War II,

⁷⁴ See text accompanying notes 22–24 above.

⁷⁵ Neff, *supra* note 2, at 210–214; Dolzer, 'The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945', 20 *Berkeley Journal of International Law* (2002) 296, at 309–310.

⁷⁶ Treaty of Peace between the Allied and Associated Powers and Germany (Versailles Peace Treaty) 1919, 225 CTS 188, Arts 231, 232.

⁷⁷ Borchard, 'The Opinions of the Mixed Claims Commission, United States and Germany', 19 *AJIL* (1925) 133, at 134; Y Sandoz, C Swinarski and B Zimmerman (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), at 1054; Vöneky, *supra* note 8, at 683.

⁷⁸ ICRC, *Final Record*, vol. 2, section B, *supra* note 64, at 17 (Italy, Monaco and Spain).

⁷⁹ The mixed claims commissions established in accordance with the Versailles Treaty to hear individual (Allied nationals') claims against Germany were at the discretion of the states and did not alter the general rule. See Dolzer, *supra* note 75, at 310 (noting that the reparations practice following World War I 'was fully consistent' with the classical approach); Borchard, *supra* note 77, at 134; Douglas, *supra* note 25, at 163.

with a number of the peace treaties including such waivers of individual claims.⁸⁰ Although a greater effort was made to compensate particular categories of victims for their suffering,⁸¹ no general individual right to reparations for violations of the laws of war was recognized.⁸² Indeed, conflicts during the Cold War period rarely concluded with reparations regimes negotiated.⁸³ The Falklands Agreement, for example, simply renounced all claims arising from the war.⁸⁴ This practice over the 20th century seemed to entrench the idea that war reparations remained entirely an interstate matter, with states free to waive any potential claims of their nationals relating to the war⁸⁵ and with individuals granted compensation and other forms of reparation only to the extent that the particular states agreed.

The early support for an individual right to reparation for breaches of IHL that could be seen in the drafting of the 1907 Hague Convention IV seems to have been overtaken and rejected by the practice above. The more recent Article 91 of Additional Protocol I, which notes the obligation of compensation for violations of the Geneva Conventions and the Additional Protocols, like Article 3 of Hague Convention IV, makes no reference to individuals being owed this obligation directly.⁸⁶ Indeed, it has been argued that the drafters of Article 91 of Additional Protocol I were more concerned with interstate reparations, in contrast to the drafters of Article 3 of Hague Convention IV.⁸⁷ It is on this basis that Germany in its written pleadings in the *Jurisdictional Immunities* case, as well as Judges Koroma and Keith in their separate opinions, emphasized the ‘long-standing’ practice of settling war-related claims at the interstate level, with no individual right to reparation for breaches of IHL.⁸⁸

⁸⁰ Treaty of Peace with Italy 1947, 49 UNTS 3, Arts 76, 80; San Francisco Treaty of Peace with Japan, *supra* note 6, Arts 14, 19; Joint Declaration by the Union of Soviet Socialist Republics and Japan 1956, 263 UNTS 99, Art. 6. See discussion in Hofmann, ‘Compensation for Personal Damages Suffered during World War II’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. 2 (2012) 508; Buxbaum, ‘A Legal History of International Reparations’, 23 *Berkeley Journal of International Law* (2005) 314, at 331.

⁸¹ See, e.g., Luxembourg Agreement between the State of Israel and the Federal Republic of Germany on Compensation 1952, 162 UNTS 205, Protocol 1 (on compensation for victims of National Socialism); San Francisco Treaty of Peace with Japan, *supra* note 6, Art. 16 (reparations for Allied POWs that suffered ‘undue hardship’).

⁸² 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 *et al.* (ed.), *Common Values in International Law: Essays in Honour of Christian Tomuschat* (2006) 341, at 348.

⁸³ Sullo and Wyatt, ‘War Reparations’, in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (2015).

⁸⁴ Argentina–United Kingdom: Joint Statement on Relations and a Formula on Sovereignty with Regard to Falkland Islands, South Georgia and South Sandwich Islands 1989, 29 ILM 1291 (1990), Art. 3.

⁸⁵ P. d’Argent, *Les Réparations de Guerre en Droit International Public: La Responsabilité Internationale des États à L’épreuve de la Guerre* (2002), at 772 (noting that practice did not even suggest an exception for grave breaches).

⁸⁶ Additional Protocol I, *supra* note 59, Art. 91 reads: ‘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.’

⁸⁷ Kalshoven, ‘State Responsibility for Warlike Acts of the Armed Forces’ (1991) 40 *International and Comparative Law Quarterly* 827, at 850.

⁸⁸ See text accompanying note 17 above. Similarly, see Provost, *supra* note 1, at 45; Kalshoven, *supra* note 87, at 830–837; Vöneky, *supra* note 8, at 684.

Interestingly, although the original ICRC Commentaries to the Geneva Conventions explicitly took the position that the Conventions create primary, substantive rights for individuals, they also took the view that no individual right to reparation arose from violations of those substantive rights.⁸⁹ However, if one takes the view noted above that individual rights under the secondary rules on state responsibility arise automatically following breaches of primary rules that confer individual rights, then this reparations practice could be seen as rejecting not only a specific individual right to reparation under IHL but also the individual rights perspective of IHL more generally.

C State (and Other) Practice and the Re-emergence of the Individual Rights Perspective

More recently, there has been a gradual re-emergence in practice of the idea expressed by the drafters of Hague Convention IV that the obligation of reparation (including compensation) under IHL is owed to the individual victims themselves as opposed to their state of nationality. As will be demonstrated in this section, at the heart of this trend in practice is an increasing legalization in the approach taken towards war reparations, with a greater focus on state responsibility for specific violations of public international law. Within this, there is more room for individualized claims for violations of IHL. This is in contrast to the practice referred to in the previous section, in which war reparations would rarely address IHL violations.

An important example of this trend towards legalization is the Eritrea–Ethiopia Claims Commission (EECC). The EECC was established to hear claims of the two states against one another and claims of individual victims (albeit submitted by their governments) against the other state for violations of international law committed during the 1998–2000 war.⁹⁰ Although the majority of claims were presented as single, government claims (rather than claims on behalf of named nationals), a few of Eritrea’s claims concerned harm to specific individuals for which compensation was individually assessed.⁹¹ Moreover, unlike traditional diplomatic protection, EECC claims could be submitted on behalf of certain non-nationals with the caveat that any damages awarded were to go to those individuals.⁹² Also indicative of this trend is the UN Compensation Commission (UNCC), which was established to process claims relating to the 1990–1991 Gulf War. Though generally

⁸⁹ See, e.g., J.S. Pictet (ed.), *Commentary to Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (1958), at 603 (regarding Art. 148 of Geneva Convention IV on the prohibition of waivers of state responsibility for grave breaches). Similarly, see *Jurisdictional Immunities*, Germany’s Comments, *supra* note 23, at para. 11 (suggesting the possibility of individual primary rights without corresponding individual secondary rights).

⁹⁰ Agreement between the Government of the State of Eritrea and the Government of the Federal Democratic Republic of Ethiopia 2000, 2138 UNTS 94, Art. 5(1) (Algiers Agreement).

⁹¹ S.D. Murphy *et al.*, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (2013), at 61.

⁹² *Ibid.*, at 69–70. As a general matter, however, compensation awarded for government claims was considered the property of the governments, even if the Commission urged that compensation should benefit victims. Eritrea–Ethiopia Claims Commission (EECC), Decision no. 8 (Relief to War Victims), 27 July 2007, reprinted in UNRIIAA, vol. 26, 21, para. 3.

rendering awards for losses arising from Iraqi liability under the *ius ad bellum*, the UNCC also awarded compensation to former POWs held by Iraq that had been mistreated in violation of Geneva Convention III.⁹³ Importantly, awards of the UNCC were required to go to the individual claimants, again unlike under traditional diplomatic protection claims.⁹⁴

The EECC and UNCC reflect a more legalized and individualized approach to assessing reparations than the practice examined in the previous section, creating more room for the possibility of individual claims.⁹⁵ Indeed, some have invoked these particular features of the EECC and UNCC to support the view that IHL does grant individual victims a right of reparation for violations.⁹⁶ However, the support they offer to such claims of an individual right *de lege lata* is limited.⁹⁷ For this reason, it is not clear that they can be considered evidence of state practice or *opinio iuris* in support of a general individual right to reparation (including compensation) for IHL violations. Other practice goes further, however, and does support such an individual right *de lege lata*, though it is not always clear whether this is viewed as a right under IHL treaty law or custom. A number of UN resolutions, for example, provide support for this view.⁹⁸ Indeed, states endorsed this in a 2005 UN General Assembly resolution, which adopted the UN Commission on Human Rights' Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.⁹⁹ Principle 7 of the Basic Principles and Guidelines states:

⁹³ UN Compensation Commission (UNCC), Governing Council, Decision no. 11: Eligibility for Compensation of Members of the Allied Coalition Armed Forces, UN Doc. S/AC.26/1992/11, 26 June 1992. Claims could not be made by Iraqi nationals against coalition states, however, even for violations of IHL. See Wooldridge and Elias, 'Humanitarian Considerations in the Work of the United Nations Compensation Commission', 85 *IRRC* (2003) 555, at 576–577, n. 66.

⁹⁴ Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations', 13 *EJIL* (2002) 161, at 170–171.

⁹⁵ D. Shelton, *Remedies in International Human Rights Law* (2nd edn, 2006), at 83 (noting the enhanced standing of individuals).

⁹⁶ See, e.g., Schwager, *supra* note 23, at 632; Hofmann, *supra* note 82, at 351–352.

⁹⁷ See note 93 above (on the UNCC's inability to assess IHL violations alleged by Iraqi nationals) and note 92 above (on the view that, generally, compensation awarded by the EECC remained the property of the states).

⁹⁸ See, e.g., SC Res. 471 (1980), para. 3 (calling on Israel to pay compensation to individuals harmed by Israeli violations of Geneva Convention IV in the Occupied Palestinian Territories); SC Res. 827 (1993), para. 7 (referring to the right of individuals to seek compensation for violations of IHL committed in the former Yugoslavia); SC Res. 1304 (2000), para. 14 (stating, in weaker terms, that Uganda and Rwanda 'should' make reparations for loss of life and damage inflicted on the civilian population in the Democratic Republic of Congo). However, contrast certain resolutions of a similar age that refer to reparations as a right of the state: e.g. GA Res. 50/22, 25 April 1996, para. 7 (on Lebanon's entitlement to compensation for IHL violations by Israel).

⁹⁹ GA Res. 60/147, 16 December 2005, Annex: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines) (adopted without a vote).

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law: ... (b) Adequate, effective and prompt reparation for harm suffered.¹⁰⁰

Similarly, though not state practice, the International Law Association's (ILA) 2010 Declaration on International Law Principles on Reparation for Victims of Armed Conflict (ILA Declaration) states, in Article 6, that '[v]ictims [whether natural or legal persons] of armed conflict have a right to reparation from the responsible parties'.¹⁰¹ Indeed, this view also finds some support in the practice of international judicial and fact-finding bodies. In its *Israeli Wall* advisory opinion, for example, the ICJ concluded that Israel is obligated to make reparations to natural and legal persons harmed by its construction of the wall, which it had earlier found to be in violation of IHL and IHRL.¹⁰² Similarly, UN Commissions of Inquiry, an increasingly common tool to investigate mass violations, have endorsed the notion that violations of IHL entail a state's responsibility to make reparation, which is owed directly to individual victims.¹⁰³

There is some further state practice and evidence of *opinio iuris* in support of an individual right to reparation under IHL in domestic jurisprudence. From the 1990s onwards, there has been a notable increase in cases brought by individuals before domestic courts seeking compensation for violations of IHL.¹⁰⁴ One must exercise

¹⁰⁰ See also *ibid.*, Annex, preambular para. 1 (recognizing that IHL contains an individual right to reparation), para. 18 (noting that reparation includes restitution, compensation and satisfaction). The Basic Principles and Guidelines suggest that the Commission sought to codify existing law. *Ibid.*, Annex, preambular para. 7.

¹⁰¹ International Law Association (ILA), Declaration on International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues) (ILA Declaration), Res. 2/2010 (2010), s. II (noting that reparation includes restitution, compensation and satisfaction). The Commentary makes clear that the ILA Declaration is codifying what it considers to be an existing right under IHL based on its assessment of state practice (Commentary to Art. 6, paras 2(b) and 2(n)).

¹⁰² *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, paras 152–153 (relying on the general principle established in *Chorzów Factory*, which might suggest that the primary, substantive obligations under IHL were viewed as being owed directly to individuals).

¹⁰³ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, paras 593–600 (recognizing that an individual right to reparation has developed in IHL in light of the influence of IHRL); Human Rights Council (HRC), Third Report of Independent International Commission of Inquiry on Syria, Doc. A/HRC/21/50, 16 August 2012, Annex II, para. 21 (recognizing an individual right to reparation under IHL); HRC, Report of the Office of the High Commissioner for Human Rights Investigation on Sri Lanka, Doc. A/HRC/30/CRP.2, 16 September 2016, para. 1260 (viewing this right as part of the obligation to ensure respect for IHL); HRC, Report of the UN Fact-Finding Commission on the Gaza Conflict, Doc. A/HRC/12/48, 25 September 2009, paras 1868–1873 (stating that international law requires the responsible state to provide reparation and compensation to the victims, though not specifying a precise source for this right); HRC, Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1 (Gaza), Doc. A/HRC/29/CRP.4, 24 June 2015, para. 46 (referring to the Basic Principles and Guidelines as enjoying 'far-reaching support'), para. 666; HRC, Report of the Commission of Inquiry on Lebanon, Doc. A/HRC/3/2, 23 November 2006, at 8 (noting the absence of mechanisms at the international level to hear individual claims for IHL violations, while nonetheless appearing to recognize individual rights to reparation).

¹⁰⁴ Dolzer, *supra* note 75, at 297.

caution in inferring from these cases the courts' views on individual rights under IHL. Claims may succeed for reasons other than an international humanitarian law right, such as a domestic statute or a human rights treaty. Similarly, claims may not succeed without any rejection of the principle that individuals have such a right under IHL – for example, they may fail on the basis of state immunity or domestic constitutional law rules such as the political question doctrine or the non-self-executing nature of any purported right under IHL.¹⁰⁵

In certain of these cases, however, the views of the courts on the question of an individual right to reparation under IHL are made clear. Within this category are a few cases that provide some support for the view that such a right exists, including Greek jurisprudence in the case that in part prompted the ICJ's *Jurisdictional Immunities* case.¹⁰⁶ This concerned individual claims against Germany for the June 1944 killing of civilians and destruction of property in violation of IHL by German occupation forces in the Greek village of Distomo. The Greek court at first instance accepted individual claims for compensation under Article 3 of Hague Convention IV for violations of the Hague Regulations by German forces.¹⁰⁷ Further support for an individual right to reparation under IHL is found in Dutch case law concerning alleged violations of Additional Protocol I committed during the 1999 North Atlantic Treaty Organization (NATO) campaign against Yugoslavia.¹⁰⁸ Although rejecting the claims on the merits, the Dutch courts did not seem to challenge the assumption that individual victims of violations of Additional Protocol I may bring a claim for compensation against the responsible state.¹⁰⁹

Notwithstanding this Greek and Dutch jurisprudence, courts in certain other jurisdictions have resolutely rejected the claim that individual victims of IHL violations have a right to reparation under IHL. A number of cases have been brought against Japan since the 1990s, for example, by victims of, *inter alia*, the Japanese practice exploiting so-called 'comfort women', mistreatment during detention, and forced

¹⁰⁵ Gattini, 'To What Extent Are State Immunity and Non-Justiciability Major Hurdles to Individuals' Claims for War Damages?', 1 *Journal of International Criminal Justice (JICJ)* (2003) 348.

¹⁰⁶ The Italian cases that were the subject matter of the dispute in the *Jurisdictional Immunities* case did not explicitly address this question. Italian Court of Cassation (Plenary Session), *Ferrini v. Federal Republic of Germany*, Decision no. 5044/2004, 11 March 2004.

¹⁰⁷ Court of First Instance of Leivadia (Greece), *Prefecture of Voiotia v. Federal Republic of Germany*, Case no. 137/1997, 30 October 1997. This judgment was upheld on appeal, though the focus there was on the lower court's rejection of state immunity rather than individual rights under IHL. Areios Pagos (Hellenic Supreme Court), *Prefecture of Voiotia v. Federal Republic of Germany*, Case no. 11/2000, 4 May 2000.

¹⁰⁸ Court of Appeal of Amsterdam (Gerechtshof te Amsterdam), *L. Dedovic et al v. W. Kok et al.* 6 July 2000, reprinted in 35 *Netherlands Yearbook of International Law (NYIL)* (2004) 508, at 521–522; Supreme Court of Netherlands, *Danikovic et al v. State of Netherlands*, 29 November 2002, reprinted in 35 *NYIL* (2004) 522.

¹⁰⁹ *Ibid.* See, e.g., *Danikovic*, *supra* note 108 (rejecting a claim from Yugoslav soldiers against the Netherlands that sought compensation, *inter alia*, for violations of Additional Protocol I on the ground that the soldiers themselves did not have an interest in such a claim as they were not the victims of any alleged violation).

labour imposed on Chinese and Korean civilians.¹¹⁰ The tendency of the Japanese courts has been to reject these cases on the basis that IHL (including Article 3 of Hague Convention IV and custom) does not grant a right to compensation to individual victims of violations.¹¹¹ German courts have similarly rejected individual claims for compensation for IHL violations on the explicit basis that IHL does not provide an individual right to reparation for breaches of its substantive rules, instead leaving it to the discretion of the national state whether or not to exercise diplomatic protection. This approach has been taken in a range of cases, including claims relating to the Distomo massacre,¹¹² Germany's participation in the 1999 NATO campaign against Yugoslavia¹¹³ and civilian deaths resulting from the 2009 Kunduz airstrike ordered by a German officer.¹¹⁴ Finally, US courts too have rejected such claims, again on the grounds that, in their view, IHL does not provide an individual right of compensation for violations.¹¹⁵

US, German and Japanese jurisprudence thus remains firmly of the traditional view that the holders of the right to reparation (and specifically compensation) under IHL are not individual victims but, rather, their national states. Yet the Greek and Dutch cases, like the other practice referred to in this section, appear to depart from this

¹¹⁰ Bong, 'Compensation for Victims of Wartime Atrocities: Recent Developments in Japan's Case Law', 3 *JICJ* (2005) 187, at 187–188.

¹¹¹ See, e.g., Tokyo District Court, *X. et al v. State of Japan*, Judgment, 30 November 1998, reprinted in 42 *Japanese Annual of International Law (JAİL)* (1999) 143 (finding no individual right to compensation under Art. 3 of Hague Convention IV or custom, instead seeing it as a right of the national state); Tokyo District Court, *Maria Rosa Henson et al v. State of Japan*, Judgment, 9 October 1998, reprinted in 42 *JAİL* (1999) 170 (after examining state practice, finding no change to the interstate character of IHL); Tokyo High Court, *X. et al v. State of Japan*, Judgment, 7 August 1996, reprinted in 40 *JAİL* (1997) 116 (rejecting the claim that custom granted an individual right to compensation, though altering the lower court's judgment to the effect that custom at the time of the alleged violation did not grant such a right); Supreme Court of Japan, *X. v. Y.*, Judgment, 27 April 2007, reprinted in 51 *JAİL* (2008) 518 (holding that individual claims by Chinese prisoners for forced labour during World War II had been waived by the 1972 Chinese–Japanese Joint Communiqué).

¹¹² Federal Supreme Court, *Greek Citizens v. Federal Republic of Germany*, Case no. III ZR 245/98, 26 June 2003, reprinted in 42 *ILM* 1027 (2003); Federal Constitutional Court (Second Chamber, First Section), *Greek Citizens v. Federal Republic of Germany*, Case no. 2 BvR 1476/03, 15 February 2006. An application to the European Court of Human Rights challenging the German jurisprudence was declared inadmissible. ECtHR, *Sfountouris et al. v. Germany*, Appl. no. 24120/06, Judgment (5th Section) of 31 May 2011. See also ECtHR, *Associazione Nazionale Reduci et al. v. Germany*, Appl. no. 45563/04, Judgment (5th Section) of 4 September 2007.

¹¹³ Federal Constitutional Court, *Varvarin Bridge Case (36 Citizens of Yugoslavia v. Germany)*, Case no. 2 BvR 2660/06, 2 BvR 487/07, 13 August 2013 (though noting recent practice in favour of individual rights under IHL, the Court concluded that the orthodox interstate approach to reparations remains positive law). See discussion in Mehring, 'The Judgment of the German *Bundesverfassungsgericht* concerning Reparations for the Victims of the Varvarin Bombing', 15 *International Criminal Law Review* (2015) 191.

¹¹⁴ Regional Court of Bonn, *Kunduz case*, Case no. LG Bonn 1 O 334/10, 1 O 460/11, 1 O 334/10, 1 O 460/11, 11 December 2013; Federal Court of Justice, *Kunduz case*, Case no. III ZR 140/15, 6 October 2016. See discussion in Henn, 'The Development of German Jurisprudence on Individual Compensation for Victims of Armed Conflict', 12 *JICJ* (2014) 615.

¹¹⁵ *Goldstar and ors v. United States*, 967 F 2d 965 (4th Cir. 1992) (claims against the USA in relation to its invasion and occupation of Panama); *Prinz v. Germany*, 26 F3d 1166 (DC Cir. 1994) (claims against Germany in relation to mistreatment during World War II); *Tel-Oren v. Libyan Arab Jamahiriya and ors.*,

approach and present a different view of the law. Scholarship is similarly divided on this point.¹¹⁶

Though the principal purpose of the preceding sections has not been to make definitive conclusions as to the existence of an individual right to reparation under IHL *de lege lata*, given this divergence in views, a few tentative proposals for moving forward will be offered on this before concluding with some themes that can be drawn out of the above analysis. Both practice and scholarship seem sufficiently divided such that one cannot easily resolve whether IHL (*qua* treaty or custom) grants individual victims the right to reparation for violations of its substantive rules. The terminology used also varies in the examples above, with some referring to ‘reparation’ generally and others to ‘compensation’ specifically. What is clear, however, is that, notwithstanding earlier practice to the contrary, there is now growing support in some state and other practice for an individual right to reparation (including compensation) for IHL violations. This growing support has been recognized by the ICRC, which has replaced its earlier rejection of an individual right with a more tentative acknowledgement of practice supporting such a right.¹¹⁷

It is submitted that both the early support for an individual right to reparation in the *travaux* of Hague Convention IV, as well as this more recent supporting practice, give a reasonable basis for courts and other bodies to assert such a right.¹¹⁸ Moreover, this should be seen as a specific right under IHL (for example, as part of Article 91 of Additional Protocol I and its customary equivalent) arising where any IHL provision that protects individuals is violated, rather than, for example, as a general right under the secondary rules on state responsibility arising only where the primary rule breached itself confers direct, substantive rights on individuals.¹¹⁹ This would have the advantage of not having to determine the existence or otherwise

726 F.2d 774 (DC Cir. 1984) (claims against Libya, the Palestine Liberation Organization and the Palestine Information Office in relation to an attack in Israel).

¹¹⁶ Recognizing an individual right to reparation under IHL, see, e.g. Mazzeschi, ‘Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview’, 1 *JICJ* (2003) 339; Zegveld, *supra* note 1; Sassòli, ‘State Responsibility for Violations of International Humanitarian Law’, 84 *IRRC* (2002) 401; Bank and Schwager, *supra* note 1. Rejecting this view, see, e.g., Tomuschat, *supra* note 1; Fleck, ‘Individual and State Responsibility for Violations of the *Ius in Bello*: An Imperfect Balance’, in W. Heintschel von Heinegg and V. Epping (eds), *International Humanitarian Law Facing New Challenges* (2007) 171, at 190–193; d’Argent, *supra* note 85, at 784–791.

¹¹⁷ Sandoz, *supra* note 77, at 1056–1057; J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, vol. 1: *Rules* (2005), at 541; ICRC, *Commentary on the First Geneva Convention* (2016), Commentary to Art. 51 of Geneva Convention I, para. 3025.

¹¹⁸ This does not affect those other issues that would likely be faced by domestic courts in such cases, including state immunity as a jurisdictional bar. Mass claims commissions may often, therefore, be a more appropriate forum. Zegveld, *supra* note 1, at 522.

¹¹⁹ Cf. Peters, *supra* note 1, at 212 (arguing that an individual right to reparation under Art. 91 of Additional Protocol I should only exist if there is a right under the primary, substantive rule breached). On the customary nature of Art. 91 of Additional Protocol I, see Henckaerts and Doswald-Beck, *supra* note 117, at 539. Though referring explicitly only to ‘compensation’, Art. 3 of Hague Convention IV and Art. 91 of Additional Protocol I are seen as incorporating all forms of reparation into IHL. Sandoz, *supra* note 77, at 1053–1056; Vöneky, *supra* note 8, at 683.

of individual rights under the primary, substantive rules of IHL in order to answer the question of whether individual victims have a right to reparation for violations of those substantive rules.¹²⁰ This also appears consistent with the practice noted above, including the UN Basic Principles and Guidelines and the ILA Declaration, which does not suggest any such limitation of the right to reparation and, for the most part, focuses on the right as one under IHL specifically. Importantly, however, this right need not be seen as absolute. Instead, as noted, it could operate so as to exclude a complete waiver by states without any form of reparation, but be limited by the ability of states to negotiate reparations (which, depending on the circumstances, may not always be ‘compensation’¹²¹), with a mechanism for ensuring that whatever reparation is agreed to benefits the victims directly.¹²² This view of an individual, yet limited, right would help to address those concerns over the practicability of individualized approaches to mass reparations,¹²³ while contributing to the fight against impunity.

Finally, a few words should also be said about reparations in the context of non-international armed conflicts, as most of the practice referred to above relates to international armed conflicts. Although Article 3 of Hague Convention IV, and, arguably, Article 91 of Additional Protocol I, apply, *qua* treaty, only in international conflicts, the ICRC has held that the obligation to make reparation for any IHL violation applies in all armed conflicts as a matter of custom.¹²⁴ Of course, were neither treaty nor custom to stipulate this obligation specifically for IHL violations, we could simply fall back on the general principle set out in *Chorzów Factory*.¹²⁵

The next question is to whom such an obligation of reparation is owed. There is practice and *opinio iuris* supporting the view that the obligation to make reparation for violations of the law of non-international armed conflict is owed to individual victims themselves. For example, the Basic Principles and Guidelines, adopted by the UN General Assembly, and the ILA Declaration both consider individual victims to be the holders of the right to reparation under IHL, both in international

¹²⁰ A comprehensive examination of this issue *de lege lata* would, therefore, need to consider a number of questions in more detail, including precisely when an individual is considered a ‘victim’ of a violation of IHL. This may be affected by considerations such as the primary, substantive rule violated (i.e., though the particular rule need not confer direct rights on individuals, it would need to confer a benefit on the individual more broadly for them to be a ‘victim’ of a violation thereof) and the seriousness of the violation.

¹²¹ Similarly, see Gillard, ‘Reparations for Violations of International Humanitarian Law’, 85 *IRRC* (2003) 529, at 533; Basic Principles and Guidelines, *supra* note 99, Annex, para. 18; ILA Declaration, *supra* note 101, s. II. Indeed, both Art. 3 of Hague Convention IV and Art. 91 of Additional Protocol I require compensation ‘if the case demands’.

¹²² See text accompanying notes 36–37 above.

¹²³ See, e.g., Gattini, *supra* note 105, at 364–365; Tomuschat, *supra* note 23, at 18–25; *Jurisdictional Immunities*, Reply of Germany, *supra* note 15, para. 46; *Tel-Oren*, *supra* note 115, at 120.

¹²⁴ Henckaerts and Doswald-Beck, *supra* note 117, Rule 150. Though Additional Protocol I only applies in international armed conflicts, it has been argued that Art. 91 itself requires compensation for violations of any provision of the Geneva Conventions, including common Art. 3. See Schwager, *supra* note 23, at 633.

and non-international conflicts.¹²⁶ Furthermore, UN Commissions of Inquiry have affirmed an individual right to reparation for IHL violations in the context of non-international armed conflicts.¹²⁷ A number of UN resolutions also give some support for this individual right in non-international conflicts.¹²⁸ There is also much domestic practice, albeit not supported by *opinio iuris*, in which reparation programs are established in the aftermath of non-international armed conflicts as part of transitional justice arrangements.¹²⁹

Moreover, unlike in international armed conflicts, in non-international conflicts it is difficult to conceive of reparations as being owed to anyone other than individual victims since non-international conflicts are not interstate in nature. One might take a few different views on this, but none seems as conceptually reasonable as the view that the obligation to make reparation for IHL violations in non-international armed conflicts is owed to individual victims. Thus, it might be argued that the substantive rules applicable in non-international armed conflicts, though speaking to the relationship between states and non-state groups (and individuals), in fact grant rights corresponding to the obligations thereunder only to states. In this sense, for example, it would be the right of other states that have contracted to observe these rules to see a state honour its obligations under IHL in a non-international armed conflict. Indeed, as noted, the text of those provisions specifically designed for non-international armed conflicts does not generally use the language of individual 'rights'.¹³⁰ However, a right to reparation for violations of rules of this nature would not ordinarily vest in non-injured states; rather, reparation could only be claimed in the interest either of injured

¹²⁵ *Chorzów Factory*, *supra* note 22.

¹²⁶ Basic Principles and Guidelines, *supra* note 99, Annex, para. 15; ILA Declaration, *supra* note 101, Art. 6.

¹²⁷ See note 103 above (reports on Sri Lanka, Syria, Darfur).

¹²⁸ Though the precise source of such a right is not always made explicit: GA Res. 48/147, 1 February 1994, para. 10 (calling on Sudan to compensate families of killed individuals working for foreign relief organizations); GA Res. 51/108, 12 December 1996, para. 11 (calling for remedies for victims of IHL and IHRL violations in Afghanistan); GA Res. 68/165, 21 January 2014, preambular para. 13 (emphasizing the importance of access of victims to effective remedies for violations of IHL generally); GA Res. 68/182, 18 December 2013, para. 11 (emphasizing the importance in Syria of domestic processes for reparations and effective remedies for victims); SC Res. 1894 (2009), preambular para. 14 (recognizing the importance of reparation programs for violations of IHL generally); SC Res. 2296 (2016), para. 9 (expressing concern with delays in compensation in the context of the South Sudan conflict); UN Commission on Human Rights, Res. 1995/77, Doc. E/CN.4/1995/176, paras 15–17 (calling on parties to the Sudan conflict to comply with IHL and provide compensation to victims).

¹²⁹ See, e.g., McCormack (ed.), 'Correspondents' Reports', 11 *Yearbook of International Humanitarian Law (YIHL)* (2008) 407, at 537 (Peruvian legislation providing reparation to victims of serious violations of IHL during the non-international conflict); Lesh (ed.), 'Correspondents' Reports', 10 *YIHL* (2007) 279, at 405–406 (Philippines bill on compensation for non-combatants harmed or who suffered loss during military operations). See also the case studies in C. Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (2012).

¹³⁰ This view of the law of non-international armed conflict is disputed by certain scholars who read common Art. 3 and Additional Protocol II as creating individual rights. See the sources in note 71 above. This must also be the case to the extent that those rules from the law of international armed conflict that now also apply as custom in non-international armed conflicts are considered to create rights for individuals.

states (of which there would be none where the victims are nationals of the violating state) or of the beneficiaries of the obligation breached (that is, individual victims).¹³¹ It would thus seem to be the more reasonable interpretation that the obligation to make reparation for IHL violations in non-international armed conflicts is owed directly to individual victims.¹³²

D Concluding Remarks on Individual Rights under IHL

The above sections have explored the development in IHL's recent history of the notion of individual rights under IHL. The principal goal in doing so has been to consider how this idea has evolved over time and to test the claims made in the *Jurisdictional Immunities* case concerning this question. In so doing, two important points may be drawn out of the above discussion. The first concerns the orthodox legal position. It was shown that those rejecting the individual rights perspective in the *Jurisdictional Immunities* case, whether generally or with respect to the specific right to reparation, relied in part on strong historical claims that states have not accepted such a view of IHL. This, however, was shown in section 3A to be inaccurate at least for the last century, with the drafters of both early and contemporary IHL treaties accepting, in principle, the notion of individual rights across a range of provisions. However, it was actual state practice in the context of war reparations during much of the 20th century that appeared to overtake this, treating states, and not individuals, as the key rights holders under IHL.

The second point to draw out of the above discussion is the recent re-emergence of the individual rights perspective in practice and the trends of humanization and legalization that have influenced this. Humanization of the law and the influence of IHRL were alluded to previously and have been invoked as the drivers behind the evolution of individual rights under IHL, including the right to reparation.¹³³ Less acknowledged, yet no less important, is the role of the legalization of war reparations. The tendency simply to hold the vanquished state responsible for the fact of the entire war and, thus, for all victor state losses is increasingly giving way to processes in which legal responsibility is invoked specifically for IHL violations. The EECC, the UNCC and UN Commissions of Inquiry were noted above in this regard, and ICJ jurisprudence in which it is called on to assess actions in armed conflict can also be seen as an example

¹³¹ ILC Articles on State Responsibility, *supra* note 4, Art. 48(2)(b); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 16, para. 127.

¹³² A comprehensive examination of this issue *de lege lata* would not only need to consider those additional questions noted above (e.g., for which rules can an individual be considered a 'victim' when violated) but also the opposability of such an individual right to non-state armed groups responsible for IHL violations. On this, see ILC Articles on State Responsibility, *supra* note 4, Commentary to Art. 10, para. 16; Henckaerts and Doswald-Beck, *supra* note 117, at 549–550.

¹³³ Meron, *supra* note 9; Zegveld, *supra* note 1, at 505; Schwager and Bank, *supra* note 1, at 389–390; *Jurisdictional Immunities*, Statement of Greece, *supra* note 12, paras 31–33; *Jurisdictional Immunities*, Judgment, *supra* note 10, Dissenting Opinion of Judge Cançado Trindade, para. 70; Report of the International Commission of Inquiry on Darfur, *supra* note 103, paras 593–600.

of this trend towards legalization.¹³⁴ As responsibility is invoked for specific IHL violations, it becomes easier to view the obligation to make reparations as owed directly to individual victims.

To say that IHL creates rights directly for individuals is to view it as serving the goal of protecting and empowering individuals. As explained, those in the *Jurisdictional Immunities* case that made this argument did so by reference to their view of IHL's object and purpose.¹³⁵ Yet, the very different notion of state rights under IHL has recently re-emerged, presenting a rather different view of the role of law in armed conflict. Here we see IHL not as empowering individual victims but, rather, as empowering states to broaden their discretion in how they conduct military operations. It is to this that we now turn in the final section.

4 State Rights under IHL: A Different Vision for the Law?

At the outset of this article, it was noted that the notion of 'rights' under IHL was historically seen in very different terms to that explored thus far, predominantly as state or belligerent rights – that is, rights granted to states and belligerents that permit actions that would not be permitted in peacetime. We have seen this notion of rights under IHL emerging again, most clearly in litigation relating to detention during armed conflict. In the case of *Serdar Mohammed v. Ministry of Defence*, the UK government sought to modify (weaken) its obligations under Article 5 of the European Convention on Human Rights (ECHR) (comprising rights of detainees) by arguing that IHL grants a legal basis to detain during non-international armed conflicts; at first instance and on appeal, the courts rejected this particular argument, and confirmed that Article 5 of the ECHR continued to apply to such detentions.¹³⁶ This case is closely related to the line of practice on the relationship between IHL and IHRL, in which the former has been invoked by states in a permissive sense so as to broaden the powers available to them under the latter.¹³⁷ Notions of a 'global battlefield', governed

¹³⁴ See, e.g., *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005) 168, paras 259–261 (referring to the obligation to make reparations for specific violations, including of IHL, which were to be negotiated); *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda)*, Order, 1 July 2015, ICJ Reports (2015) 580 (on the new request for a reparations judgment in light of a failure to negotiate).

¹³⁵ See text accompanying notes 39–40 above.

¹³⁶ *Serdar Mohammed v. Ministry of Defence*, [2014] EWHC 1369 (QB); *Serdar Mohammed et al v. Secretary of State for Defence; Yanus Rahmatullah and the Iraqi Civilian Claimants v. Ministry of Defence and Foreign and Commonwealth Office*, [2015] EWCA Civ 843; *Al-Waheed and Mohammed v. Ministry of Defence* [2017] UKSC 2. Although agreeing with the courts below on the IHL point, the Supreme Court did hold that the detention was authorised by Security Council Resolutions, which it then held to have modified Art. 5 of the ECHR.

¹³⁷ See, e.g., *Hassan v. UK*, *supra* note 21; IACtHR, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Judgment (Preliminary Objections, Merits, Reparations and Costs), 14 November 2014, para. 38. I explore this in more detail in Hill-Cawthorne, 'Humanitarian Law, Human Rights Law and the Bifurcation of Armed Conflict', 64 *ICLQ* (2015) 293.

by IHL and with boundaries coterminous with the state's military operations against broad categories of non-state actors, represent the evolution of these claims.¹³⁸

I have engaged with these arguments in detail elsewhere, and I do not wish to repeat that here.¹³⁹ Instead, this practice is referred to in order to juxtapose the notion of state rights under IHL invoked by the UK and other governments with the notion of individual rights that was explored above and invoked in certain pleadings and judgments in the *Jurisdictional Immunities* case. There is nothing mutually exclusive between these different claims in themselves; the law can create rights for individuals in some respects and rights for states in others. Indeed, one must not lose sight of the differing contexts of these claims: for the UK, the notion of state rights under IHL was central to its defence against the charge of unlawful detention; for Greece and Italy, the notion of individual rights was part of their defence against the alleged wrongdoing of their courts. Not only the actor but also the context is thus important in determining the content of legal arguments, including the ways in which 'rights' under IHL are invoked in any given circumstance.¹⁴⁰ Similarly, IHL's inherent compromise between humanitarian considerations and military necessity certainly invites interpretive disagreement resulting from different weight being placed on each of these underlying concerns.

Yet, while these two uses of 'rights' in IHL may not be incompatible as such, it is submitted that the tension emerges in the different understandings of IHL's purpose that underlies each or, to put it another way, what these claims mean for the role that law is to serve in contemporary armed conflicts. In *Serdar Mohammed*, IHL was invoked for quite a different purpose than it was in the *Jurisdictional Immunities* case, not as a protective legal regime that empowers individuals to assert and enforce their own rights but, rather, as a permissive regime empowering states to take measures that would not otherwise be lawful. Indeed, this contemporary resurgence in the notion of state rights seems to challenge the view presented above of IHL as an increasingly humanized and individual-focused body of law. The different ways in which the notion of 'rights' is invoked in these claims thus have important implications for, and present radically different views of, the law's *raison d'être*. This becomes clear when comparing the reliance on IHL by the UK in *Serdar Mohammed* as a source of state rights to detain with Italy's assertion in the *Jurisdictional Immunities* case that 'IHL does not pose rights and obligations in the interests of the Contracting Parties, but to protect persons. ... This is more than a fundamental principle of IHL, it is its very *raison d'être*'.¹⁴¹ This disagreement over IHL's underlying purpose is increasingly apparent in scholarship, with some seeing IHL in a purely prohibitive sense and others seeing it in a permissive sense.¹⁴²

¹³⁸ See discussion in Lubell and Derejko, 'A Global Battlefield?: Drones and the Geographical Scope of Armed Conflict', 11 *JICJ* (2013) 65; Blank, 'Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat', 39 *Georgia Journal of International and Comparative Law* (2010) 1.

¹³⁹ L. Hill-Cawthorne, *Detention in Non-International Armed Conflict* (2016), at 66–76 (on *Serdar Mohammed*), chs 5, 6 (on the relationship between IHL and IHRL).

¹⁴⁰ For an interesting discussion of related points, see Windsor, 'Narrative Kill or Capture? Unreliable Narration in International Law', 28 *LJIL* (2015) 743.

¹⁴¹ See note 40 above.

¹⁴² Cf., e.g., Jinks, 'International Human Rights Law in Times of Armed Conflict', in A. Clapham and P. Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (2014) 656, at 666–669 (IHL as purely

Different interpretations, and even different views of the primary purpose of a particular rule, is an inevitable feature of law. As noted, this tension is related to IHL's inherent compromise between humanitarianism and military necessity, which already gives us notice of the opposing forces that inform IHL. Yet the incompatible visions presented by the protective, individual-empowering view and the permissive, state-empowering view risks creating an identity crisis for IHL. Indeed, if scholars disagree over whether IHL is purely prohibitive or (also) permissive, the potential for meaningful debate about the law is undermined.

To understand how such fundamental disagreement is possible in IHL, an appreciation of the historical influences on the contemporary law of armed conflict is necessary. Stephen Neff's account of the history of the relationship between law and war is useful here. According to his account, the contemporary law of armed conflict has two key, seemingly conflicting, influences.¹⁴³ On the one hand, Neff argues that the end of World War II and the prohibition of the use of force in the UN Charter led to a 'humanitarian revolution' in IHL, with its principal goal being seen as relieving 'the sufferings of victims of war' and viewing the law 'in terms of restraint rather than privilege. This was in sharp contrast to the prevailing view of the previous centuries, where there had been concern with the *rights* of belligerents'.¹⁴⁴ This helps to explain the trend of humanization discussed above and, with it, individual rights-based accounts of IHL.

Yet, against this, Neff also notes that contemporary IHL has been heavily influenced by the 19th-century notion of war as a legal institution, in which war was treated as a legal situation regulated by a specific set of rules.¹⁴⁵ This idea makes the re-emergence of the concept of state rights and the view of IHL as a permissive body of law more understandable. Indeed, scholars such as Nathaniel Berman and David Kennedy view this as a principal force on IHL today, accounting for the increasing inter-connectedness of law and war.¹⁴⁶ Kennedy argues that this inter-connectedness enables the strategic instrumentalization of contemporary IHL by states and military actors:

Consequently, to resist war in the name of law, to exalt law as an external ethical restraint on the frequency and violence of war, to praise law for bringing the calculations of cool reason to the passions of warfare is to misunderstand the delicate partnership of war and law ... Although legal and military professionals may seem to march to different drummers, law no longer stands outside violence, silent or prohibitive. Law also permits injury as it privileges, channels, structures, legitimates and facilitates acts of war.¹⁴⁷

prohibitive); Aughey and Sari, 'Targeting and Detention in Non-International Armed Conflict: *Serdar Mohammed* and the Limits of Human Rights Convergence', 91 *International Law Studies* (2015) 60 (IHL as also permissive).

¹⁴³ Neff, *supra* note 2, at 396.

¹⁴⁴ *Ibid.*, at 340 (emphasis in original).

¹⁴⁵ *Ibid.*

¹⁴⁶ D. Kennedy, *Of War and Law* (2006); Berman, 'Privileging Combat: Contemporary Conflict and the Legal Construction of War', 43 *Columbia Journal of Transnational Law* (2004) 1.

¹⁴⁷ Kennedy, *supra* note 146, at 167.

The manner in which IHL was invoked by the UK in *Serdar Mohammed*, for example, and the traditional concept of belligerent rights, seems to fit this narrative well; if the law is seen not as an external force limiting war but, rather, as an internal vocabulary and strategic consideration, it becomes much easier to understand how the UK could rely on it as an explicitly permissive set of rules.

These accounts go some way in explaining how it is that the incompatible visions of IHL's object and purpose supported by these different notions of 'rights' can co-exist. To be sure, the suggestion is not being made that we should (or, indeed, could) attempt to reconcile these different visions. Yet it is suggested that a greater appreciation of the implications of particular legal arguments for the overall aims and trajectory of the law is essential if IHL is to avoid an identity crisis. Moreover, a greater awareness of our own perspectives on IHL's overall purpose is needed if we are to have meaningful debates about the law. By doing this, one can start to engage with the question of the role that the law should serve in regulating armed conflict.

5 Concluding Remarks

This article has examined the notion of 'rights' under international humanitarian law. In so doing, its aims were two-fold. The largest part of the article explored the development of the idea of individual rights in IHL's recent history in order to test the various claims made in the *Jurisdictional Immunities* case. After considering what is at stake in this debate, this exploration went on to reveal a more nuanced account of the emergence of individual rights, not as a linear progression but, rather, fluctuating over time. Thus, early support for the individual rights perspective appeared to be superseded by practice relating to war reparations over much of the 20th century, only to re-emerge again in recent practice that, in part, reflects a more legalized (and individualized) approach to reparations for violations of IHL. The inclusion in the Rome Statute of the International Criminal Court of the power to award reparations to victims of international crimes is indicative of this more recent trend.¹⁴⁸

The second aim of the article was to compare the debate over individual rights with the re-emergence of the concept of belligerent or state rights under IHL. This was the subject of section 4, and it was argued there that these different notions of 'rights' under IHL, and the different ways in which the law is invoked under each, are not mere subtle interpretive differences but, rather, reflect more fundamental disagreements over the purpose that we wish law to serve in armed conflict. How the law will develop with respect to these two notions of 'rights' remains to be seen. The development of IHL is influenced by a wide range of different actors – state and non-state – and claims made in its name are constantly assessed and reassessed against this diverse background.¹⁴⁹ It is essential, however, for those making such claims to be aware of their implications for broader questions concerning the law's *raison d'être*.

¹⁴⁸ Rome Statute of the International Criminal Court 1998, 2187 UNTS 90, Art. 75.

¹⁴⁹ Alexander, 'A Short History of International Humanitarian Law', 26 *EJIL* (2015) 109.